5 Experts, Practices, Power
The Work of International Criminal Court Reform

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Introduction

According to Donna Harraway, '[t]here is no unmediated photograph or passive *camera obscura* in scientific accounts of bodies and machines; there are only highly specific visual possibilities, each with a wonderfully detailed, active, partial way of organizing worlds'.[1] In April 2019, four ex-Presidents of the governing body of the International Criminal Court (ICC) machine, the Assembly of States Parties (ASP), published a joint opinion piece in *Atlantic Council* to mark the twentieth anniversary of the signing of the Rome Statute. As leading figures in international criminal justice, they hoped to capture the ICC in full view, both its successes and, tentatively, its failures.[2] On one account, the ICC had achieved much in its short lifespan: 'put[ting] on notice' would-be war criminals and bringing justice to victim communities around the globe, facilitating peacebuilding efforts in Colombia, modelling 'accountability mechanisms for Syria and Myanmar', and, ultimately, placing some individuals responsible for the world's worst crimes behind bars.[3] With this 'unmediated photograph', the authors reaffirm their commitment to the ICC as an institution tasked with closing the impunity gap by prosecuting atrocity crimes and bringing justice to victims.

Yet this image also depicts problems and 'deficiencies' hampering the court's quest for justice as the prompt for the ex-Presidents'

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[1] D. Harraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 *Feminist Studies* 575, 583.

[2] Z. Al Hussein, B. Ugarte, C. Wenaweser, and T. Intelman, 'The International Criminal Court Needs Fixing' (*Atlantic Council*, 24 April 2019).

[3] Ibid.

intervention. They highlight a gap between the court's 'unique vision' and its 'daily work': cases collapsing due to inadequate case-building and witness protection, judges declining to authorise investigations out of fear for the organisation's long-term stability, and various 'management deficiencies prevent[ing] the court from living up to its full potential'.[4] Looking beyond the court's own work, there is also the fragile political context in which it operates, especially dwindling 'diplomatic support' and the sanctions levelled against senior court figures by the first Trump administration.[5] Further afield (though omitted by the ex-Presidents) lie the protracted tensions between the ICC and African states parties over allegations of structural racism and bias, as well as serious resourcing issues resulting from successive zero-growth budgets.[6]

After this diagnosis comes the cure: a course of international organisation (IO) reform, via 'an independent assessment of the Court's functioning by a small group of independent experts'.[7] This comes after two decades of ICC reform punctuated by recurring cycles of deficiency, improvement, and renewal, ranging from small-scale reorganisations of court organs to institutionalised working groups devoted to studying and streamlining court governance.[8] Yet despite their quiet optimism about past and future reform efforts, the ex-Presidents offer little sense of how reform works beyond self-evident assumptions

[4] Ibid.

[5] Ibid. See US Executive Office of the President, Blocking Property of Certain Persons Associated with the International Criminal Court, EO 13928, 11 June 2020.

[6] R. López, 'Black Guilt, White Guilt at the International Criminal Court' in Matiangai Sirleaf (ed.), *Race and National Security* (Oxford University Press 2023) 211; S. Ford, 'Funding the ICC for Its Third Decade' in Carsten Stahn (ed.), *The International Criminal Court in its Third Decade: Reflecting on Law and Practice* (Brill Nijhoff 2023).

[7] Hussein *et al*, 'ICC Needs Fixing'. For an excellent study of the relationship between international law, institutions and reform, see G. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

[8] I have previously discussed these cycles in the context of wider narrative trends around institutional progress in R. Clements, 'From Bureaucracy to Management: The International Criminal Court's Internal Progress Narrative' (2019) 32 *Leiden Journal of International Law* 149. The reference to renewal and repetition is drawn from D. Kennedy, 'When Renewal Repeats: Thinking against the Box' (1999–2000) 32 *NYU Journal of International Law & Politics* 335, 337.

about its functional effectiveness. In this regard, they join many ICC practitioners and commentators who frequently call for court reform but rarely consider its mechanics or wider distributional effects. This chapter problematises the 'black box' of reform to think about what it entails and how it is constructed, experienced, and effected within IOs like the ICC, taking its Independent Expert Review (IER) of 2019–2020 – the follow-up to the ex-Presidents' proposal – as the expert production of a partial organisational world that entrenches existing arrangements of power among states parties.

At the heart of this discussion lies the notion of *expert reform work*. This notion seeks to reorient – theoretically and methodologically – the plane on which IOs and their legal landscapes are analysed. The phrase itself hints at its own recalibrations: *expert* because the experienced, trained professional turns out to be a more important site of institutional innovation than the IO itself or external structural forces; *reform* because experts' seemingly mundane tweaking exercises have the power to reconstitute an IO's contexts, problems, priorities, and future possibilities; and *work* because the effort of IO reform is an interpretive task performed by experts but is also the many other ideas and materials that craft an institutional reform process.

