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Introduction

A court of law is not a factory*

[T]he Court can be conceived of as producing certain outputs, or core activities ... The production line should be organized in such a way as to avoid both bottlenecks and overcapacities within the process.**

1.1 A Tale of Two Tongues

To engage with the International Criminal Court (ICC) is to encounter the familiar language of anti-impunity. This is the language of 'common bonds', the 'unimaginable atrocities that deeply shock the conscience of humanity', and the desire to end impunity for the perpetrators of the world's worst crimes.[1] This language describes the key events of international criminal law as genocide, war crimes, and crimes against humanity. It frames the everyday procedural terminology of an international criminal court established to investigate and prosecute grave atrocities: the concepts of jurisdiction, modes of liability, evidence, as well as victim participation and reparation. Ultimately, the language of anti-impunity is the sobering yet somehow inadequate expression and redemption of mass suffering, victimhood, conflict, violence, and death.

Spend time in the court's public gallery, offices, or hallways, and you are likely to hear this vocabulary spoken by officials, judges, and interns. Here, legal officers and judges convene to discuss whether charges should

* Report on the Special Court for Sierra Leone by the Independent Expert Antonio Cassese, 12 December 2006, para. 58, available at: www.rscsl.org/Documents/Cassese%20Report.pdf.

** ICC Report on the Court Capacity Model, ICC-ASP/5/10, 21 August 2006, paras. 14 and 25.

[1] Preamble, Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) A/CONF.189/9 (Rome Statute).

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be confirmed against a suspect accused of grave crimes and find themselves debating whether reports and evidence gathered by the Office of the Prosecutor (OTP) establish 'substantial grounds to believe that the person committed each of the crimes charged'.[2] A legal assistant within the Victims Participation and Reparations Section consults their superior to determine whether an individual qualifies as a victim under the Rome Statute.[3] A research institute hosts a roundtable event to reflect on the challenges of prosecuting Vladimir Putin or the crime of ecocide. Spend long enough in these institutional spaces and expert circles, and you may find yourself speaking that same language. In fact, it is a marker of professional success that you do so confidently, flexibly, and with relative ease, or so I realised once I began to spend time in these spaces and circles.

Yet there is another less familiar language that one may not have expected to hear in the 'primary institution of global justice'. This is the language of management. These are the ideas of 'effectiveness and efficiency', spoken like a mantra by successive ICC presidents annually before the plenary session of the Assembly of States Parties. It is the talk of strategic planning, performance measurement, and lessons learnt exercises that populate the court's official documents. It is the concern for optimisation and value for money voiced by practitioners, scholars, and students in their speeches, articles, essays, and classroom interventions. Ideas and practices of management are much more ubiquitous and familiar once we begin to notice them. This, I also learnt during my brief time as an ICC intern. Legal advisers and officers would move from a judges' conference meeting about the latest interlocutory appeal to a performance review meeting with their supervisor. Or perhaps they would be reminded to keep gathering statistics for court-wide performance indicators or engage in the latest process for an updated strategic plan. Although I was unfamiliar with this vocabulary at the time, I was struck by the seamlessness with which colleagues transited from talk of anti-impunity, mass violence, and justice to efficiency, performance appraisal, and risk.

Confronting these two very different languages, I initially reacted with unease. How was it that a court which Kofi Annan had designated 'a gift

[2] Article 61(7) Rome Statute.

[3] Article 68 Rome Statute; Rule 85 International Criminal Court Rules of Procedure and Evidence, ICC-PIDS-LT-02-002/13_Eng (Rules of Procedure and Evidence).

of hope to future generations' could so easily take up this banal lingo?[4] Was it possible for a criminal tribunal to fulfil its requirements of independence, impartiality, and legality in the face of management pressure to efficiently deliver positive results?[5] Where did this leave those in whose name the court purported to act? My unease reached its peak when I read that ICC officials ended a 'retreat on efficiencies' in Poland with a trip to the Nazi extermination camp at Auschwitz-Birkenau.[6] Surely the irony of visiting that horrifyingly efficient system of people management cannot have been lost on them?[7]

Putting aside the tone-deaf nature of such a visit, I began to rationalise that even the most utopian ideals demand some institutional fleshing-out. And building an 'entire administrative infrastructure from scratch' was no easy task.[8] Any institution charged with ending impunity and strengthening international justice would have to take regular stock of its performance, monitor progress, and engage in reform in order to fulfil such an ambitious mission. Given the rather staid and rigid qualities of law, were techniques of cost accounting, strategic planning, and human resources management not better avenues for court improvement? Officials and scholars seemed to think so.

My scepticism took a back seat as I ended my internship and left The Hague. But management kept on coming. The Assembly of States Parties approved several audits of court organs and their activities, while also placing funding aside for the recruitment of management consultants PricewaterhouseCoopers, Mannet, and others to evaluate internal performance. Institutional experiments around workflow procedures, the onboarding of personnel, and risk management came and went. All the

[4] 'Secretary-General Says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights, Rule of Law' (Press Release) L/2890 (20 July 1998), available at: www.un.org/press/en/1998/19980720.l2890.html.

[5] This concern was also articulated in Sara Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court' (2015) 13 *Journal of International Criminal Justice* 113–134.

[6] 'Judges of the ICC Visit Auschwitz-Birkenau at the End of their Retreat on Efficiencies' (Press Release) ICC-CPI-20170626-PR1314 (26 June 2017), available at: www.icc-cpi.int/news/judges-icc-visit-auschwitz-birkenau-end-their-retreat-efficiencies.

[7] Similar connections are made in Zygmunt Bauman, *Modernity and the Holocaust* (Polity Press 1989).

[8] Philippe Kirsch Address to the Assembly of States Parties, Assembly of States Parties 7th Session, 14 November 2008, 9, available at: https://asp.icc-cpi.int/NR/rdonlyres/EB40944C-C250-4466-B99A-2F5ACDC8C941/0/ICCASPASP7GenDebePresident_Kirsch.pdf.

while, organ leaders and individual staff members were becoming the 'responsible managers of the funds which the States Parties have provided'.[9] Antonio Cassese's early claim that 'a court of law is not a factory' fell victim to discussions on court 'production line[s]', 'bottlenecks', 'efficiency indicators', and 'demand'.[10] As some participants began to label the court Eurocentric and neo-colonial, official desires to optimise seemed only to grow. With this, so too did my suspicion about management's role.[11]

This book is an attempt to confront and think through this suspicion. It is concerned with the relationship between the anti-impunity apparatus of the ICC and the ideas and practices of management which are now institutionally pervasive. The vast majority of practitioners and scholars who have sought to articulate that relationship (and there are not many) have often posited management as being in the service of the court's anti-impunity efforts. In simplified form, management practices are objective tools which help the ICC, its organs, processes, and professionals to function better. Yet this book not only challenges the immediate effectiveness of such tools but also opens up a range of much more subtle effects that management generates for the institution and its professionals. In brief, the relationship between these two languages turns out to be much more complex and constitutive of the project of global justice than previously thought.

The book therefore studies management's role and effects on the ICC as the primary institution of global justice in the twenty-first century. I begin by introducing management in isolation from the court. The book is a rare attempt to bring management ideas and practices, as well

[9] Sang-Hyun Song Remarks to the 11th Session of the Assembly of States Parties, Assembly of States Parties 11th Session, 14 November 2012, available at: www.icc-cpi.int/sites/default/files/NR/rdonlyres/0EEEED0E-5BA8-4894-8AB5-3C2C90CD301B/0/ASP11OpeningPICCSongENG.pdf.

[10] Report on the Special Court for Sierra Leone, para. 58. Cassese reasons that 'its output and productivity cannot be accurately measured by counting either the number of items it has produced or the number of hours or days it takes to produce them. While the efficiency of a Court is one aspect of its overall impact, the true measure of a court is in the quality, and not the speed, of its judgements'. The language of bottlenecks and production is from the ICC Report on the Court Capacity Model, ICC-ASP/5/10, 21 August 2006, para. 25.

[11] On a 'hermeneutics of suspicion', see Paul Ricoeur, *Freud and Philosophy: An Essay on Interpretation* (Yale University Press 1970) 356. See also Eve Kosofsky Sedgwick, 'Paranoid Reading and Reparative Reading, Or, You're So Paranoid, You Probably Think This Essay is About You' in Eve Kosofsky Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity* (Duke University Press 2003) 123–151.

as the heterodox literature on critical management studies (CMS), into conversation with the ICC and its scholarship. Rather than attempting a single definition, I conceptualise management by thinking with critical social theory, as well as CMS. Thereafter, I situate management within the contemporary ICC before looking to critical international law scholarship on managerialism, technocracy, and expertise to articulate the book's theoretical axioms. I then summarise the argument in brief. The introduction ends by outlining the book and its stylistic choices.

1.2 Management Defined

There are as many definitions of management as there are of international law. Management has been described as a 'delegation of ownership',[12] a set of tasks for directing and co-ordinating production, a practice of control by managers,[13] a powerful class,[14] a post-capitalist ideology,[15] a historical period in late capitalism,[16] and a language.[17] Management is also 'an academic discipline', with all the disciplinary skirmishes and cross-disciplinary borrowings that characterise scholarly research.[18] Certainly, management may be all of these things; as famed management theorist Peter Drucker put it, '"management" denotes both a function and the people who discharge it. It denotes a social position and authority, but also a discipline and a field of study'.[19] For the purposes of this book, these definitions may be divided into two broad camps: the 'managerialist' and the 'critical' approaches. The managerialist approach represents the 'mainstream' or common sense

[12] Peter Drucker, *Management: Tasks, Responsibilities, Practices* [1974] (Harper Collins 2008) 2.

