“Efficiency Is Paramount in This Regard”: The Managerial Role of the ICC Presidency from Kirsch to Fernández

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Abstract

Since the International Criminal Court commenced its work, much has been made of the institution-building role of successive ICC Prosecutors as central to the Court’s legal framework and as ambassadors for the “fight against impunity”. Much less has been said about the role of the ICC Presidency, as the Court’s smallest organ, and its successive Presidents. Yet the Presidency operates at the apex of the Court as an international organisation, manages relations with states, coordinates internal governance issues, and acts as the “public face” of the Court globally, not to mention its judicial functions. The ICC Presidency and its first three Presidents have been particularly influential in shaping the ICC into an institution prioritising the values of efficiency and effectiveness, with deeply political and distributive implications. This article traces those influences, from the Presidency of Philipp Kirsch, until the end of the third Presidency under the leadership of Silvia Fernández de Gurmendi in March 2018.

Keywords

International Criminal Court – presidency – management – governance – efficiency

1 Introduction

Much has been made of the institution-building role of successive ICC Prosecutors, Luis Moreno-Ocampo, Fatou Bensouda, and, since 2021, Karim...
Whether in creating an organ “from scratch”, applying their prosecutorial powers in selecting cases, or devising priorities in successive strategies and policy papers, ICC Prosecutors attract significant attention as not only heads of legal teams investigating grave crimes, but as ambassadors for the “fight against impunity”. However, less has been written about the role of the ICC Presidency and their leadership in shaping the work and priorities of international criminal justice, and indeed of the International Criminal Court as its primary institution. This is surprising given the Presidency operates at the apex of the ICC as an international organisation, manages the Court's diplomatic relations with states, and secures cooperation agreements with states and other international organisations. In fact, the ICC Presidency and its first three Presidents have been particularly influential in shaping the ICC as an institution. This article traces those influences, from the first Presidency of Philipp Kirsch, until the end of the third Presidency under the leadership of Silvia Fernández de Gurmendi in March 2018.

The specific contribution of successive ICC Presidents lies in their promotion of a managerial court, one that prioritises the organisational values of efficiency and cost-effectiveness. Through their institutional and extra-institutional efforts, Philipp Kirsch (2003–2009), Sang-hyun Song (2009–2015), and Silvia Fernández (2015–2018) worked to make organisational efficiency a central aim of the now twenty-year-old Court. The ICC’s first President, Philippe

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1 M. Minow et al. (eds.), The First Global Prosecutor: Promise and Constraints (University of Michigan Press, 2015).
Kirsch, stated in 2008 that while Court officials had “built a solid foundation” for the permanent institution, more needed “to be done to maximize the effectiveness of the Court”. Recalling one of the core aims of the 2006 Strategic Plan, Kirsch affirmed that “[t]he Court continues to aim to be a model of public administration and is focused on eliminating any inefficient bureaucratic policies or procedures”. A year later, Kirsch’s successor, Sang-hyun Song, noted his wish that the Court “strive to be a model of public administration”, adding that “efficiency is paramount in this regard”. Finally, Silvia Fernández de Gurmendi declared at the beginning of her mandate as President in March 2015 that her “main priority” was “to enhance the effectiveness and efficiency of the institution”. Collectively, these senior officials have declared efficiency a central pillar of the Court since 2002.

Yet it would be wrong to suggest that these successive engagements serve only to optimise the functioning of a large bureaucracy in neutral and apolitical terms. This is because neither efficiency nor effectiveness are themselves objectively valid and fixed metrics, as Court officials would have them. Rather, they are open-ended concepts which, over the Court’s short lifetime, have acquired a particular meaning through the recurring interventions and practices of various global justice professionals, of which the ICC President is but one. In short, and as seen throughout this article, “efficiency” in ICC terms equates to cost-effectiveness for Western taxpayers, such that the concerns, interests, and priorities of this imagined community are increasingly baked into the daily work and aspirations of the Court itself. Hence, the seemingly objective presidential work of coordinating administrative functions, establishing an audit infrastructure, and enhancing “corporate governance” all interpellate amorphous donor concerns as the Court’s own through the powerful vocabulary of efficiency and effectiveness. From this background work, it becomes easier to trace the rise of the value-for-money concerns that now dominate mainstream criticism of the ICC.

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8 Ibid., at p. 11.


11 For example, S. Ford, “Complexity and Efficiency at International Criminal Court”, 29 Emory International Law Review (2014), 1. For a powerful critique of this vocabulary, see https://creativecommons.org/licenses/by/4.0/
The regularity of these interventions hints at a role for the Presidency beyond instilling an amorphous organisational culture. By shaping the institutional discourse through speech-making, exercising the Presidency’s statutory functions, and public and scholarly engagements, the first three Presidents have contributed to a managerial institution guided by the ideas of efficiency and cost-effectiveness. As a small and largely administrative organ, the Presidency does not engage in this discursive work alone – other Court organs, officials, state representatives and experts, as well as NGOs, scholars, and the media are all involved in this task. However, the Presidency’s size and functions do not detract from its constitutive role vis-à-vis the institution. Indeed, it is precisely because of the Presidency’s non-legal functions, and its location within the ICC structure, that it plays such a significant role in shaping the Court into a managerial body.

Through the background work of coordinating inter-organ administration, implementing a managerial apparatus, and liaising with an array of Court supporters, the Presidency has, for better or worse, made technocracy and optimisation central pillars of the global justice project.

This article elucidates this managerial work, or the dynamics through which the Presidency attempts to shape the ICC into a managerial institution. I begin by reinterpreting the Presidency from the “lesser-known organ of the Court” to an organ uniquely and centrally situated within the wider

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12 This topic has been taken up in various institutional contexts, notably in relation to the World Bank, D. Van Den Meerssche, “Performing the rule of law in international organizations: Ibrahim Shihata and the World Bank’s turn to governance reform”, 32 LJIL (2018), 47. While this and other works also take account of the social, economic, and cultural “capital” of such institutional personalities, this article does not discuss these facets of influence, even though they too are significant in shaping presidents’ own approach to the Court. I thank one of the reviewers for prompting this clarification.