The notion of expert reform work, which is further fleshed out later, draws on Harraway's idea of partial worlds, but also actor network theory (ANT) as a lens 'that attempts to map and understand the relationship and interplay between physical or material objects and concepts' as not only a semiotic but a 'material-semiotic method' concerning 'the symbiotic relationship between people, things and ideas'.[9] The draw of actor network theory for this study of IOs derives from a 'central tenet of ANT thinking', namely that 'such systems or material-semiotic states are not static or fixed but rather are in a perpetual state of *forming and reforming*'.[10] This chapter attempts to bring this underlying premise of ANT thinking, namely that states (or institutions) are always becoming and re-becoming, to the study of IO reform itself as an expert institutional exercise involving people, documents and sites. As such, the chapter's focus on IO reform as expert

[9] P. Stokes, *Critical Concepts in Management and Organization Studies* (Palgrave Macmillan 2011) 3. See B. Latour, *Science in Action* (Oxford University Press 1987).

[10] Stokes, ibid, p. 4 (emphasis added).

work is an attempt to think through IO change as a perpetual, but no less political or pliable, process of institutional becoming.

Following the likes of Harraway and Bruno Latour, the chapter proposes that expert reform work is neither a rational science of perfectibility nor a 'god trick' that creates the organisation from nothing and nowhere.[11] It is precisely these imaginaries of reform that have led to the predictable yet lacklustre reformism of the past two decades of ICC operations. Instead, reform work often means expertly encountering and mediating myriad textual and non-textual materials, ideas, and structures in ways that allow the expert to do their job to a standard that those with a stake in the outcome deem satisfactory. Studying these encounters allows us to capture the tectonic effects of the seemingly contingent and inconsequential framings that legal reformers bring to their task, as well as the push and pull effect other materials such as institutional documents and position papers have on the process of institutional becoming.

To grasp the mechanics of this expert reform work at the ICC, I begin by summarising key aspects of the IER before centring the expert as an important node in IO reform.[12] This differs from other accounts of the expert as rational technician or handmaiden of power, situating them instead as and among a 'network of relations' between ideas and practices that rearrange the IO's context, problems, priorities, and possibilities.[13] From here, the chapter then poses a set of reflections on the IER process to attend to the expert-led and situated institution-making process that is IO reform.

Conditions for Expert Work: The Independent Expert Review

The IER will be our aid throughout. Specifically, the central axis on which this chapter turns is an obscure, yet important concept

[11] Harraway, 'Situated Knowledges'.

[12] There is a rich literature on international legal reform, see e.g. D. Kennedy, 'When Renewal Repeats: Thinking against the Box' (1999–2000) 32 *NYU Journal of International Law & Politics* 335, 337; L. Eslava and S. Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 *Trade Law & Development* 103. Sinclair describes international law as 'discipline, discourse and practice of reform', Sinclair, 'To Reform the World'.

[13] Stokes, 'Critical Concepts in Management'.

introduced in the opening pages of the IER experts' final report, published in September 2020. The concept in question is the 'three-layered governance model', a heuristic or interpretive device offered by the experts as a way to understand the ICC's different functions and how they relate to one another, but also a crucial component in the experts' re-imagination of the court.[14] Before discussing the model, it is necessary to go back several steps, to clarify who these experts are, and why and for whom they were conducting this analysis. In doing so, I begin to flesh out the notion of expert reform work.

In Resolution 18/7 of December 2019, the ICC ASP commissioned a 'State Party-driven review process' – the IER – to 'identify ways to strengthen the ICC and the Rome Statute system' via 'concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court'.[15] The ASP devised a preliminary document, the Terms of Reference to delimit the scope of the review. It also proposed that a group of nine independent experts be appointed to consider 'complex technical issues' under three clusters of 'governance', 'judiciary', and 'investigations and prosecutions'.[16] The panel was formed of international lawyers such as Richard Goldstone (the panel chair), Mónica Pinto, and Mohamed Chande Othman. Once appointed, the panel of experts commenced a nine-month period of stakeholder consultations and analysis (conducted predominantly online due to the COVID-19 pandemic). The panel's findings were published in a final report in September 2020, which became the panel's definitive statement on the conditions, constraints, and prospects for the institution. It proposed 384 recommendations across the court's organs, processes, and activities that were promptly taken up and evaluated by scholars and court officials including the ICC Prosecutor and the President of the court.[17] The ICC itself offered a detailed official response the following year.[18]

[14] ICC, 'Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report', 30 September 2020, para. 31.
[15] ASP resolution 18/7, ICC-ASP/18/Res.7, 6 December 2019, para. 6.
[16] Ibid, para. 2.
[17] E.g., OTP, Remarks of the Prosecutor on the IER Report, The Hague Working Group and the New York Working Group of the Bureau, 4th Joint Meeting, 7 October 2020; ICC, The ASP Bureau Working Group's Online Meeting on the Report of the Independent Expert Review: Preliminary Reactions of the ICC President, 7 October 2020.
[18] ICC, Overall Response of the International Criminal Court to the Independent Expert Review Final Report, 14 April 2021.

