ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS: A GOAL-BASED APPROACH

*By Yuval Shany**

During the last twenty years, the world has experienced a sharp rise in the number of international courts and tribunals, and a correlative expansion of their jurisdictions.[1] These occurrences have dramatically affected and will continue to affect the fields of international law and international relations. The creation and operation of international judicial bodies that are capable of enforcing international commitments, interpreting international treaties, and settling international conflicts have facilitated the growth of international legal norms and cooperative regimes governing important areas of international law and politics, such as economic relations, human rights, and armed conflicts. International courts—understood in this article as independent judicial bodies created by international instruments and invested with the authority to apply international law to specific cases brought before them[2]—have thus become important actors as well as policy instruments in the hands of international lawmakers. Such

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[1] *See* YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 3–7 (2003); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV 429 (2003); Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999).

[2] Romano defines an international judicial body as a one having five specific features: (1) permanence, (2) established by an international instrument, (3) use of international law to decide cases, (4) reliance upon preexisting rules of procedure in deciding cases, and (5) result of process is a binding decision. Romano, *supra* note 1, at 712; *see also* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 458 (2006); SHANY, *supra* note 1, at 12 (noting that international tribunals are bodies that are manned by independent decision makers and created by international legislative processes, and that operate and decide cases according to law by issuing binding decisions); Christian Tomuschat, *International Courts and Tribunals*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2008), *available at* http://www.mpepil.com ("International courts and tribunals are permanent judicial bodies made up of independent judges which are entrusted with adjudicating international disputes on the basis of international law according to a pre-determined set of rules of procedure and rendering decisions which are binding on the parties."); Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L L. 387, 389 (2009) (explaining that international courts are, by definition, formed by multiple governments).

courts serve, in some respects, as the lynchpin of a new, rule-based international order, which increasingly displaces or purports to displace the previous power-based international order.[3]

The increased centrality of international courts in international life invites, however, a critical assessment of their performance: Are international courts effective tools for international governance? Do they actually fulfill the expectations that have led to their creation and empowerment? Do they, by way of example, improve compliance with international norms? Why do some courts appear to be more effective than others? Could results of equal value to those produced by international courts have been generated by other, less costly or time-consuming mechanisms?[4]

A growing body of legal literature has turned its attention to just such questions of effectiveness in recent years.[5] For example, it has been alleged by two U.S. authors that international courts "are likely to be ineffective when they neglect the interests of state parties and, instead, make decisions based on moral ideals, the interests of groups or individuals within a state, or the interests of states that are not parties to the dispute."[6] Applying this standard, the authors concluded that independent courts such as the International Criminal Court (ICC) and International Tribunal for the Law of the Sea, as well as the World Trade Organization (WTO) dispute resolution system, have relatively low prospects of success as measured by compliance with their judgments, their usage rates, and the overall success of the treaty regimes in question.[7] In response, two other U.S. authors argued that judicial independence is just one of thirteen factors that may contribute to international judicial effectiveness.[8] Moreover, these

[3] For a discussion of the increased role of legal rules in international relations, see Karen Alter, *Private Litigants and the New International Courts*, 39 COMP. POL. STUD. 22 (2006); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) and THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)).

[4] *See generally* NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994) ("It is institutional choice that connects goals with their legal or public policy results.").

[5] *See, e.g.*, James Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1 (2009); Elena A. Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1 (2009); Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383 (2009); Laurence Helfer, Karen Alter & Florencia Guerzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AJIL 1 (2009); Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171 (2008); Donald McRae, *Measuring the Effectiveness of the WTO Dispute Settlement System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1 (2008); Mike Burstein, *The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights*, 24 BERKELEY J. INT'L L. 423 (2006); Leah Granger, *Explaining the Broad-Based Support for WTO Adjudication*, 24 BERKELEY J. INT'L L. 521 (2006); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006); William Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1 (2002); Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

[6] Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 7 (2005).

[7] *See id.* at 73–74.

[8] Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 906 (2005). The other factors identified by Helfer and Slaughter are tribunals' composition, caseload or functional capacity, independent fact-finding capability, formal authority, awareness of audience, incrementalism, and quality of legal reasoning, plus the extent of judicial cross-fertilization and

responding authors claimed that compliance may be a poor proxy of judicial effectiveness if viewed in isolation from the nature of the commitments undertaken by the relevant state parties.[9]

The rapidly increasing range of legal literature discussing the effectiveness of international courts contains many important insights as to the factors that could explain increased or decreased court effectiveness. This literature also presents some empirical data to sustain claims of judicial effectiveness or ineffectiveness.[10] Nevertheless, a significant portion of this literature possesses an "Achilles heel" in the crude or intuitive definitions of *effectiveness* that are employed, which often equate effectiveness with compliance with court judgments, usage rates, or impact on state conduct.[11]

Yet, complicated links exist between the effectiveness of international courts, on the one hand, and each of the three aforementioned factors: judgment compliance, usage rates, and impact on state conduct. For instance, judgment-compliance rates may depend as much on the nature of the remedies issued by a court as on the actual or perceived quality of the court's structures or procedures.[12] Thus, a *low-aiming* court, issuing minimalist remedies, may generate a high level of compliance but have little impact on the state of the world.[13] In addition, judgment-compliance rates fail to capture either out-of-court settlements conducted under the court's shadow[14] or the court's more general compliance-inducing effect.

In the same vein, usage rates are also a poor proxy for judicial effectiveness.[15] Limited resort to adjudication may reflect either the perceived uselessness of the court in question (its perceived lack of effectiveness) or its "long shadow" that prods the disputing parties toward out-of-court settlements and dispute avoidance (its perceived effectiveness). Similarly, high rates of adjudication can be explained by either the attractiveness of the judicial forum or its inability to introduce legal stability and predictability.

dialogue, the form of opinions, the nature of the violations, the existence of autonomous domestic institutions, and the relative cultural and political homogeneity of member states.

[9] *See id.* at 918.

[10] *See, e.g.*, Ku & Nzelibe, *supra* note 5, at 780; Posner & Yoo, *supra* note 6, at 7.

[11] These methodological problems are further compounded by certain writers' general assumptions about the role of international courts in the life of the international community; these assumptions seem to transpose the role that courts play in national legal systems onto the international realm. *See, e.g.*, Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUST. 434, 441 (2006); Helfer & Slaughter, *supra* note 5, at 290 (defining effectiveness of supranational courts as the ability to compel compliance, and essentially using domestic courts as a model for effectiveness); *see also* Guzman, *supra* note 5, at 178 ("Much of the existing debate on international courts . . . implicitly assumes that the role of these tribunals is essentially the same as that of domestic courts.").

[12] *See* Yuval Shany, *Compliance with Decisions of International Courts as Indicative of Their Effectiveness: A Goal-Based Analysis*, 2010 PROC. EUR. SOC'Y INT'L L. 251 (2012). For a comparable discussion of the relationship between compliance and effectiveness, see Harold K. Jacobson & Edith Brown Weiss, *A Framework of Analysis*, *in* ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 1, 5 (Edith Brown Weiss & Harold K. Jacobson eds., 2000) ("Countries may be in compliance with a treaty, but the treaty may nevertheless be ineffective in attaining its objectives.").

[13] *See, e.g.*, Guzman, *supra* note 5, at 187; Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 394 (2000).

[14] *See, e.g.*, MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 16 (1986). Settled cases tend to have different attributes than unsettled cases. A focus on cases that proceeded a particular judgment may thus involve a selection bias. *See, e.g.*, James G. Woodward, *Settlement Week: Measuring the Promise*, 11 N. ILL. U. L. REV. 1, 32–33 (1990) (claiming that cases that courts failed to settle are less likely to be settled in subsequent mediation than cases that courts did not attempt to settle).

[15] *See* Guzman, *supra* note 5, at 188.

Finally, measuring the impact of international courts on state conduct—a factor highlighted in some of the relevant international relations literature on international institutions[16]—may help us in assessing what courts actually do, but it lacks a normative baseline, which would enable us to evaluate actual performance (or lack thereof) against some preconceived idea about what it is that courts should be doing. Furthermore, even if one finds broad support for the proposition that certain effects are indeed desirable, delineating the causal relationship between judicial performance and state conduct may remain difficult.[17]

To illustrate, Andrew Guzman has persuasively argued that when discussing international judicial effectiveness, we should focus on the degree to which international courts generate one particular set of effects (whose desirability can be assumed)—namely, improved compliance by states and other relevant actors with the legal norms that such courts enforce.[18] Although this approach to assessing international court effectiveness is better than measuring compliance with court judgments alone, isolating the contribution of judicial processes to norm compliance (in particular, in cases involving long-term or strategic habits of compliance by states) presents serious methodological challenges.[19] Furthermore, it is doubtful whether such an approach can provide us with precise tools for understanding and evaluating specific strategies through which courts can promote norm compliance (for example, through generating *ex ante* deterrence, issuing *ex post* remedies, disseminating information on practices, or elucidating legal standards). In other words, since measuring effects may fail to capture the actual organizational features or dynamics leading to those effects, such measures may provide a limited understanding of those aspects of international courts in need of reform.

Assessing international judicial effectiveness on the basis of any specific set of effects, even a central one such as norm compliance, may ignore other potential or actual effects of international courts on state conduct, including those relating to dispute settlement (whose outcomes sometimes deviate from existing law)[20] and also other factors that could promote or undercut the objectives of the legal regimes in which courts operate, notwithstanding the level of compliance with the regime norms per se.[21] In addition, an excessive focus on norm

[16] *See, e.g.*, Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance, in* HANDBOOK OF INTERNATIONAL RELATIONS 538, 539 (Walter Carlsnaes, Thomas Risse & Beth Simmons eds., 2002) (focusing on influence on behavior as indicative of effectiveness); Raustiala, *supra* note 13, at 388; Oran R. Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables, in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 160 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992); *see also* Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AJIL 47 (2012).

[17] For an analogous discussion, see Young, *supra* note 16, at 163.

[18] Guzman, *supra* note 5, at 188.

[19] For a discussion of some of the limits of compliance data, see George Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 383 (1996); Hafner-Burton et al., *supra* note 16; Raustiala & Slaughter, *supra* note 16, at 545; Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AJIL 1 (2012).

[20] *See, e.g.*, Gabçikovo-Nagymaros Project (Hung. v. Slovk.), 1997 ICJ REP. 7, paras. 140–41 (Sept. 25):

> [T]he Parties together should look afresh at the effects on the environment of the operation of the Gabçikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.
>
> It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution . . . .

[21] *See* Jacobson & Weiss, *supra* note 12, at 5; Raustiala & Slaughter, *supra* note 16, at 549, 553.

compliance or, more generally, on state conduct may ignore the longer-term and systemic contribution of international courts to international law development or to the legitimacy of international governance—which do not directly manifest themselves in state compliance.[22]

The current literature's lack of clear, persuasive criteria for assessing the effectiveness of international adjudication bodies, coupled with the theoretical and methodological difficulties associated with actually measuring such criteria, generates unsatisfying results as well as misunderstandings about the effectiveness of international courts. What is needed is a richer understanding of the concept of international court effectiveness—one that moves beyond the notions of compliance inducement, usage rates, and impact. By the same token, a more sophisticated evaluative methodology is required.

Fortunately, other academic disciplines may assist us in developing adequate concepts and methods.[23] In particular, one may find within social science literature a vast body of studies dealing with how to assess the effectiveness of organizations, in general, and public or governmental organizations, in particular. That literature, typically classified in sociology under organizational or public administration studies, includes diverse conceptual frameworks and empirical indicators that could be applied in assessing the effectiveness of international courts and tribunals—which may be regarded, like domestic courts, as public organizations. Such an act of "intellectual borrowing" may enrich the existing discourse on the effectiveness of international courts, provide us with new tools to measure effectiveness, and improve our understanding of the methodological limits of such an exercise.

In the present article I survey some key social science notions concerning the methodology for measuring the effectiveness of public organizations and also discuss their possible application to international courts. The resulting analytical framework for discussing international court effectiveness will, it is hoped, be more useful than those generally found in the existing international law literature and will serve to illuminate some basic concepts relating to international adjudication. In part I, I discuss the notion of *organizational effectiveness* and explain why a goal-based definition of effectiveness is the most suitable for evaluating international court performance. I then survey ways of classifying organizational goals and discuss some of the difficulties and ambiguities involved in measuring effectiveness on the basis of goal attainment. In part II, I discuss how analytical methods from the social sciences could be applied to the study of the effectiveness of international courts, while taking into account that each court has distinctive features and operates in a particular legal and political context. In part III, I illustrate how my proposed model for evaluating international court effectiveness could help us rethink some basic concepts in international adjudication, such as judicial independence, judgment compliance, and judicial legitimacy.

The present article makes no attempt to determine whether international courts in general or any particular international court is effective, nor does it explore whether the international

[22] *See, e.g.*, ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 54 (2010) (stating that one of the reasons for creating international tribunals is that they may establish or clarify the substantive rules of international law); Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters,* 1 GLOBAL POL'Y 127 (2010); *see also* HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 330–31 (1933); Rein Müllerson, *Aspects of Legitimacy of Decisions of International Courts and Tribunals: Comments, in* LEGITIMACY IN INTERNATIONAL LAW 189, 199 (Rüdiger Wolfrum & Volker Röben eds., 2008) (discussing the law-changing function of international courts).

[23] For a general call to engage in interdisciplinary research when thinking about fundamental international law concepts, see THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 10–11 (1990).

community actually is, or should be, interested in developing more effective international courts. The latter question relates, inter alia, to the balance of power between states and institutions of international governance and also among the institutions themselves.[24] My main interest in this article is, instead, to develop a research agenda for an interdisciplinary approach toward studying international court effectiveness. This framework could serve as a foundation for future analytical and empirical work that would be more specific in its focus—for example, by examining the attainment of particular goals by particular courts.[25]

I. WHAT CONSTITUTES ORGANIZATIONAL "EFFECTIVENESS"?

The Goal-Based Approach

Whether intended to appraise organizational performance or to affect organizational design or procedures,[26] a key conceptual hurdle for any research into organizational effectiveness is to define what constitutes an *effective* organization. Although some argue that there may be as many models of effectiveness as there are studies of organizational effectiveness,[27] the dominant definition of effectiveness in the social science literature follows the *rational-system approach*, which offers a straightforward formulation: "an action is effective if it accomplishes its specific objective aim."[28] Satisfaction of this performance-based standard is assessed over predefined units of time. Consequently, in order to measure the effectiveness of an international court using this approach, one has to identify the court's aims or goals[29]—that is, the desired outcomes that it ought to generate—and ascertain a reasonable time frame for meeting some or all of these goals.[30]

Under the rational-system approach, the desirability of the goals themselves is not questioned. Hence, the project of assessing effectiveness pursuant to this approach is, like many other projects in sociology, predominantly descriptive and analytical, rather than normative.[31] Even so, as discussed below, normative considerations relating to courts cannot be completely divorced from a goal-based analysis of international court effectiveness;[32] among other things, the goals set for international courts (like other public organizations) are likely to derive from

[24] *See* Guzman, *supra* note 5, at 189.

[25] Indeed, under the supervision of the current author, junior colleagues are already engaged in a variety of such research projects.

[26] W. RICHARD SCOTT, ORGANIZATIONS: RATIONAL, NATURAL AND OPEN SYSTEMS 350 (5th ed. 2002) (noting that "effectiveness is argued by some theorists to be a determinant as well as a consequence of organizational structure").

[27] Robert D. Herman & David O. Renz, *Theses on Nonprofit Organizational Effectiveness*, 28 NONPROFIT & VOLUNTARY SECTOR Q. 107, 109 (1999).

[28] CHESTER I. BARNARD, THE FUNCTION OF THE EXECUTIVE 20 (1968); *see also* AMITAI ETZIONI, MODERN ORGANIZATIONS 8 (1964); JEFFREY PFEFFER, ORGANIZATIONS AND ORGANIZATION THEORY 41 (1982); James L. Price, *The Study of Organizational Effectiveness*, 13 SOC. Q. 3, 3–7 (1972).

[29] RAYMOND F. ZAMMUTO, ASSESSING ORGANIZATIONAL EFFECTIVENESS 12 (1982).

[30] MARK H. MOORE, CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT 95–99 (1995); SHARON M. OSTER, STRATEGIC MANAGEMENT FOR NONPROFIT ORGANIZATIONS: THEORY AND CASES 27–28 (1995).

[31] Young offers the term *equity* as encapsulating a normative assessment of the collective behavior facilitated by social institutions. Young, *supra* note 16, at 164.

[32] *See* SCOTT, *supra* note 26, at 351.

a plausible conception of the public good.[33] Moreover, the underlying premise of the rational-system approach—namely, that organizations need to meet their goals and faithfully execute their mandates—contains an implicit normative statement about the desirability of organizational conduct and, for our purposes, about the proper manner in which international courts should conduct their business.[34]

Goal Categories

Since the rational-system approach, which I propose to apply to the study of international courts, is goal based, it is critical to understand what types of organizational goals can serve as the relevant yardsticks for effectiveness analysis. In his writings on organizational effectiveness, the influential organization studies theorist Charles Perrow distinguishes between the *official goals* and the *operative goals* of the evaluated organization.[35] While official goals are the organization's formally stated general purposes (these goals are often vague and open-ended),[36] operative goals reflect the specific policies that the organization actually prioritizes.[37] For example, an international court's official goal may be to settle disputes between states or to fight impunity, and these general goals may then be translated over time into more specific operative goals, such as to expedite the pace of legal proceedings,[38] increase the number of prosecutions

[33] *See* Herman L. Boschken, *Organizational Performance and Multiple Constituencies*, 54 PUB. ADMIN. REV. 308, 311 (1994); Terry Connolly, Edward Conlon & Stuart Jay Deutsch, *Organizational Effectiveness: A Multiple Constituency Approach*, 5 ACAD. MGMT. REV. 211, 213–14 (1980).