13 Despite being comprised of judges, the Presidency’s only direct legal function is to judicially review administrative decisions made by the Registrar, P. Ambach and K. Rackwitz, “A Model of International Judicial Administration?: The Evolution of Managerial Practices at the International Criminal Court”, 76 Law & Contemporary Problems (2013), 119, 131. Functions relating to facilitating legal processes and proceedings include the designation, excusal and disqualification of judges from appearing on the bench, and the enforcement of sentences, on which see H. Abtahi and S.A. Koh, “The Emerging Enforcement Practice of the International Criminal Court”, 45 Cornell International Law Journal (2012), 1; H. Abtahi, O. Ogwu and R. Young, “The Composition of Judicial Benches, Disqualification and Excusal of Judges at the International Criminal Court: A Survey”, 11 JICJ (2013), 379. Although central components of the Presidency’s everyday work, such functions contribute only indirectly to the efficiency discourse with which this article is concerned.
ecology of the Rome Statute system. It is the Presidency’s location within this system which allows it to translate the interests and concerns of certain external “stakeholders” into a set of palatable institutional practices and priorities. With this insight, I then analyse the work of the Court’s first three presidencies, with a focus on their efficiency-seeking efforts. Although I structure these sections around the prominent judges who have headed the Presidency, I do not attribute the organ’s managerial work entirely to them. Rather than occupying regnal status, successive Presidents merely occupy one of many nodes in the large assemblage of institutionalized global justice. Reading the Presidency chronologically through successive mandates, I emphasise the patterns of repetition and reinforcement that led efficiency to become the key institutional priority it is today, and why it is that concerns about value-for-money so dominate contemporary ICC discourse. I begin by reinterpreting the Presidency as an organ within the Court’s wider managerial network.

2 The Presidency in the Managerial Network

The status and functions of the Presidency are contained in Article 38 of the Rome Statute. Under Article 38(3)(a) and (b), the Presidency is responsible for the “proper administration of the Court” and “other functions conferred upon it in accordance with th[e] Statute”. Most of Article 38 deals with the composition of the Presidency and its location within the Court structure. Thus, the Presidency comprises a President and two Vice-Presidents. All three are elected by an absolute majority of ICC judges and serve for a term of three years with the possibility of re-election.

Structurally, the Presidency sits at the apex of the Court’s administrative apparatus. Despite the Registrar’s role as the Court’s chief administrative officer, they act under the ultimate authority of the Presidency. The Registrar often

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15 To borrow from Orford, the article is “not primarily interested in studying those professional men [and women] and their internal struggles for status and power, but rather in redescribing the attributes of their practices as seen from the perspective of those upon whose bodies discipline [is] administered”, A. Orford, “International Law and the Limits of History”, in W. Werner et al. (eds.), The Law of International Lawyers: Reading Martti Koskenniemi (CUP, 2017), 297, 307; see F. Mégret, “International Criminal Justice as a Juridical Field”, Champ pénal/Penal field, Vol. XIII (2016).

meets the President to provide “regular input into the development of administrative policies”.17 The exception to the Presidency’s administrative authority is the Office of the Prosecutor, which maintains control over its own administrative functioning in the interests of judicial and prosecutorial independence. Nevertheless, the Presidency will often have cause to liaise with the Prosecutor and is thus expected to “coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern”.18 To complete this “challenging management model”, the Assembly of States Parties (ASP) bears management responsibility over the Presidency, Prosecutor and Registrar under Article 112(2)(b).19

As a result of Article 38’s focus on the division of administrative responsibilities, the main scholarly debates on the Presidency have centred on the question of its functional independence.20 John Jones, for example, consistently critiqued the Statute for cementing an inequality of arms to the benefit of the Office of the Prosecutor (OTP). Commenting on Article 38, Jones cautioned that “virtually any matter affecting the Court may be deemed by the Prosecutor to be a matter ‘of mutual concern’”, thereby allowing the Prosecutor much greater opportunity for collaboration with the Presidency than defence teams.21 In a similar vein, Woolaver and Palmer focus on the challenges to independence arising from the Court’s relationship to the ASP.22

These scholarly interventions look to the Presidency’s position within the ICC’s formal structure and the problematic overlaps arising from that position. However, by accounting only for the Presidency’s formally-prescribed functions, this concern obscures the bureaucratic ways in which the Presidency impacts other organs and the wider global justice project, specifically by shaping institutional discourse. This discursive role is enabled by – though not limited to – the Presidency’s statutorily-inscribed position within the Court’s structure. Crucially, the Presidency is positioned at an arm’s length from states parties and ASP bodies while also representing the Court as a whole both internally and externally. As such, it is informed by the priorities and agendas of the

18 Art. 38(4), Rome Statute.
20 See Ambach and Rackwitz, supra note 13, at 127 et seq.; Abtahi and Young, ibid., at 1239.
While also having the freedom to translate those priorities into a suitable institutional lexicon, this is the discursive space of possibility within which the Presidency operates.

There are numerous formal and informal connections between the ASP and the Presidency which bring the Presidency into contact with state interests and agendas. Article 112(2)(b) requires that the ASP “[p]rovide management oversight to the Presidency ... regarding the administration of the Court”. Alongside the Prosecutor and Registrar, the President participates in meetings of the ASP Bureau – the Assembly’s executive body. The President also makes an annual presentation to states parties at the ASP plenary session and participates in many diplomatic events with both members and non-member states throughout the year. Under Article 112(2)(d), the Presidency and Registry participate in the ASP’s annual budget negotiations and the Assembly relies heavily on both organs to formulate the Court’s annual budget projections.