Despite its widespread promotion at the time, IER commentary has been brief. With so many recommendations, it is not surprising that the panel's findings on workplace bullying and harassment drew most attention, with many other proposals being quickly lumped together, quietly implemented, or forgotten.[19] Moreover, many scholars, including several normally critical voices, seemed indifferent to yet another effort to tinker around the edges of a system that, to them, required nothing less than structural transformation.[20] Only one scholar hinted at the three-layered governance model proposed by the expert panel as 'a new way of conceptualizing the ICC as a complex institution'.[21]

Despite general disinterest, though, studying the conditions and effects of the panel's work demonstrates why it may be important to take such reform exercises and interpretive devices seriously as recalibrations of institutional power and stakeholder interest. The experts were supposed to identify ways to 'strengthen' the ICC and the Rome Statute system, and to do so through proposals that would be 'concrete, achievable and actionable'. Already in this description, what was deemed organisationally achievable became a key limiting factor for the kind of analysis and proposals the experts could offer to the ASP. Other factors included skill and time: all appointed experts were lawyers and institution-builders and Resolution 18/7 indicates that the experts would begin their work on 1 January 2020, submitting their final report by 30 September 2020. These legal experts had to account for what was 'concrete, achievable and actionable' within nine months as criteria directing and limiting their work.

Beyond these factors, the experts also operated in, and reaffirmed, a particular historical moment. As noted at the outset, the IER appears as the latest cycle in a long history of ICC reform efforts largely initiated and justified on grounds of efficiency, effectiveness, and improved

[19] D. Guilfoyle, 'The International Criminal Court Independent Expert Review: Questions of Accountability and Culture' (EJIL Talk!, 7 October 2020), www.ejiltalk.org/the-international-criminal-court-independent-expert-review-questions-of-accountability-and-culture/; L. Sadat, 'The International Criminal Court of the Future' in Stahn (ed.), *The International Criminal Court in Its Third Decade* (Brill 2023) 444–472, at 456.

[20] See Lopez, 'Black Guilt/White Guilt'. Stahn does not directly engage with the IER but offers 'ways to re-imagine the ICC beyond [it]', C. Stahn, 'Re-imagining the ICC in a Multipolar World' in Stahn (ed.), *The International Criminal Court in Its Third Decade* (Brill 2023) 562–594, at 562.

[21] Guilfoyle, 'International Criminal Court Independent Expert Review'.

performance.[22] Already during preparatory discussions on a permanent ICC in 1995, the United Kingdom asked whether it was 'the best use of limited resources to undertake international investigations and prosecutions with all the difficulties and duplication of personnel that that involves'.[23] While these kinds of questions did not stop the court from emerging, they set the tone for the infant body: when the ICC began operations in 2002, its first Prosecutor, Luis Moreno Ocampo, stated: 'I have the chance to build the most efficient public office' for tackling anti-impunity.[24]

Such managerial concerns are themselves not context-free but were baked in over time. At the ICC, as in other modern IOs, efficiency has been justified as necessary for securing 'value for money' for stakeholders, i.e. the court's funders. Particularly in the wake of the 2008 global recession, western states as the main financial backers have become more vocal about ensuring the court's cost-effectiveness for the sake of national (read European) taxpayers.[25] This was soon translated by court leaders into the working practices and culture of the institution. In November 2012, then-ICC President, Sang-Hyun Song, reassured states parties that court officials had become 'responsible managers of the funds which the States Parties have provided'.[26] This growing connection between efficiency and the concerns of major donors is not

[22] By way of example, former ICC President Silvia Fernández de Gurmendi informed states parties upon her election in 2015 that her 'main priority' would be 'to enhance the effectiveness and efficiency of the institution', ICC, Presentation of the Court's Annual Report to the Assembly of States Parties, 18 November 2015. See also ICC, Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court, August 2016, para. 38.

[23] Summary of Observations Made by the Representative of the United Kingdom of Great Britain and Northern Ireland on 3, 4, 5, 6 and 7 April 1995, Ad Hoc Committee on the Establishment of an International Criminal Court, Press Release no. 32/95, 7 April 1995, 11–12.

[24] L. Moreno Ocampo, 'The International Criminal Court' in David Crane, Leila Sadat, and Michael Sharf (eds.), *The Founders: Four Pioneering Individuals Who Launched the First Modern-Era International Criminal Tribunals* (Cambridge University Press 2018) 94–125, at 116.

[25] S. Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court' (2015) 13 *Journal of International Criminal Justice* 113.