[34] The normative aspects of the rational-system approach give it strong adavantages as an organizing framework for social science research. Other, competing approaches—for example, the *open-system approach* (which evaluates organizational interactions with their environments, without juxtaposing organizational effects against a specific normative yardstick) and the *system-resource approach* (which regards survivability and resource attainment as the key parameters of success)—have weaker normative content and are thus less conducive to a law-related study. For more on the open-system approach, see W. RICHARD SCOTT & GERALD F. DAVIS, ORGANIZATIONS AND ORGANIZING: RATIONAL, NATURAL, AND OPEN SYSTEMS PERSPECTIVES 31 (2006). One application of the open-system approach can be found in Oran Young's work focusing on international institutions and defining effectiveness as "a measure of the role of social institutions in shaping or molding behavior in international society." Young, *supra* note 16, at 161. For more on the system-resource approach, see Ephraim Yuchtman & Stanley E. Seashore, *A System Resource Approach to Organizational Effectiveness*, 32 AM. SOC. REV. 891, 898 (1967). Note, however, that even under the rational-system approach, an organization's longevity is of some import. It can suggest, for example, that core stakeholders have continued to perceive the court in question as a useful or successful one. *See, e.g.*, DAVID MCKEVITT & ALAN LAWTON, PUBLIC SECTOR MANAGEMENT: THEORY, CRITIQUE & PRACTICE 226 (1994); Young, *supra* note 16, at 166–69 (describing the longevity of the Svelbard regime in the face of strong political upheavals as indicative of its robustness).

[35] Charles Perrow, *The Analysis of Goals in Complex Organizations*, 26 AM. SOC. REV. 854, 854–66 (1961).

[36] Melissa Forbes & Laurence E. Lynn Jr., Organizational Effectiveness and Government Performance: A New Look at the Empirical Literature 8 (Nov. 2006) (unpublished manuscript), *at* http://www.docstoc.com/docs/1013053/Organizational-Effectiveness-and-Government-Performance-A-New-Look-at-the-Empirical-Literature); *see also* STEWART CLEGG & DAVID DUNKERLEY, ORGANIZATION, CLASS AND CONTROL 309 (1980); Perrow, *supra* note 35, at 55 (defining "[o]fficial goals" as "the general purposes of the organization as put forth in the charter, annual reports, public statements by key executives and other authoritative pronouncements"); HAL G. RAINEY, UNDERSTANDING AND MANAGING PUBLIC ORGANIZATIONS 127 (2d ed. 1997) ("[o]fficial goals are formal expressions of general goals that present an organization's major values and purposes").

[37] Operative goals tend to "designate the ends sought through the actual operating policies of the organization; they tell us what the organization actually is trying to do, regardless of what the official goals say are the aims." Perrow, *supra* note 35, at 855; *see also* RAINEY, *supra* note 36, at 127 ("*Operative goals* are the relatively specific immediate ends an organization seeks, reflected in its actual operations and procedures.").

[38] Council of Europe, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, Explanatory Report, para. 37 (May 13, 2004), *at* http://conventions.coe.int/Treaty/en/Reports/Html/194.htm (indicating that "these elements of the reform seek

for international crimes before the court,[39] or increase the overall number of court judgments per annum.[40]

Perrow's goals can be broken down into more specific subcategories. Such further acts of categorization will help us to organize and prioritize the different goals—in part by capturing our legal sensibilities about form and authority—and will thereby facilitate a more precise assessment of goal attainment. I therefore suggest that we distinguish between different organizational goals on the basis of their source, hierarchical level, and method of articulation:

— *Source.* Some public organization goals are set by *external* constituencies (for example, the general public or its elected representatives), whereas other goals are *internal* in that they have been determined by actors within the organization itself (for example, employees or management).[41] This distinction has potential implications for the present analysis since judicial policy choices and agendas sometimes need to be juxtaposed against external demands and expectations.

— *Hierarchical level.* Certain ambitious goals, which organizations can hope to attain only in the long run, represent the *ultimate ends* of organizational operations, whereas other goals are merely strategic or *intermediate* in nature. The latter contribute to achieving the ultimate ends and are thus hierarchically inferior to them. This distinction has not only analytical, but also normative, significance: the intermediate goals that international courts seek to attain may be more readily challenged than their ultimate ends (which the intermediate goals should strive to promote).[42]

— *Method of articulation.* Some goals are *explicitly* identified in instruments promulgated by the organization or its stakeholders; other goals are *implicit* in those instruments and can reasonably be inferred from them; and yet other goals are *unstated* (either explicitly or implicitly) and may have been embraced tacitly by the organization in question, or its stakeholders, independent of any formal text. Note that this last category often reflects the beliefs of constituents in important inherent goals of the organizations in question (for example, that international courts advance the cause of justice). Hence, while explicit goals may, more than other goals, restrict the

to reduce the time spent by the Court on clearly inadmissible applications and repetitive applications so as to enable the Court to concentrate on those cases that raise important human rights issues"); Sixth Annual Report of the ICTY to the UN General Assembly, para. 116, UN Doc. A/54/187 (1999) ("[t]his amendment is part of the ongoing commitment of the Tribunal to speeding up the trial process while providing for the proper protection of the rights of the accused").

[39] Office of the ICC Prosecutor, Report on Prosecutorial Strategy 7 (2006), *at* http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf ("The second objective is to conduct four to six new investigations of those who bear the greatest responsibility in its current or new situations.").

[40] *See, e.g.*, Report of the International Court of Justice to the UN General Assembly, para. 239, UN Doc. A/62/4, para. 239 (2007) ("President Higgins explained that the aim of the Court was 'to increase further [its] throughput in the coming year.'").

[41] In this context Perrow and Robert Gross distinguish between output goals, which correspond to the expectations of external referents (for example, customers or investors), and support goals, which address the needs of internal referents that maintain the operation of the organization (for example, directors or employees). CHARLES PERROW, ORGANIZATIONAL ANALYSIS: A SOCIOLOGICAL VIEW 134 (1970); Edward Gross, *The Definition of Organizational Goals*, 20 BRIT. J. SOC. 277, 282 (1969).

[42] Stanley Seashore and Ephraim Yuchtman propose to divide goals into three hierarchical categories: ultimate criteria (which may be immeasurable), penultimate criteria, and subsidiary variables (states and processes). Stanley E. Seashore & Ephraim Yuchtman, *Factorial Analysis of Organizational Performance*, 12 ADMIN. SCI. Q. 377, 378–79 (1967).

ability of judges to formulate policy choices,[43] explicit goals are not necessarily more important in the eyes of the goal setters than implicit or unstated ones.

Like many other public organizations, international courts have diverse goals that reflect the expectations of different external and internal constituencies, and that are formulated within a hierarchical structure and with varying degrees of explicitness. Thus, a key decision for researchers studying goal-based effectiveness is to identify which goals or set of goals to use as an evaluative standard or baseline.[44] I will present in part II a framework for assessing the effectiveness of international courts, one that identifies as a normative baseline the goals set by one external constituency: the *mandate providers.* Since other choices are obviously possible, I will be careful to explain the reasons for making this particular choice.

The Problem of Goal Ambiguity

Even when a set of goals is identified as a baseline, a critical problem in measuring organizational effectiveness relates to *goal ambiguity*—competing understandings of an organization's aims.[45] At the international law level, such ambiguities are often the result of political difficulties in establishing clearer goals, with the consequence being that instruments are drafted with "constructive ambiguity." Ambiguities relating to four different types of goals may especially complicate goal-based studies of international court effectiveness:

- *Mission.* Some goals, especially official goals or ultimate ends, are formulated in vague language that gives rise to conflicting interpretations of their meaning. As a result, the principal goals of any international court may be contested.
- *Operative goals.* The general nature of some abstract goals renders them imprecise and leaves considerable interpretative discretion as to translating such goals into concrete judicial policies and operative or intermediate judicial goals.
- *Priorities.* Complex public organizations, such as courts, often strive to attain a plurality of goals, without having designated a hierarchy among them.[46] It is therefore uncertain which goals should be accorded preference if the goals conflict or if resources are scarce. Even when the hierarchy of goals is clear, it may still remain uncertain how that hierarchy should be translated into specific resource-allocation decisions.[47]
- *Evaluative goals.* Some goals are inherently less amenable to objective measurement. They invite interpretive leeway in deciding upon the particular goals to be used as

[43] FRANCK, *supra* note 23, at 50–52.

[44] Frank Friedlander & Hal Pickle, *Components of Effectiveness in Small Organizations*, 13 ADMIN. SCI. Q. 289, 302–03 (1968).

[45] Young Han Chun & Hal G. Rainey, *Goal Ambiguity and Organizational Performance in U.S. Federal Agencies,* 15 J. PUB. ADMIN. RES. & THEORY 529 (2005).

[46] *Id.* at 535.

[47] Note that if an organization's goals are inconsistent, certain goals will, over time (and almost by definition), be only partially achieved. Under such circumstances, it may be difficult, if not impossible, to assess the organization's overall effectiveness. One may therefore have to settle in such cases for an assessment that is only partial or "piecemeal." *See* SCOTT, *supra* note 26, at 370 ("We must agree to settle for modest and limited measures of specific aspects of organizational structures, processes, and outcomes.").

> standards for assessing judicial performance and also upon the particular methods to be used in assessing that performance.[48]

Goal ambiguity increases with the complexity of the policy problems faced by the organization in question.[49] Complex problems, such as the fact patterns that lead to the creation of international courts, may involve a large number of constituencies and are thus less amenable to consensus on specific goal formulations. Addressing complex problems may also require the delegation of open-ended discretionary authority from the mandate providers to the court's management, thus increasing the international court's operative-goal ambiguity.

The age of the organization and the changes made to its mandate over time (often in response to perceived successes and failures) are additional factors that may affect goal ambiguity. Official mandates that are periodically revised tend to become increasingly specific in a way that reduces concerns about operative-goal ambiguity. In response to changing needs and circumstances, however, international courts tend to become "overburdened" with an increasing number of functions[50]—typically without any comprehensive revision of their mandates or structures—which may increase ambiguities and conflicts concerning their priorities.[51]

The Time Frame

The element of time is important to an analysis of effectiveness—and not just because it affects goal ambiguity. The results of any goal-based effectiveness study may largely depend on the unit of time selected for conducting the assessment. Different organizations have distinct life cycles and fluctuations in performance over time (which may be explained by a variety of internal and external factors).[52] Hence, the unit of time may significantly affect assessments of goal attainment. For example, if a performance evaluation includes a new international court's first years of operation—a period during which the court has invested in its long-term infrastructure and struggled with various "growing pains"—the assessment of the court's cost-effectiveness (the relationship between goals attained and resources invested) may well be skewed. Likewise, using a court's entire lifespan as the single period of assessment may obscure positive and negative trends in performance and goal attainment. Too narrow a temporal focus

[48] Some normative assessment of the skewing effect of measurable operative goals on goal prioritization may therefore be warranted. *See id.* at 354. Some writers have claimed that public organizations, unlike for-profit organizations, suffer from inherent ambiguity in their evaluative goals, that one consequently cannot measure their objective effects, and that one needs to rely, instead, on proxies of effectiveness, such as workloads. JOHN L. THOMPSON, STRATEGIC MANAGEMENT: AWARENESS AND CHANGE 175–76 (2d ed. 1997); Rosabeth M. Kanter & David V. Summers, *Doing Well, While Doing Good: Dilemmas of Performance Measurement in Nonprofit Organizations and the Need for a Multiple-Constituency Approach*, *in* THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK 154, 156 (Walter W. Powell & Richard Steinberg eds., 1987); Mark H. Moore, *Managing for Value: Organizational Strategy in For-Profit, Nonprofit, and Governmental Organizations*, 29 NONPROFIT & VOLUNTARY SECTOR Q. (SUPP. 1) 183, 193 (2000).

[49] Young Han Chun & Hal G. Rainey, *Goal Ambiguity in U.S. Federal Agencies*, 15 J. PUB. ADMIN. RES. & THEORY 1, 12 (2005).

[50] For a comparable discussion, see Celeste A. Wallander & Robert O. Keohane, *Risk, Threat and Security Institutions*, *in* IMPERFECT UNIONS: SECURITY INSTITUTIONS OVER TIME AND SPACE 21, 33 (Helga Haftendorn, Robert O. Keohane & Celeste A. Wallander eds., 1999) (suggesting that changing conditions may result in the evolution of existing security institutions).

[51] *See* Chun & Rainey, *supra* note 49, at 13.

[52] *See* SCOTT, *supra* note 26, at 352; *see also* Young, *supra* note 16, at 179 (discussing institutional robustness in light of changes over time).

can also skew results. For example, it may overshadow the overall picture of a court's effectiveness and may also fail to capture delayed outcomes attributable to operations during the period being assessed.[53]

Furthermore, as already noted, goals may shift throughout the life of an international court. Such shifts can result from its actual or perceived record of performance (which may reduce or raise constituency expectations) or from changes in the external environment (such as increases or decreases in court resources, the emergence of other domestic or international institutions with overlapping mandates, and the changing needs of relevant stakeholders).[54] In fact, longevity and adaptability often are important indications of organizational effectiveness.[55] In any event, when designating a time frame for assessing effectiveness, one must be sensitive to the possibility of goal shifting during that period.

A final problem concerning the selection of a time frame pertains to the dialectics between external and internal organizational stakeholders. In international law, the phenomenon of "runaway courts" has been observed.[56] One potential explanation is that, since the process of reformulating courts' mandates is typically slow and cumbersome (especially through explicit amendment of their constitutive instruments), courts take matters into their own hands when faced with new conditions or opportunities.[57] At some further time, however—which may be hard to pin down—the mandate providers may "catch up" and explicitly endorse the court's self-identified goals as their own, or may at least accept such goals by way of acquiescence.[58] Here, too, designating the time frame for assessing effectiveness is crucial because the nominal goals to be attained may be different before and after the mandate providers endorse the court's new goals.

Other Conceptual Problems

Two additional conceptual issues need to be discussed before dealing more directly with the application of the goal-based approach to international courts. First, we should be mindful of the distinction between goals and motives. The questions *what* an international court should

[53] *See* SCOTT, *supra* note 26, at 365 ("Some organizations insist that their full effects may not be apparent for long periods following their performance.").

[54] *See, e.g.*, JAMES G. MARCH, A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN 31 (1994); Donald A. Palmer & Nicole Woolsey Biggart, *Organizational Institutions*, *in* THE BLACKWELL COMPANION TO ORGANIZATIONS 259, 265–66 (Joel A. C. Baum ed., 2002).

[55] *But see* MARSHALL W. MEYER & LYNNE G. ZUCKER, PERMANENTLY FAILING ORGANIZATIONS 133 (1989) (suggesting that long-lasting organizations may be permanent failures; their longevity is attributed to their ability to capture diverse constituencies with interests that are served by the organization's continued existence).

[56] *See, e.g.*, Tom Ginsburg, *International Judicial Lawmaking*, *in* INTERNATIONAL CONFLICT RESOLUTION 155, 156 (Stefan Voigt, Max Albert & Dieter Schmidtchen eds., 2006); Guzman, *supra* note 5, at 179–80.

[57] A classic example for this phenomenon may be the European Court of Justice's ongoing effort to construe European Community/European Economic Community law as supranationalistic even when the European-integration process was deadlocked. *See, e.g.*, RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION 78–79 (1998); Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, *in* IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 173, 196 (Judith Goldstein & Robert O. Keohane eds., 1993).

[58] *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Declaration [No. 17] Concerning Primacy, Dec. 13, 2007, 2007 O.J. (C 306) 231, 256 ("The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law."); *see also* DEHOUSSE, *supra* note 57, at 142.

aim to achieve and *why* it should aim to achieve it do not always fully overlap. This discontinuity is especially likely to occur when the stakeholders involved in creating a court acted pursuant to interests that diverge from those of the institution itself or from those of other stakeholders. For example, politicians unable to resolve a complex problem (such as a civil war) may have created an international court for that purpose. Although political impotence and public relations concerns can explain why such a court was created (and perhaps also some of its structural attributes), these explanations are typically not part of the public justification for the creation and continued existence of the international court, and also not translated into a concrete set of expectations communicated to the court's officials in an effort to shape the institution's daily operations.

Since institutional goals operate over a long term and tend to be more transparent, accessible, and shared by more of the institution's constituencies than motives (which may be short term, hidden, unstated, and idiosyncratic), research into public organizations serving multiple constituencies over a long term, such as international courts, is likely to be more useful if it focuses on goals rather than motives as the primary yardstick for evaluating performance. Furthermore, given that goals are more general in that they lack the particularistic and potentially idiosyncratic character of motives, goals are more likely than motives to be shared across courts, thereby opening up possibilities for comparative research. (It would be wrong to infer, however, that motives are irrelevant to a goal-based approach to the study of international court effectiveness. The motives of the mandate providers may throw light on the circumstances in which its goals were set, which may, in turn, assist in determining how those goals are to be understood.)

A second conceptual problem involves the challenge of *piercing the institutional veil.* Since international courts, like all other organizations, are merely social constructs, one should arguably not focus on the goals of the organization as a whole, but rather on the goals of the individuals and subunits within the organization (for example, on the goals of individual judges or of court units, such as the office of the prosecutor). Such an investigation, if followed, may capture more accurately the actual social forces that shape organizational preferences.