The Presidency also liaises with other ASP bodies. The most well-established link between the Court and states parties is arguably to be found in the Presidency’s relationship with the Committee on Budget and Finance (CBF). As I detail below, the Presidency and CBF are constantly engaged in an exchange of information both “on the Court’s main administrative areas” and on the implementation of efficiency savings. During her last speech to the ASP as President, Silvia Fernández thanked the CBF for “the guidance it provide[d] to the Court” and expressed her gratitude to the then-chair of the CBF whose “frank discussions and ... candid feed-back helped [Fernández] and the Court to understand the Committee’s perspectives and concerns”. This forum supplied the Presidency with a vocabulary and a set of policy parameters within which they could shape the institution.

Despite the ASP’s oversight over the Presidency, its interventions do not amount to total administrative control. Woolaver and Palmer find that “the ASP has generally carried out its duties in a manner respectful of the ICC’s independence”. Most commentators agree that under Article 38, “the
Presidency is granted a wide ambit of authority capable of including almost all activities pertaining to the daily functioning of the Court.28 Thus, the Presidency directs and shapes the coordination activities of all the Court’s organs. As noted above, the President and Prosecutor are in constant communication on administrative issues “of mutual concern”.29 The 2010 report clarifying the responsibilities of the organs observes that both the Presidency and OTP operate under a “common, unified system for the setting of Court rules, policies and procedures”.30 They also coordinate their activities in relation to the Court’s Strategic Plan and other plans such as the Outreach Strategy.31

A similar dynamic exists between the Presidency and the Registry. Free from concerns about judicial and prosecutorial independence, the Presidency and Registry have deep administrative ties. Under Article 43(2), the Registrar acts under the authority of the President. The Court has also clarified that the Registry is “in its entirety, hierarchically subordinate to the Presidency”.32 Moreover, the Presidency has a constructive role in shaping the Registry by “provid[ing] strategic guidance to the Registry” and “monitor[ing] activities of the Registry which may have a more strategic or significant impact”.33 Importantly for the following discussion, the Presidency offers guidance in the Registry’s “efforts to become a model of public administration”.34 For its part, the Registry “proactively seeks the guidance of the Presidency on strategic or otherwise significant issues” and “provides the Presidency with the means to monitor Registry performance”.35 Through these inter-organ activities, the Presidency takes “an active approach with regard to all problems and challenges facing the court”.36

28 Abtahi and Young, supra note 19, at 1238; Ambach and Rackwitz, supra note 13, at 133.
29 Art. 38(4), Rome Statute.
31 Clarifying Report, para. 23. The Presidency and OTP also coordinate their activities through a series of inter-organ working groups including the Security Coordination Committee and the Information Security Management Forum, Clarifying Report, para. 25.
32 Clarifying Report, para. 11.
35 Clarifying Report, para. 28(b).
As well as harmonising strategic priorities internally, the Presidency discharges a range of external functions as the ICC’s “public face”.\(^{37}\) It acts on the Court’s behalf in establishing and maintaining relations with states and international organisations. In 2004, the Presidency concluded a relationship agreement with the United Nations, and the President has periodically appeared before the UN Security Council and General Assembly to provide updates on situations affecting international peace and security.\(^{38}\) The Presidency also concluded a headquarters agreement with The Netherlands\(^{39}\) as host state and has signed many bilateral cooperation agreements with both states and non-states parties on the Court’s behalf.\(^{40}\) For Schabas, the Presidency’s “special responsibility” towards external actors not only requires the signing of bilateral agreements, but “broadening [the court’s] support and promoting its values and ideals”.\(^{41}\) Thus, the Presidency engages with many constituencies, including NGOs and academics, both in The Hague and on national visits, and has sought to publicise the Court through media appearances and academic scholarship. In all of these external functions, the Presidency shapes the “consciousness of human beings” as they play witness to and engage the Court from beyond its walls.\(^{42}\)

The result of the Presidency’s position between states parties on one hand and other Court actors and constituencies on the other is that it has become a crucial site of innovation in the Court’s regulatory framework. As I detail below, the space occupied by the Presidency allows it to translate the concerns, demands, and aspirations of states and other actors into a distinct institutional lexicon. This means that the Presidency neither freely shapes the Court’s context, activities, and priorities nor directly mirrors the interests of states parties. In particular, the Presidency’s moves to shape the institutional discourse may

\(^{37}\) Abtahi and Young, supra note 19, at 1240.


\(^{39}\) ICC, Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008.


\(^{42}\) Bergsmo, supra note 6, at 7.
be conditioned by states parties, possibly to their benefit, but these moves are not captured by states in the crude manner often described by realists.43

Similarly, the Presidency’s discursive work does not flow entirely from the independent choices of individual actors like the President. Influential though the President is, they are also constrained by the surrounding context and the dominant discourses of the field. Theirs is a “regulated autonomy”.44 In short, the Presidency, as an assemblage of actors, structures, and interests, governs by translating that assemblage into a (managerial) institutional discourse where translation means the “movement from one space to another, and an expression of a particular concern in another modality”.45 It is this translating function which I now trace through the Court’s first three presidencies.

3 The Presidency’s Managerial Origins

The decision to establish a Presidency was already guided during the drafting of the Rome Statute by a concern for efficiency and effectiveness. The idea of establishing the Presidency as a separate organ of the Court was an innovation going beyond the structure of the ad hoc tribunals. The International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) Statutes had not provided for such an organ, but the judges of both tribunals created in the respective Rules of Procedure and Evidence a “Bureau” with which the President could consult “on all major questions relating to the functioning of the Tribunal”.46 The Bureau provided the basis for the ICC Presidency’s structural form and functions.

However, the Presidency also had more explicit efficiency origins. As Karim Khan, a prominent international defence counsel before the Court and third


44 Rose and Miller, supra note 23, at 173.

45 Ibid., at 181.

46 Rule 23(B), ICTY Rules of Procedure and Evidence (as amended), IT/32/Rev.50, 8 July 2015. See Jones, supra note 21, at 260.
ICC Prosecutor, has noted, “[t]he creation of the Presidency, as a separate organ from the rest of chambers was also the result of a bid to reduce costs and to give organizational form to the Court”. Moreover, the Presidency was placed on a statutory footing in order to provide an immediate roster of judges to preside over the Court’s first cases. Given that “it was not anticipated that the full complement of judges permitted under the Statute would be needed from the outset”, having an initial group of full-time judges was expected to save money. It was on the basis of these managerial concerns that the first President, Philipp Kirsch, began his mandate. Operating within this context, the Kirsch Presidency would internalise and refine such concerns as the Court’s activities got under way.