[26] Statement of President Song to the ASP 11th Session, 14 November 2012, The Hague, p. 4, available at: https://asp.icc-cpi.int/NR/rdonlyres/0EEEED0E-5BA8-4894-8AB5-3C2C90CD301B/0/ASP11OpeningPICCSongENG.pdf.

an innate characteristic, then, but a condition that emerged out of the specific political-economic and discursive relations between court officials and states parties since the drafting of the Rome Statute. It is a particular meaning of efficiency that experts, including the IER panel, were inured to and fluent in.

These being some of the panel's background conditions and ideas, they did not explicitly constrain or determine the panel's conclusions. Within certain strands of critical scholarship, such wider forces as political or economic capacity are often deemed determinative of institutional outcomes. Yet the expert remains central as mediator: to draw on Duncan Kennedy, such external constraints around the meaning of efficiency produce within them 'the effect of necessity, the experience of legal compulsion', leaving them with a sense, though not a 'reality', that 'there is no alternative'.[27] Background conditions and ideas are thus necessarily mediated by the modalities of expertise itself: its requirements of objectivity, independence, and rational analysis. It is through these modalities that expertise bears the descriptive power to reimagine the institution. While there may be a great many pressures and forces at play during experts' efforts to reform an IO, how those pressures are assembled and articulated is part of the expert's objective function.[28] Taking the expert as a key unit of analysis, as other scholars have done,[29] thus centres the specific descriptive and imaginative power of experts in IO reform settings.

To elaborate, experts largely rely on the traits of objectivity and the techniques of rational scientific analysis to establish themselves and their findings as authoritative.[30] As Littoz-Monet acknowledges in this volume, there are multiple uses of expertise beyond its capacity to rationalise decision-making. Yet it is at least these rational claims of experts that necessitate a conceptual break or firewall between those proposing and overseeing reform and those carrying it out (never mind

[27] D. Kennedy, *A Critique of Adjudication* (Harvard University Press 1997) 161.
[28] B. Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press 2005) 159.
[29] See e.g. T. Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (University of California Press 2002); O. Sending, *The Politics of Expertise: Competing for Authority in Global Governance* (University of Michigan Press 2015); D. Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press 2016).
[30] This is no longer always the case, partiality and indeterminacy having become part of a new style of expertise of late, see Van den Meerssche in this volume.

those experiencing its effects). This firewall is familiar not only from scholarship on expertise but also in the literature on the independence of IOs from their members,[31] or judicial independence from state interests.[32] Similarly, for reformers, their independence from states is deemed crucial for sound decision-making and the legitimacy of institutional processes. It was not for nothing that the ICC reform exercise was branded an *independent* expert review.

Nonetheless, claims to independence and objectivity have often been branded mere smokescreens for the hegemonic interests that remain hidden behind them.[33] These are the dynamics that David Kennedy has described as 'capture', or the idea that 'international policy-making will favour some policies and exclude others, and distribute resources from some groups to others, because the policy-making machinery has been captured by political forces committed to these results'.[34] At the ICC, capture is often closely linked to global *realpolitik*, great powers, or global distributions of capital.[35] Latent in the idea of capture is the assumption that, if kept non-ideological, 'outcomes will be in some sense neutral or benign'.[36] Yet to attend to the modalities of IO reform from within means acknowledging its own distributive potential.

This alludes to a second power of expertise, namely its constitutive power vis-à-vis the IO, emphasising the *expert* dimension of the independent review. Evidently, states parties and other stakeholders have an interest in the outcome of reform exercises given their potential effects on scrutiny of potential crimes as well as budget demands. However, these interests are not directly translatable to the organisational setup given the 'objective' expert vocabulary and

[31] R. Collins and N. White, 'International Organizations and the Idea of Autonomy' in Richard Collins and Nigel White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 3.

[32] Article 40, Rome Statute of the International Criminal Court, A/CONF.183/9, agreed 17 July 1998, entered into force 1 July 2002.

[33] See T. Krever, 'Spectral Expertise' (2017) 106 *New Left Review* 148, 157.

[34] D. Kennedy 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (2001) 5 *European Human Rights Law Review* 463, 473.

[35] See e.g. D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014); G. Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill 2019) 239.

[36] Kennedy, 'Politics of the Invisible College', at 466.

techniques that exist quite apart from state control.[37] Not only this, but states would find it difficult to control such reform processes in practice without being condemned by stakeholders for attempting to influence or politicise independent investigations. It is the same logic that has the court maintain such a strict division between its own objective legal functions and the political interests of its states parties, now applied to court governance as opposed to investigations.