Although I agree that organizations can be disaggregated into individuals and constitutive units that pursue their own distinct agendas,[59] the resulting ability to extend the proposed, goal-based approach to such entities does not negate the possibility of applying it to an international court per se. In fact, from a sociological point of view, one could argue that organizations serve as focal points for the distinct expectations of their members and subunits, as well as for those of their various mandate providers,[60] and that an organization's success in attaining its goals largely depends on its ability to generate a unity of purpose or a coalition of interests that transcends the idiosyncratic interests and goals of the individuals and subunits within it.[61]

[59] Scott describes organizations meeting this description as "organized anarchies." SCOTT, *supra* note 26, at 355.

[60] *Cf.* Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 186 (1982) (defining regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations").

[61] Larry L. Cummings, *Emergence of the Instrumental Organization, in* NEW PERSPECTIVES ON ORGANIZATIONAL EFFECTIVENESS 56, 60 (Paul S. Goodman & Johannes M. Pennings eds., 1977); SCOTT, *supra* note 26, at 354.

In any event, the social science literature amply supports the proposition that public organizations, which would include international courts, can be expected to meet certain ascertainable goals and that they consequently represent a legitimate unit for an effectiveness study.[62]

Broadening the Research Framework: Efficiency and Cost-Effectiveness

Much of the attraction in the proposed goal-based approach to the study of the effectiveness of international courts lies in its simplicity and in the strength of the normative argument that supports it—namely, that courts should execute their mandates. Even so, it must be acknowledged that the conception of institutional performance implicit in a goal-based effectiveness study is only a partial one. It fails to capture unintended or unexpected results, and it does not specifically take into account the costs invested in attaining the intended or expected goals. These issues are central, however, to a full understanding of organizational conduct and the assessment of organizational performance. An organization may be effective (in the sense of fulfilling all of its goals) but still be *inefficient* in the sense of generating considerable costs and negative externalities that may offset any benefits associated with goal attainment.[63] Similarly, an organization may fail to meet its designated goals and be ineffective in that sense, while nevertheless creating unforeseen or unintended benefits that compensate for its apparent failures—and thereby be acting *efficiently*.[64]

In addition to an organization's effectiveness in reaching particular goals, its cost-effectiveness can also be measured; that is, one can examine the relationship between inputs and outputs in order to form an opinion on its *relative* effectiveness and efficiency.[65] For example, the completion strategy leading to the approaching closure of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) appears to have been motivated in part by a perception that the Tribunals' continued operation had become too expensive to be justified by their diminishing returns.[66]

A comprehensive approach to assessing international court effectiveness (especially in the context of research projects geared towards facilitating judicial reforms) should thus take into account the unforeseen or underestimated consequences of courts' operations as well as the costs of goal attainment; that is, such an approach needs to explore both overall efficiency and

[62] *See* SCOTT, *supra* note 26, at 353; *see also* Yuchtman & Seashore, *supra* note 34, at 896.

[63] *See, e.g.*, Jacobson & Weiss, *supra* note 12, at 5 (noting that an antipollution treaty proscribing a particular pollutant may lead to use of more-polluting substitutes).

[64] *See* BARNARD, *supra* note 28, at 19–20.

[65] BART PRAKKEN, INFORMATION, ORGANIZATION AND INFORMATION SYSTEMS DESIGN: AN INTEGRATED APPROACH TO INFORMATION PROBLEMS 45 (2000) ("Effectiveness makes clear whether that target is reached while ignoring the means that were used.").

[66] *See, e.g.*, Dominic Raab, *Evaluating the ICTY and Its Completion Strategy*, 3 J. INT'L CRIM. JUST. 82, 84 (2005) ("It was reasonable to question the value for money derived from a war-crimes tribunal, absorbing a large amount of UN resources disproportionate to its geographical focus."); David Wippman, *The Costs of International Justice*, 100 AJIL 861, 862 (2006) (noting that "cost concerns played a major role in the adoption of the ICTY's 'completion strategy,' designed to bring the work of the Tribunal to a close by 2010"). Still, another explanation for adopting the completion strategy may have been that the two tribunals were perceived as having achieved much of their mission: they were effective. *See, e.g.*, Raab, *supra*, at 84 ("[P]rogress in the states of the former Yugoslavia suggested that the ICTY could conclude its activities claiming some credit as a motor for political reform in the region. Rightly or wrongly, this gave rise to increasing pressure for some degree of finality to the ICTY obligations of the states of the former Yugoslavia.").

cost-effectiveness.[67] At a higher level of abstraction, by introducing questions concerning organizational efficiency and cost-effectiveness into the analysis of performance, one is led to consider the further question of whether the resources invested in establishing and maintaining an international court could have been employed to advance other, alternative projects that may have generated better consequences[68] (for example, by attempting to settle certain disputes by nonjudicial means). Hence, expanding the research framework to encompass the efficiency and cost-effectiveness of international courts may facilitate not only the discussion of judicial performance and outcomes, but also the justifications for the very existence of international courts.[69]

The limited ability of a goal-based effectiveness study to capture certain chronic failures in judicial performance (such as inability to resolve potentially violent conflicts) also favors a resort to efficiency and cost-effectiveness analysis. If, over time, a particular court fails to attain its prescribed goal, the mandate providers' expectations may decrease, and a new, less ambitious goal might be set, whether explicitly or implicitly, for future operations. Paradoxically, a constantly disappointing international court might thereby become more effective over the years since the court will be more likely to meet the resulting, more modest expectations. In such circumstances, efficiency and cost-effectiveness become more important as evaluative tools.

The Use of Operational Categories

Another potentially useful taxonomy found in the social science literature dealing with organizational effectiveness involves the utilization of operational categories to describe three aspects of judicial operations: *structure* (or *input*), *process*, and *outcomes*.[70] According to the rational-system approach, an examination of effectiveness can consider the following: whether the tangible and intangible *resources* or *assets* available to the organization actually enable it to meet its objectives (structure);[71] whether organizational processes facilitate the aim of the organization (process);[72] and whether the outputs and their social effects are consistent with the organization's goals (outcomes).[73]

[67] PETER F. DRUCKER, MANAGING THE NONPROFIT ORGANIZATION: PRINCIPLES AND PRACTICES 198 (2006) (explaining that efficiency is doing things right, whereas effectiveness is doing the right things). *But see* Young, *supra* note 16, at 164 (describing inefficiency as pareto suboptimal performance).

[68] This level of analysis is sometimes referred to as *macro-quality assessment*. Uwe E. Reinhardt, *Proposed Changes in the Organization of Health-Care Delivery: An Overview and Critique*, 51 MILBANK MEM'L FUND Q. 169 (1973).

[69] Efficiency and cost-effectiveness may also be important considerations in explaining changes in judicial mandates. If, over time, a certain judicial activity designed to attain one of the court's goals generates significant negative externalities or proves to be too costly to justify the efforts to attain it, the mandate providers may renounce that goal or try to deprioritize it. If, however, the court's practice suggests that some of its activities generate significant unforeseen benefits, external goal-setters may seek to incorporate such outcomes within the court's goals or to prioritize the goal whose attainment is generating these side benefits.

[70] *See, e.g.*, PAMELA S. TOLBERT & RICHARD HALL, ORGANIZATIONS: STRUCTURES, PROCESSES AND OUTCOMES 17 (10th ed. 2008).

[71] Patricia Ingraham & Amy Donahue, *Dissecting the Black Box Revisited: Characterizing Government Management Capacity*, *in* GOVERNANCE AND PERFORMANCE: NEW PERSPECTIVES 292, 293–97 (Carolyn J. Heinrich & Laurence E. Lynn Jr. eds., 2000).

[72] *Id.* at 303.

[73] *See* RAINEY, *supra* note 36, at 129; *see also* TOLBERT & HALL, *supra* note 70, at 187.

Although only the third set of questions (dealing with outcomes) is directly relevant to evaluating whether international courts actually meet their goals—or, in other words, function as an *effective* judicial bodies—measuring the outcomes that they produce may be extremely difficult. The goals of public organizations, such as courts, tend to be ambiguous, and the public goods that they generate, such as justice, peace, and legal certainty, are hard to quantify (by contrast, private organizations typically generate quantifiable profits or losses). The performance of public organizations, such as courts, also tends to be more dependent on their external environment than that of private organizations, thus further complicating cause-and-effect analyses and calculations of efficiency.[74]

A better understanding of the structure and process of international courts can therefore, by way of reverse engineering, help in assessing the feasibility of effective outcomes;[75] for example, an international criminal court that lacks an outreach department or that conducts minimal outreach activities is unlikely to facilitate the changes in public opinion necessary to realize its reconciliation mandate.[76] Moreover, exploring judicial structures and processes may help in diagnosing problems—which may, in turn, explain a court's suboptimal performance. Finally, structural and process indicators may provide important insights into an international court's cost-effectiveness, facilitating a determination, for example, of whether the prescribed goals might be achieved with fewer resources or whether they require the adoption of better, potentially more expensive procedures.[77]

Evaluation of organizational structure, process, and outcomes can be facilitated by the use of specific quantitative and qualitative indicators that serve as proxies for measuring organizational effectiveness. The problem, however, is that the number of potential indicators is very high. A recent meta-analysis looking into the methodology applied in studies assessing the effectiveness of public organizations found no less than 874 possible dependent variables, which the researchers categorized as relating to different operational categories (structure, process, or outcomes).[78] While many of the indicators thereby identified would be of little use in evaluating international courts, some indicators for assessing the effectiveness of domestic courts[79] would be helpful. Indicators would also need to be identified for measuring and assessing any unplanned or unforeseen benefits and costs associated with the operation of international courts;[80] as noted above, these factors would need to be taken into account in any comprehensive assessment of performance.

[74] Forbes & Lynn, *supra* note 36, at 9.

[75] *See* Jessica E. Sowa, Sally C. Selden & Jodi R. Sandfort, *No Longer Unmeasurable? A Multidimensional Integrated Model of Nonprofit Organizational Effectiveness*, 33 NONPROFIT & VOLUNTARY SECTOR Q. 711, 715 (2004) ("To improve outcomes, organizations need to understand how their structures and processes enable or hinder those outcomes.").

[76] *See, e.g.*, Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, 3 J. INT'L. CRIM. JUST. 950 (2005).

[77] *See* MOORE, *supra* note 30, at 33–36.

[78] *See* Forbes & Lynn, *supra* note 36, at 11.

[79] Some research projects, conducted at both national and international levels, have developed standards and criteria for assessing the effectiveness of domestic courts. These initiatives include THE INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE (2009), *available at* http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf (looking at seven areas of court performance: court management and leadership; court policies; human, material, and financial resources; court proceedings; client needs and satisfaction; affordable and accessible court services; and public trust and confidence); European Commission for the Efficiency of Justice, Scheme for Evaluating Judicial Systems 2010–2012 Cycle 3–46, Council of Europe Doc. CEPEJ(2010)11 (2011), *at* https://wcd.

II. THE CONTOURS OF A GOAL-BASED ANALYSIS OF INTERNATIONAL COURT EFFECTIVENESS

Identifying the Goals of International Courts

Applying to international courts the social science methods used for measuring the effectiveness of public organizations may provide us with new research possibilities regarding international law and international institutions. Most significantly, the emphasis on organizational goals in assessing effectiveness requires us to identify the specific goals of each international court—which itself would advance our understanding of the roles that such judicial institutions could and should play. As explained below, my approach involves an institution-by-institution analysis of effectiveness, as opposed to the "thick brush" approach that much of the extant legal literature uses to describe the goals of international courts.

Identifying a Key Constituency: The Mandate Providers

If, according to the rational-system approach, an effective organization is one that meets its goals, then assessing the effectiveness of international courts necessarily requires the ascertainment of those goals. Before identifying the goals of international courts, however, one needs to select the goal setters whose choices and expectations should inform the analysis. International courts involve a multiplicity of stakeholders—states, international organizations, court officials, members of the legal community, the general public, and others—that typically possess divergent interests and wishes. It is therefore vital when discussing goals, or "desired outcomes," to clarify in whose eyes certain designated outcomes are seen as desirable. In other words, the identification of the relevant goal-setters must precede the identification of organizational goals.[81]

The present research framework envisions a series of policy-oriented research projects that are designed to offer one dominant category of stakeholders—the *mandate providers*—methodological tools to assess whether courts meet their expectations. The term *mandate providers* alludes to the international organizations and member states that jointly create, fund, and monitor international courts, and that exercise certain powers of control over their operations. Such mandate providers are collectively responsible for formulating and periodically revising the courts' legal mandates, typically through a treaty or a resolution by an international organization. They also oversee the performance of the courts that they have created, and may signal, formally or informally, their support of, or displeasure with, strategic choices that the

coe.int/ViewDoc.jsp?id=1796345&Site=COE (looking at demographic and economic data; access to justice and courts; organization of the court system; fair trials; careers of judges and prosecutors; lawyers; alternative dispute resolution; enforcement of court decisions; notaries; and functioning of the justice system); THE NATIONAL CENTER FOR STATE COURTS, COURTOOLS, *at* http://www.ncsconline.org/D_Research/CourTools/index.html (measuring access and fairness; clearance rates; time to disposition; age of pending caseload; trial date certainty; reliability and integrity of case file; collection of monetary penalties; effective use of jurors; satisfaction of court employees; and cost per case); HOW TO ASSESS QUALITY IN THE COURTS?, *at* http://www.oikeus.fi/uploads/6tegx.pdf (focusing on judicial process; judicial decisions; treatment of parties and public; promptness of proceedings; competence and professional skills of judges; and organization and management of adjudication).

[80] JAMES D. THOMPSON, ORGANIZATIONS IN ACTION: SOCIAL SCIENCE BASES OF ADMINISTRATIVE THEORY 94 (1967).

[81] *Cf., e.g.*, Sowa et al., *supra* note 75, at 713.

courts have made.[82] In extreme cases, the mandate providers may even terminate the operation of a court whose existence is no longer deemed effective, efficient, or cost-effective.

The focus on mandate providers is warranted, first and foremost, from a realistic perspective that seeks to identify influential benchmarks that can explain and predict the actual practices of international courts. In political terms, the goals set by mandate providers often constitute the principal benchmarks against which courts' records of achievement will be tested, and the judgment of that particular constituency will influence courts' institutional welfare and even determine whether particular courts continue in operation.[83] Moreover, given the political and legal controls that mandate providers exercise over the resources available to international courts, effectiveness studies conforming to their perspectives, rather than those of others, may facilitate reforms in the mandate, structure, and process of existing courts.

The selection of mandate providers as the focal point of the analysis can be justified even from a normative perspective. First, the proposition that international courts should faithfully execute their mandates is straightforward and can be supported by both the principal-agent and trusteeship theories explaining the relationship between the mandate providers and international courts; that is, mandate providers delegate to courts the powers to act as their "long arm" or as independent guardians of their collective interests.[84] Both of these conceptions of the relationship between mandate providers and courts rely on the presumptive ability of state representatives to speak and act on behalf of nations and their citizenry—which confers a significant degree of legitimacy on international courts.[85] By the same token, the goals established through this legitimacy-conferring process need to be afforded some priority over the goals identified by the courts' own judges.

Second, the mandate providers for international courts typically exercise their powers of mandate creation, modification, and termination through a deliberative process involving some degree of transparency.[86] Given that the results of such deliberations often need to be publicly justified and articulated, the goal-setting process undertaken by the mandate providers may enjoy more legitimacy than other goal setting-processes taking place at the international level; for example, internal judicial deliberations or bilateral consultations among diplomats about the goals of international courts may be both less public and not as fully articulated or

[82] *See, e.g.*, Victoria Donaldson, *The Appellate Body: Institutional and Procedural Aspects*, *in* I THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1277, 1332–33 (Patrick F. J. Macrory, Arthur E. Appleton & Michael G. Plummer eds., 2005) (discussing attempts by the WTO's Dispute Settlement Body to convey to the WTO's Appellate Body its dissatisfaction with the latter's position on the admissibility of amicus briefs).

[83] Thus, Helfer and Slaughter are correct, in my view, in referring to international courts as not fully independent, but rather as operating within a context of "constrained independence." Helfer & Slaughter, *supra* note 8, at 955.

[84] For a survey of the relevant literature on international courts as agents or trustees, see Hafner-Burton et al., *supra* note 16; *see also* Karen J. Alter, *Delegation to International Courts and the Limits of Re-contracting Political Power*, *in* DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 312 (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006).

[85] *See, e.g.*, Christian Reus-Smit, *The Politics of International Law*, *in* THE POLITICS OF INTERNATIONAL LAW 14, 35–36 (Christian Reus-Smit ed., 2004) (comparing the community consent-based legitimacy of domestic and international law).

[86] *See, e.g.*, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1992), UN Doc. S/25704 (May 3,1993) (explaining the rationale for creating the ICTY and for its main features); Explanatory Report, *supra* note 38.

justified.[87] From a methodological perspective, the mandate providers' public articulation and justification of goals make research concerning such goals much more straightforward than in the case of more opaque, fragmented goal-setting processes.[88]

Finally, since mandate providers for international courts need to attract broad support among domestic constituencies for the mandated goals, such goals are more likely to coincide, and are presumptively in accord, with commonly held perceptions of the public good and the traditional role of international courts in contributing to it. (Note, however, that the effectiveness analysis of this goal-based approach presented here is indifferent regarding the social or political desirability of specific judicial goals per se.)