3.1 The Kirsch Presidency

Shortly after the ICC was established, the Presidency set about organising the Court’s administrative framework in conjunction with the other organs. Through the Regulations of the Court, the judges created a Coordination Council comprising the President, Prosecutor, and Registrar. Convened monthly by the President, the Council was established to “discuss and coordinate on, where necessary, the administrative activities of the organs of the Court”. In practice, the Council has also addressed “Court-wide matters of strategic significance”, which has allowed it to propose and implement various managerial practices. These include practices relating to “human resources, budget and finance, as well as public information, outreach [and] documentation”.

In budgetary matters, the Council is involved in setting the annual priorities for the budget and approves the Court’s budget proposal before sending it to the ASP. To this end, the Council established in 2004 a Budget Steering Committee “to facilitate the sound, efficient and transparent preparation of the budget”. Similarly, the Council also adopted the Court’s Charter for

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48 Khan, ibid., at 1199.
49 Reg. 3(1), Regulations of the Court, ICC-BD/01-01-04, adopted 26 May 2004.
50 Reg. 3(2), Regulations of the Court.
51 Abtahi and Young, supra note 19, at 1244–1245.
52 Clarifying Report, supra note 30, para. 22.
Internal Audit “which clarifie[d] the mandate of the Office of Internal Audit and establishe[d] an Oversight Committee”.

Notably, the President, Presidency and Council were given responsibility in the Court’s early phase for “developing and overseeing the implementation of the Court’s Strategic Plan”. Establishing a Strategic Planning Project Group in 2005, the Council began to define the Court’s strategic goals in collaboration with the CBF. Although states were consulted on the goals, the Planning Group, spearheaded by the Presidency, was responsible for setting the Court’s long-term aims, among which it listed the aim of becoming a model of public administration. President Kirsch was a fervent advocate of strategic planning and promoted the Planning Group’s efforts before states parties. At the ASP’s Fifth Session in 2006, Kirsch announced the publication of the “first-ever ICC Strategic Plan” as an “internal management tool” designed to create an “efficient, flexible and transparent administration”. Kirsch hoped that states parties would endorse the Plan and welcomed their comments. To ensure its smooth implementation, Kirsch later requested that the Court recruit a Strategic Planning and Coordination Officer to be located in the Presidency. Finally, the Council was heavily involved in developing the Court Capacity Model which instituted a production line approach to the Court’s justice-seeking efforts by predicting future workload and allocating institutional resources according to these expectations. In this and other practices, the Presidency attempted to make optimisation of internal processes a constant concern of Court organs from any early stage.

This discursive power is evident in the Presidency’s efforts to create “a system of Court-wide administrative issuances”. This system, comprising Administrative Instructions, Presidential Directives, and Information Circulars, lies “at the core of the Court’s operational administration on a day-to-day

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55 Ibid., para. 22.
58 ICC, Proposed Programme Budget for 2008 of the International Criminal Court, ICC-ASP/6/8, 25 July 2007, para. 61. This request was rejected by states.
59 Clarifying Report, supra note 30, para. 16. For a detailed overview of the various themes addressed in the Court’s administrative issuances, as well as some of the pitfalls of relying solely on such procedures, see C. Laucci, “The Wider Policy Framework of Ethical Behaviour: Outspoken Observations from a True Friend of the International Criminal Court”, in M. Bergsmo and V. Dittrich (eds.), Integrity in International Justice (Torkel Opsahl Academic EPublisher, 2020), 845, 847 et seq.
basis”. Presidential Directives, for example, “are required for the promulgation of procedures for the implementation of regulations, resolutions and decisions adopted by the Assembly.” They may also be promulgated in connection with any other significant policy decision” and are binding on the entire Court. The Whistleblowing Policy was established by way of Presidential Directive in 2014. Administrative Instructions “are used to prescribe procedures for the implementation of Presidential Directives”, including financial regulations and staff rules, and to otherwise “regulate the administration of practical and organizational matters of general concern”. Notably, the Court’s performance appraisal regime for staff is elaborated via a series of administrative instructions.

According to the ICC, administrative issuances have “contributed significantly to the sound governance of the Court”. They have also been the channels through which the Presidency has solidified values of efficiency and measured performance, by introducing procedures of professional oversight and appraisal. This has been made possible through the Presidency’s position within the Court apparatus. Moreover, the President regulates the official stream of knowledge in deciding which documents should be published in the Official Journal of the Court. The Journal predictably contains the Statute, Rules, and Elements of Crimes, as well as other documents such as the Code of Judicial Ethics. It also contains the Staff Regulations and Financial Regulations and Rules, placing internal performance and financial matters on a par with the Court’s core texts. The decision whether to publish in the Journal – and indeed on the Court’s website – determines what the Court considers to be important for its successful functioning and dictates what the outside world sees when engaging with the Court.