[13] Harry Braverman, *Labour and Monopoly Capital: The Degradation of Work in the Twentieth Century* [1974] (Monthly Review Press 1998) 68.

[14] James Burnham, *The Managerial Revolution: What Is Happening in the World* (The John Day Company Inc. 1941).

[15] Thomas Klikauer, *Managerialism: Critique of an Ideology* (Palgrave 2013).

[16] Willard F. Enteman, *Managerialism: The Emergence of a New Ideology* (University of Wisconsin Press 1993) 156.

[17] Robert Protherough and John Pick, *Managing Britannia: Culture and Management in Modern Britain* (Imprint Academic 2003) 45–46.

[18] Martin Parker, 'Managerialism' in Mark Tadajewski et al. (eds.), *Key Concepts in Critical Management Studies* (SAGE Publishing 2011) 157. See also Nik Rajkovic, 'The Space between Us: Law, Teleology and the New Orientalism of Counterdisciplinarity' in Wouter Werner, Marieke de Hoon and Alexis Gálan (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 167–196.

[19] Drucker, 'Management' 3.

understanding of management visible in the courses at Business Schools and the strategy meetings of large-scale organisations.[20] The critical approach, though popular in some pockets of academia, is rarely taken up institutionally but instead as a mode of theoretical engagement.

Mainstream understandings of management characterise it as an objective and positivist set of techniques, processes, and ideas designed to make organisations function effectively. This has led one of the leading textbooks on management thought to offer a definition of management as 'the activity whose purpose is to achieve desired results through the efficient allocation and utilization of human and material resources'.[21] While very few ICC practitioners or scholars have sought to conceptualise the term, this mainstream position is popularly accepted in such circles. As seen in later chapters, when ICC presidents, registrars, legal officers, and commentators invoke something called management, they largely adopt this position, studying and evaluating management's functional effects as a set of neutral tools.

The critical alternative, reflected in the major works of CMS, differs from the mainstream position in several respects. As Stokes defines it,

> critical management studies (CMS) challenges the normative and mainstream representations of the structures and assumptions of human experiences in relation to organisational and managerial contexts and environments. It aims to critique and point up shortcomings in mainstream portrayals of management.[22]

These representations and portrayals include the assumption that management works but also that it is objective and politically neutral.[23] Critical Management Studies comprises critical sociologists, economists, organisations theorists, and psychologists, and eclectically draws on the critical tradition in social theory, including Marxism, post-structuralism,

[20] Chris Grey, *A Very Short, Fairly Interesting and Reasonably Cheap Book about Studying Organisations* (SAGE Publishing 2005) 106.

[21] Daniel A. Wren and Arthur G. Bedeian, *The Evolution of Management Thought* (Wiley 2017) 3.

[22] Peter Stokes, *Critical Concepts in Management and Organisation Studies* (Palgrave 2011) 30.

[23] For an overview, see Chris Grey and Hugh Willmott, 'Introduction' in Chris Grey and Hugh Willmott (eds.), *Critical Management Studies: A Reader* (Oxford University Press 2005) 1–6. Critical management studies represents, reacts to, and seeks to counterbalance a crisis of faith in the 'rationalistic models of orthodox management studies . . . positivism and functionalism', Chris Grey, 'Towards a Critique of Managerialism: The Contribution of Simone Weil' (1996) 33 *Journal of Management Studies* 591–611, at 592.

feminist, and postcolonial approaches to organisations and management. Its chief aim is to 'challenge[] prevailing relations of domination – patriarchal, neo-imperialist as well as capitalist – and anticipate[] the development of alternatives to them'.[24] Under these influences, CMS offers a thick, contextualised, and troubling picture of management in modern institutions. I therefore elaborate these conceptual strands of CMS to offer a critical approach to management as the approach guiding this book. International lawyers will likely recognise many of these positions in the insights of critical legal theorists and their studies of international (criminal) law.

An initial critical reading of management sees it as a set of discourses and techniques of power/knowledge active in assembling, arranging, and dispersing contemporary institutions and their participants. To elaborate, I briefly consider the notions of power, techniques, and knowledge drawing principally on the work of Michel Foucault. It is true that mainstream thinking has much to contribute to these notions. Mainstream management thinkers are certainly not devoid of a theory of power. However, they often overlook power's diffuse, subtle, and changing manifestations. Mainstream examples of power include struggles between and within organisations over control and authority. This is best represented in the figure of the overweening manager exerting control over their subordinates.[25] In this analysis, power is reified as a coercive 'thing' capable of being possessed and wielded by one over another. This reading of power is familiar to international lawyers as the *realpolitik* of geopolitical life in which states, organisations, or governance regimes tussle to maximise their interests.[26]

[24] Mats Alvesson, Todd Bridgman and Hugh Willmott, 'Introduction' in Mats Alvesson, Todd Bridgman and Hugh Willmott (eds.), *The Oxford Handbook of Critical Management Studies* (Oxford University Press 2013) 1–28, at 1. For a poststructuralist account, see Philip Hancock and Melissa Tyler, '"MOT your Life!": Critical Management Studies and the Management of Everyday Life' (2004) 57 *Human Relations* 619–645, at 620. Anshuman Prasad (ed.), *Against the Grain: Advances in Postcolonial Organisation Studies* (Universitetsforlaget 2012) offers a postcolonial reading of organisations. On feminism within CMS, see Joan Acker, 'Hierarchies, Jobs, Bodies: A Theory of Gendered Organisations' (1990) 4 *Gender & Society* 139–158; Karen Lee Ashcraft, 'Gender and Diversity: Other Ways to "Make a Difference"' in Alvesson et al. (eds.), 'The Oxford Handbook of Critical Management Studies' 304–327, at 324–7 contains an excellent bibliography on feminist thinking in management and organisation studies.

[25] This approach is visible in Burnham's sociology of a new managerial class taking over the levers of state power in the New Deal United States, Burnham, 'Managerial Revolution'.

[26] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Springer 1977).

Foucault has challenged this account of power, most famously in volume 1 of *The History of Sexuality*, with another which he depicts as 'the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organisation'.[27] This multiplicity of relations includes processes, chains, systems, strategies, disjunctions, contradictions, networks, and assemblages that manifest institutional apparatuses such as the state, society, and law.[28] Power is not possessed but an effect threaded into the 'always local and unstable' relations between people, places, and institutions.[29] Similarly, this book refrains from denoting states, experts, or the ICC as bearers of power since power *effects* these entities in a complex assemblage of people, structures, and practices.

Decentring the bearer of power also decentres the manager as a key figure. Mainstream and critical theorists of management thought have often focused on a managerial class.[30] For managerialists, managers are crucial mediators between ownership and workers, ensuring that both communicate and work effectively to their mutual benefit. For Drucker, managers represent 'the basic resource of the organisational enterprise'.[31] Managers have also occupied an important place in the critical management literature. Here, they emerge as enforcers of capitalist relations of domination, or as an exploitative class in their own right.[32] Whether commended or reviled, managers often take centre stage in studies of organisations.[33]

This book brackets the figure of the manager, partly because the hierarchical structure of the ICC means that most people are managers of *someone* or *something* at one point or another, and are often *manager* and *managed* concurrently. It is not possible to identify such an isolated

[27] Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume 1* [1976] (Penguin 1998) 92.
[28] Ibid., 92–3.
[29] Ole Jacob Sending and Iver B. Neumann, 'Governance to Governmentality: Analysing NGOs, States, and Power' (2006) 50 *International Studies Quarterly* 651–672.
[30] See Wren and Bedeian, 'Evolution of Management Thought'; Burnham, 'Managerial Revolution'.
[31] Drucker, 'Management' 235.
[32] Burnham, 'Managerial Revolution', 82–5; Braverman, 'Labour and Monopoly Capital', 403–404. See Robert R. Locke and J.-C. Spender, *Confronting Managerialism: How the Business Elite and Their Schools Threw Our Lives Out of Balance* (Bloomsbury Academic 2011) xi.
[33] Drucker, 'Management' 521. See Stefan Sveningsson and Mats Alvesson, *Managerial Lives: Leadership and Identity in an Imperfect World* (Cambridge University Press 2016).

group or *a priori* class in this institution. The *who* of management thus becomes less important than the *how*. Looking to this how and thus to managerial relations of power brings forth 'the complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures' involved in governing.[34] This network Foucault termed 'governmentality', a thick and intersecting arrangement of power relations spanning micro and macro scales of governance.[35] Considering these arrangements of power, Foucault also pointed towards the 'range of multiform tactics' comprising it, which flow through myriad and minute spaces rather than the decisions of political or institutional leaders.[36] In a management register, these tactics include discourses of efficiency, performance, success, supply, and austerity, as well as specific practices or 'governmental technologies' of strategic planning, audit, performance indicators, performance appraisal, best practices, lessons learnt, organigrams, and restructuring.[37] These and more are the 'techniques of power' that form the ICC.[38] This book follows the life cycle of such practices, rather than their 'users' or 'the institution', to understand their various roles and effects.

Management's effects are not simply coercive but constitutive of individual subjectivities and the institution itself.[39] For the ICC lawyer – and other professionals – management helps mediate the efficient, committed technician of institutionalised global justice through human

[34] Nikolas Rose and Peter Miller, 'Political Power beyond the State: Problematics of Government' (1992) 43 *British Journal of Sociology* 173–205, at 175.