Although this article focuses on mandate providers as the dominant category of goal setters, the model presented here is not limited to that means of determining goals or desired outcomes. Parallel research projects focusing on the expectations of other international court constituencies—internal or external—may also be envisioned. In addition, even research focusing on mandate providers cannot ignore the expectations of other constituencies. The mandate providers themselves may encourage courts to address the needs and expectations of certain groups (such as human rights victims).[89] Furthermore, a court's ability to satisfy the goals set by its mandate providers may be compromised if some other key constituencies become disappointed and disillusioned with the court.[90] Hence, to the degree that mandate providers' goals refer to, depend on, or overlap with the outcomes desired by other constituencies, the latter will constitute part of our investigation.

Identifying the Goals of the Mandate Providers

My decision to focus on the goals set by mandate providers implies that I will concentrate on one subcategory of external goals and not on the internal goals set by courts themselves. Other goal categories mentioned above (hierarchical level and method of articulation) may be useful in identifying, organizing, and prioritizing the goals set by the mandate providers.

Particular attention needs to paid to *unstated goals*—that is to say, to goals that courts' official mandates or internal guidelines fail to establish (explicitly or implicitly) but that have the actual or presumptive support of the mandate providers. Since unstated goals often reflect what may be regarded as the inherent goals of international courts (for example, interpreting norms or

[87] *See, e.g.*, Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions, in* LEGITIMACY IN INTERNATIONAL LAW, *supra* note 22, at 25, 54 (discussing the legitimacy conferring effect of public justifications).

[88] For example, judicially set goals may be less than uniform since individual judges may have idiosyncratic conceptions of the court's goals—ones not shared by the bench as a whole. For a discussion of an analogous problem, see Tullio Treves, *Aspects of Legitimacy of Decisions of International Courts and Tribunals, in* LEGITIMACY IN INTERNATIONAL LAW, *supra* note 22, at 169, 175, 186–87 (discussing the possibility that judges may differ as to what would constitute legitimacy-enhancing strategies).

[89] For example, one justification for creating international criminal courts has been the need to satisfy crime victims' desire for the sense of closure that would be achieved through telling their stories and punishing the guilty. *See, e.g.*, Mirjan Damaska, *What is the Point of International Criminal Justice?,* 83 CHI.-KENT L. REV. 329, 333–34 (2008).

[90] *See, e.g.*, CARLA DEL PONTE & CHUCK SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 93 (2009) (discussing how the ICTR's ability to perform its task might be affected by the Rwandan goernment's refusal to cooperate with the ICTR in the aftermath of the *Barayagwiza* fiasco).

legitimizing the exercise of international governmental power),[91] they represent some of the mandate providers' most important expectations concerning the judicial institutions that they oversee.

Although the internal goals established by the courts themselves (judges, registrars, prosecutors, and so on) are not an integral part of our inquiry, they are also not completely irrelevant. First, the goals of international courts, as understood by their officials, are often a mirror image of the goals set by the mandate providers and communicated by them to courts, whether explicitly, implicitly, or as unstated objectives. Identifying the internal goals of international courts may therefore help us to identify and comprehend their external goals.

Second, courts are well situated to identify new goals that are related to their mandates and that would fall within their own institutional capabilities, of which they have intimate knowledge. Among other things, courts may react quicker than mandate providers to changing circumstances (the mandate providers presumably formulated their expectations before the courts began to operate, when the actual challenges to be encountered remained uncertain and hypothetical). In such situations, as was noted earlier, mandate providers may choose to respond to runaway courts by embracing or accepting, whether explicitly or tacitly, the new missions that such courts have set for themselves.[92] In sum, identifying internal goals may help us in tracking the future goals of the mandate providers themselves.

Finally, the development of certain internal goals may sometimes hinder the achievement of the mandate providers' goals. For example, a criminal court might expend considerable resources in pursuing the self-identified goal of providing a historical narrative of the conflict at hand, thereby compromising the mandate providers' goal of deterring further criminal acts (and as quickly as possible).[93] In these cases, identifying internal goals may provide some explanation as to why the relevant external goals remain unsatisfied, and facilitate reforms in judicial structures and processes.

General and Specific Goals of International Courts

Having selected the mandate providers as the principal category of goal setters for the purpose of my research program, and having discussed different goal categories, we are in a position to discuss some of the actual goals of particular international courts. (A comprehensive mapping of the goals of all international courts far exceeds the bounds of the present article.) Indeed, one of the significant contributions of a goal-based approach to the study of judicial effectiveness is to clarify that goal identification is necessarily a meticulous, institution-specific endeavor—one that, in our case, requires that we identify the goals designated by particular international courts' mandate providers, as modified over time. That is, one cannot specify a

[91] *See, e.g.*, Iris Canor, *The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale de Sena and Maria Chiara Vitucci*, 20 EUR. J. INT'L L. 870, 880 (2009) (suggesting that international courts legitimize international rules and the rule of law); Treves, *supra* note 88, at 175 (describing legitimization as inherent in judicial function).

[92] See, for example, the Dispute Settlement Body's acceptance of the Appellate Body's allegedly self-identified goal of harmonizing trade law with general international law. Donald McRae, *Treaty Interpretation and the Development of International Trade Law by the W TO Appellate Body*, *in* THE W TO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 360, 369–71 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., 2006).

[93] *See* Damaska, *supra* note 89, at 341.

one-size-fits-all list of goals and also cannot speak in general about the overall effectiveness of international courts.

Despite the impossibility of making a single list of goals for all international courts, the initial mapping exercises that my research team conducted suggest that some ultimate ends—goals specified at a high level of abstraction—may be shared by most, if not all, international courts. The existence of such shared goals is unsurprising since the very choice to establish a court invokes common preconceptions about judicial structures, procedures, and functions. Thus, for example, all courts are manned by more or less independent judges, receive legal pleadings from parties, and are expected to resolve disputes over the interpretation of legal texts, the relevant facts, and the application of the law to those facts. Institutions lacking these features would not classified as courts [94] and would likely not produce the valuable, reasoned outcomes that courts typically generate.

Another reason for the existence of some similarities in goals is that international adjudication has developed through a process of replication and adaptation.[95] For example, the International Tribunal for the Law of the Sea has been largely modeled after the International Court of Justice (ICJ);[96] to a lesser extent, the ICJ also influenced the structure and procedures of the European Court of Human Rights,[97] which has itself been used as a model by the Inter-American Court for Human Rights and the African Court of Human Rights;[98] and the various regional-integration courts have been largely modeled after the Court of Justice of the European Union.[99] The ICC and ICTR have been modeled after the ICTY,[100] which was itself was modeled after the International Military Tribunal in Nuremberg.[101] These historical connections between courts suggest some degree of goal emulation across judicial institutions.

One can identify four generic goals (qualifying under our terminology as ultimate ends) that all or almost international courts have been encouraged by their mandate providers to achieve:

— *Promoting compliance with the governing international norms (primary norm compliance).* Most international courts have been constituted through particular interstate treaties, whose norms the courts are then required to interpret and apply. Thus,

[94] *Cf.* Belilos v. Switzerland, 132 Eur. Ct. H.R. (ser. A), para. 64 (1988).

[95] Hafner-Burton et al., *supra* note 16 (alluding to path dependence in institutional design).

[96] Alexander Yankov, *The International Tribunal of the Law of the Sea and the Comprehensive Dispute Settlement System of the Law of the Sea, in* THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE 33, 37 (P. Chandrasekhara Rao & Rahmatullah Khan eds., 2001).

[97] *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 46, ETS No. 5, 213 UNTS 222 [hereinafter European Convention] (introducing an optional jurisdiction clause); *id.*, Art. 43 (introducing the ad hoc judge system).

[98] *See, e.g.*, SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 31 (1997); VINCENT O. ORLU NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS 58, 259 (2001).

[99] *See, e.g.*, KATRIN NYMAN METCALF & IOANNIS PAPAGEORGIOU, REGIONAL INTEGRATION AND COURTS OF JUSTICE 20 (2005); Carl Baudenbacher, *Judicialization: Can the European Model Be Exported to Other Parts of the World?*, 39 TEX. INT'L L.J. 381, 397 (2004).

[100] *See, e.g.*, Gregory P. Noone & Douglas William Moore, *An Introduction to the International Criminal Court,* 46 NAVAL L. REV. 112, 116 (1999); Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court,* 25 N.C. J. INT'L L. & COM. REG. 551, 592 (2000).

[101] *See, e.g.*, Madelaine Chiam, *Different Models of Tribunals, in* THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OR INSTITUTIONALISED VENGEANCE? 205, 206 (David A. Blumenthal & Timothy L. H. McCormack eds., 2008); Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79, 80 (2009).

courts are often an institutional counterpart to normative densification of international relations in certain areas of international law,[102] and whether stated by the mandate providers explicitly or not,[103] investing international courts with a core of law-interpretation and law-application functions has important consequences. First, it augments the credibility of the member states' treaty undertakings by raising the prospects of subsequent compliance through courts' monitoring of conduct, their identification of violations, and their issuing orders for a return to compliance or for other corrective measures;[104] and second, it strengthens the compliance pull of the norms in question through courts that generate information on the contents of the applicable norms[105] and that also adapt existing norms to changing or unforeseen circumstances. At a more general level, international courts, such as the ICJ and its predecessor, the Permanent Court of International Justice, have been created as part of an ideology-driven attempt to strengthen the rule of law in international affairs. Indeed, some of their constitutive instruments—the Charter and Covenant, respectively—indirectly allude to the expectation that the new institutions would contribute to establishing an international rule of law.[106]

— *Resolving international disputes and specific problems (dispute resolution or problem solving).* International courts are expected to help resolve specific disputes and problems whose prolongation or exacerbation may harm international relations, cooperative structures, and peaceful coexistence, and one can find mandate-provider statements to that effect.[107] Even when such expectations are not spelled

[102] See, for example, Georges Abi-Saab's *law of legal physics*: "To each level of normative density, there corresponds a level of institutional density necessary to sustain the norms[.]" Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919, 925 (1999).

[103] For an explicit allusion to the goals of promoting norm compliances, see, for example, European Convention, *supra* note 97, Art. 19 ("To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights . . . ."); Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 UNTS 90 [hereinafter Rome Statute] ("*Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, . . . *Determined* to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court, ... *Resolved* to guarantee lasting respect for and the enforcement of international justice . . . ."); Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226, 1227 (1994) [hereinafter DSU] ("The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."); Treaty of the South African Development Community, Art. 16(1), Aug. 17, 1992 ("The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it."), *at* http://www.sadc.int/index/browse/page/120; William J. Davey, *The WTO Dispute Settlement Mechanism* (III. Public Law and Legal Theory Research Paper No. 03-08, 2003), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=4199432 (stating that "[c]learly the goal of the dispute settlement system should be to promote compliance with WTO rules").

[104] GUZMAN, *supra* note 22, at 51.

[105] FRANCK, *supra* note 23, at 61–62. Guzman regards "information dissemination" as the core function of international tribunals. Guzman, *supra* note 5, at 179–80; *see also* GUZMAN, *supra* note 22, at 134.

[106] *See, e.g.*, UN Charter, pmbl. ("We the Peoples of the United Nations determined . . . to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . . ."); League of Nations Covenant, pmbl. ("The High Contracting Parties, In order to promote international co-operation and to achieve international peace and security . . . by the firm establishment of the understandings of international law as the actual rule of conduct among Governments . . . .").

[107] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, Feb. 19, 2010, Action Plan, sec. A1 ("The Conference reaffirms the fundamental importance of the right of individual

out, however, the historical development of international courts in the context of the pacific dispute settlement movement strongly supports the view that dispute settlement and problem resolution are unstated goals of mandate providers.[108]

— *Contributing to the operation of related institutional and normative regimes (regime support).* Since most international courts operate within the framework of specific regimes (such as the European Union, WTO, or Council of Europe), the institutional relationships involved are crucial to a full understanding of the courts mandated by those organizations. Arguably, "regime courts" have a unique *missionsbewusstsein* (built-in bias) and may be expected, like other regime institutions, to contribute to the goals of the overarching regimes in which they operate; such expectations may be reflected in the courts' explicit, implicit, or unstated goals.[109] At a high degree of abstraction, one may claim that at least some mandate providers expect international courts to support through their operations the general international legal system, with the consequence that the latter's systemic welfare should be a matter of concern for international courts.[110]

— *Legitimizing associated international norms and institutions (regime legitimization).* More broadly, international courts, like their national counterparts, are expected to confer legitimacy on the social institutions or political systems that established

petition as a cornerstone of the Convention system which guarantees that alleged violations that have not been effectively dealt with by national authorities can be brought before the Court."); Rome Statute, *supra* note 103, pmbl. ("*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished . . . , *Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . . *Determined* to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole . . . ."); DSU, *supra* note 103, Art. 3.1 ("The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.").

[108] *See, e.g.*, JAMES BROWN SCOTT, THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS: REPORT AND COMMENTARY 49 (1920) ("The field of peaceful settlement is to be enlarged, or rather a new agency is to be created in this field, to the end that disputes which parties may wish to have settled by due process of law, that is to say, by the application of the principles of justice which we call rules of law, may be submitted to a court of justice, instead of a special or temporary tribunal of arbitration, to have them settled 'on the basis of respect for law.'").

[109] *See, e.g.*, African Union, Protocol on the Statute of the African Court of Justice and Human Rights, pmbl., July 1, 2008, *at* http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm ("The Member States of the African Union, Parties to this Protocol, . . . *Firmly Convinced* that the establishment of an African Court of Justice and Human Rights shall assist in the achievement of the goals pursued by the African Union . . . ."); Agreement Establishing the Caribbean Court of Justice, pmbl., Feb. 14, 2001, *at* http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf ("The Contracting Parties, . . . *Aware* that the establishment of the Court is a further step in the deepening of the regional integration process . . . ."); DSU, *supra* note 103, Art. 3.2 ("The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."); *see also* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, ITLOS Case No. 17, para. 30 (Feb. 1, 2011) ("The [Seabed Disputes Chamber] is mindful of the fact that by answering the questions it will assist the Council in the performance of its activities and contribute to the implementation of the Convention's regime.").

[110] *See, e.g.*, Rome Statute, *supra* note 103, pmbl. ("The States Parties to this Statute, . . . *Resolved* to guarantee lasting respect for and the enforcement of international justice . . . ."); International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group on the Fragmentation of International Law, Finalized by Martti Koskenniemi, at 206–11, UN Doc. A/CN.4/L.682 (2006) (discussing the principle of "systemic integration" and the expectations that international courts shall resort thereto).

them,[111] and to partake in advancing the rule of law in international relations.[112] Although such generic goals typically remain unstated, one may consider them to be the raison d'être for creating international courts to begin with or for preferring judicial avenues to other institutional approaches to certain policy problems.[113] For some courts, however, their legitimacy-conferring function represents an intermediate goal, facilitating the attainment of the other, ultimate ends.[114]

Beyond these generic goals, international courts are expected to promote other goals, which sometimes give meaning to their ultimate ends but also sometimes go beyond their scope. Such goals may be idiosyncratic in nature—tailored to the needs of a specific set of mandate providers—or more generally applicable to a family of international courts that have been established by similarly situated mandate providers (for example, human rights courts, economic-integration courts, or international criminal courts). Thus, for example, the European Free Trade Association Court was invested with the unique role of harmonizing European Economic Area law with European Union law;[115] the WTO dispute settlement system was created in order to discourage unilateralism;[116] and the goals of international criminal courts tend to encompass political aims, such as promoting peace and security, reconciliation, or stability.[117] What needs to be remembered, however, is that different courts may prioritize different

[111] *See, e.g.*, FRANCK, *supra* note 23, at 61–62; Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 407 (2006).

[112] *See, e.g.*, LAUTERPACHT, *supra* note 22, at 425–26; Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 791 (1999); Anne Peters, *Global Constitutionalism Revisited*, 11 INT'L LEGAL THEORY 39, 65 (2005).

[113] On the relationship between goal choice and institution choice, see KOMESAR, *supra* note 4, at 49.

[114] *See, e.g.*, Andreas Paulus, *International Adjudication*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 207, 216 (Samantha Besson & John Tasioulas eds., 2010) (reviewed in this issue of the *Journal*).

[115] Agreement on the European Economic Area, Art. 6, May 2, 1992, 1992 O.J. (L 1) 3; Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, Art. 3, Jan. 31, 1994, 1994 O.J. (L 344) 1.

[116] *See* DSU, *supra* note 103, Art. 23 (requiring member states to resolve all disputes through the DSU, rather than on their own); 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992), at 2777–79, 2810 (Terence P. Stewart ed., 1993) [hereinafter GATT URUGUAY ROUND]; PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 171–72 (2d ed. 2008); Keisuke Lida, *Is WTO Dispute Settlement Effective?*, 10 GLOBAL GOVERNANCE 207, 215 (2004) ("Another purpose for which the WTO dispute settlement system was constructed was to fend off unilateralism."); McRae, *supra* note 5, at 4–5 (WTO dispute settlement "was to provide an obligatory mechanism that would channel the behavior of states that wished to complain about non-compliance by others. That was how Section 301 was to be controlled. The United States was not going to be able to make unilateral determinations of WTO violations as it had done in the past in relation to GATT. It would have to go through WTO dispute settlement. This was accomplished by the prohibition in DSU Article 23 against unilateral action by WTO Members.").