Existing alongside these practices and procedures is the President himself as the organ’s internal and external representative. Within the Court’s managerial web, the President conducts much of the organ’s discursive work. That contribution was evident in President Kirsch’s efforts to promote the Court’s first Strategic Plan among states parties. It is also visible in his attempt to foster

60 Clarifying Report, supra note 30, para. 16. See Abtahi and Young, supra note 19, at 1244–1245; Schabas, supra note 41, at 703.
61 Clarifying Report, ibid., para. 17.
62 Ibid., para. 17.
63 Ibid., para. 18.
64 Ibid., para. 22.
65 Reg. 7(i)(n), Regulations of Court.
66 Reg. 7(i)(i) and (j), Regulations of Court.
67 Reg. 8, Regulations of Court.
close ties between the Court and the Committee on Budget and Finance. Initially, Kirsch hoped to “strengthen our dialogue in order to ensure sufficient understanding by the Committee of the Court’s positions.”68 This was deemed necessary during the early stages of the Court’s operations after certain CBF recommendations were said to have had a damaging impact on essential Court functions.69

However, Kirsch’s attempts to resist isolated and potentially damaging recommendations of the CBF did not challenge, but reiterated, the deeper efficiency logic which guided them. In 2007, Kirsch noted that the Court “has worked with the [CBF] to continue to improve both the structure and content of the budget”.70 He expressed anxiety over proposed budget cuts which were due to target the legal aid budget and the budget for the interim premises. Yet these sentiments did not trickle down to the institutional grammar, which continued to be guided by efficiency concerns. In an interview with the International Committee of the Red Cross (ICRC) in 2006, Kirsch stated that the Court was “seeking to make efficient use of resources”, both as regards the internal organisation of the Court and the management of its external relations.71 Kirsch’s concerns as to the deleterious effects of court austerity appeared not to dent his belief in the promise of efficiency.

Kirsch also hoped to embody the professional ideal of an efficient and committed ambassador for the Court during its establishment phase. He had served as the chair of the Rome Conference and subsequently as chair of the Preparatory Commission during its formulation of the Rules of Procedure and Evidence and Elements of Crimes. As his interview with the ICRC demonstrates, Kirsch was eager to promote the Court as a modern, efficient organisation to a global audience. And like other senior figures, he often elided that rational image of the Court with the broader global justice project, notably in a 2005 speech to the Organisation of American States entitled “The International Criminal Court and the Fulfilment of International Justice”.72 After the end of

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68 Statement of President Kirsch to ASP 5th Session, p. 5.
69 Ibid., at p. 5.
his mandate in 2009, Kirsch continued to promote its work pedagogically – through the Philippe Kirsch Institute73 – and in the search for efficient lawyers as chair of the ICC’s Advisory Committee on the Nomination of Judges.74

Through such activities, the President and Presidency solidified the Court’s nascent managerial infrastructure by adopting an efficiency mindset and leading efforts to become a “Model of Public Administration”.75 The Presidency took the financial concerns of states parties and broader support for enhancing effectiveness as the basis for advocating and realising this ethos. It therefore utilised its powers to flesh out a managerial court and project the image of “a fully functional judicial institution”.76

3.2 The Song Presidency

The election of a new Presidency in 2009 coincided with major developments in the global economy. ICC states parties most affected by the global financial crisis – among whom were the Court’s largest contributors including France, Germany, and Japan – began advocating for greater budgetary restraint and fiscal scrutiny of the Court. The German representative to the ASP, Susanne Wasum-Rainer, reminded the Court that “[i]nternational criminal justice costs money – and money is a scarce resource, particularly in times of deep economic and financial crisis”.77 At a time when Western states parties were implementing policies of austerity in their domestic economies, the Court was said to “derive its legitimacy not only from the full implementation of its mandate, but also from aspiring to the highest standards of good governance and management, transparency and efficiency[,] and cost-effective executive operations”.78 The Court would therefore have to live within its means if it was to continue to attract the support of its members. This financial reality

was officially inscribed via ASP Resolution 7/4. Therein, states parties noted “the current exceptional and extraordinary circumstances in 2009” and “urge[d] the Court to make every effort to find efficiency savings”.79

The CBF adopted these concerns when reflecting on the Court’s achievements. As the financial crisis unfolded, the Committee stated that “it was an appropriate point in the life of the Court to take stock of progress so far, to examine the factors likely to drive further growth in the Court, and to improve the productivity of administrative processes”.80 Moreover, by 2008 the Court had “largely completed its establishment phase” and would “soon be in full operation with the commencement of trials”.81 It would “increasingly need to live within the means available to it”, and on this basis the CBF recommended “action to consider cost drivers in the Court and to manage workload and reform administrative processes”.82 To this end, the CBF requested, among other things, that the Presidency report on the responsibilities of the different organs to increase clarity and efficiency.83

Sang-hyun Song commenced his duties as President in this climate of economic austerity and internal pressure for reform. At the beginning of his term, Song was asked by the UK representative to the ASP to “seek ways to further strengthen the governance of the Court”.84 Song responded by following in the pattern set by Kirsch, affirming the Court’s commitment to improving its operational and budgetary performance. In his first appearance before the ASP as President, Song reiterated the Court’s priority of “continu[ing] to strive to be a model of public administration”,85 noting that “[e]fficiency is paramount in this regard”.86

Song combined the financial imperatives of states parties with the desire for institutional effectiveness to justify the extension of the Court’s managerial

79  ASP Resolution ICC-ASP/7/Res. 4, 21 November 2008, Section D, paras. 2 and 5.
81  Ibid., para. 51.
82  Ibid., para. 51.
84  Statement of the United Kingdom at the ASP 8th Session, 19 November 2009, p. 3, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba -United%20Kingdom-ENG.pdf. The UK noted that such measures “are vital if the Court is to continue to progress and develop in future years”.
86  Statement of President Song to ASP 8th Session, 9.
practices. He continued to direct the meetings of the Coordination Council, which was by then overseeing the implementation of the Strategic Plan and addressing issues of internal governance.\textsuperscript{87} After state interventions and the CBF’s recommendations, the Council also began to connect the Strategic Plan and the Court’s annual budget.\textsuperscript{88} The Court noted that it was “specifically through budgetary allocations that the strategic orientations should be translated into operational policies”, thereby consolidating cost-effectiveness as the standard by which strategic goals were to be evaluated.\textsuperscript{89}