[35] Wendy Larner and William Walters, 'Introduction: Global Governmentality' in Wendy Larner and William Walters (eds.), *Global Governmentality: Governing International Spaces* (Routledge 2004) 1–20, at 2. See Michel Foucault, 'Governmentality', in Graham Burchell, Colin Gordon and Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991) 87–104. In international law, see Nik Rajkovic, '"Global Law" and Governmentality: Reconceptualizing the "Rule of Law" as Rule "through" Law' (2010) 18 *European Journal of International Relations* 29–52; Stephen Legg, '"The Life of Individuals as well as of Nations": International Law and the League of Nations' Anti-Trafficking Governmentalities' (2012) 25 *Leiden Journal of International Law* 647–664; Isobel Roele, *Articulating Security: The United Nations and its Infra-Law* (Cambridge University Press 2021).

[36] Foucault, 'Governmentality' 95. See Michael Barnett and Raymond Duvall, 'Power in International Politics' (2005) 59 *International Organisation* 39–75.

[37] Colin Gordon, 'Governmental Rationality: An Introduction', in Burchell, 'The Foucault Effect' 1–52, at 4.

[38] Michel Chauvière and Stephen S. Mick, 'The French Sociological Critique of Managerialism: Themes and Frameworks' (2011) 39 *Critical Sociology* 135–143, at 140.

[39] Michel Foucault, *Discipline and Punish: The Birth of the Prison* [1977] (Penguin Books 1991) 23.

resourcing practices of recruitment, probation, and appraisal.[40] On an organ level, management also arranges activities such as prosecutorial investigations and outreach programmes through capacity models, workflows, and strategic plans.[41] Finally, management also produces novel legal arguments as part of and response to the well-worn argumentative dilemmas facing the court and its lawyers. In these various ways, management fashions the ICC professional, the organisation, and its argumentative field.

Management produces the professional, the organisation, and its arguments through expert knowledge. This knowledge is devised and deployed by various actors within and beyond the court's walls, and can be understood as the sets of tools mentioned previously but also a shared professional attitude towards the court's anti-impunity problematic. Much like international law, then, management is a 'field of people sharing professional tools and expertise, as well as a sensibility, viewpoint, and mission'.[42] And such expertise is not the exclusive domain of lawyers or managers but is mediated by judges, investigators, interns, scholars, students, and policymakers, not to mention those most affected by mass atrocities. Foregrounding management allows us to redescribe what these actors are doing as *managerial* work, and to appreciate that they each manage the court's human, financial, and administrative resources in diverse ways.

While certain actors perform managerial work, as we will see, they continue to conduct their international legal work alongside.[43] Yet this legal work entails not only the application of normatively constraining yet apolitical rules. Law is also part of the *dispositif* and, as such, comprises its own set of discourses and techniques of rule to form a professional practice. Law is a tactic which is 'constantly growing as the

[40] Michel Foucault, 'The Subject and Power' (1982) 8 *Critical Inquiry* 777–795, at 781. Chapter 4 discusses these practices as forms of 'micro-management'.

[41] See Martin Parker, *Organisational Culture and Identity: Unity and Division at Work* (SAGE Publishing 2000) 69–70. See also Mats Alvesson and Stanley Deetz, 'Critical Theory and Postmodernism: Approaches to Organisation Studies' in Grey and Willmott, 'Critical Management Studies' 60–106, at 85; Andreas Georg Scherer, 'Critical Theory and its Contribution to Critical Management Studies' in Alvesson and Willmott, *Oxford Handbook of Critical Management Studies*, 29–51, at 37.

[42] David Kennedy, 'When Renewal Repeats: Thinking Against the Box' (1999–2000) 32 *NYU Journal of International Law and Politics* 335–500, at 340. See Jean d'Aspremont et al. (eds.), *International Law as a Profession* (Cambridge University Press 2017).

[43] Fleur Johns, *Non-Legality and International Law: Unruly Law* (Cambridge University Press 2013) 1.

exercise of power and the accretion of knowledge'.[44] As such, it goes beyond the text and application of the Rome Statute to encompass the arguments deployed by ICC lawyers, the theories of justice posited by scholars, and the practices of evidence-gathering, outreach, and reparation that comprise the everyday work of court professionals. The managerial work of organisational improvement thus appears alongside the international legal work of anti-impunity.

Often, managerial and legal work coalesce wherein one conditions, buttresses, and effects the other. Legal concepts, processes, and arguments frame management practices and motivate their application to a particular problem. The OTP must attempt to discharge its investigatory powers under the Statute despite certain budgetary limitations. Accordingly, it has devised workflow systems, methods of prioritisation and selection, and capacity models to funnel its resources. Yet the opposite dynamic of management effecting or shaping law is also visible. When ICC judges decided not to open an investigation into the situation in Afghanistan in 2019, their primary argument concerned organisational sustainability and the proper use of court resources.[45] Management discourse clearly affected judicial decision-making. In these examples, law and management become intertwined, reciprocally conditioning and constituting one another.

Under such circumstances, the question arises whether the distinction between law and management collapses altogether.[46] After all, both are professional and institutional practices that disperse arguments and resources institutionally. Building on this similarity, though, law and management are still received and deployed very differently within the ICC.[47] The distinction between them is laid down and policed by those

[44] Anthony Beck, 'Foucault and Law: The Collapse of Law's Empire' (1996) 16 *Oxford Journal of Legal Studies* 489–502, at 501. For law as tactic, see Foucault, 'Governmentality' 95.

[45] This decision forms the backdrop for a discussion on the ICC argumentative field as 'meso-management' in Chapter 5.

[46] This is a query raised in Frédéric Mégret, 'International Criminal Justice as a Juridical Field' (2018) 13 *Champ pénal* 1, at 3.

[47] Jens Meierhenrich, 'The Practice of International Law: A Theoretical Analysis' (2013) 76 *Law & Contemporary Problems* 1–83. Sinclair describes international law as 'a discipline, discourse, and practice of reform', Guy Fiti Sinclair, *To Reform the World: International Organisations and the Making of Modern States* (Oxford University Press 2017) 2. For a reading of institutional practice based on actor-network theory, see Dimitri van den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice* (Oxford University Press 2022).

who invoke and apply them. Institutional officials often treat certain practices as law or law-like because of their source, the process of their creation, or purported normative force. Having different traits, pedigree, and purposes, management will often be received differently. In fact, management is often engaged with precisely because it is *not* read as law: management is said to be efficient, flexible, and apolitical where law is slow, rigid, and politicised. Without collapsing the law/management distinction, both can be viewed as professional practices subsumed under either category in light of the professional sensibilities of those working within and around the ICC as a particular institutional space. This may, of course, differ in other international legal spaces.

1.3 Management Situated: The ICC *Dispositif*

Highlighting the role of power, techniques, and knowledge means capturing the wider *dispositif*, or discursive apparatus, of anti-impunity.[48] The Rome Statute 'ecosystem' is a global justice apparatus consisting of the players, procedures, practices, arguments, and places of global justice. Global justice is a field oriented around various institutional assemblages operating under the rationale of closing the impunity gap.[49] This gap is framed, like other contemporary global issues, as a governance problem to be solved or minimised. Its actors and experts put themselves in the service of that aim daily. Their procedures and practices span investigations and prosecutions – the 'core' functions of international criminal tribunals – as well as more peripheral but no less important practices of stigmatisation, representation, translation, outreach, reparation, and marketing, which also shape the field.[50] Its chief argumentative dilemmas concern the selectivity of investigations, the relationship between

[48] Defined in Michel Foucault, 'Confessions of the Flesh' in Colin Gordon (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977 by Michel Foucault* (Pantheon Books 1980) 194–228.

[49] Zeid Raad Al Hussein et al., 'The International Criminal Court Needs Fixing', *New Atlanticist*, 24 April 2019, available at: www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing.

[50] See, for example, Frédéric Mégret, 'Practices of Stigmatisation' (2013) 76 *Law & Contemporary Problems* 287–318; Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013) 76 *Law & Contemporary Problems* 235–262; Leila Ullrich, 'Beyond the "Global–Local Divide": Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court' (2016) 14 *Journal of International Criminal Justice* 543–568, at 557–563; Luke Moffett, *Justice for Victims before the International Criminal*

international authority and domestic sovereignty, co-operation, and defendant- versus victim-centred justice.[51] Its key sites are The Hague, sub-Saharan Africa, and historically Nuremberg and Rome.

The global justice architecture thus goes far beyond the conventional focus on the Rome Statute, judges, and their decisions. In an effort to construct anti-impunity as a regime and a governance problem, the ICC occupies a central place in the imaginary of global justice. Yet such a place remains unstable thanks to entrenched dilemmas about the version of justice the court renders. In the twenty years since it became operational, the court and its infrastructure have been the subject of wide-ranging interventions, ranging from the promotional to the oppositional. I briefly capture the discourse around and against the ICC to better frame management's relationship to this institutional project.

The principal vector of policy and scholarly engagement with the ICC project is that of effectiveness.[52] Despite its low conviction rate and high cost, the court is considered effective on multiple fronts.[53] It has prosecuted multiple individuals for serious crimes ranging from the conscription of child soldiers and mass murder to the destruction of cultural property. Beyond this central plank of its work, the court has also worked with national criminal justice systems to prevent crimes from going unpunished. This complementary role has seen the court intervene to prosecute where states are 'unwilling or unable' to do so but has also allowed it to provide technical assistance to local authorities or promote domestic law reform.[54] The court's innovative victims regime has

Court (Routledge 2014) 143; Christine Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press 2021).

[51] For further details, see Chapter 5.

[52] Schwöbel-Patel describes this as 'effectiveness critique' in contrast to 'assumptions critique', see Christine Schwöbel, 'Introduction' in Christine Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2015) 1–14, at 1.

[53] David Davenport, 'International Criminal Court: 12 Years, $1 Billion, 2 Convictions', *Forbes*, 12 March 2014, available at: www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/?sh=4d2e0b672405.