At the ICC, states parties already play a large role in managing the court via the ASP and other internal bodies such as the Committee on Budget and Finance. Moreover, as Emma Palmer and Hannah Woolaver have shown, 'in some instances States Parties have attempted to use the ASP to influence the exercise of judicial and prosecutorial functions in cases where their interests were implicated in ongoing proceedings'.[38] Yet in reform settings, fears of such assertions of coercive power by states parties distract from the more subtle power of experts and their practices.[39] As noted earlier, the meaning acquired by efficiency through the discourse of major donor states has placed a premium on reform proposals likely to make the court more cost-effective and therefore more accountable to certain stakeholders. This discourse has since become a central component of the way experts conduct themselves when analysing and offering recommendations, namely to take account of all relevant information as well as the wider realities and challenges facing the court, or in Martti Koskenniemi's words, to 'streamline, balance, optimize [and] calculate'.[40] Taking account of such managerial factors is not to be captured by state interests, but to be a competent, pragmatic technocrat. In this way, reform work is itself capable of reconstituting and redistributing an

[37] Expertise, too, has its own processes of cultural production based on prestige, awards, and location, see A. Rasulov, 'What Is Critique? Towards a Sociology of Disciplinary Heterodoxy in Contemporary International Law' in Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper, and Wouter Werner (eds.), *International Law as a Profession* (Oxford University Press 2017) 189–221.

[38] E. Palmer and H. Woolaver, 'Challenges to the Independence of the International Criminal Court from the Assembly of States Parties' (2017) 15 *Journal of International Criminal Justice* 641, 645.

[39] M. Foucault, *Archaeology of Knowledge and the Discourse on Language* (trans. A. M. Sheridan Smith, 1972 [1969]) 135–140.

[40] M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9, 13.

organisation's resources, values, and power differentials precisely as an act of objective expertise, rather than as a repudiation of it.

This point chimes with the international law literature on expertise. According to David Kennedy, '[g]enerating a common vision of a world to be governed is both a communicative and performative work of the imagination and a technical institutional project'.[41] This is particularly visible in the context of IO reform, where expert work meets complex bureaucratic machineries. Much of what it means to be an expert concerns the visions of governance that such expert work is capable of producing. International lawyers, diplomats, policymakers, NGOs, legal advocates, and activists produce knowledge as part of their job. Such knowledge constitutes in various ways: framing an organisational context, identifying its problems, establishing narratives of success and failure, establishing 'realities' constraining the organisation, and recommending solutions.

IO reformers such as the IER panel are similar to experts and such expert work, with some distinctions. First, given how many obstacles stand in the way of proposals being accepted and implemented, reformers' recommendations and solutions may be among the least significant of their articulations as far as constituting the IO is concerned. Instead, and second, reformers are often uniquely mandated to make a diagnosis of the IO as a whole, rather than only one of its organs or as an official with a set of bounded tasks. This gives IO reformers a particularly unique opportunity to redefine the entire IO, relying on the ideas, materials, and practices assembled about them in the process without being accused of overstepping their mandate. To understand more concretely how this constitutive work *works*, I return to the panel's interpretive device, the 'three-layered governance model', to reflect further on the kind of imaginaries experts perform.

Expert Reform Work in Action: The 'Three-Layered Governance Model'

Putting aside any suggestions of bias or capture, let's imagine how nine independent experts might have inscribed efficiency – and thereby the preferences of major financial contributors – into the ICC's organisational form simply by applying their legal knowledge and

[41] Kennedy, *World of Struggle*, at 90.

objective, technical expertise. From the beginning, the expert panel confronts a dilemma. Operating on the basis of their expansive mandate across governance, judiciary, and prosecutions, the panel must reckon with how to fulfil such a mandate despite the judicial and prosecutorial independence that underwrites two of the panel's focus areas: 'judiciary' and 'investigations and prosecutions'.

As shown earlier, the firewall of independence prevents the experts from simply overriding judicial and prosecutorial independence by assertion: their findings must, after all, satisfy both the requirements of expert objectivity and the expectations of stakeholders such as court officials, state representatives, and NGOs with an interest in upholding the fundamental principles of judicial and prosecutorial independence. Independence therefore becomes a fulcrum on which the panel's framing of the IO turns. It is for this reason that the expert panel begins its final report by addressing precisely this dilemma. The report begins by recalling that 'inherent in the structure of any international court or tribunal is the dual nature of the institution: the ICC is both a judicial entity (ICC/Court) and an international organisation (ICC/IO)'.[42] This duality corresponds to the underlying rationale of judicial independence on the 'ICC/Court' level and that of state party oversight and accountability on the 'ICC/IO' level.

As IO, the ICC 'does not carry out judicial activity – it indirectly supports it', with states parties playing a 'key role'.[43] As a court, though, the panel offers a further division 'between justice and the administration of justice'.[44] This further division is also connected to the question of independence. According to the experts, justice as '[j]udicial and prosecutorial work (e.g. judgments, deliberations by judges, the prosecutor's decisions to initiate or pursue a case, investigations) require[s] absolute independence'.[45] Yet this idea of 'absolute independence' already suggests its opposite. And indeed, the administration of justice is deemed 'not [to] necessitate the same degree of independence'.[46] Why? Because 'the administration of justice is audited in national systems – the same should be the case for the ICC'.[47] To reinforce the point, and the shrinking role of independence in the division of court functions, the panel avers that 'confidentiality and independence should not be used as a way of deflecting accountability and

[42] IER Final Report, para. 26. [43] Ibid, para. 27. [44] Ibid, para. 28.
[45] Ibid. [46] Ibid, para. 29. [47] Ibid.

preventing oversight'.[48] Hence, efficiency, not independence, becomes the vehicle for assessing performance in relation to the administration of justice.