[117] The Security Council's resolution establishing the ICTY stated that the Security Council was "[c]onvinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would . . . contribute to the restoration and maintenance of peace." SC Res. 827, pmbl. (May 25, 1993). Similarly, with regard to establishing the ICTR, the Security Council declared that it was "[c]onvinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would . . . contribute to the process of national reconciliation and to the restoration and maintenance of peace." SC Res. 955, pmbl. (Nov. 8, 1994). *See also* Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, pmbl. (2003), *at* http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf ("Whereas . . . the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security . . . .").

generic or special goals, and that even a single court may prioritize some goals over others in different sectors of its operations.[118] Hence, only a contextualized, court-specific analysis can *provide comprehensive evaluation of the actual performance of an international court—with* little possibility of making that specific assessment part of a broader, overall assessment of international courts.[119]

Mapping the goals to be pursued by different international courts (which is itself a major enterprise) represents only one stage in establishing benchmarks for assessing court effectiveness. Future research projects need to develop a methodology for identifying, where possible, quantitative and qualitative means for assessing the degree to which relevant goals are attained (including when measured by outcome indicators)—and in ways that would meet valid statistical and analytical standards.[120]

Measuring Judicial Outcomes

Differences between outputs and outcomes. The key to assessing the effectiveness of international courts according to the rational-system or goal-based approach involves evaluation of judicial outcomes. While some outputs generated by international courts are relatively easy to capture (for example, the number of decisions issued by courts within a given time frame), others raise more complicated evaluation problems (such as the development of a coherent jurisprudence). In any event, one needs to distinguish between *outputs*, which are the direct products of an organization's operations (for example, decisions, speeches, and legal briefs), and *outcomes*, which are the effects of such outputs on the external state of the world.[121] Although measuring outputs may assist us in evaluating outcomes, application of a goal-based approach

In the third paragraph of Rome Statute's preamble, the state parties "[r]ecogniz[e] that such grave crimes threaten the peace, security and well-being of the world." Rome Statute, *supra* note 103, pmbl. The Security Council's Chapter VII referrals are one of the bases for the ICC to exercise its jurisdiction, and the inclusion of the crime of aggression under the ICC's jurisdiction may also reflect that one of the ICC's goals is to promote peace and security. *See id.*, Art. 13(b). Note, however, that Article 16 of the Rome Statute assumes that there may be circumstances in which the criminal proceedings may be undesirable from the international peace and security perspective. *Id.*, Art. 16 ("No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter . . . has requested the Court to that effect; that request may be renewed by the Council under the same conditions."). For a discussion of the tension between criminal justice and achieving peace and reconciliation, see Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209 (2008); Jens David Ohlin, *Peace, Security, and Prosecutorial Discretion, in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 185 (Carsten Stahn & Göran Sluiter eds., 2009); Danilo Zolo, *Peace Through Criminal Law?*, 2 J. INT'L CRIM. JUST. 727 (2004).

[118] For example, when exercising its advisory competence, the ICJ prioritizes its role in supporting norms and the international legal regime over its dispute settlement functions (which are more prominent when the Court exercises contentious jurisdiction).

[119] *See* Guzman, *supra* note 5, at 177 ("Highly contextualized analysis can generate a more accurate portrait of a single institution but makes it difficult to extract lessons applicable across a range of dispute settlement strategies."); Young, *supra* note 16, at 163 (indicating that "the effectiveness of institutional arrangements differs from one issue-area to another, . . . one spatial setting to another, or one time period to another").

[120] Even when quantitative methods are selected, a supplementary, qualitative analysis may be needed in order to provide a meaningful context for any quantitative findings. *See, e.g.*, Alec Stone Sweet & Thomas L. Brunell, How the European Union's Legal System Works—and Does Not Work: Response to Carruba, Gabel, and Hankla 18 (October 2010) (unpublished manuscript), *at* http://www.works.bepress.com/alec_stone_sweet/36) (noting the need to supplement quantitative work with "thicker, descriptive analyses").

[121] Geert Bouckaert & Wouter van Dooren, *Performance Measurement and Management in Public Sector* Organizations, *in* PUBLIC MANAGEMENT AND GOVERNANCE 130 (Tony Bovaird & Elke Löffler eds., 2d ed. 2009)

to the study of international court effectiveness requires us to juxtapose goals (or desired ends) and outcomes (or actual ends), not outputs. From a goal-based perspective, outputs are mere instruments or means to attain social outcomes, and thus represent a less important object of study than outcomes.

Quantifying certain intangible outcomes—such as an international court's normative impact on the internal laws and practices of the state parties; its normative contribution to a specific legal regime, general international law, or the harmonization of different legal regimes; or its actual impact in increasing deterrence, strengthening compliance with international norms, or promoting social processes such as national reconciliation—is difficult. And since any such changes occur within complicated political and legal environments, isolating a court's contribution (or, in other words, identifying the exact chain of causation) is hard to ascertain (although methods of process tracing may go some way toward identifying relevant causes and effects).[122] Nevertheless, the proposed analytical framework can facilitate the drawing of comparisons between different courts operating in somewhat analogous environments, between national and international courts fulfilling comparable functions, and between the records of a single court's performance during different periods, thereby offering a meaningful perspective for evaluating relative effectiveness.[123] For that to occur, however, suitable methodological tools would need to be developed for the purpose of identifying, measuring, and analyzing indicators of outcome effectiveness in relation to different international courts.

Although the precise measurement of outcomes (or even intermediate outcomes)[124] is difficult, the social science literature suggests that applying the rational-system approach can significantly improve our understanding of public organizations' performance, along with their promise and their limits. Such improved understanding may also be facilitated by an increased awareness by courts, stakeholders, and academic critics of the need to engage in discussions about international courts' goals and the likelihood of attaining them.[125]

("Outcomes are events, occurrences, or changes in conditions, behaviour or attitudes. Outcomes are not what the programme or organization itself did, but the consequences of what the programme or organization did.").

[122] For a discussion of process tracing, see ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES 205 (2005). For examples of recent empirical studies claiming to identify effects of international courts on national legal systems, see SIGALL HOROVITZ, SIERRA LEONE: INTERACTION BETWEEN INTERNATIONAL AND NATIONAL RESPONSES TO THE MASS ATROCITIES 58 (2009), *available at* http://www.domac.is/media/domac/DOMAC3-SH-corr..pdf (claiming that the witness protection program in Sierra Leone has been facilitated by the Special Court for Sierra Leone); SIGALL HOROVITZ, RWANDA: INTERNATIONAL AND NATIONAL RESPONSES TO THE MASS ATROCITIES AND THEIR INTERACTION 66 (2010), *available at* http://www.domac.is/media/veldu-flokk/DOMAC6–Rwanda.pdf (attributing, among other things, the revocation of the death penalty in Rwanda to the ICTR's influence); SILVIA BORELLI, THE IMPACT OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS IN THE CONTEXT OF WAR CRIMES TRIALS IN BOSNIA AND HERZEGOVINA 23 (2009), *available at* http://www.domac.is/media/domac/DOMAC5–Impact-of-the-ECHR-on-war-crimes-prosecutions-in-Bosnia.pdf (claiming that Bosnia and Herzegovina introduced legal reforms in response to decisions of the European Court of Human Rights).

[123] *See* SCOTT, *supra* note 26, at 364 ("The problem of inadequate knowledge of cause-effect relations can be handled by the use of relative rather than absolute performance standards . . . .").

[124] Like intermediate goals, intermediate outcomes represent changes in the state of the world that may facilitate other, more profound changes. HARRY P. HATRY, PERFORMANCE MEASUREMENT: GETTING RESULTS 18 (2d ed. 2006).

[125] *See, e.g.*, SCOTT, *supra* note 26, at 350 ("The topic of organizational effectiveness is eschewed by some analysts on the ground that it necessarily deals with values and preferences that cannot be determined objectively. Such criticisms, however, apply not to the general topic, but only to certain formulations of it.").

Unintended/unforeseen costs and benefits. As previously noted, international courts can generate unexpected outcomes that represent certain social costs or benefits. Such costs and benefits affect the overall evaluation of the *efficiency* of international courts. Among the unexpected negative outcomes, one may identify both direct outcomes, such as jurisdictional conflicts between different international courts,[126] and indirect outcomes, such as the possible derailment of peace processes due to the refusal of international criminal courts to respect national amnesties.[127] In this context, one should also acknowledge the indirect costs associated with "paths not taken."[128] If one can establish (though the associated methodological problems are daunting)[129] that the creation and operation of international courts have preempted other, more promising international efforts—for example, if creating an international criminal court preempted a humanitarian intervention that could have prevented more crimes from occurring—then establishing such a court may actually have generated a net cost.

One also needs to look at unexpected direct and indirect benefits generated by the operations of international courts. Some direct outcomes—such as national capacity building through the transfer of expertise from international courts,[130] the development of a historical record of events,[131] and informal socialization from courts to other relevant actors[132]—may not even have been included in the official or even operative goals of particular international courts. Such benefits could therefore be viewed as unintended. Some indirect beneficial outcomes can also be identified. The establishment of some international courts has inspired the subsequent creation of similar additional courts; for example, the ICTY and the ICTR, taken together,

[126] *See, e.g.*, SHANY, *supra* note 1, at 8–11; Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions*, 42 CORNELL INT'L L.J. 77, 79–85 (2009); Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 440–45 (2007); Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 1999 AUSTRL. Y.B. INT'L L. 191, 192–93; Benedict Kingsbury, *Is Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 683–84 (1999).

[127] *See, e.g.*, Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 312–23 (2007); Hurst Hannum, *Peace Versus Justice: Creating Rights as Well as Order out of Chaos*, 13 INT'L PEACEKEEPING 582, 583 (2006); Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY, Winter 2003–04, at 5–6.

[128] *See, e.g.*, Alexander, *supra* note 5, at 36–42; Philipp Kastner, *The ICC in Darfur—Savior or Spoiler?*, 14 ILSA J. INT'L & COMP. L. 145, 152 (2007); *see generally*, Hugh Rockoff, *History and Economics*, *in* ENGAGING THE PAST: THE USES OF HISTORY ACROSS THE SOCIAL SCIENCES 67 (Eric H. Monkkonen ed., 1994) ("If outcomes are path dependent, and the choice among alternative paths [is] sometimes made on the basis of limited short-run concerns, the final outcome may not be the most efficient. The road not taken may be the right one.").

[129] *See* Hafner-Burton et al., *supra* note 16 (discussing the problem of counterfactuals in effectiveness analysis).

[130] *See, e.g.*, David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT'L L. 1281, 1287, 1293–94 (2009); OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, MAXIMIZING THE LEGACY OF HYBRID COURTS 4 (2008); William Burke-White, *The Domestic Influence of International Criminal Tribunals: The Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279, 345–48 (2008).

[131] *See, e.g.*, Janine N. Clark, *The Limits of Retributive Justice*, 7 J. INT'L CRIM. JUST. 463, 473 (2009); *Judge Dennis Byron's Address to the UN General Assembly*, ICTR NEWSLETTER, Oct. 2008, at 1, *available at* ictr-archive09.library.cornell.edu/ENGLISH/newsletter/oct08/oct08.pdf ("Among the most basic and most important of the Tribunal's achievements has been the accumulation of an indisputable historical record, including testimony of witnesses, testimony of victims, testimony of accused, documentary evidence, video recordings and audio recordings."); Richard Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUM. RTS. Q. 908, 909 (2005); Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 9–10 (1998).

[132] *See, e.g.*, Baylis, *supra* note 5, at 3–6; Moshe Hirsch, *The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System*, 19 EUR. J. INT'L L. 277, 291 (2008).

influenced the establishment of the ICC.[133] Furthermore, court adjudication raises the international profile of certain problems (such as WTO jurisprudence concerning the relationship between trade and the environment)[134] and thereby encourages international cooperation to resolve them.[135] Such increased attention and its consequences may be viewed as unexpected benefits that could compensate for certain suboptimal features in the operation of the court in question.

Although factoring in the unexpected effects of international courts potentially enables us to develop a better-informed and more comprehensive assessment of their performance, the added level of methodological complication raises problems that are not fully resolved.

Using structural indictors as outcome predictors. The difficulties in measuring the actual outcomes generated by international courts increase the relative importance of structural indicators (sometimes referred to as *inputs*) and process indicators in evaluating judicial effectiveness. Structural indicators may help to explain some of the perceived discrepancies between outcomes and goals, and may also, by way of reverse engineering, help to identify what international courts can do to improve their performance.[136] Nonetheless, one must observe that structural indicators are "twice removed" from outputs and that their actual impact on the latter is mediated by intervening factors such as the quality of the process employed by a court, and by the myriad environmental factors that may either facilitate or hinder goal attainment.[137]

While every court is characterized by its own, distinct set of structural indicators, we can potentially identify and classify some indicators that are common to all or almost all international courts, with each indicator varying in degree and character from court to court. Such structural attributes may explain, in part, why mandate providers often choose courts as the vehicle for achieving their aims,[138] and may also explain why mandate providers choose to structure particular courts as they do. The primary determinants for each of these indicators are given below.

— *Legal powers* are determined by jurisdiction, bindingness of judicial decisions, applicable law, ancillary powers (including fact-finding powers),[139] right of access to the court, number of parties to constitutive instruments, and enforcement machinery.[140]

[133] *See, e.g.*, Tolbert, *supra* note 130, at 1282; Andrea K. Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 289 (2009); Leila Sadat, *The Establishment of the International Criminal Court: From the Hague to Rome and Back Again*, 8 J. INT'L. L. & PRAC. 97, 112 (1999).

[134] *See, e.g.*, Laura Yavitz, *The WTO and the Environment: The Shrimp Case That Created a New World Order*, 16 J. NAT. RESOURCES & ENVTL. L. 203, 205 (2001–02).

[135] *See, e.g.*, Firew Kebede Tiba, *What Caused the Multiplicity of International Courts and Tribunals?*, 10 GONZ. J. INT'L L. 202, 203 (2006–07).

[136] *See* Guzman, *supra* note 5, at 203 ("[t]ribunal design can influence outcomes").

[137] *See* SCOTT, *supra* note 26, at 367.

[138] *See* KOMESAR, *supra* note 4, at 123 (discussing the special attributes of legal structures than may offer courts a comparative advantage over other social institutions for certain purposes).

[139] *See* Young, *supra* note 16, at 176 (noting the critical importance of transparency—that is, the monitoring of compliance with governing rules—in assessing the effect of social institutions on the individual and collective behavior of states).

[140] *Cf.* Raustiala & Slaughter, *supra* note 16, at 546 (discussing the relationship between the solution structure and norm qualities, on the one hand, and compliance, on the other).

- *Personnel capacity* is determined by the number of judges, number of employees, legal-assistance procedures, and actual and perceived quality of personnel (qualifications, experience, and professional background).[141]
- *Resources* are determined by short- and long-term budgets, facilities, and other tangible resources.[142]
- *Structural independence* is determined by the conditions in place to ensure that the court and its members are free from the influence and interventions of other actors and stakeholders.
- *Usage potential* is determined by the conditions influencing how much the court will be used, such as the propensity of member states to litigate, relevance of the problem area addressed by the court, and relevance of the court's applicable norms to the problems and disputes occupying states.[143]
- *Reputation* is determined by the court's perceived independence, impartiality, legitimacy, and effectiveness.[144]
- *Relations with other institutions* are determined by, and are reflected in, the court's capacity to harness domestic or international institutions to promote its objectives and implement its outputs.[145]

Another important structural factor is the possibility of modifying judicial structures or procedures in response to changing needs or circumstances.[146] To the extent that a court is authorized to reform its own structures or procedures, such changes may occur through the court's exercise of its own legal powers. More commonly, however, the court would directly or indirectly appeal to mandate providers pursuant to established procedures for modifying the court's constitutive instrument. In any event, the ease with which changes can be made may affect the court's ability to attain its goals.[147]

[141] Guzman emphasizes the perceived quality of the judges. Guzman, *supra* note 5, at 206. While perceptions of quality may be especially important in inducing compliance, my approach to effectiveness is broader and justifies considering other objective indicia of judicial quality.

[142] One may note this overlap between the rational-system and system-resource approaches: a court's survival and its empowerment (even self-aggrandizement), which are the measures of effectiveness under the latter approach, may improve its prospects for goal attainment, which is the measure of effectiveness under the former approach. Put differently, increasing the material capabilities available to international courts may be an intermediate goal that courts set for themselves in order to attain the ultimate ends for which they were created. *Cf.* Nick Huls, *Introduction: From Legitimacy to Leadership*, *in* THE LEGITIMACY OF THE HIGHEST COURTS RULINGS 3, 13 (Nick Huls, Maurice Adams & Jacco Bomhoff eds., 2009) ("Every legal system tries in its own way to create legitimacy for its courts.").

[143] *Cf.* Raustiala & Slaughter, *supra* note 16, at 545 (discussing the relationship between problem structure and compliance).

[144] The actual use of a court by the parties to litigation, which is one of the proxies for effectiveness identified in some of the literature, *see, e.g.*, Posner & Yoo, *supra* note 6, at 28, could be indicative of the court's perceived effectiveness.

[145] *Cf.* Raustiala & Slaughter, *supra* note 16, at 547 (discussing the relationship between domestic linkages and compliance).

[146] *See* Young, *supra* note 16, at 179 (emphasizing the importance of transformation rules for institutional effectiveness).

[147] For a discussion of institutional change as an effectiveness criterion, see Palmer & Biggart, *supra* note 54, at 266–72.