[54] See article 17 Rome Statute. Important scholarly contributions on complementarity include Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013); Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2018); Christian de Vos, *Complementarity, Catalysts, Compliance: The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo* (Cambridge University Press 2020); Patryk I. Labuda, *International Criminal Tribunals and Domestic Accountability: In the Court's Shadow* (forthcoming, Oxford University Press).

permitted individuals and communities to participate in trial proceedings and to receive reparations for atrocities committed against them. The court has allowed historical and group narratives to be articulated in moments of individual and communal catharsis.[55] Such achievements of what remains an innovative institutional experiment are not to be dismissed.

Most critiques of the court challenge these achievements on their own effectiveness terms. For the billions of euros invested in it, the court's record remains underwhelming. Its procedures remain slow while various episodes, including the prosecutor's overreliance on intermediaries and the low quality of court jurisprudence, demonstrate a still infant institution.[56] But there are also those who query the court's underlying assumptions and possible consequences. Tallgren has shown how 'artificial' and 'ridiculous' the ICC's claims to international justice and ending impunity are, given the tools at its disposal.[57] Nesiah cautions further by recalling 'the intertwined history and legacy of impunity that has accompanied every attempt at international justice'.[58] Victor's justice and hence impunity, from Nuremberg to Bogoro, is a recurring feature of anti-impunity. Even the anti-impunity efforts of the court are heavily circumscribed and partial. The ICC is said to focus on individuals rather than structures, on recent rather than historical events and transgenerational patterns of violence, and on direct, physical acts rather than slow, structural, and colonial forms of domination. In creating such a picture of global anti-impunity, the court works to 'naturalize, to exclude from the political battle, certain phenomena which are in fact the preconditions for maintenance of the existing governance'.[59] Such an argument sees the court as both reproducing of and dependent upon conditions of subordination for its continued existence.

These critiques have arisen out of the court's encounters with situation countries over the past twenty years. While supporters have witnessed co-operation and complementary justice-seeking between the court and

[55] Barrie Sander, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning' (2019) 32 *Leiden Journal of International Law* 851–872.
[56] Ullrich, 'Global–Local Divide'.
[57] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561–595.
[58] Vasuki Nesiah, 'Doing History with Impunity' in Karen Engle, Zina Miller and D.M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016) 95–122, at 96.
[59] Tallgren, 'Sensibility and Sense' 594–5.

national authorities, others highlight the dominating effects of the court's relationship with states parties, particularly for those caught up in mass atrocities. In Uganda, for example, former ICC prosecutors have 'uncritically taken on the point of view of one side' in the conflict between government and rebel forces, thereby downplaying government oppression of Ugandan citizens.[60] This has arguably consolidated authoritarian state apparatuses to the court's benefit.[61] Moreover, applying its penal lens, the ICC has been said to reduce complex dynamics of conflict, and political and economic relations to matters of individual guilt or innocence, and to an inherent vulnerability of 'victim communities'.[62] This focus on individual responsibility has prioritised institutional interests, often at the expense of ongoing national efforts. This was a particular concern levelled against the court in its interventions in Sudan while peace negotiations were in process.

Many such critiques revolve around the court's ostensible reproduction of colonial relations between Western actors and communities of the Global South long after the end of formal decolonisation. The vast majority of the court's activities concern the African continent, and it has only ever convicted Africans in its twenty-year history. Even ardent supporters are forced to confront such allegations, attempting to play down the possibility of an 'anti-African bias'.[63] The greatest concern has come from African states themselves. Despite early optimism among various African signatories to the Rome Statute, the court's pursuit of certain persons and types of criminality has led to frustration that Africa is being unfairly targeted, or that the court is simply designed to produce such outcomes. A sustained campaign by African states parties and the African Union to prompt mass withdrawal from the ICC has only recently abated.[64]

[60] Mahmood Mamdani, 'The New Humanitarian Order', *The Nation*, 29 September 2008, available at: www.thenation.com/article/new-humanitarian-order/.

[61] For a summary, see Richard Clements, 'Near, Far, Wherever You Are: Distance and Proximity in International Criminal Law' (2021) 32 *European Journal of International Law* 327–350.

[62] Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21 *Ethics & International Affairs* 179–198; Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda* (Princeton University Press 2001).

[63] Rachel López, 'Black Guilt, White Guilt at the International Criminal Court' in Matiangai Sirleaf (ed.), *Race and National Security* (Oxford University Press 2023).

[64] African Union Assembly decision 622(XXVIII), Decision on the International Criminal Court, Doc. EX.CL/1006(XX), Twenty-Eighth Ordinary Session of the Assembly of the Union, 30–31 January 2017, para. 6, available at: https://au.int/sites/default/files/deci

This combination of achievement, scepticism, and opposition forms the terms of debate for the court. Court officials often rebuff such criticism as either pessimistic or as conducive to current and would-be perpetrators. On the charge of an anti-African bias, the court has entirely rejected the analysis and demands of its detractors. Former prosecutor, Luis Moreno-Ocampo has likened peddlers of the bias argument to Holocaust deniers.[65] While extreme, such rebuttals are also visible in less rhetorical interventions within mainstream scholarship. While largely accepting critiques of the court's effectiveness, such scholars reject claims of bias. In doing so, they 'largely forget[] to consider the complicity of international criminal law in injustices in the world'.[66]

Lastly, the court's *dispositif* also encompasses alternative interpretations of the organisation and its work. Many critical interventions have sought to read the court 'against the grain' as a mode of argumentation, deconstruction, and political action. Scholars have therefore interpreted the court variously as a distribution centre for stigma;[67] a sphere for political contestation through historical narrative; a body that acts on the basis of local choice and conditions;[68] an 'open, democratic and

sions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf. See also Max du Plessis and Chris Gevers, 'The Sum of Four Fears: African States and the International Criminal Court in Retrospect – Part I', Opinio Juris blog, 8 July 2019, available at: http://opiniojuris.org/2019/07/08/the-sum-of-four-fears-african-states-and-the-international-criminal-court-in-retrospect-part-i/.

[65] Luis Moreno-Ocampo, 'From Brexit to African ICC Exit: A Dangerous Trend', Just Security blog, 31 October 2016, available at: www.justsecurity.org/33972/brexit-african-icc-exit-dangerous-trend/. Cf. the response to Ocampo in Itamar Mann and Ntina Tzouvala, 'Letter to the Editor: Response to Luis Moreno Ocampo on Comparisons to Holocaust Denial', Just Security blog, 1 November 2016, available at: www.justsecurity.org/34016/letter-editor-conflating-icc-african-bias-holocaust-denial-polarizing-dangerous-irresponsible/.

[66] Christine Schwöbel, 'The Comfort of International Criminal Law' (2013) 24 *Law & Critique* 169–191, at 183.

[67] Mégret, 'Practices of Stigmatisation'. See also Frédéric Mégret, 'What Sort of Global Justice Is "International Criminal Justice"?' (2015) 13 *Journal of International Criminal Justice* 77–96.

[68] Cf. Vasuki Nesiah, 'Local Ownership of Global Governance' (2016) 14 *Journal of International Criminal Justice* 985–1009. This form of complementarity would be residual as opposed to 'burden-sharing', see Padraig McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-Sharing Policy as an Example of Creeping Cosmopolitanism' (2014) 13 *Chinese Journal of International Law* 259–296.

participatory' process for establishing accountability;[69] a public good;[70] a 'transitional justice mechanism';[71] a development or anti-development agency;[72] a 'security court' for those living insecurely,[73] including, among others, women and gender non-conforming groups;[74] an anti-racist institution;[75] and a people's tribunal.[76]

It is this ICC *dispositif* to which management ideas and practices relate. Management shapes and is shaped by this discourse of global justice. Although the book's primary aim is to demonstrate the connection between the two, it can also be read as a story about why it is so

[69] Antony Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict' (2003) 2 *Chinese Journal of International Law* 77–103, at 92.

[70] Kendall, 'Commodifying Global Justice' 118.

[71] Obiora Okafor and Uchechukwu Ngwaba, 'The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections' (2014) 9 *International Journal of Transitional Justice* 90–108, at 106.

[72] See Helen Clark, Keynote Address to the 11th Session of the Assembly of States Parties to the International Criminal Court: Human Development and International Justice', 19 November 2012, available at: https://asp.icc-cpi.int/sites/asp/files/NR/rdonlyres/E10A5253-DA2D-46CE-90B8-7497426E9C39/0/ICCASP11_COMPKeynote_Remarks_HCENG.pdf; Errol Mendes, 'The important role of the IMF and external creditors in case of arrest warrants from the ICC – the Case of Sudan', OTP Guest Lecture Series (2009). Contemporary development projects and development thinking have been subject to much critical intervention in recent years; see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011); Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2011); Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge University Press 2015). Nouwen and Werner hint at this role by referring to ICL as 'redistribution', Sarah M. H. Nouwen and Wouter G. Werner, 'Monopolising Global Justice: International Criminal Law as Challenge to Human Diversity' (2015) 13 *Journal of International Criminal Justice* 157–176, at 170.

[73] George P. Fletcher and Jens David Ohlin, 'The ICC – Two Courts in One?' (2006) 4 *Journal of International Criminal Justice* 428–433, at 428–31.

[74] Christine Chinkin, *Women, Peace and Security and International Law* (Cambridge University Press 2022).

[75] López, 'Black Guilt, White Guilt' 10. See also Frédéric Mégret and Randle DelFalco, 'The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System' (2019) 7 *London Review of International Law* 55–87.