From this reframing emerges the 'three-layered governance model', in which each layer is subject to greater degrees of state oversight: a protected inner 'core' of judicial and prosecutorial activity, a 'middle layer' of partial accountability facilitated by performance indicators and a proposed Judicial Audit Committee, and an outermost layer of IO administration heavily influenced by state oversight. The model is backed up by reference to article 119 of the Rome Statute, as well as a decision of Pre-Trial Chamber II in *Prosecutor v. Ali Kushayb*, in which it states that 'the Court's statutory framework clearly distinguishes the role of the Court, as a judicial institution entrusted with the power to exercise its jurisdiction over persons for the most serious crimes of international concern; the position of the ASP, which is responsible for considering and deciding on the Court's budget; and the duties of the judiciary and Chambers'.[49] This is taken to affirm the three layers of ICC governance.

What are the experts doing by elaborating this model at the very outset of their report? While the model may be read consistently with the Rome Statute and its case law, those (two) sources say nothing of the efficiency rationale that now underpins the model. These 'primary' sources merely refer to a functional division of labour grounded in notions of judicial independence and state party control over budgetary matters. The panel's reframing is thus facilitated by a professional internalisation of efficiency, after years of efficiency measures and austerity politics, fused to a familiar legal division between Court and IO and backed by the legal framework and its jurisprudence. Collectively, it allows – or demands – that court functions be judged according to an efficiency rather than an independence rationale, altering the power differentials within the court, especially as between the Prosecutor, judges, and states parties.

Yet this work is not the experts' alone. Beyond the final report itself, this redescription of the ICC's organisational form along efficiency

[48] Ibid.

[49] Arts 38–43, Rome Statute; ICC, *Prosecutor v. Ali Kushayb*, Decision on the Defence request under article 115(b) of the Rome Statute, ICC-02/05-01/20-101, 23 July 2020, para. 8.

lines is afforded by three 'clusters' of issues first proposed by the ASP in the IER Terms of Reference mentioned earlier, namely '(a) governance; (b) judiciary; and (c) investigations and prosecutions', a triple division which appears to have been copy-and-pasted as the panel's triple conceptualisation of the court.[50] In keeping with the earlier discussion on the power of experts, a degree of interpretation and translation was required to make these issues commensurable and legible at an organisational level. Yet the Terms of Reference, as a document, directs us to the affordances of many different practices, concepts, ideas, and things in relation to one another.[51] It makes reform a much more worthy site of analysis to consider such heterogeneous elements as a Terms of Reference and the situated meaning of efficiency, as affording certain possibilities and impossibilities, rather than as the instruments of a hegemonic apparatus. This applies equally to the other crucial documents of the IER. One is the draft working paper of November 2019 that had already consolidated some issues under 'clusters' by posing certain objectives, possible actions, and useful instruments for experts to draw upon.[52] Another is the panel's own interim report of June 2020 which did not yet offer the three-layered conceptualisation of the final report, but began to situate the work of reform in a longer institutional history of optimisation, creating a placeholder for the final report that would appear three months later.[53] As Annelise Riles has argued elsewhere, 'each document – the old and the new – lean on each other to take full effect'.[54] In this way, one can sketch how experts and reformers knit together, both as expert and node, a network of interpretive and material associations.

With this expanded understanding of what such assemblages afford, other important conditions, including time and global events, re-emerge as relevant considerations for why the IER came out as

[50] ASP resolution 18/7, ICC-ASP/18/Res.7, 6 December 2019, Annex I: Terms of Reference for the Independent Expert Review of the International Criminal Court.

[51] B. Latour, 'On Actor-Network Theory: A Few Clarifications' (1996) 47 *Soziale Welt* 369.

[52] ASP, Draft working paper: Matrix over possible areas of strengthening the Court and Rome Statute system, 27 November 2019.

[53] ICC, Independent Expert Review on the International Criminal Court and the Rome Statute System: Interim Report, 30 June 2020.