While operating through bodies such as the Coordination Council, the Presidency was also directly responsible for extending a managerial ethos throughout the organisation. Until 2009, the Court’s audit matters had been managed by the Coordination Council. Thereafter, responsibility for “oversight” and “internal and external control” of the Presidency and Registry was allocated to the Audit Committee by way of a Presidential Directive. The Committee was to “provide strategic advice on organizational matters to the heads of organs”, assisting them in their oversight, financial reporting, risk management, and audit responsibilities.\textsuperscript{90} The Committee itself would comprise the President, Prosecutor, and Registrar as well as four independent members with audit expertise.\textsuperscript{91}

The Presidency also embedded the Court’s risk regime. In 2010, the President (alongside the Prosecutor) adopted the Corporate Governance Statement which asserted that “[d]ivisions among the organs, whether real or perceived, are among the most significant risks facing the Court”.\textsuperscript{92} The Presidency was also involved in a “comprehensive risk-mapping exercise” in 2011 with a view to creating a “risk identification and management structure” the following year.\textsuperscript{93} The Court did not, however, follow through on this objective and instead substituted it with a “high level Court-wide approved risk register … as the basis for the identification of risk-control and – mitigation strategies”.\textsuperscript{94} In extending the risk framework, the Presidency ensured that risk was perceived in terms of risk to the institution and its performance.

\textsuperscript{87} Clarifying Report, para. 25.
\textsuperscript{89} Report of the Bureau on the Strategic Planning Process, para. 21.
\textsuperscript{90} ICC, Presidential Directive on Audit Committee, ICC/PRESD/G/2009/1, 11 August 2009, s. 2.
\textsuperscript{91} Presidential Directive on Audit Committee, s. 4.1.
\textsuperscript{92} Clarifying Report, Annex 1, para. 1.
The most wide-ranging of the Presidency’s managerial efforts was the 2009/10 assessment conducted into the Court’s organs with a view to clarifying their responsibilities. This was conducted “in the context of the Court’s goal of becoming a model of public administration and the corollary commitment to achieve excellence with minimal resources through streamlined structures and processes”. Setting the managerial boundaries of the Court’s enquiries, the Presidency proceeded to solidify its own position within the Court’s managerial network. The Registry was said to be “in its entirety, hierarchically subordinate to the Presidency” which would ensure “a sound, efficient and well-directed administration by placing the Registry under the control of the Presidency”. The Presidency would offer “strategic guidance” to the Registry, monitor its activities, and oversee compliance with the Court’s objectives. By entrenching the Presidency’s position vis-à-vis other court organs, the 2010 report allowed the Presidency and President greater scope in devising court priorities and values.

Within this network, the Presidency not only produced managerial practices but was produced by them. Song reinforced the image of the Court – and of the Presidency – as “responsible managers of the funds which the States Parties have provided”. Continuing to translate state concerns into institutional practice, Song envisaged the Presidency as a prototype for the Court’s other organs. This self-regulation was evident in the Presidency’s efforts to revise the staffing structure of Chambers. The Presidency reiterated that “[t]he current allocation of staff in Chambers reflects a considered effort to maximize resources and increase efficiencies”. It justified the need for reform based on one of the goals contained in the Court’s Strategic Plan, namely the goal to “conduct fair, effective and expeditious public proceedings ... with high legal standards”.

The Presidency also bolstered its managerial credentials through its work with the Study Group on Governance (SGG). The SGG was created in 2010 to "strengthen[] the institutional framework of the Rome Statute system and ... [engage] with the political, legal and administrative aspects of governance and the implementation of the Rome Statute system". The SGG was tasked with "considering innovative measures to enhance efficiency of the courts and to further streamline the Court's administrative arrangements". The Presidency reiterated that "the current allocation of staff in Chambers reflects a considered effort to maximize resources and increase efficiencies". It justified the need for reform based on one of the goals contained in the Court’s Strategic Plan, namely the goal to “conduct fair, effective and expeditious public proceedings ... with high legal standards”.

96 Clarifying Report, para. 11.
97 Ibid., para. 28.
98 Statement of President Song to the ASP 11th Session, p. 4, available at: https://asp.icc-cpi.int/NR/rdonlyres/0EEEED0E-5BA8-4894-8AB5-3C2CD9CD301B/0/ASP11OpeningPICCSSongENG.pdf. According to Song, “[c]ourt officials bear the heavy responsibility of ensuring that public funds are put to their proper use, with no tolerance for waste” (9).
100 Ibid., para. 15.
enhanc[e] the efficiency and effectiveness of the Court”.

Although the SGG considered many legal issues, including the allocation of judges and proposed amendments to the Rules of Procedure and Evidence, it also dealt with organisational concerns. Song’s Vice-President, Judge Sanji Monageng, chaired the SGG’s Working Group on Lessons Learnt which instituted several “efficient working practices” within chambers. Monageng emphasised at various points the need to balance between civil and common law systems “while promoting efficiency”.

To secure its reputation as a managerial organ, the Presidency also began to provide more detailed information to the CBF as part of the Court’s budget process. As early as the Kirsch Presidency, the CBF had requested a “more comprehensive and detailed” format for the Court’s annual Proposed Programme Budget, and had asked that performance indicators be ‘SMART’: “Specific, Measurable, Achievable, Relevant [and] Time-bound”. By Song’s election, the Presidency was also producing expenditure forecasts alongside the Court’s annual budget proposal, and was implementing “zero-based budgeting”, a system wherein “the value of each activity is systematically re-examined” to ensure the Court’s resources are not put to unpredictable and unquantifiable purposes. Through these practices, the Presidency internalised the ideals of “transparency, predictability and efficient conduct of the entire budget process”, interpellating the amorphous concerns of major donor states into institutional practice.

Despite responding to many financial pressures both within and without the Court, Song did not blankly succumb to state demands. He was wary of allowing the demand for efficiency to affect the conduct of Court proceedings, stating that “no trial of the ICC should be delayed for financial reasons” and that any further budget cuts beyond those prescribed by the CBF “would risk
seriously affecting the Court’s ability to fulfil [its] mandate”. By 2011, some states had begun to advocate for a “zero-growth” budget which would seek to find additional financial resources not in a larger annual budget but in internal cost savings. Song lobbied strongly against such a budget when appearing at the 10th session of the ASP, arguing that it would be “profoundly damaging to the Court’s ability to deliver fair and expeditious justice”. For Song, “the search for efficiencies and economies [had to] be realistic”.