[76] Dianne Otto, 'Beyond Legal Justice: Some Personal Reflections on People's Tribunals, Listening and Responsibility (2017) 5 *London Review of International Law* 225–249; Sara Dehm, 'Accusing "Europe": Articulations of Migrant Justice and a Popular International Law' in Andrew Byrnes and Gabrielle Simm (eds.), *Peoples' Tribunals and International Law* (Cambridge University Press 2017) 157–181; Ayça Çubukçu, *For the Love of Humanity: The World Tribunal on Iraq* (University of Pennsylvania Press 2018).

difficult to formulate and effect these alternative imaginaries – and thus distributions – of ICC justice. The following discussion of international legal managerialism offers the building blocks for such an account.

1.4 Management Situated: On International Legal Managerialism

With this account of the ICC project in place, it is worth considering the tools already available to the international lawyer seeking to make sense of management ideas and practices.[77] Management may be a relatively under-theorised concept for international lawyers, but managerialism is not. Over the past thirty years, a consistent stream of critical scholarship has investigated the 'managerialism' of international law and its governance regimes.[78] I draw on these strands to fashion four axioms about international legal expertise that can be relied upon for the study of management. Together these axioms problematise the assumptions on which expertise (and management) rests, namely that it works, that it is objective, that its power is exclusively functional, and that it is largely ahistorical.

The term 'managerialism' has multiple meanings in international law and scholarship: as a flexible model for enhancing rule compliance,[79] a style of judicial activism,[80] a concern with the effectiveness of law,[81] and a tool for minimising jurisdictional overlap between courts.[82] For others, 'managerialism' captures much of what is wrong with contemporary international law. Koskenniemi diagnoses it as a form of 'unreflective

[77] As detailed later in Chapter 2, the newness of management is a product of management thought which occludes its own past uses and historical patterns. The novelty of management is also refuted by the academic experience of the managerial university, see David West, 'The Managerial University: A Failed Experiment?', *Demos Journal*, 14 April 2016, available at: http://demosjournal.com/article/the-managerial-university-a-failed-experiment/.

[78] Beginning with Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissued with a new epilogue, Cambridge University Press 2005).

[79] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 3.

[80] Judith Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Review* 374–448, at 376.

[81] Hersch Lauterpacht, *The Function of Law in the International Community* [1933] (Oxford University Press 2011) 354.

[82] Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' (2017) 28 *European Journal of International Law* 13–72.

pragmatism' by international lawyers,[83] while Kennedy equates it to the global rule of experts.[84] These and other scholars offer a rich sociology and genealogy of expertise even if they have not directly engaged with the practices discussed in this book. Conversely, mainstream scholars, particularly those involved in the ICC project, have often grappled with the mechanics of select management practices without employing the same analytic of power. The point, then, is to bring existing international law critiques of managerialism to the critique of management through the former's insights on expertise.

Axiom 1: Expertise May Not Do What It Claims

A first critical insight is that expertise may not do what it claims to do. This may be because projects such as the ICC are systematically unable to deliver on their ambitious goals. One frequent achievement the court lays claim to is its deterrent effect on would-be perpetrators. Yet the verifiability of such a speculative claim is suspect, with scholars disagreeing over whether such a hypothetical claim can ever be proven.[85] The goal of rendering justice, whether to victims or suspects, is equally difficult to measure, given the instability and multivalence of the concept.[86] The court has sought to shed light on these terms, as in the OTP Strategic Plan for 2012–2015, which lists specific sub-goals of ending impunity as 'prevention of crimes, complementarity achieved, justice (seen to be) done, etc'.[87] Yet none are prioritised, nor are 'prevention' or 'justice done' further defined. Determining whether a goal has been met is a difficult task when the goal itself is always open to contestation and reinterpretation.

[83] Koskenniemi, 'From Apology to Utopia' xiv.

[84] David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

[85] Compare Courtney Hillebrecht, 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 *International Interactions* 616–643, at 628, with Yvonne Dutton and Tessa Alleblas, 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 91 *St. John's Law Review* 105–175, at 108.

[86] Sarah M. H. Nouwen, 'Justifying Justice' in Martti Koskenniemi and James Crawford (eds.), *Cambridge Companion to International Law* (Cambridge University Press 2012) 327–351.

[87] Office of the Prosecutor Strategic Plan June 2012–2015 (OTP Strategic Plan 2012), 11 October 2013, para. 95, available at: www.legal-tools.org/doc/954beb/pdf/.

A further basis for this axiom lies in the difficulty of rendering empirical judgment of any kind within such a complex institution.[88] These critiques have been raised before. Some scholars point to the partiality of expertise arising from its predominant reliance on measurable data. The picture rendered by expert analysis omits the historical, structural, or affective traces impacting individuals and communities.[89] The ICC is particularly susceptible to this critique, given the nature of its work with complex crimes and victim groups. Furthermore, the partiality of expertise comes to shape understandings of the context, problems, and possible solutions. As Nouwen puts it, '[W]hen what matters is what is countable, what is countable determines what matters'.[90] Rather than gradually forming a more comprehensive picture, expertise tends to prioritise evaluations based on what can be evaluated, and solutions for what can be measured. Over time, expertise conditions its own object of study.

Finally, one noticeable quality of management expertise is its rapid implementation cycle. This, too, militates against evaluations of its effectiveness. Court officials have noted that since efficiency is 'an ongoing process', it is difficult to take a snapshot of management's effects in isolation.[91] The volume of managerial practices introduced within the ICC over its first two decades attests to this never-ending character of reform. As techniques are proposed, introduced, implemented, altered, discarded, or audited, new ones are quickly layered on top. The ICC's Committee on Budget and Finance is particularly susceptible to proposing new reforms even while previous processes and techniques are being implemented. Such breathlessness offers little hope of measuring the effectiveness of management expertise.

[88] Max Horkheimer, 'Traditional and Critical Theory', in Max Horkheimer, *Critical Theory* (Continuum 1972, trans. Matthew J. O'Connell et al.) 188; Theodore Adorno et al. (eds.), *The Positivist Dispute in German Sociology* (Heinemann Books 1977).

[89] Kevin Davis, Benedict Kingsbury and Sally Engle Merry, 'Indicators as a Technology of Global Governance' (2012) 46 *Law & Society Review* 71–104, at 74–5.

[90] Sarah Nouwen, '"*As You Set Out for Ithaka*": Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' (2014) 27 *Leiden Journal of International Law* 227–260, at 230.

[91] Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court, Registry, ICC, August 2016, x, available at: www.icc-cpi.int/sites/default/files/itemsDocuments/ICC-Registry-CR.pdf.

Axiom 2: Expertise Is Not Politically Neutral

Many ICC practitioners and scholars maintain that neither the court nor the Rome Statute framework is 'political' but is concerned only with questions of law. Interestingly, the few ICC practitioners who have written about management maintain a similar distinction between politics and management, which appears as a politically neutral means of enhancing organisational performance.[92] In this reading, expertise has no stake one way or the other in a certain set of distributive outcomes but may be put to whatever objectives are laid out for it.

Interestingly, this claim has been challenged by international criminal courts themselves. In June 2017, Co-Investigating Judges at the Extraordinary Chambers in the Courts of Cambodia (ECCC) requested submissions on a possible stay of proceedings resulting from budgetary underfunding. Having implemented the management tool of 'results-based budgeting' to monitor court spending, the ECCC was confronted with a financial shortfall. 'As a measure of success and/or progress', the judges found this budgeting tool 'incompatible with judicial independence'.[93] The judges also surmised that the ICC's uptake of similar tools displayed a tension between the 'managerialist demands around effectiveness and efficiency from the donor community' and 'fair trial principles'.[94] They warned that 'applying managerial criteria to the core judicial activity is either bound to end as an exercise in futility or risks making dangerous inroads to the judicial self-perception'.[95] Management

[92] Philipp Ambach and Klaus Rackwitz, 'A Model of International Judicial Administration?: The Evolution of Managerial Practices at the International Criminal Court' (2013) 76 *Law & Contemporary Problems* 119–161; Philipp Ambach, 'The "Lessons Learnt" Process at the International Criminal Court – A Suitable Vehicle for Procedural Improvements?' (2016) 12 *Zeitschrift für Internationale Strafrechtsdogmatik* 854–867; Silvia Fernández de Gurmendi, 'From the Drafting of the Procedural Provisions by States to their Revision by Judges' (2018) 16 *Journal of International Criminal Justice* 341–361; Osvaldo Zavala, 'The Budgetary Efficiency of the International Criminal Court' (2018) 18 *International Criminal Law Review* 461–488; Sam Sasan Shoamanesh, 'Institution Building: Perspective from within the Office of the Prosecutor of the International Criminal Court' (2018) 18 *International Criminal Law Review* 489–516.

[93] 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, Office of the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia, 004/2/07-09-2009-ECCC-OCIJ (11 August 2017) para. 35, available at: www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/D349_6_EN.PDF (ECCC Combined Decision).

[94] Ibid., para. 37.

[95] Ibid., para. 43.

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practices may therefore carry within them a capacity to prioritise the interests of certain donors or alter how institutional actors discharge core activities.

Aside from this cautionary tale, critical international lawyers have also taken aim at the objectivity of legal expertise. Interventions by Martti Koskenniemi, Hilary Charlesworth, Christine Chinkin, and Antony Anghie expose the politics of international law from various angles.[96] There have also been efforts, by Koskenniemi in his notion of 'structural bias' and Kennedy in his idea of 'background norms', to further apply these insights to expertise. For example, Koskenniemi identified the 'structural bias' characteristic of international law's governance regimes.[97] It is this bias, Koskenniemi claims, that explains why the same arguments and actors consistently win out despite international law's indeterminacy. While governance regimes such as 'human rights' appear to be neutral as to their outcome, Koskenniemi posits that each tilts in favour of certain priorities to the exclusion of others. In that example, the human rights regime favours political and civil over socio-economic rights. There is thus a political bent to how such regimes prioritise the arguments of their experts.