Finally, a more complete picture of the structural attributes of international courts would emerge by exploring the legal, institutional, political, economic, ideological, and cultural environments in which particular courts operate, as it appears that courts' de jure and de facto powers derive largely from these background circumstances.[148] For example, the differences between European and non-European courts' records of achievement may be as much a product of Europe's pro–rule of law climate as of any structure indicators of the relevant courts.[149]

Using procedures as outcome predictors. As in the case of structural indicators, examining the processes employed by international courts may help us in understanding their effectiveness and explaining their ineffectiveness and inefficiencies. By assessing the quantity and quality of the effort invested in operating international courts, one may predict the degrees to which some of their goals will be attained—and, as noted with regard to structure, also explain why a judicial process was deemed appropriate by the mandate providers.[150] For example, the pace at which court proceedings take place may partly predict a court's ability to resolve a large number of disputes, provide normative guidance on a variety of issues, and promote enforcement—that is, to generate relevant outcomes in a given time frame. Likewise, a court's adherence to standards of due process can contribute to its legitimacy in the eyes of certain target audiences and ultimately enhance the impact of its decisions on the relevant constituencies.[151]

One needs to remember, however, that an examination of process is a suboptimal proxy for a goal-based assessment of effectiveness. The reason is that such an examination might reflect the same incorrect assumptions about the relationship between process and outcomes that are employed by the courts themselves—for example, that more prosecutions lead to greater deterrence or that expedited proceedings lead to fewer, not more, disputes.[152]

Some of the relevant social science literature mentions three main categories for evaluating the quality of the judicial process: procedural justice, interpersonal justice, and informational

[148] Young refers to these factors as *exogenous* ones that govern effectiveness (as opposed to *endogenous*, structural factors). Young, *supra* note 16, at 176; *see also* Jacobson & Weiss, *supra* note 12, at 7.

[149] See Helfer & Slaughter, *supra* note 5, at 298, 367; Raustiala & Slaughter, *supra* note 16, at 547–48; *see also* Young, *supra* note 16, at 183–90 (discussing how, in an international regime, the effectiveness of institutions is influenced by state parties' capacities to govern, the distribution of power among them, and their interdependence); Harold K. Jacobson & Edith Brown Weiss, *Assessing the Record and Designing Strategies to Engage Countries*, *in* ENGAGING COUNTRIES, *supra* note 12, at 511, 528–35 (discussing the centrality of the current international setting and country-related factors in assessing the effectiveness of international environmental regimes). Note, however, that Andrew Moravcsik claims that liberal states may be less inclined to embrace strong human rights institutions than some of their less-liberal counterparts. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 219–20 (2000).

[150] *Cf.* Raustiala & Slaughter, *supra* note 16, at 545 (discussing the relationship between the solution process and compliance).

[151] Note that legitimacy may, ultimately, be a subjective notion. *See* Mitchel Lasser, *Transforming Deliberations*, *in* THE LEGITIMACY OF THE HIGHEST COURTS RULINGS, *supra* note 142, at 33, 37. *But see* IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY 20 (2007) (defining legitimacy as the "political space marked out by the boundaries of legality, morality, and constitutionality").

[152] *See* SCOTT, *supra* note 26, at 366 (noting that process measures "assess conformity to a given program but not the adequacy or correctness of the programs themselves"); IVAN ILLICH, DESCHOOLING SOCIETY 9 (1972) (Students are schooled "to confuse process and substance. Once they become blurred, a new logic is assumed: the more treatment there is, the better are the results."). *But see* SCOTT, *supra* note 26, at 367 (recognizing that in organizations "confronting strong institutional pressures, . . . to a large degree process *is* substance").

justice.[153] Although such literature focuses on justice and not on effectiveness, the three categories may provide a useful starting point for understanding how judicial procedures are connected with effectiveness. Procedural justice criteria can be used to evaluate courts' performance in relation to objective performance standards[154]—for example, access to justice, actual usage rates, participation of all the relevant stakeholders in the process, duration of the proceedings, their costs, consistency in the application of procedural rules (similar cases being treated alike, and identifying deviations from court procedures), compliance monitoring, and actual judicial independence (lack of actual interference in the court's work). Interpersonal justice criteria assess how participants in the process are treated (that is, fairly and respectfully at one extreme, and abusively and disrespectfully at the other).[155] Finally, informational justice refers to the transparency of the process and invites assessment of courts' reasoning.[156] Whereas some of these procedural indicators, such as costs or duration, can be determined with relative ease, other, less tangible indicators may need to be evaluated in relation to the subjective assessments of the parties and other stakeholders.

III. THE GOAL-BASED APPROACH'S CONTRIBUTION TO THE STUDY OF INTERNATIONAL COURT EFFECTIVENESS

Possible Applications of the Goal-Based Approach

The goal-based effectiveness model described above offers tools for conducting institution-specific and goals-specific effectiveness studies. For example, one may conduct research on whether the ICC is effectively contributing to the fight against impunity;[157] whether the WTO dispute settlement system helps to maintain a balance of rights and interests between member states;[158] and whether the European Court of Human Rights has effectively facilitated observance by Council of Europe member states of the human rights standards specified in the European Convention on Human Rights.[159] At the very minimum, such research projects would involve goal identification, outcome assessment, and establishing causation. A more comprehensive approach would also refer to structural and procedural indicators in order to

[153] Martin A. Gramatikov, J. Maurits Barendrecht & Jin Ho Verdonschot, *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology* 11 (TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No. 004/2008), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269328; Laura Klaming & Ivo Giesen, *Access to Justice: The Quality of the Procedure* 17 (TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No. 002/2008), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269329.

[154] Klaming & Giesen, *supra* note 153, at 11.

[155] *Id.* Employee involvement may also be an important component in the process. Robert J. Vandenberg, Hettie A. Richardson & L. J. Eastman, *The Impact of High Involvement Work Processes on Organizational Effectiveness: A Second-Order Latent Variable Approach*, 24 GROUP ORG. MGMT. 300 (1999).

[156] Gramatikov et al., *supra* note 153, at 11.

[157] Rome Statute, *supra* note 103, pmbl.

[158] DSU, *supra* note 103, Art. 3.3 (stating that dispute settlement is essential to the "maintenance of a proper balance between the rights and obligations of Members"); VAN DEN BOSSCHE, *supra* note 116, at 93; THOMAS A. ZIMMERMANN, NEGOTIATING THE REVIEW OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING 21 (2006), *available at* http://mpra.ub.uni-muenchen.de/4498/1/MPRA_paper_4498.pdf; 2 THE GATT URUGUAY ROUND, *supra* note 116, at 2669.

[159] For country-specific research on the European Court of Human Rights' impact on selected aspects of national legal systems, see BORELLI, *supra* note 122. For a more general study, see A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (Helen Keller & Alec Stone Sweet eds., 2008).

gauge outcomes better and to diagnose root causes for underperformance, and would consider the cost-effectiveness and efficiency of specific goal-attainment strategies.

An even more ambitious research program could seek to explore the overall effectiveness of one particular international court in light of its various goals. While such an analysis is unlikely to result in a definitive answer to the question whether the court is, on the whole, effective, it may highlight areas of relative effectiveness (that is, the court appears to attain some goals better than others) and expose the tradeoffs involved in the court's current operations. Insofar as such an analysis is time sensitive, it can help us better understand how courts adapt to changing environments and to the changing expectations of their mandate providers.

But even without engaging in extensive empirical work on the performance of international courts, the goal-based approach presented here provides significant new analytical tools to describe and understand international judicial structures, procedures, and outcomes from either a general perspective or from that of particular courts.[160] In this part, we see how the goal-based approach may help us develop new insights into three key concepts linked to judicial effectiveness—judicial independence, compliance, and legitimacy.

Understanding the Role of Judicial Independence in International Adjudication

In a provocative, 2005 article, Eric Posner and John Yoo argued that there is no evidence that independent international courts are more effective than dependent ones. In fact, they suggested that the reverse may be true; that is, independent courts could be less effective than their dependent counterparts:

> Conventional wisdom holds that independence at the international level, like independence at the domestic level, is the key to the rule of law as well as the success of formalized international dispute resolution. We argue, by contrast, that independent tribunals pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties. Indeed, states will be reluctant to use international tribunals unless they have control over the judges. On our view, independence prevents international tribunals from being effective.[161]

Shortly thereafter, Laurence Helfer and Anne-Marie Slaughter published a response in which they challenged the hypothesis and methodology employed by Posner and Yoo, as well as their conclusions.[162] According to Helfer and Slaughter, the most effective international courts are independent ones; Posner and Yoo's theoretical conjectures cannot be reconciled with the available empirical data or with states' actual preferences for creating independent courts.[163]

The goal-based effectiveness model may help us develop a new perspective on the relationship between judicial independence and effectiveness that would enable us to revisit the arguments raised by Posner and Yoo and by Helfer and Slaughter. Not only does this model introduce a more nuanced understanding of what judicial effectiveness is (by focusing on goal

[160] *See, e.g.*, THORBJORN BJORNSSON, REPORT 1/12 ON THE EFFECTIVENESS OF THE EFTA COURT: STRUCTURE (2011), *available at* www.effective-intl-adjudication.org.

[161] Posner & Yoo, *supra* note 6, at 7; *see also* GUZMAN, *supra* note 22, at 53 (arguing that compliance rates in relation to decisions of dependent tribunals are likely to be high).

[162] Helfer & Slaughter, *supra* note 8, at 955.

[163] For a response to these arguments, see Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CALIF. L. REV. 957 (2005).

attainment, not compliance with judgments or usage rates), it also allows, as shown below, for court-specific variations in actual or perceived independence levels. In other words, some international courts may need greater levels of judicial independence than others, and for certain international courts, too much perceived independence may be counterproductive.[164]

Judicial independence as a structural feature. Judicial independence—understood as the shielding of the decision-making power of judges and other senior court officials (such as prosecutors and registrars) from control and interference by other actors[165]—is, first and foremost, a notion and image (or myth) generated by an accumulation of norms and practices relating to the operation of international courts (and other courts, too). For example, Ruth Mackenzie and Philippe Sands identify two salient factors that have the capacity either to enhance or to compromise the independence of international courts:[166] the judicial-selection process[167] and political organs' potential interference in courts' work.[168] Posner and Yoo allude to other important independence-related features, such as fixed terms for judges, their protection from salary decreases, and the existence of compulsory jurisdiction (as opposed to ad hoc jurisdiction).[169] Slaughter and Helfer have identified additional factors, such as courts' willingness to decide against governments[170] and the existence of limits on post-service employment of judges by the disputing parties.[171] Other relevant, independence-generating or -enhancing factors include courts' freedom to determine their internal administration, the confidentiality of court deliberations, the elaboration of judicial-service conditions in legally binding instruments, conferring diplomatic privileges and immunities upon international judges, and furnishing courts with adequate budgets.[172]

Many of the factors listed above are structural in nature and predate the commencement of any particular court's operations; they determine how it is to be established and the initial powers conferred upon it, rather than the manner in which the court exercises its powers after its creation. More specifically, these factors regulate the powers of courts and their judges, make it more difficult for other actors to limit such powers or influence their manner of application, and advance an institutional framework that ensures a high degree of freedom from outside interference. Judicial independence thus constitutes an intangible structural "asset" that an international court may possess—the capacity to operate without interference, accompanied

[164] For a recent work, reaching nuanced conclusions on the connections between independence and effectiveness, see Erik Voeten, International Judicial Independence (Sept. 2011) (unpublished manuscript), *at* http://ssrn.com/abstract=1936132); *see also* GUZMAN, *supra* note 22, at 54.

[165] *See, e.g.*, B. J. Van Heyst, *The Netherlands*, *in* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 240, 241 (Shimon Shetreet & Jules Deschênes eds., 1985) (noting that "judicial independence means that in deciding cases that come before them, members of the judiciary are free from interference by the executive and legislative powers, political and social pressure groups, litigants and fellow members of the judiciary").

[166] Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271 (2003).

[167] *Id.* at 276–79. For a more recent study on the topic, see RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN & PHILIPPE SANDS, SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS AND POLITICS (2010).

[168] Mackenzie & Sands, *supra* note 166, at 283–84.

[169] Posner & Yoo, *supra* note 6, at 7.

[170] Helfer & Slaughter, *supra* note 5, at 313.

[171] *Id.* at 346.

[172] *See* BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY (2004), *at* http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf.

by a reputation for having that same capacity. Such a reputation is not fixed in stone, however; it may be enhanced or eroded by a court's actual record of performance.

Judicial independence as a process feature. Some independence-creating or -enhancing factors are connected not to structure as such, but to the judicial processes employed by courts—that is, to the actual exercise of courts' powers and whether other actors interfere or attempt to interfere in judicial procedures. For example, political bodies may try to interfere with judicial decisions by issuing threats or by exacting pressure on a court or its judges.[173] Likewise, the confidentiality of judicial deliberations might be compromised in a manner that causes judges to become more susceptible to outside pressure.[174] Efforts to identify process factors affecting independence would require a different focus than when examining structural factors; the focus would be less on the legal texts and the resources available to courts, and more on empirical data of actual interactions between courts and other actors.

Outcome-related factors. Although the notion of judicial independence relates to the judicial decision-making process rather than to the outcome of that process, the actual outcomes generated by international courts may provide us with important insights on judicial independence. Most significantly, courts' records in generating decisions running contrary to the interests of powerful states and constituencies may be suggestive of independence or the lack thereof. For example, a series of high-profile, controversial judicial decisions that appear to serve the interests of powerful constituencies may suggest that the court in question is less than fully independent. The value of the court's independence "assets" could therefore decrease, which may affect in various ways its ability to attract new cases, to generate compliance with its future decisions, and, ultimately, to achieve its goals. By contrast, a solid record of "speaking law to power" may strengthen a court's perceived independence, with different results than those mentioned above. Thus, a "feedback loop" is created through a court's activities and decisions.[175] Reports of actual interference in judicial decision making by external actors (a process indicator) or a perceived tendentiousness in the court's jurisprudence (an outcome indicator) may compromise a court's reputation for independence (which forms part of its structure) and ultimately influence its effectiveness.

The relationship between judicial independence and effectiveness. As noted above, mandate providers have entrusted international courts with a variety of judicial goals (typically, promoting norm compliance, resolving disputes/problems, supporting regime goals, and legitimizing legal regimes) whose attainment requires high or low levels of judicial independence. The need for courts to achieve multifaceted goals, coupled with their need to do so while setting workable priorities among those goals, should, in itself, cast doubts over the claim made by Posner and Yoo that judicial independence and judicial effectiveness are inversely correlated. First, it is questionable whether any linear correlation can exist across different judicial institutions: some courts (for example, those that prioritize their legitimating function) may need high levels of independence to be effective, whereas other courts, with different goals or goal priorities (for

[173] See, for instance, Mackenzie and Sands's discussion of how, in the *Asbestos* litigation before the Appellate Body, the WTO general counsel may have interfered in the procedures for admitting amicus briefs. Mackenzie & Sands, *supra* note 166, at 284.

[174] For a discussion of the link between confidentiality of deliberations and judicial independence, see Helfer & Slaughter, *supra* note 5, at 327.

[175] For a comparable discussion of feedback loops in the operation of international courts, see ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 55 (2004).

example, dispute settlement) may be no less effective with lower levels of judicial independence. Second, it cannot be ruled out that for some international courts, the relationship between the two variables in question is nonlinear; for example, in cases where high levels of effectiveness depend on an equilibrium between judicial independence and other variables (such as accountability or cost-effectiveness), then either an increase and a decrease in judicial independence may compromise judicial effectiveness. Furthermore, a reputation for judicial independence is built over time on the basis of an accumulation of norms and practices; it is therefore doubtful whether the data set relied upon by Posner and Yoo (which includes relatively few structural factors) is actually indicative of any given court's level of overall independence (which undercuts, in turn, their inverse-correlation claim, which depends upon such an assessment).

Posner and Yoo may be right, however, in observing that dependent judges may be more closely attuned to the interests of the disputing parties than independent judges, and that, as a result, dependent judges may be better situated to facilitate a judicial settlement agreeable to the parties.[176] The premise that they rely upon, however,—namely, that international courts operate solely as dispute resolution bodies—is again questionable. In fact, most international courts operating in the field of economic relations (for example, the WTO dispute settlement mechanism, Court of Justice of the European Union, and numerous regional courts in Africa and Latin America) operate in the context of legal regimes that prioritize the collective interests of the states participating in the regimes over the immediate interests of the litigants in resolving their disputes.[177] Likewise, international courts operating in the field of human rights and criminal law are created primarily in order to enhance the enforceability of certain legal norms reflective of important common values. The dispute resolution responsibilities of such courts are arguably of secondary importance.[178]

When viewed from this perspective, it is plausible to maintain that the level of judicial independence actually enjoyed by any specific international court would be positively correlated—to some extent—with the success of the overarching regime in which the court operates, and whose operations it supports and legitimizes. If international regimes succeed to the degree that they are able to create stable normative and institutional environments that prioritize the long-term, collective interests of the participating states over the short-term interests of specific member states,[179] then it is not surprising that states participating in such regimes are expected,

[176] Posner & Yoo, *supra* note 6, at 7. Posner and Yoo argue that independent judges may sacrifice the parties' dispute-resolution needs to advance the broader legal and political regime's normative goals, and that, as a result, they are less effective as dispute resolvers. For further discussion see Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73, 81 (1999).

[177] *See e.g.*, JANE FORD, A SOCIAL THEORY OF THE WTO: TRADING CULTURES 42–43 (2003); Anne-Marie Slaughter, *International Law and International Relations*, 285 RECUEIL DES COURS 9, 71–72 (2000).

[178] For example, the European Court of Human Rights is instructed to support friendly settlements only on the basis of "respect for human rights as defined in the Convention and the Protocols thereto." European Convention, *supra* note 97, Art. 39(1). For a general discussion on goal prioritization, see Yuval Shany, *One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?*, *in* THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW 15 (Ole Kristian Fauchald & André Nollkaemper eds., 2012).