Yet Song’s seemingly balanced approach nonetheless reinforced efficiency as a priority by continuing to instantiate the concerns of states and the CBF in the Court’s internal operations. As the foregoing analysis illuminates, Song was a steadfast proponent of managerial practices and believed in the power of rationalisation to improve the delivery of justice. He also accepted the CBF’s reading of the organisation as inefficient and argued in 2010 that the most recent round of efficiency savings proposed by the CBF “[could] be accommodated without fundamentally altering the Court’s ability to carry out its core work”. By the time he came to resist the zero-growth budget in 2011, he had already accepted that the budget needed to reflect a “rational balance between the task-driven needs of the Court and the requirements of economy and efficiency”. He therefore left the underlying austerity policies of the major donors unchallenged, reaffirming that “some important efficiencies have already been achieved, but more will be needed”.

Externally, the Presidency was cognisant that its activities “have a profound impact on the perception of the Court as an institution and on the development of international criminal law”. Thus, while Song was aware of the need to promote the Court’s managerial credentials, he understood that not all the

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109 Statement of President Song to the ASP 10th Session, 12 December 2011, p. 3, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ASP10-ST-Pres-Song-Remarks-ENG.pdf. The Court similarly argued that it had “become increasingly difficult for the Court to achieve efficiency gains as a result of the current budgetary constraints” and that “excessive reductions in resources can themselves create inefficiencies and impair performance”, ICC, Proposed Programme Budget for 2013 of the International Criminal Court, ICC-ASP/11/10, 16 August 2012, para. 41.

110 Statement of President Song, supra note 109, at p. 3.

111 Statement of President Song, supra note 108, at p. 4.

112 Statement of President Song, supra note 109, at p. 3.

113 Ibid., at p. 3.

Court’s constituencies were equally behind the efficiency drive. Proposing a balanced approach to the budget in 2011, he stated that this would also be in the interests "of all those affected by the tragic situations with which the Court deals". At the UN, Song reaffirmed that the Court had managed its growing workload by "simply work[ing] harder". Many external supporters, including NGOs, assumed the same set of concerns: in 2012, the Fédération Internationale des Droits de l’Homme (FIDH) published "10 recommendations for an efficient and independent International Criminal Court" to mark the Court’s tenth anniversary.

Song’s external activities sought to promote managerialism with a human face even if it entrenched the efficiency demands of states and the CBF. Yet Song also operated in a more confined space than Kirsch, who did not experience the same degree of austerity as the post-2008 Court. Within this space, the Presidency was “heavily engaged” in extending the Court’s managerial apparatus. It also marketed this more efficient institution to those external groups less sympathetic to cost-cutting efforts. Through such managerial work, Song thus attempted to turn managerialism into an acceptable priority for all the Court’s constituencies, even while recognising the origins and consequences of efficiency concerns.

3.3 The Fernández Presidency

By the end of the Song Presidency in 2014, Court officials, diplomats, academics, and parts of the media had embraced the vocabulary of efficiency and cost-effectiveness in debates about the ICC. The Court’s uptake of managerial practices and the routine implementation of efficiency measures had inured many of the Court’s supporters, both inside and out, to the value of optimisation. Indeed, as the Court’s largest donors saw the Court adopting a managerial lens, they continued to ask for more. In 2015, Japan emphasised that “[a]lthough the ICC is a judicial organ, the Court is not immune from any examination of its management and governance by the States Parties as being

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115 Proposed Programme Budget for 2012 of the International Criminal Court, para. 38.
an organization established by international agreement”.¹²⁰ Through the com-
mingling of state and ASP pressure and the build-up of managerial practices,
the range of governance issues up for discussion had gradually narrowed down
to the question of how best to optimise existing court processes, rather than
how to radically rearrange court priorities.

Within this regulatory web, the Presidency often acted as a conduit through
which external concerns (particularly from Western donors) could be trans-
lated into a palatable institutional discourse. It was partially as a result of this
endorsement of the efficiency mindset by successive presidencies that the CBF
could proceed to articulate a new position in relation to court efficiency in
2013. In a report on savings, the CBF stated

the Court’s efforts have evolved from efficiency improvements, linked
to the start-up of its operations, to a stage for which measurement of
progress relates to harmonization of business processes across the orga-
nization, analysis of mutual influence on the organization’s goals and
implementation of ideas for improvement.¹²¹

After a decade of operations, the Court ended its ad hoc approach to effi-
ciencies, replacing it with a long-term vision of organisational reform as a
comprehensive and ongoing process of measurement and evaluation. In short,
“[t]he Court [was] moving away from strict ‘efficiency improvement’ efforts
towards a review of its ‘efficiency and effectiveness’”.¹²²

The third Presidency, headed by Silvia Fernández de Gurmendi, consoli-
dated this managerial vision. Fernández ran for election as ICC President on the
slogan of “efficiency and effectiveness”. Once elected in March 2015, Fernán-
dez confirmed that her “main priority” as President would be “to enhance the
efficiency and effectiveness of the institution”.¹²³ She took an interest in all
aspects of court administration to foster “good governance, cohesion of action
and alignment of vision”.¹²⁴ In this vein, a few months after assuming office,
Fernández organised a retreat for ICC judges in Nuremberg to “consider ways