The idea of an in-built bias has been reproduced in critical scholarship on international criminal justice as a challenge to the field's objectivity: the anti-impunity regime prefers individualised over collective responsibility or immediate over transhistorical violence. The anti-African bias is a similar argument about the imbalanced co-ordinates of the regime. Yet the notion of bias tends to fix the parameters of a given regime too rigidly in time and place, when regimes themselves are also acts of professional world-building.[98] This is where Kennedy's notion of 'background norms' helps visualise global governance regimes as the result of expert articulation.[99]

[96] Koskenniemi, 'From Apology to Utopia'; Hilary Charlesworth and Christine Chinkin, *Boundaries of International Law* (Manchester University Press 2000); Antony Anghie, *Sovereignty, Imperialism, and the Making of International Law* (Cambridge University Press 2004).

[97] Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 *European Journal of Legal Studies* 8–24, at 10–11. The shift is elaborated upon in Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *European Journal of International Law* 7–19, at 9.

[98] Cf. B.S. Chimni, *International Law and World Order* (Cambridge University Press 2017) 317.

[99] See David Kennedy, 'Background Noise?: The Underlying Politics of Global Governance' (1999) 21 *Harvard International Review* 52–57, at 52.

Kennedy uses the term "background" to capture 'the suspicion that something that purported to be the result of foreground deliberation was actually the product of less visible background forces'.[100] In global affairs, this means looking to the expert and their legal arguments, rather than to political leaders, to understand the shape of the field.[101] Despite disavowing politics, experts working in the background are involved in narrating, invoking, and contesting the expert claims of others, to obvious distributive effect. A trade lawyer may read a toxic chemical spillage differently to an environmental lawyer, but the vocabulary of trade law – comparative advantage, trade barriers, social protection, and so on – will also have to be deployed as arguments in different arrangements with differing outcomes for the actors and habitats involved.[102]

At the ICC, ideas of complementarity, co-operation, and legitimacy affect the prosecutor's decision whether or not to open an investigation. By framing those terms through a context, experts like the prosecutor fashion the world of global justice as state based and state dependent, demanding proximity to governmental and often authoritarian structures. By such expert arguments, OTP officials govern atrocity situations, bringing some actors into the discussion, such as national security forces, while devaluing others, such as those proximate to atrocities themselves.[103] The solutions available – to have the ICC deal with criminality or its domestic equivalent – foreclose other avenues of political and social justice-seeking. Such dynamics of articulation, interpretation, narrowing, and exclusion are the politics of expertise.

Axiom 3: The Power of Expertise Lies Elsewhere than in Its Effectiveness

Expertise is overwhelmingly assessed against its effectiveness in achieving its aims. As noted earlier, the focus on effectiveness also permeates ICC practice and scholarship.[104] But it also occludes the constitutive or

[100] David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27 *Sydney Law Review* 1–24, at 3.

[101] Ibid., 6.

[102] Kennedy, 'World of Struggle' 139. This example adapts Koskenniemi's in 'The Politics of International Law – 20 Years Later' 11.

[103] Kennedy, 'Background Noise?' 57.

[104] For a selection of this effectiveness turn, see Cedric Ryngaert (ed.), *The Effectiveness of International Criminal Justice* (Intersentia 2009); Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014); Linda Carter, Mark Ellis and

productive power of experts as they fashion the people, institutions, and arguments of global justice. Critical legal scholars have adopted this lens to map the mechanics of international legal expertise. The expert does not only propose and effect institutional reforms but articulates an institutional context and set of problems, a relevant legal infrastructure, and a range of policy solutions. Koskenniemi gives an insight into how profound this redescription of the field can be. With international law's fragmentation into functional regimes, the 'generalist' language of rules, government, and responsibility was substituted by the language of regulation, governance, and compliance. Indeed, even conflict and contestation are no longer recognised as 'disputes' but as 'management problems'.[105]

Managing problems, Koskenniemi's international lawyer 'looks behind rules and institutions' to 'assess costs and benefits. Streamline, balance, optimize, calculate'.[106] They are not rigidly concerned with a consistent jurisprudence, but 'context-sensitive, short-term, market-oriented and ad hoc'.[107] The lawyer becomes a 'cog in the regime-machine'[108] deploying their expertise to secure concrete results and 'smooth the prince's path'.[109] This managerial style makes the uptake of management ideas and tools less surprising, given the shared will to optimise, contextualise, and smooth institutional pathways. Similarly, Kennedy's experts 'aggregate interests, resolve conflicts, manage risks, address common problems,

Charles Chernor Jalloh, *The International Criminal Court in an Effective Global Justice System* (Edward Elgar 2016).

[105] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9–36, at 14; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 485.

[106] Koskenniemi, 'Ethos of Legal Education' 13.

[107] Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in Martti Koskenniemi, *The Politics of International Law* (Hart Publishing 2011) 271–293, at 280. The growing connections between international law and international relations from the 1980s onwards has also influenced the uptake of this language in combination with those of microeconomics, including notions of 'stakeholders', 'firms', and 'transaction costs', see Robert Keohane, 'The Demand for International Regimes' (1982) 36 *International Organisation* 325–355, at 330–337; Allen Buchanan and Robert Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405–437. For an overview, see Dennis Dijkzeul and Yves Beigbeder, 'Introduction' in Dennis Dijkzeul and Yves Beigbeder (eds.), *Rethinking International Organisations* (Berghahn 2006) 1–23, at 7–11.

[108] Koskenniemi, 'Ethos of Legal Education' 17.

[109] Koskenniemi, 'Politics of International Law' – Twenty Years Later' 16.

and promote prosperity'.[110] They are trained to think in terms of 'best practice, practical necessity [and] efficiency' as a form of 'intellectual and practical work'.[111] The expert governs (or constitutes) 'when what is articulated comes to pass'.[112] Both accounts of expertise signal its constitutive capacity. They also beg the question that if experts govern via a 'modest practice of eclectic social and institutional management',[113] then how does management itself fit in?

Alongside these interventions, the socio-legal literature on managerial judging, spearheaded by Judith Resnik, offers an insight into the constitutive role of management vis-à-vis court proceedings and judges. Writing in the context of increased litigation within US courts in the 1980s, Resnik identified a shift in how federal judges were responding to such changes.[114] They had graduated from 'uninformed, passive umpires' relatively unconcerned with issues of scheduling, documentation control, and speed into 'active managers' who took control over their calendars and sought out alternative dispute settlement avenues in order to reduce their docket and increase court efficiency.[115] These 'trappings of the efficiency era' may or may not have sped up proceedings, but for Resnik they crucially changed litigants' self-understanding as collaborators in judicial efficiency as *adjudication* became *administration*.[116]

A similar shift was marked internationally, at the Yugoslavia Tribunal, by Langer and Doherty. They revealed how a mix of legal and managerial tools, including the use of *ad litem* judges, case management plans, and pre-trial conferences impacted the Tribunal's work in subtle yet far-reaching ways.[117] This managerial judging style created 'different

[110] José María Beneyto and David Kennedy (eds.), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press 2012) v; David Kennedy, 'The Mystery of Global Governance' (2008) 34 *Ohio Northern University Law Review* 827–860. See Johns, 'Unruly Law' 17.

[111] David Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (2001) 5 *European Human Rights Law Review* 463–497, at 471; Kennedy, 'World of Struggle' 110.

[112] Kennedy, 'World of Struggle' 9.

[113] Kennedy, 'Invisible College' 472.

[114] Resnik, 'Managerial Judges' 374. See also Judith Resnik, 'Managerial Judges and Court Delay: The Unproven Assumptions' (1984) 23 *Judges Journal* 8–11 and 54–55.

[115] Maximo Langer, 'The Rise of Managerial Judging in International Criminal Law' (2005) 53 *American Journal of Comparative Law* 835–910, at 836.

[116] Resnik, 'Managerial Judges' 445.

[117] Maximo Langer and Joseph Doherty, 'Managerial Judging Goes International but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms' (2011) 36 *Yale Journal of International Law* 241–305, at 291.

structures of interpretation and meaning through which the participants in the criminal adjudication process (prosecutors, judges, defence attorneys, etc.) understand criminal procedure and their respective roles'.[118] Adopting such practices, they 'become part of actors' internal dispositions' and shape their 'legal identities'.[119]

Axiom 4: Expertise Is Neither Ahistorical Nor Progressively Linear

Mainstream accounts of the connection between expertise and history embody a paradox. At one level, expertise and its effects are often intentionally studied as if outside history. The historical vacuum in which management emerges and operates extends only to the immediate institutional context, rendering wider trends and external dynamics irrelevant. In this account, the historical context and emergence of expert tools and arguments are also irrelevant. At another level, however, practitioners and scholars of disciplines such as international law are constantly 'doing history'.[120] This kind of work is often on show at the ICC, whether in the construction of historical narratives of atrocity, or in symbolic invocations of the Nuremberg legacy. The international criminal lawyer situates their expertise, deploying history and narrative to celebrate, justify, or warn. History is also deployed in the narration of the field's institutional maturation from flawed, skeletal mechanism at Nuremberg to the more robust but still temporary ad hoc Tribunals to the end story

[118] Langer, 'Rise of Managerial Judging' 849.