[179] *See, e.g.*, Robert O. Keohane, *The Demand for International Regimes*, *in* INTERNATIONAL REGIMES 141, 146 (Stephen D. Krasner ed., 1983).

over time, to surrender control over certain policy areas to international institutions.[180] The establishment of independent courts arguably serves as an important building block in creating legal regimes and reinforcing their powers. Accepting independent judicial review removes from the purview of state control the interpretation and application of the regime's legal norms, and also constitutes a useful method through which states signal their commitment to the success of the regime.[181] Thus, it is difficult to accept that courts operating in regimes, such as the European Union or WTO, should remain subject to the control of the very same states that agreed to create a cooperative regime designed to operate beyond their direct control. In fact, the move away from state control is, to a large extent, the raison d'être of sophisticated international regimes of economic cooperation. The renunciation of control over the regime's judiciary—that is, judicial independence—must be viewed as consonant with the long-term expectations of participating members that regime courts contribute to the success and legitimacy of the regime.

In the same vein, human rights and international criminal courts operate in legal environments where states have agreed to surrender control over the interpretation and application of certain international norms of great moral and political significance. By establishing international courts to monitor national human rights practices and to try the perpetrators of serious international crimes, the application and interpretation of the relevant norms is no longer in the hands of states—which signals a high degree of normative commitment by the participating states.[182] By contrast, creating dependent judicial institutions to enforce human rights norms would have undercut the practical and symbolic value of removing norms in the field of human rights and criminal law from the purview of state control, and would render largely unattainable the goal of encouraging norm compliance, which the international human rights and criminal courts were created to advance.

Even with regard to international courts, such as the ICJ, whose primary goal may indeed be dispute settlement, Posner and Yoo's position on the counterproductiveness of judicial independence is not persuasive. The judicial settlement of international disputes through international arbitration or court adjudication has developed over the centuries as a reaction to the inability of diplomatic methods of dispute resolution—processes subject to the parties' full control—to resolve sensitive and volatile international disputes.[183] International courts have been created as part of a conscious decision by disputing parties to surrender control over certain conflicts to a third-party adjudicatory mechanism, in part because the costs associated with prolonging the unresolved conflict outweigh the risk of losing in adjudication.[184] In other words, dispute resolution through a body of independent judges may represent, in the eyes of at least some disputing parties, an attractive alternative to the "tried-and-failed," control-based,

[180] *See generally* MICHAEL BARNETT AND MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS (2004).

[181] *See, e.g.*, Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 741 (2006); Helfer & Slaughter, *supra* note 8, at 955.

[182] *See, e.g.*, Gordon Silberstein, *Judicial Review, in* ENCYCLOPEDIA OF POLITICAL SCIENCE 730, 731 (Mark Bevir ed., 2010).

[183] *See* Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, Art. 38, 36 Stat. 2199, TS No. 536 ("In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.").

[184] *See* Shany, *supra* note 176, at 79.

partisan-driven methods for dispute settlement. To establish international courts without structures designed to ensure judicial independence would thus undercut their ability to attain the very dispute settlement goal that led to their creation.

Posner and Yoo may nevertheless be right in observing that judgments issued by independent judges that disregard important interests of the disputing parties might antagonize the parties and that a series of judgments running contrary to party interests may even push parties to disengage from the court in question—to underutilize the court, withdraw from its jurisdiction, or perhaps even refuse to comply with its judgments. If that was to occur, it would compromise the court's ability to achieve some of its most important goals: to facilitate norm compliance (including the states potentially antagonized by the court's decisions) and to resolve disputes (including those involving the potentially antagonized states).

More generally, the attractiveness of legal regimes in the eyes of participating states and other relevant constituencies will suffer if regime institutions, including regime courts, are viewed as insensitive to potential disputants' crucial needs and interests. Such a perception complicates a regime court's mission of promoting the regime's norms and policies and of legitimizing its operations. To achieve their goals, international courts may therefore sometimes need to strike a fine balance between their objective missions and strong "client preferences." Put differently, the design of an effective international court should establish structures and procedures that insulate international courts from most external pressures (protecting thereby, inter alia, the court's image as an independent body), while retaining sufficient flexibility to accommodate important party interests.

The notion of *constrained independence* advanced by Helfer and Slaughter[185] represents a promising conceptual framework for reconciling the need for structural and procedural independence with a certain responsiveness to the needs and interests of parties, as conveyed to the court in question, directly or indirectly, through a host of subtle (or not so subtle) signaling devices,[186] including threats to refuse cooperating with the court or even to withdraw from the court's jurisdiction if the court decides something in a particular way.[187] Furthermore, an effective court may include within its structures and procedures some channels through which relevant stakeholders can communicate their policy preferences about specific judicial outcomes—which the court can then consider. For example, the "interests of justice" provision in the Rome Statute is a structural feature allowing the ICC Office of the Prosecutor, as well as the Court itself, to ascertain and consider contextual factors—often indicative of state interests—when deciding whether to pursue an investigation or prosecution.[188] Likewise, the WTO Dispute Settlement Body's consideration of panel and Appellate Body reports may serve as a useful channel for conveying member-state preferences to the latter bodies, and with a view to influencing future proceedings on similar matters.[189] Although international courts

[185] Helfer & Slaughter, *supra* note 8, at 929–30.

[186] For a discussion, see Ronli Sifris, *Weighing Judicial Independence Against Judicial Accountability: Do the Scales of the International Criminal Court Balance?*, 8 CHI.-KENT J. INT'L & COMP. L. 88 (2008).

[187] *See, e.g.*, DEL PONTE & SUDETIC, *supra* note 90, at 60, 73 (describing the direct and indirect pressures that Rwanda and NATO member states exerted on the ICTR and ICTY, respectively, with respect to specific high-profile cases).

[188] Rome Statute, *supra* note 103, Art. 53.

[189] DSU, *supra* note 103, Arts. 16.4, 17.14.

are not obligated to follow such signals, they would, under certain conditions and from a goal-attainment perspective, be wise to accommodate them, at least in part.

A goal-based approach thus militates against insisting on some ideal version of judicial independence and supports a more nuanced study of the nuts-and-bolts constraints that operate on international courts in the context of their particular institutional, legal, and political environments. It is unlikely that judicial independence and effectiveness are linearly connected; instead, one should expect to find correlations between a finely calibrated equilibrium of independence and responsiveness, on the one hand, and judicial effectiveness, on the other.

Understanding the Role of Compliance in International Adjudication

Whereas the notion of judicial independence concerns the structural and procedural conditions governing the work of international courts (which may or may not affect the results generated), compliance with the judgments of international courts directly relates to the outcomes of the judicial process. A court's most palpable impact on the state of the world may be ascertained through compliance with its decisions. It is therefore not surprising that many scholars and practitioners have viewed compliance as a dominant proxy for judicial effectiveness—the "litmus test" of judicial effectiveness.[190] A goal-based analysis of judgment compliance, however, puts into question its centrality to assessing judicial effectiveness. Since high levels of compliance may be found in the records of both effective and ineffective international courts, compliance is not a reliable indicator of effectiveness.

The first, sometimes overlooked point about the utility of using compliance—understood as a causal relationship between the contents of judicial decisions and state practice, leading to a convergence of the two[191]—as a proxy for judicial effectiveness is that such compliance may be strongly influenced by two factors: the substantive legal positions staked out by the court and the nature of the remedies issued. Arguably, the less objectionable the position (to the losing party) and the less burdensome the remedies, the greater the likelihood of compliance.[192]

This basic insight as to why states comply is supported in the legal realism literature (which often uses "game theory" models to illustrate how compliance occurs)[193] and in the literature on international legitimacy (which links compliance to the way in which decisions are perceived by target audiences).[194] The insight also finds support in empirical work suggesting that states comply less frequently with "high-cost" judgments (that is, when compliance would seriously compromise important state interests) than with "low-cost" judgments (that is, when

[190] *See supra* note 11 and accompanying text.

[191] *See* Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 348 (1998). *But see* Raustiala & Slaughter, *supra* note 16, at 539 (defining compliance as rule-confirming conduct, regardless of causation).

[192] *See, e.g.*, David P. Forsythe, *The International Court of Justice at Fifty*, *in* THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 385, 396 (A. S. Muller, D. Raič & J. M. Thuránszky eds., 1995). Other potential factors affecting the compliance pull of remedial orders, which are not discussed here, are the orders' specificity (arguably, more specific orders lend themselves to greater compliance), FRANCK, *supra* note 23, and the inclusion in the judgment of "legitimizing statements," rendering it more acceptable to the parties, Treves, *supra* note 88, at 169.

[193] *See, e.g.*, ERIC A. POSNER & JACK GOLDSMITH, THE LIMITS OF INTERNATIONAL LAW 154–55 (2005); Guzman, *supra* note 5; LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 50 (1995); Downs et al., *supra* note 19, at 380–83.

[194] FRANCK, *supra* note 23.

compliance does not compromise important state interests).[195] Similarly, it has been proposed that more robust *ex ante* enforcement mechanisms are needed to stimulate compliance with high-cost judgments than with low-cost ones.[196] Strong correlations between state practice and court judgments are consequently consistent with both significant judicial impact and the lack thereof: the more that court judgments simply mirror preexisting practices (or later practices that would have been adopted anyway), the less impact that judgments have on the state of the world.

The goal-based approach to judicial effectiveness offers us an additional critical perspective to understand compliance with court judgments—a perspective that goes beyond approaches that focus on the response of the losing state. The approach presented here highlights the constant tradeoffs that courts make as they seek to advance different and, at times, inconsistent goals. Hence, if a court sees a potential decision as conducive to attaining its other judicial goals, the court may issue the decision even if the losing party is likely to reject it. In some cases such noncompliance may focus international attention on the losing state's failure to comply with the underlying norm that the judgment seeks to uphold, potentially leading, in the long run, to better norm compliance. Similarly, the setting of high normative standards may be conducive to the regime's goals and legitimacy.

Compliance with the European Court of Human Rights' judgments as indicative of its effectiveness. The difficulty of drawing any firm conclusions about effectiveness from judgment-compliance rates can be illustrated through a cursory review of recent developments in regard to the structuring of the European Court of Human Rights' judicial remedies. The Court has long claimed an almost perfect compliance rate (with some notable exceptions).[197] This record stands in marked contrast to the poorer compliance rates normally attributed to some other international courts—for instance, the Inter-American Court of Human Rights[198]—and has sometimes been used to support claims about the effectiveness of the European Court.[199] Recent Council of Europe reports on the execution of Court judgments,[200] however, allow us

[195] *See, e.g.*, Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights*, 6 J. INT'L L. & INT'L REL. 35, 37 (2010) (indicating that "compliance is higher when it is at its least complicated"). For a parallel argument on the selection effects governing compliance rates, see Hafner-Burton et al., *supra* note 16.

[196] *See, e.g.*, Beth A. Simmons, *Capacity, Commitment, and Compliance*, 46 J. CONFLICT RESOL. 829, 843 (2002); *cf.* Raustiala, *supra* note 13, at 415 (noting that systems of implementation review can improve compliance with complex environmental regimes).

[197] COUNCIL OF EUROPE COMMITTEE OF MINISTERS, SUPERVISION OF THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: FIRST ANNUAL REPORT 10 (2007) [hereinafter COUNCIL OF EUROPE FIRST ANNUAL REPORT].

[198] *See, e.g.*, Hawkins & Jacoby, *supra* note 195, at 56 (noting that "full compliance has occurred in five of the 81 cases for which there are compliance reports"); *see also* FERNANDO BASCH, LEONARDO FILIPPINI, ANA LAYA, MARIANO NINO, FELICITAS ROSSI & BÁRBARA SCHREIBER, THE EFFECTIVENES OF THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS: QUANTITATIVE APPROACH ON THE SYSTEM'S OPERATION AND THE COMPLIANCE WITH ITS DECISIONS (2009), *available at* http://www.adc-sidh.org/images/files/adctheeffectivenessoftheinteramericansystemfortheprotectionofhumanrights.pdf; James Cavallaro & Stephanie Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-first Century: The Case of the Inter-American Court*, 102 AJIL 768, 774 (2008).

[199] *See, e.g.*, Humphrey Waldock, *The Effectiveness of the System Set Up by the European Convention on Human Rights*, 1 HUM. RTS. L. J. 1 (1980).

[200] *See* COUNCIL OF EUROPE FIRST ANNUAL REPORT, *supra* note 197; COUNCIL OF EUROPE COMMITTEE OF MINISTERS, SUPERVISION OF THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: SECOND ANNUAL REPORT (2008) [hereinafter COUNCIL OF EUROPE SECOND ANNUAL REPORT];

to use the goal-based approach to examine critically these traditional assertions about the Court's judicial effectiveness.

In the past, the two main remedies awarded by the European Court were declaratory statements that a violation of the European Convention on Human Rights had occurred, and orders for monetary compensation, which the Court referred to as "just satisfaction."[201] This second type of remedy covered both pecuniary and nonpecuniary damages and costs incurred by the prevailing applicant. Given their limited degree of intrusiveness and burdensomeness (especially since the Court's awards for monetary compensation were generally modest),[202] states usually complied with compensation orders and fully paid the sums awarded.[203]

Once the European Court started indicating more intrusive remedies, however—including individual, nonmonetary remedies (such as orders to reopen faulty legal proceedings) and general measures (such as requiring states to adopt broad legal or policy reforms),[204] compliance rates significantly declined.[205] By the same token, the poor rates of full compliance with Inter-American Court judgments (6 percent according to one study)[206] can be partly explained by the Court's intrusive remedies, which often include onerous individual and general measures, with significant financial and political implications.[207] Thus, as noted above, congruence between state practice and court judgments may be as revealing about the nature of the judgments as about their impact.

Applying the goal-oriented approach to the European Court of Human Rights underscores the limited usefulness of judgment compliance as an effectiveness indicator. Arguably, the European Court is entrusted with three main ultimate ends: securing compliance with regional human rights norms (primary norm compliance),[208] providing specific remedies to human

COUNCIL OF EUROPE COMMITTEE OF MINISTERS, SUPERVISION OF THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: THIRD ANNUAL REPORT (2009) [hereinafter COUNCIL OF EUROPE THIRD ANNUAL REPORT].

[201] European Convention, *supra* note 97, Art. 41; John C. Sims, *Compliance Without Remands: The Experience Under the European Convention on Human Rights*, 36 ARIZ. ST. L. J. 639, 645 (2004).

[202] *See, e.g.*, MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXTS AND MATERIALS 99 (3d ed. 2008).

[203] Still, the Council of Europe's reports on execution suggest that significant delays in payment of compensation sometimes occur. For example, according to the 2007 report, payment was not processed within the prescribed schedule in 41 percent of the cases. COUNCIL OF EUROPE FIRST ANNUAL REPORT, *supra* note 197, at 219.

[204] *See, e.g.*, Broniowski v. Poland, 2004-V Eur. Ct. H.R. 1; Öcalan v. Turkey, 41 Eur. H.R. Rep. 985, para. 210 (2005); Popov v. Russia, App. No. 26853/04 (Eur. Ct. H.R. July 13, 2006); Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2), App. No. 32772/02 (Eur. Ct. H.R. June 30, 2009); *see also* Luzius Wildhaber, *The European Court of Human Rights: The Past, the Present, the Future*, 22 AM. U. INT'L L. REV. 521, 534 (2007).

[205] COUNCIL OF EUROPE FIRST ANNUAL REPORT, *supra* note 197, at 230; COUNCIL OF EUROPE SECOND ANNUAL REPORT, *supra* note 200, at 63; COUNCIL OF EUROPE THIRD ANNUAL REPORT, *supra* note 200 (all three reports suggesting that 46 percent of the "leading cases," requiring general measures of compliance, remain pending before the Council of Europe two years from the date of judgment).

[206] Hawkins & Jacoby, *supra* note 195, at 37.

[207] For a survey of development related to the Inter-American Court of Human Rights' remedial practices, see Thomas A. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008).

[208] European Convention, *supra* note 97, Art. 19 ("To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights . . . ."); *see also* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978); Karner v. Austria, 38 EUR. H.R. REP. 24, 24–26 (2004); Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI. J. INT'L L. 537, 564 (2009).

rights victims (dispute resolution or problem solving),[209] and supporting the Council of Europe's political goal of achieving greater unity among the council's member states (regime support).[210] In addition, the Court may be expected, like other international courts, to legitimize the operation of regional norms and institutions (regime legitimization), as well as to fulfill other, more specific goals.

Council of Europe reports on execution suggest, however, that the high rates of compliance with compensation orders did not necessarily translate into good levels of primary norm compliance (which are also linked to the Court's mission of fostering the harmonization of human rights practices across Europe and to its legitimizing role). First, the frequent incidence of repetitive cases submitted to the Court[211]—that is, cases raising issues that the Court has already identified as a violation of the European Convention on Human Rights by the same state[212]—appears to suggest, if anything, that the Court's judgments have a limited impact on primary norm compliance.

Second, recent changes in the European Court's attitude toward remedy design can be explained, in part, as an acknowledgement that the traditional monetary awards have had little impact—a state of affairs that has contributed to the Court's exploding workload.[213]

Third, at least in some cases, states likely welcome the possibility of "buying" the ability to continue to violate the Convention through the payment of nominal sums or other forms of low-cost compliance.[214] By complying with such judgments, states are able to offset some of the reputational harms associated with the substantive human rights violations that they have committed. Such a reputational "redemption," when combined with the prestige associated with ongoing membership in the Council of Europe's human rights system, may embolden states to violate the Convention again in the future.[215] Thus, even on the long run, compliance does not necessarily correlate with primary norm compliance.[216]

One might still argue, however, that the reputational costs associated with findings of vio-

[209] STEVEN C. GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 167–69 (2006).

[210] European Convention, *supra* note 97, pmbl. ("[T]he aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms.").