[54] A. Riles, 'Models and Documents: Artefacts of International Legal Knowledge' (1999) 48 *ICLQ* 805, 813.

it did. Although approaching the question of legal interpretation from a phenomenological perspective, Duncan Kennedy considers the role of 'resources, time and skill' in lawyers' efforts to make their interpretations stick.[55] Applied to the IER, it was already noted that the panel operated within a tight timeframe of nine months: how would a process twice this length have changed or potentially undermined the chosen governance model? Moreover, their resources, though extensive and well-connected to important figures within the court, were somewhat inhibited by the COVID-19 pandemic and the constraints associated with relying on many online rather than in-person meetings. The materiality – including meeting constraints and technological possibilities – afforded by physical meetings may have caused the governance model to be discounted altogether: a circular room populated by a bank of NGO officials may be somewhat more persuasive than the appearance of individual video profiles isolated from themselves and their colleagues;[56] gaps in connectivity may cause an interruption of conversation and a return to the basic premise of judicial independence without its sub-division into judicial and administration of justice mandates. Lastly, the nine-member panel comprised experienced lawyers and institution-builders within other international criminal tribunals. They did not seek to offer a sociological, economic, or anthropological analysis, but an expertise cognisant of the legal frameworks and constraints of IO reform. This may also have affected the kinds of stakeholders the panel consulted with – court managers and transnational NGOs rather than those directly affected by the court's work. A lens that is attuned to a wider range of materials and actors, and what these collectively afford, helps to make sense of IO reform beyond theories of rational science and structural determinacy.

[55] D. Kennedy 'A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation' in D. Kennedy, *Legal Reasoning: Collected Essays* (Davies Group Publishers 2008) 160.

[56] S. Jasanoff, 'Subjects of Reason: Goods, Markets and Competing Imaginaries of Global Governance' (2016) 4 *London Review of International Law* 361, 370; C. Schwöbel-Patel and W. Werner, 'Screen' in Jessie Hohmann and Daniel Joyce (eds.), *International Law's Objects* (OUP 2018) 419, 423. For an overview on the (new) material turn, see D. Quiroga-Villamarín, 'Domains of Objects, Rituals of Truth: Mapping Intersections between International Legal History and the New Materialisms' (2020) 8 *International Politics Reviews* 129, 130.

Work Effects: Redistributing the ICC

The discussion until now has focused largely on the sociologically enriching potential latent in approaching IO reform exercises through the notion of expert reform work: the constitutive role of experts, but also the assemblages that form them and which they re-form in turn. However, the earlier discussion on efficiency and its meaning-making potential for the ICC also hints at the wider range of distributive effects that can be surveyed when acknowledging the work of reform. This points to the wider stakes of expert reform work. The IER panel was clear about the functional intent of their governance model. Their first recommendation to the court was that 'the Three-Layered Governance Model should be used as a tool to ensure effective and efficient governance, clarify reporting lines, and improve cooperation among stakeholders'.[57] This narrow reading of the model's effects as relating only to the specific organisational purposes and components for which it was intended is consistent with the mainstream view of expertise as concerned only with functional effectiveness.[58]

The IER complicates this narrow reading of the model's effects by considering both its unintended consequences and the broader redistributions of meaning, influence, and resources it is capable of effecting across the ICC. These redistributions relate to the context, problems, priorities, and future possibilities of the organisation and are discussed in turn.[59]

Context: While experts are often said to operate within a context – 'the "drivers" that decision makers are said to ignore at their peril: technological, historical, social, economic, or political "realities"'[60] – these realities are also expert articulations that narrate a particular social milieu within which the IO is said to exist, and to which it should be directly responsive. The context of the IER was already outlined by the ex-Presidents, and the expert panel, as they

[57] IER Final Report, para. 50, Recommendation 1.

[58] R. Clements, *The Justice Factory: Management Practices at the International Criminal Court* (Cambridge University Press 2023) 23–26.

[59] G. Burrell, 'Modernism, Postmodernism and Organisational Analysis: The Contribution of Michel Foucault' in A. McKinlay and K. Starkey (eds.), *Foucault, Management and Organization Theory* (SAGE Publications 1998) 14, 25.

[60] Kennedy, *World of Struggle*, at 112.

diagnosed the judicial and administrative 'deficiencies' of the court and the need to remain efficient and effective in an unstable political landscape. The official context therefore knits together a sense of declining multilateralism with isolated court problems and the scarce resources of an austerity-prone donor community. This (and subsequent organisational imperatives) may have differed had the ex-Presidents and the panel referred to alternative contexts, such as the African Union's hostility towards the court or the tangibility of justice for victim communities.

Problems: From this context emerges a more tangible set of problems than the ex-Presidents' references to 'management deficiencies'. Kennedy reminds us that 'the idea of a "global problem" is a complex work of imagination'.[61] Within IOs, the rendering of an *organisational* problem is no different, although as we have seen, the remit for expert imagination here may also be conditioned by experts' mandate, experiences, and time. Indeed, it is part of the power of framing a problem as organisational that it directs concern towards internal structures, workflow issues, personnel, fragmentation, and underperformance. Framing the problem differently, as a problem inherent in the tensions between different visions of global justice, would demand a different analysis and alternative recommendations.[62] So too would framing the problem in terms of leadership, the court's constituencies, racial bias, or transnational capitalism.[63] As it happened, these problem frames remained unused.