[119] Ibid. International law and international relations scholarship on international bureaucracy touch on the cultures that spring up within them. See Michael Barnett and Martha Finnemore, *Rules for the World: International Organisations in Global Politics* (Cornell University Press 2004) 18–19: 'rules can be constitutive of identity, particularly of the identity of the organisation … Bureaucratic rules thus shape the activities, understandings, identity, and practices of the bureaucracy and consequently help to define the bureaucratic culture'. International law scholars have traced the effects of bureaucratic culture within certain 'normative orders'; see Touko Piiparinen, 'Law versus Bureaucratic Culture: The Case of the ICC and the Transcendence of Instrumental Rationality' in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge University Press 2013) 251–283, at 252–253.

[120] Barrie Sander, *Doing Justice to History: Confronting the Past in International Criminal Courts* (Oxford University Press 2021); Janne Nijman, 'An Enlarged Sense of Possibility for International Law: Seeking Change by Doing History' in Ingo Venzke and Kevin Jon Heller (eds.), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021) 92–110.

of the permanent ICC.[121] The upshot of this paradoxical view of expertise and history is that supporters of the ICC project find themselves constantly looking to history to explain and expand the enterprise whose 'time has come' even while they assert the timelessness of the tools deployed to realise it.

Critical scholarship pinpoints a more significant role for history in analysing expertise, and for the role of expertise in the past. Scholars have pointed to the continuity and contingency of international legal arguments and concepts, locating these in time and place in order to render them politically contestable.[122] As well as bracketing the question of historical progress, such accounts also demonstrate the importance of history to expertise. Koskenniemi's historical account of international law from its late-Victorian rise to its 'fall' in the 1960s pinpoints the specific historical conditions of international legal managerialism. The decline of the field is attributed to its instrumentalisation for political ends during the Cold War.[123] Thereafter, the discipline 'never really recovered'[124] and became what it remains today: a specialist, technical craft put to the ends of global rulership.[125] Once the field began to fragment in the 1990s, expertise was further put to the task of proffering efficient solutions to the global challenges of the post-Cold War era.[126] Since then, legal expertise has 'slowly vanished behind its utilitarian reasons', according to Koskenniemi.[127] Far from being isolated from history, expertise, particularly international legal managerialism, is partly conditioned by, partly responsible for disciplinary undulations.

Historically entangled with professional sensibilities, expertise also exhibits the scars of the institutional struggles and skirmishes in which

[121] See, for example, Philippe Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press 2009).

[122] Roberto Unger, *False Necessity* (Cambridge University Press 1988); cf. Susan Marks, 'False Contingency' (2009) 62 *Current Legal Problems* 1. For an example, see Karen Knop, 'The Tokyo Women's Tribunal and the Turn to Fiction' in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds.), *Events: The Force of International Law* (Routledge 2010) 145–164.

[123] Koskenniemi, 'Gentle Civilizer of Nations' 3.

[124] Ibid., 3.

[125] Ibid., 413.

[126] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1–30, at 4.

[127] Martti Koskenniemi, 'Global Governance and Public International Law' (2004) 37 *Kritische Justiz* 241–254, at 252.

it was forged.[128] Expertise is both the register in which political contestation takes place institutionally and the spoils of victory won from it. As noted in Chapter 2, management expertise thus appears as the 'truth effects' of such contestation, papering over the cracks and conflicts that define its very terms. Hence, the expertise surfacing in ICC discourse cannot be viewed in isolation from that institution, nor indeed from other prior institutions in which management ideas and practices were forged internationally. To understand management at the ICC, it is thus important to trace its pre-lives, particularly in the United Nations, as is done in Chapter 2.

These four axioms provide a starting point for the study of management in international institutions by resisting some common assumptions about expertise. It brackets the question of management's effectiveness and contests its claim to political neutrality. It also looks to the world-making effects of expertise, particularly as it appears in specific institutional milieux. With these axioms in mind, I briefly summarise the arguments of this book as they relate to management before outlining the book's structure and style.

1.5 The Argument

The four axioms above are only a starting point for the analysis conducted in this book. Having studied the ICC's management apparatus, these axioms can be further refined. Instead of rehashing arguments from each chapter, I connect them here in rudimentary form to the four axioms, indicating the chapters in which such arguments are elaborated:

- Management ideas and practices are important features of international legal expertise, such that international law is not *all* that international lawyers do;[129]

[128] Jochen von Bernstorff and Philipp Dann (eds.), *The Battle for International Law: South–North Perspectives on the Decolonisation Era* (Cambridge University Press 2019). See Martin Clarke et al., 'Cold War International Law', Oxford Bibliographies, 28 October 2020, available at: www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953–0214.xml; see also Pahuja, 'Decolonising International Law'; Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017).

[129] To paraphrase Koskenniemi, 'From Apology to Utopia' 612.

- Management ideas and practices are not universal and timeless but particular to the (largely Western, European, American) experience of governing spaces and peoples institutionally. This experience can be traced to the management of slavery through the plantation to the organisation of war and the running of the (American) factory. More recently, management has been part of the effort to establish international institutional projects relating to those living under and breaking with colonial rule, whether in the League of Nations or, later, the postcolonial United Nations (Chapter 2);
- Management forms and reforms the institutional co-ordinates and characters of global justice rather than simply improving extant structures and processes. Discourses of efficiency, strategy, risk, and workload and techniques of strategic planning, audit, performance appraisal, onboarding, indicators, workflow, best practices, and organigrams produce an institutional imaginary and a professional sensibility (Chapters 3, 5 and 6);
- Management ideas and practices have facilitated the radical closure of institutional and emancipatory possibilities, from the G77's New International Economic Order at the UN to African states' desire for decolonial global justice at the ICC. That process does not play out in identical terms wherever management is found. At the level of large-scale organisational reform, it turns the ICC organisation into the outer limits of justice-seeking (Chapter 3) and of professional/political action (Chapter 6). In day-to-day professional interactions of staff, it encourages and rewards a concern for the institution above other priorities (Chapter 4). And within the ICC's legal discourse, it occasions a flight from the dilemmas and complexities comprising the argumentative field (Chapter 5);
- Management is less a 'force for good' smoothing the path towards global justice than part of the expert and institutional architecture that narrows the terms of global justice to what the ICC can offer, discounts contestations of ICC-style justice and alternative imaginaries thereof, and excludes those in whose name the court purports to act from its decision-making processes;
- Management's various effects can be neither reformed away nor entirely removed but can be targeted only at the level of professional discourse. A posture or strategy of discomfort admits to the politics of management, the choices it engenders, and the possibility of taking a break from the will to manage (Chapter 7).

In sum, management is a pervasive discourse, set of arguments and practices which implicates the ICC from the macro- to the micro-level. Management implicates the ICC in ways not altogether benign but helps explain why political alternatives within the court are so radically foreclosed and ignored by those at the centre of this project.[130] Management's force therefore lies not in its problem-solving potential for a gradually improving court but its productive and indeed subordinating potential as against the court's alternative interpretations. This cannot be represented as a homogeneous set of traits but is traceable instead across multiple scales of operation from large-scale organisational reform to everyday professional work to the ICC's argumentative field. Nonetheless, the commonality between the ideas and practices deployed across these scales is to narrow, exclude, and invisibilise the political contestations and argumentative dilemmas that comprise the project.

1.6 Outline and Style

This book traces a concerted flight to management resulting from two decades of institution building and rebuilding, professional improvement, and argumentative innovation. In addition to the (in)visibilising and in/exclusionary effects of the court's managerial machinery, management has also foreclosed the contestations, complexities, and dilemmas that comprise the ICC project. Together, such effects of management render 'thinking otherwise' not only difficult but also susceptible to condemnation. These insights come through a series of different interventions over the course of five substantive chapters and a conclusion.

These chapters gradually compile a picture of management and the ICC through the layering of different argumentative styles or methods. Rather than limiting the mechanics of these chapters to the notion of method, I also take account of other devices, including pace, intimacy, irony, and audience in offering a series of management studies across and between various scales of operation. I treat these styles as fragments 'lying about that we can use quite instrumentally, pragmatically, and

[130] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2000) 543.

disloyally'.[131] This is not a supermarket sweep of pre-packaged methods but an effort to think with and against certain styles and methods to overcome the will to make method an agent or actor in the story while also allowing them to render management's effects differently when approached from alternative angles.[132] Some will appeal more than others, and I encourage hypertextual rather than linear readings of the book and its chapters.[133]

Chapter 2 starts from the premise that in order to understand management's effects on the ICC project, it is crucial first to consider how and under what circumstances management ideas and practices have come to appear self-evident, authoritative and universally applicable 'at all'.[134] This chapter therefore looks to history to 'trace the forces that gave birth to our present-day practices ... and identify the historical conditions upon which they still depend'.[135] This genealogical style allows us to trace

> how contemporary practices and institutions emerged out of specific struggles, conflicts, alliances, and exercises of power, many of which are nowadays forgotten. It thereby enables the genealogist to suggest ... by presenting a series of troublesome associations and lineages – that institutions and practices we value and take for granted today are actually more problematic or more "dangerous" than they otherwise appear.[136]

Genealogy thus makes the ICC and its expert tools look strange, even unrecognisable.[137] It helps answer the question I began this book with: how could terms such as 'audit', 'appraisal', and 'performance' fit so seamlessly with terms such as 'atrocity', 'victims', and 'global justice'?

[131] Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press 2006) 7.

[132] Following Martti Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 *American Journal of International Law* 351–361, at 352.

[133] This form of reading is captured in the IGLP 'Crunching the Core' seminar series and, to an extent, reflects the lawyer's mode of engaging with treaty texts.

[134] Raymond Geuss, 'Genealogy as Critique' (2002) 10 *European Journal of Philosophy* 209–215, at 212.