¹²⁰ Statement of Japan at the ASP 14th Session, 18 November 2015, p. 4, available at: https://
asp.icc-cpi.int/iccdocs/asp_docs/ASPl4/GenDeb/ASPl4-GenDeb-Japan-ENG.pdf.
¹²¹ ICC, Eighth Status Report on the Court’s progress regarding efficiency measures, ICC-ASP/
12/16, 4 June 2013, para. 5 (‘Eighth Efficiency Report’).
¹²² Ibid., at para. 5.
¹²³ Statement of President Fernández to the ASP 14th Session, 18 November 2015, p. 1, available
at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASPl4/GenDeb/ASPl4-Opening-ST-PRE-ENG
.pdf.
¹²⁴ Statement of President Fernández to ASP 14th Session, p. 2.
of improving the Court’s judicial work” and “to ensure an ongoing focus on key issues which may enhance efficiency.”125

Internally, the Presidency continued to discharge a wide range of administrative functions aimed at improving performance. The Presidency continued to manage the Coordination Council, provide spending and performance data to the CBF, and “further streamline the Court’s governance and control structure”.126 It attempted to improve the strategic planning process and presented an updated Strategic Plan to states and other constituencies.127 From 2015, the Court began to institute staff-wide performance indicators, and the Presidency reported to states and the ASP on their execution and results. The Presidency also engaged with the SGG, specifically on the Court’s budget process.

Through these practices, the Presidency shaped itself and the other Court organs in the image of an efficient and modern organisation. It complied in full with the CBF’s recommendations to find “synergies” with other organs.128 And the Presidency reiterated its own objectives to “ensure effective resource management, including identification and implementation of possible further efficiency measures, and improving the measurement of staff performance, and to develop appropriate performance indicators”.129 In 2016, Fernández reiterated the efforts of all Court organs to pursue “a path of reforms to improve the Court’s performance”.130 Through these activities and external engagements, the Presidency reinforced its own image as a model of public administration.

Externally, Fernández assumed an even more ambassadorial role during her three years as President than her predecessors. The Fernández Presidency emphasised

129 ICC, Proposed Programme Budget for 2017 of the International Criminal Court, ICC-ASP/15/10, 17 August 2016, para. 150.3.
130 Statement of President Fernández to ASP 15th Session, p. 1.
renewing relationships with key external partners and informing a broad range of the Court's stakeholders about the new Presidency's strategic priorities, in particular the President's focus on enhancing the Court's efficiency and effectiveness through internal reforms.\textsuperscript{131}

This priority manifested in Fernández's repeated slogan of “efficiency and effectiveness” both at the ASP and further afield. At the UN General Assembly and at a session of the Pacific Islands Forum, she reiterated these objectives as her top priority.\textsuperscript{132}

Fernández also deployed her own diplomatic and academic credentials assiduously in promoting the managerial court. She participated in academic discussions on the Court’s performance indicators.\textsuperscript{133} She published several book chapters and scholarly articles in which “efficiency and effectiveness” are listed among the Court’s most pressing future challenges.\textsuperscript{134} Fernández has also sought to appeal to a wider public audience, either in writing op-ed pieces

\textsuperscript{131} ICC, Report on Activities and Programme Performance of the International Criminal Court for the Year 2015, para. 5.


for global news outlets, or in interviews on national radio and in print. Through these myriad interventions, Fernández has pursued the efficiency discourse and the ideal of a managerial institution as a personal project to a much greater extent than either Kirsch or Song.

4 Conclusion

In this article, I have shown how the Presidency regulates the ICC’s discursive space by discharging not only its statutory powers, but by harnessing informal practices and personal projects. The Presidency’s legal mandate appears to be dwarfed by a range of formal and informal administrative activities, many of which operate in and around the Court’s legal activities. It is these non-legal functions which have allowed the Presidency to determine how the Court’s future priorities are to be framed and who is to be involved in solving them. Indeed, the Presidency has prioritised the budgetary and financial expertise of bodies such as the CBF and the pressures of major financial contributors in its bid to address institutional challenges. And the Presidency and President have utilised such expertise to justify resort to management tools such as strategic planning, governance groups, and indicators.

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Although alluding to these common themes, this article also reveals how institutional constraints nonetheless provide a space in which professionals operate to shape and reshape institutions. The space in which the Presidency has operated since 2002 has been framed by various actors. Of the Court's multiple constituencies, wealthy states parties and the CBf have been most influential in identifying the context of the Court's work, its most pressing problems, and the type of solutions needed to make the Court a success. Thus, the institutional veil which formally divides the Court from its members does not preclude states from benefitting from court reforms and reprioritisation.

Yet this ability to shape the institution does not render the Presidency a fig leaf for state interests. Indeed, were it not for the Presidency, the various realities and demands posited by states and others would not penetrate its everyday work. The Presidency is therefore a mechanism for stabilising certain languages, against which policies and priorities are set. Through background work, the Presidency “figur[es] out what to do, what is appropriate, what will work, or what is right”. It posits sub-optimal performance as the principal problem and thus looks to managerial practices as the most appropriate solution. In doing so, it depoliticises the Court’s faults and challenges, ensuring that they can only be addressed in the language of organisational reform and management.

As for Kirsch, Song, and Fernández, this article is not designed to negate or question their own sincere and tireless commitment to improving the Court’s effectiveness. Yet paradoxically, their commitment has manifested as a form of managerial fine-tuning consistent with the present institutionalized and expert-driven vision of global justice rather than those conducted outside such institutions, whether locally or transnationally. Their discursive contributions are visible both internally in the managerialisation of the Presidency and the Court, and externally, in producing a consensus around the need for an efficient global justice system. As a particularly visible expert, it would be easy to attribute the managerialisation of the Court to these senior officials. It is true that the President is able to embed the managerial discourse while

simultaneously saying “it really was not me: it was our policy ... the require-
ments of sound economic management or institutional process”\textsuperscript{141} However,
successive Presidents have also been unable to throw off the economic pres-
sure emanating from states and the CBF, and as the ICC has continued its
work, its Presidents have become increasingly committed to optimising the
Court. In this way, the Presidents themselves, like the organ of the Presidency,
and the Court as a whole, operate to reproduce a managerial institution and
the technocratic coordinates of global justice.

\textsuperscript{141} D. Kennedy, \textit{A World of Struggle: How Power, Law, and Expertise Shape Global Political