Priorities: Operating in a fragile global 'context' and having identified corresponding organisational 'problems', certain activities (and solutions) are prioritised. As a result of the three-layered governance model, those measures that were most likely to deliver efficiencies for the court were prioritised. The increased oversight this model afforded to states also allowed their concerns, specifically those on whom the court financially relies, to take on greater importance. This was already acknowledged at the 1998 Rome Conference, when the conference secretary stressed that 'to secure the financial health of the Court, the

[61] Kennedy, ibid, at 95.
[62] D. Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win' (2015) 28 *Leiden Journal of International Law* 323.
[63] C. Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press 2021).

support of major financial contributors was crucial and hence the concerns of the major contributors should be looked at more sympathetically'.[64] The issue becomes more acute when value-for-money concerns begin to funnel resources into constructing a managerial apparatus to oversee the court's administration of justice functions, including a Judicial Audit Committee and data-collection for performance indicators. These all necessitate the allocation of resources towards some concerns and away from others, including those not seen as real concerns in the first place.

Possibilities: Lastly, the cumulative effect of such contextualising, problematisation, and prioritisation is to further shape the ICC's conditions of possibility and the very institutional imaginaries that produce the court.[65] Much as Martti Koskenniemi denoted that '[t]he concepts and structures of international law… are the conditions of possibility for the existence of something like a sphere of the international', so too do expert articulations form the conditions of possibility for the organisational sphere.[66] Considering what is easier or more difficult to articulate before and after a reform exercise such as the IER may be a fruitful way of assessing the effects of this discursive work. Although the ICC itself pushed back against some of the panel's findings, including parts of its model framing, it will certainly be easier for states parties to argue in favour of greater oversight over administration of justice matters given the panel's reasoning that these are audited nationally. The ICC itself pointed out in its response to the IER final report that the model's three layers are 'inextricably linked' not hermetically closed, meaning that states and other interested actors may become more strategic in seeking to exert influence. For example, efficiency savings in the recruitment and retention of staff may disproportionately advantage those already familiar with the court's work in the Global North, shaping the types

[64] M. Arsanjani, 'Financing' in Antonio Cassese, Paola Gaeta, and John Jones (eds.), *The Rome Statute of the International Criminal Court, Volume 1* (Oxford University Press 2002) 315, 320.

[65] S. Jasanoff, 'Future Imperfect: Science, Technology and the Imaginations of Modernity' in S. Jasanoff and Sang-Hyun Kim (eds.), *Dreamscapes of Modernity: Sociotechnical Imaginaries and the Fabrication of Power* (Oxford University Press 2015) 1–33.

[66] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005 reissue) xiii.

of prosecutorial and judicial activity the court undertakes in the long term.[67] Under such circumstances, it becomes more difficult to justify reforms based on non-efficiency rationales, such as the fairness of proceedings or the court's practical effect on victims. Together, reform work points to these subterranean effects on the court's present and future activities.

Conclusion

It perhaps misses the point of re-imagining IO law to spend a chapter on one relatively obscure reform exercise. There are far more pressing issues confronting the ICC than the outworkings of its latest technical tweaking. Yet through this managerial example, I have sought to perform a double take on IO reform as an important site for studying not only how institutions change but via what modalities and materials, by what interpretive devices, and with what redistributive effects institutions like the ICC remain in a perpetual state of becoming. The IER's contribution was not only to offer a sound, rational basis for court optimisation, nor to act as handmaiden to powerful states. Rather, it was to carry out expert reform work in ways that re-formed the ICC anew by baking efficiency rationales into the division of its judicial and administrative functions.

The notion of expert reform work attends both to the forms of expert knowledge required to carry it out and the additional epistemic labour required to put abstract expectations, constraints, and mandates into organisational action. It offers an account of expert reform beyond positivist ideas of functional optimisation and more structuralist accounts of embedded and instrumentalised hegemony.[68] This also opens up the concept of work to dynamics not limited to experts and their agentic manoeuvring of materials, but also the entanglement of people, ideas, norms, and documents and what these 'nodes' afford to one another as part of organisational (re)assembly. Expanding the analytic thus does not negate but enriches the discussion on reform's distributional effects: the IER having demonstrated

[67] ICC, Overall Response of the International Criminal Court to the Independent Expert Review Final Report, 14 April 2021, para. 26.

[68] P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805.

how organisational tools, devices, documents, and ideas reshaped the context, problems, priorities, and possibilities of the ICC as an IO. Attending to the granular and the banal is perhaps where alternative IO scholarship will find new modes of engagement and new questions to ask of IOs, offering 'wonderfully detailed, active, partial ways of organizing worlds' beyond the imaginaries supplied by ICC ex-Presidents and expert reform panels.[69]

[69] Harraway, 'Situated Knowledges'.