[135] David Garland, 'What Is a "History of the Present"? On Foucault's Genealogies and Their Critical Preconditions' (2014) 16 *Punishment & Society* 365–384, at 373. The 'original' contribution is from Michel Foucault, 'Nietzsche, Genealogy, History' in Paul Rabinow (ed.), *The Foucault Reader* (Pantheon Books 1984) 76–100.

[136] Garland, 'What Is a "History of the Present"?' 372.

[137] Anne Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609–624, at 617–618.

Problematising a classic understanding of management from a former ICC president, this chapter replaces a decontextualised yet progressive management with one that has appeared in institutional settings ranging from the plantation to the postcolonial United Nations. In those spaces – and in the ICC of today – management's self-evidence and popularity became possible through repeated efforts to depoliticise and dehistoricise it. These traits were attached to management under deeply political conditions, whether in the factory relations between workers and managers in late nineteenth-century New England or the struggles between North and South over the United Nations from the 1960s onwards. The spoils of victory that followed such struggles were the discursive possibilities of describing and pursuing political agendas via the seemingly scientific and apolitical register of efficiency, planning, cost-effectiveness, and performance. Genealogy highlights the power of management at the ICC through these earlier institutional snapshots.

The third to fifth chapters are studies of management at the ICC. These studies take place across three different scales: macro, micro, and meso. I divide the analysis in light of the multiple layers of institutional power relations. Foucault often characterised power spatially as 'near and far', 'side-by-side', and 'dispersed'.[138] There are 'general conditions ... organised into a more-or-less coherent and unitary strategic form' – otherwise called 'global strategies' – and there are 'dispersed, heteromorphous, localised procedures of power'.[139] To this may be added the plane of legal argumentation. These three layers are arranged grid-like, even if they are not hermetically sealed off from one another. They offer points of entry for viewing management from above (macro-level organisational reform), across or diagonally (meso-level field of argumentation), and individually (micro-level professional engagements over the course of one individual career).

Chapter 3 thus studies management at the macro-architectural level, tracing its emergence within the court as a central ordering language for the new permanent institution. This chapter also begins to map the actors, arguments, and meanings ascribed to management ideas and

[138] Michel Foucault, 'Of Other Spaces: Utopias and Heterotopias' (1984) *Architecture/Mouvement/Continuité* (trans. Jay Miskowiec) 1–9.

[139] Michel Foucault, 'Power and Strategies' in Colin Gordon (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977 by Michel Foucault* (Pantheon Books 1980) 134–145, at 142. See Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press 2015) 121.

practices as the court's workload expanded. Such macro-analysis reveals how the parameters of global justice were narrowed through the deployment of management and its interpretations of success, failure, performance, and risk. This chapter attempts to redescribe the organisation from the perspective of these practices. This means, to quote Orford, reading 'expert documentation on international institutional arrangements with the care and rigour that we are used to seeing given to the pronouncements of European philosophers'.[140] In attempting this redescription, it necessarily includes and excludes in an effort to train a lens on specific discourses and practices, rather than the key court cases and political shifts that normally take centre stage.[141]

Chapter 4 moves to the micro-scale to consider how management ideas and practices implicate the ICC professional, specifically the ICC lawyer. At their most benign, management practices are made available to professionals to guide the application of their knowledge and skills and to facilitate self-optimisation. Yet within that vision of individual micro-management lies the capacity to delimit the conditions of possibility by limiting the professional imaginary of global justice. From the point at which the would-be employee begins to fill out an application for an ICC position, to when they are onboarded on day one, to their annual performance appraisals, and finally until they leave, the ICC professional is mediated through management ideas and tools that constrain and discourage confrontation with the ICC's politics, contestations, and complexities.

The style of this chapter is based on an ethnography of documents inflected with personal observation during my time as an ICC intern.[142] Managerial practices mostly take a material form whether as plans, reports, or forms. Like other techniques of rule, these documents bring into being that which they represent, both in their content and in their material form as pieces of paper.[143] Managerial

[140] Orford, 'In Praise of Description' 620.

[141] On the (colonial) politics of archives, see Ann Stoler, 'Colonial Archives and the Arts of Governance' (2002) 2 *Archival Science* 87–109. In international law, see Madelaine Chiam et al., 'Introduction: History, Anthropology and the Archive of International Law' (2017) 5 *London Review of International Law* 3–5, at 5.

[142] On an ethnographic 'way of seeing', see Harry Wolcott, *Ethnography: A Way of Seeing* (AltaMira Press 1999) 66 and 68. In international law, see Eslava, 'Local Space, Global Life', and Johns' 'quasi-ethnography' in 'Unruly Law' 31.

[143] Matthew Hull, 'Documents and Bureaucracy' (2012) 41 *Annual Review of Anthropology* 251–267, at 253.

documents enforce certain rules of engagement, capture and direct individual activity, and establish their own lifecycles.[144] I thus rely on Annelise Riles' definition of (managerial) documents as 'paradigmatic artifacts of modern knowledge practices'.[145] Seeing ethnographically allows one not only to 'describe what the people in some particular place or status ordinarily do', but also to understand 'the meanings they ascribe to what they do', thereby revealing the sentiments on which the project relies.[146]

Among international legal scholars, documents have only recently been subjected to the ethnographic lens normally reserved for groups and communities.[147] The ICC's managerial documents, like any other, demand engagement, communication, transportation, verification, filing, and storage by a range of actors within and without the institution. Many of the aesthetic features of documents help produce and sustain the institution through crests, letterheads, organigrams, tables, flowcharts, boxes, lists, and bullet points.[148] Appreciating the material qualities of managerial documents and professional encounters with them also foregrounds the more subtle discursive effects missed by a macro-level analysis or interviews and trains the gaze back on the metropole and its official practices.

[144] Carol Bacchi and Jennifer Bonham, 'Reclaiming Discursive Practices as an Analytic Focus: Political Implications' (2014) 17 *Foucault Studies* 173–192, at 184.

[145] Annelise Riles, 'Introduction: A Response' in Annelise Riles (ed.), *Documents: Artifacts of Modern Knowledge* (University of Michigan Press 2006) 1–40, at 2.

[146] Wolcott, 'Ethnography: A Way of Seeing' 68.

[147] The most notable exceptions include Richard Harper, *Inside the IMF: An Ethnography of Documents, Technology and Organisational Action* (Routledge 1998); Annelise Riles, 'Models and Documents: Artefacts of International Legal Knowledge' (1999) 48 *International & Comparative Law Quarterly* 805–825; Annelise Riles, *The Network Inside Out* (University of Michigan Press 2001); Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'État* (John Wiley & Sons 2010); Julie Billaud, 'Keepers of the Truth: Producing "Transparent" Documents for the Universal Periodic Review' in Hilary Charlesworth and Emma Larking (eds.), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2015) 23–84, at 63. For a more recent 'turn' to artefacts and objects in international law, see the London Review of International Law special issue on 'History, Anthropology and the Archive of International Law' (2017) 5 *London Review of International Law* 3–196; Jessie Hohmann and Daniel Joyce (eds.), *International Law's Objects* (Oxford University Press 2019).

[148] See Riles, 'Documents', esp. chapters by Don Brenneis and Marilyn Strathern; Nayanika Mathur, *Paper Tiger: Law, Bureaucracy, and the Developmental State in Himalayan India* (Cambridge University Press 2016), chapter 4.

Between the macro and micro lies management and indeed law as a 'discursive field' of arguments.[149] That field emerges in the course of professional practice but is also capable of orienting expert debate and action as Pierre Bourdieu has shown. Chapter 5 therefore positions management alongside the legal arguments structuring the ICC as a professional field. As Simpson and others have demonstrated, the ICC field is largely constructed as 'a set of dilemmas' or dyadic oppositions – law versus politics, international versus domestic, accused versus victim and so on – that facilitate arguments without ever finally resolving them.[150] This chapter engages a mode of deconstruction similar to Simpson, Koskenniemi, and others in seeking to unearth a pattern in the invocation of management to deal with these legal dilemmas. Within this legal terrain, management operates as a mechanism deployed by arguers to escape these dilemmas (even while it displaces critical engagement with them). It is in such instances that management's function as professional salve is most apparent as it conditions a flight from the professional responsibility to confront the theoretical and political contradictions of the ICC project.

Chapter 6 takes one notable reform moment at the ICC – the *Re*Vision project to reorganise the Registry – as a sounding of management ideas and practices running through and effecting this reorganisation.[151] It shows how management expertise relates to politics in two ways. It depoliticises through its terms of engagement and reform techniques, while simultaneously enacting managerial reform as the extent of the court's politics. The zeal with which management is taken up and obsessed over institutionally can be described as the draw of an apolitical politics. This chapter takes up the mode of redescription once again while also engaging with the network of documents that justified and diagnosed *Re*Vision. It is a more synchronic sounding of the court's managerial layers as displayed in previous chapters but here offered as a means for thinking through the relationship of politics and technocracy.

Together these chapters offer a vision of an institutional project saturated and conditioned by management ideas and practices. In large

[149] Gerry Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (Wiley 2007) 2.

[150] Ibid., 4.

[151] Joseph H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 547–562.

part, these prove to have exclusionary effects for the field and its professional consciousness. The conclusion therefore asks how management and ICC-style managerial justice might be confronted, resisted, or broken with. Rather than the reactionary move of posing solutions, the conclusion offers the possibility of adopting a professional posture – *a strategy of discomfort* – to confront management and the iteration of global justice it presently supports. Engaging dialogically with the writings of Jacques Vergès, Max Weber, and decolonial thinkers, I end this book by invoking the strategy of rupture and the ethic of responsibility. The strategy of discomfort is intended for various participants in the ICC project and may occasion quite different avenues for critical engagement if taken up.