[211] According to the 2007 Council of Europe report on judgment execution, 80 percent of the new cases submitted that year were repetitive or clone cases (that is, raising similar issues to cases already decided or pending), as were 90 percent of older cases still pending in 2007. COUNCIL OF EUROPE FIRST ANNUAL REPORT, *supra* note 197, at 213, 218.

[212] *See, e.g.*, COUNCIL OF EUROPE THIRD ANNUAL REPORT, *supra* note 200, at 40 n.31 (noting that more than 2000 of the 2,471 Italian cases pending for execution ("representing some 31% of the total of cases pending for execution") concern "one single problem, the excessive length of judicial proceedings"); *see also* GREER, *supra* note 209, at 158.

[213] *See* GREER, *supra* note 209, at 160.

[214] *Cf.* Oliver W. Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (discussing the law from the viewpoint of the "bad man"). For an interesting analogy, see Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. L. STUD. 1 (2000) (finding that imposing fines on parents for picking up their children late from preschool actually increases, rather than decreases, the number of late pickups).

[215] *Cf.* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (suggesting that treaty ratification may lead to more treaty violations).

[216] *See* GREER, *supra* note 209, at 174; LISA J. CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION 50 (2002).

lations[217] and the cumulative costs of complying with numerous low-cost awards could eventually induce states to change their human rights practices and to improve their records of primary norm compliance. In addition, the ongoing dialogue between the Strasbourg human rights apparatus, national authorities, and local norm entrepreneurs, facilitated by repeated litigation, could generate a better internalization of the Convention's standards.[218] Arguably, only a qualitative study of the circumstances in which judgment compliance occurs may enable us to understand the relationship between it and international court effectiveness. It is highly likely that such a relationship may reveal different levels of effectiveness in relation to different Council of Europe member states.

Understanding the Role of Legitimacy in International Adjudication

As was noted above, one of the generic goals of international courts is to confer legitimacy—understood as accepted authority[219]—on the norms and institutions that constitute the regimes in which the courts operate.[220] In fact, the mandate providers may have chosen to address the policy issues of concern to them by creating an international court—as opposed to a nonjudicial, norm-enforcing body; a nonjudicial, dispute-resolution or problem-solving body; or another mandate-promoting agency—precisely because courts have the unique capacity to generate legitimacy on the regime itself. Put differently, *external* legitimization seems to constitute one of the ultimate ends of international courts.

However, as also noted earlier, a court's ability to attain its other goals—norm compliance, dispute/problem resolution, support for the goals of the overarching legal regime, and other potential goals—may depend on the court's perceived legitimacy in the eyes of key constituencies. In other words, *internal* legitimization may actually be an *intermediate* judicial goal. Instead of being an end in itself, it is a means to an end. It is a prerequisite for external legitimization (since, at least arguably, only legitimate institutions can bestow legitimacy on other institutions)[221] and also for the attainment of other judicial ultimate ends. Legitimacy can

[217] *See, e.g.*, Guzman, *supra* note 5, at 181.

[218] *See, e.g.*, Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 216 (2003); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 666 (2004); Harold H Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2649 (1997); James L Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 281 (2004); BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 126 (2009); *see also* Raustiala & Slaughter, *supra* note 16, at 542 (indicating that judgment compliance may derive from commitment to the same rule-of-law predisposition that underlies compliance in general).

[219] *See* MAX WEBER, ECONOMY AND SOCIETY 216 (Guenther Roth & Claus Wittich eds., 1978). Note that a less descriptive and more normative definition of legitimacy based on the concept of "justified authority" also exists. *See, e.g.*, William C. Gay, *The Violence of Domination and the Power of Non-violence*, *in* PHILOSOPHICAL PERSPECTIVES ON POWER AND DOMINATION: THEORIES AND PRACTICES 15, 24 (Laurence F. Bove & Laura Duhan Kaplan eds., 1997).

[220] *See, e.g.*, ROBERT HOWSE, THE WTO SYSTEM: LAW, POLITICS AND LEGITIMACY 213 (2007); NICHOLAS WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 4 (2000); HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 3 (7th ed. 1993); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 150 (2009).

[221] *See, e.g.*, Ginsburg, *supra* note 56, at 172 (describing the legitimacy of courts and the regimes in which they operate as "bundled" together).

therefore be understood as an overarching goal-related concept that provides important context and substance to any study of judicial effectiveness.

Not only does the goal-based approach encourage us to evaluate international courts' effectiveness in attaining and maintaining external and internal legitimacy, it also provides important insights on how legitimacy is created and how perceptions of legitimacy change over the life of an international court. In the academic literature, three types of legitimacy are often identified: source, procedural, and result based;[222] our goal-based approach to effectiveness complements such analysis by understanding legitimacy in terms of judicial structures, processes, and outcomes.

Using these three latter, operational categories, it is possible to understand international courts as endowed with source legitimacy—the initial capital or credit that generally attaches to judicial institutions or to international institutions per se.[223] These initial levels of legitimacy may fluctuate from one international regime or court to another, depending upon the perceived importance of launching a coordinated international response to the policy problems needing to be addressed.[224] This initial capital of source legitimacy, which is a structural asset held by the international court in question, may be affected by perceptions of a court's procedural legitimacy, which is the product of the ongoing evaluation of the fairness, justice, and efficiency of the court's structures (which control its procedures) and the actual judicial processes that it follows. In the same vein, perceptions of result-based legitimacy by external audiences—which reflect the fairness and justice of judicial outputs and the desirability of the outcomes brought about by the court's operations—also influence the court's existing legitimacy capital.

A court's ability to attain its goals—that is, to be effective—may largely depend on its perceived legitimacy in the eyes of key constituencies. In this respect, legitimacy creates a bridge across different constituencies. By establishing an international court, one constituency (the mandate providers) seeks to communicate with other constituencies (for example, civil society, professional elites, or third states) through an adjudicatory body, which then speaks to those same constituencies, relying in part on its own perceived legitimacy. In that way, mandate providers are capable of influencing, through international adjudication, the conduct and attitudes of such external constituencies; the notion of legitimacy provide us with a framework for discussing whether and how a mandate provider's efforts have been successful.

Judicial independence and legitimacy. The role of legitimacy in the study of judicial effectiveness can be illustrated through revisiting the concepts of judicial independence and judgment compliance discussed above and connecting them to notions of legitimacy and effectiveness. Judicial independence, which symbolizes procedural fairness and connotes a professional decision-making process, increases the legitimacy of international court decisions and strengthens a court's overall legitimacy capital. Thus, one may expect that judicial effectiveness, which judicial legitimacy facilitates, may be positively correlated with the existence of judicial structures

[222] *See, e.g.*, Rüdiger Wolfrum, *Legitimacy in International Law from a Legal Perspective: Some Introductory Remarks*, *in* LEGITIMACY IN INTERNATIONAL LAW, *supra* note 22, at 1, 6.

[223] *See, e.g.*, Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1519 (2006) ("The overarching governance structure also shapes the legitimacy of the policy choices that emerge from the decisionmaking process.")

[224] *See, e.g.*, HELMUT BREITMEIER, THE LEGITIMACY OF INTERNATIONAL REGIMES 19 (2008).

and procedures that underlie judicial independence (for example, robust judicial-selection procedures, long-term tenure, and adequate budget and staffing).

The actual level of judicial independence is not, however, always correlated with a court's perceived legitimacy. The acceptance of a court's authority may depend not only on values of fairness and professionalism (which a reputation for judicial independence advances), but also on a court's ability to address policy problems effectively and in ways that accommodate, in whole or in part, important constituency interests. Arguably, international courts will enjoy support and be accepted as authoritative only if states and other key stakeholders perceive them as beneficial, at least in the long run.[225] A chronic gap between judicial outcomes and client preferences may erode a court's result-based legitimacy in the eyes of its constituents, likely undermining, in turn, the court's effectiveness. Compliance with norms might decrease; fewer disputes would be referred for judicial settlement; and defections from the overarching legal regime might occur. Judicial independence may therefore be both a source of legitimacy in the eyes of some constituencies and a source of illegitimacy in the eyes of those constituencies whose interests a court has allegedly failed to accommodate.

This legitimacy conundrum is perhaps exemplified in the events surrounding the decision of the ICTY prosecutor not to open a criminal investigation into the 1999 NATO attacks on Serbia (occurring in the context of the Kosovo crisis). In her memoire, Carla Del Ponte justified her decision in the following terms:

> No one in NATO ever pressured me to refrain from investigating the bombing campaign or from undertaking a prosecution based upon it. But I quickly concluded that it was impossible to investigate NATO, because NATO and its member states would not cooperate with us. They would not provide us access to the files and documents. Over and above this, however, I understood that I had collided with the edge of the political universe in which the tribunal was allowed to function. If I went forward with an investigation of NATO, I would not only fail in this investigative effort, I would render my office incapable of continuing to investigate and prosecute the crimes committed by the local forces during the wars of the 1990s. Security for the tribunal's work in Bosnia and Herzegovina as well as in Kosovo depended upon NATO. The tribunal's forensics teams were only able to exhume mass graves because they enjoyed NATO escorts. Arrests of fugitives depended upon NATO-country intelligence as well as NATO ground and air support.[226]

In other words, the formal independence enjoyed by the ICTY and its prosecutor[227] was not matched by actual powers that would enable them actually to operate free of pressure and interference or contrary to the expectations of certain stakeholders. The Tribunal's de facto strong dependency on cooperation by NATO states dictated a decision not to investigate the allegations raised against NATO service members. The prosecutor thus prioritized the need to retain

[225] *See* JEAN-MARC COICAUD, LEGITIMACY AND POLITICS: A CONTRIBUTION TO THE STUDY OF POLITICAL RIGHT AND POLITICAL RESPONSIBILITY 25 (2002). For a comparable notion, see Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: The Internalization of Disputing in Organizational Fields*, 33 L. & SOC'Y REV. 941, 968 (1999).

[226] DEL PONTE & SUDETIC, *supra* note 90, at 60.

[227] Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 16(2), SC Res. 827, annex (May 25, 1993), *as amended by* SC Res. 1166, annex (May 13, 1998) ("The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.").

acceptance of the Tribunal's authority (or result-based legitimacy) in the eyes of one key constituency (NATO) over the reputational harm caused to the Tribunal (or loss of procedural and result-based legitimacy) in the eyes of other constituencies, including the people of Serbia, due to the ostensible failure to operate independently.

From a goal-attainment perspective, the prosecutor's decision appears to be defensible. As Del Ponte notes, the loss of support by NATO states may have led to the collapse of the ICTY's Balkan operations. Without NATO's support, the Tribunal's ability to take effective measures that would bring to justice suspected criminals[228] and help to restore peace and security in the region[229] might have been seriously compromised. Thus, international courts operating under conditions of constrained independence[230] may need to sustain their legitimacy, as well as the legitimacy of the norms they promote and the institutions they serve, in the eyes of some constituencies at the expense of antagonizing other constituencies. By identifying and prioritizing certain goals, and by creating structures and procedures that allow certain stakeholders to exercise more influence than others on a court, the mandate providers may, in effect, direct the court in how to exercise its discretion and thereby maximize its effectiveness. Given the overlap in the composition of the Security Council (the ICTY's mandate provider) and NATO, the Tribunal had strong institutional incentives to accommodate in its operations the interests and expectations of the latter, at the expense of those of Serbia.

Judgment compliance and legitimacy. As noted above, the relationship between judgment compliance and judicial effectiveness may be tenuous since compliance with low-cost judgments may have limited significance from a goal-attainment perspective. From a legitimacy perspective, however, even compliance with low-cost judgments should not be disregarded.[231] Judgment compliance—that is, solving problems through legal means—is one of the main goals of international courts, including the European Court of Human Rights. The perceived success of the European Court may contribute to its legitimacy in the eyes of applicants resorting thereto and likely encourages an increasing number of prospective applicants to approach the Court. More significantly, even instances of "shallow" compliance (representing limited normative commitment by member states) help the Court to project an image of acceptance of its authority by states, thereby contributing to its perceived legitimacy across the Council of Europe. Such perceived legitimacy strengthens, in turn, the compliance pull of the Court's subsequent decisions and allows it, over time, to aim higher—that is, to move toward higher-cost judgments.

The European Court of Human Rights' approach toward applying the margin-of-appreciation doctrine is suggestive of such incrementalism in action. Although the gradual shrinking of the margin of appreciation afforded to states in some areas covered by the European Convention on Human Rights[232] is formally explained through the growing consensus across

[228] *Id.*, pmbl.

[229] *Id.*

[230] *See* Helfer & Slaughter, *supra* note 8, at 955.

[231] Still, one may argue that compliance with low-cost judgments generates smaller legitimacy dividends than compliance with high-cost judgments. For a discussion, see Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L L. 115 (2011).

[232] See, for example, the Court's increasingly assertive jurisprudence on "due process" requirements. HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS 186–87 (1996).

Europe regarding substantive human rights standards,[233] a number of commentators have noted the linkage between the Court's degree of assertiveness and its increased self-confidence and perceived legitimacy.[234] In other words, compliance with low-cost judgments (that is, those in which the Court has afforded member states a considerable margin of appreciation) seems to have bolstered the Court's legitimacy capital; such capital eventually enabled the Court to issue higher-cost judgments affording member states a narrower margin of appreciation.

In the same vein, one may observe that the low level of judgment compliance encountered by the Inter-American Court of Human Rights reflects negatively on the perceived legitimacy of that court and the legal regime in which it operates. This unintended side effect may eventually undermine the Court's ability to induce norm compliance. Thus, from a goal-attainment perspective, the incremental approach of the European Court of Human Rights may be more conducive to greater legitimacy and, through it, to improved compliance with high-cost judgments.

Nevertheless, it must again be emphasized that compliance rates in themselves may tell us little about judicial effectiveness and legitimacy. Only a careful and context-rich study of judgment compliance may illuminate its actual relationship to goal attainment. Such a study should consider, for example, the different political and cultural environments in which the European and Inter-American Courts of Human Rights operate[235]—a difference that affects the two courts' goal-attainment capabilities, that dictates particular choices in relation to both the formulation of substantive judgments and the design of remedies, and that potentially generates different legitimacy-enhancing strategies (for example, incremental dialogue versus public shaming).

IV. CONCLUSIONS

Measuring the effectiveness of international courts is a serious challenge—arguably, a more serious challenge than has been generally acknowledged in the existing international law literature. Such measurements require a thorough analysis of the different goals of international courts, and reliable measurement criteria and indicators need to be identified and further supplemented by quantitative analysis. In addition, future research ought to measure and evaluate,

[233] *See, e.g.*, Rasmussen v. Denmark, 7 Eur. H.R. Rep. 371, para. 40 (1984); Ignacio de la Rasilla del Moral, *The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine*, 7 GERMAN L. J. 611, 617 (2006); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1202 (2007).

[234] *See* Ronald St. J. Macdonald, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83, 123 (Ronald St. J. Macdonald, Franz Matscher & Herbert Petzold eds., 1993) ("[T]he margin of appreciation is a useful tool in the eventual realization of a European-wide system of human-rights protection, in which a uniform standard of protection is secured. Progress towards that goal must be gradual, since the entire legal framework rests on the fragile foundations of the consent of the Contracting Parties. The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority . . . ."); *see also* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AJIL 38, 75 (2003); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 465 (2001); Helfer & Slaughter, *supra* note 5, at 317.

[235] *See, e.g.*, RUTH MACKENZIE, CESARE ROMANO & YUVAL SHANY, MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 383 (2d ed. 2010); Douglass Cassel, *Inter-American Human Rights Law: Soft and Hard*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 393, 395–96 (Dinah Shelton ed., 2004).

whenever possible, the intended and unintended outcomes of international courts, their structures, and processes. Such an endeavor may, if successful, provide important insights into international courts' effectiveness, cost-effectiveness, and efficiency. It may also serve as the basis for reform proposals concerning judicial structures (for example, to increase or decrease jurisdictional powers), process (for example, to introduce tighter schedules or to increase or decrease of the role of third parties), and even outcomes (for example, balance of low- versus high-cost remedies).

In contrast to much of the existing international law literature, I posit—in light of the relevant social science literature—that the study of court effectiveness should be based on the specific goals set for each particular court. Such goals might be those set by a court's mandate providers or by other stakeholders (including the judicial institution itself). As some courts are modeled after one another, it may be possible and useful to perform some comparisons between courts in order to improve our understanding of their effectiveness; for example, one can compare the work of the ICTY to that of the ICTR, and the work of the Court of Justice of the European Union to that of the European Free Trade Association Court. Moreover, some aspects of the operation of international courts are modeled after domestic courts and thus invite comparison in that regard. Yet another possibility is to measure how the effectiveness of individual judicial institutions has fluctuated over time.

Beyond evaluating actual effectiveness, the goal-based approach introduced here provides us with new analytical tools to understand how international courts operate and, in particular, to assess how key concepts relating to their structure, process, and outcomes—for example, judicial independence, judgment compliance, and judicial legitimacy—contribute to their effectiveness. Here, too, the general analytical framework needs to be adapted to the specific tasks and contexts of each judicial institution. Thus, assertions of a direct correlation between independence or compliance (or even legitimacy in the eyes of certain constituencies) and effectiveness should be taken with a grain of salt.

At the end of the day, one has to admit that the prospects for this research agenda are uncertain. Although applying the insights developed in the social science literature can, no doubt, improve our analytical understanding of international courts and their social functions, as well as encourage a healthy discussion of international courts' social roles—which has been often lacking both in theory and practice—our existing methodological tools can only partly capture court effectiveness. It remains to be seen whether the necessary tools for a meaningful qualitative and quantitative evaluation of effectiveness can be developed.