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Assessing the Effectiveness of International Courts:
Can the Unquantifiable be Quantified?

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Introduction

During the last twenty years the world has experienced a sharp rise in the number of international courts and tribunals, and the correlative expansion of their jurisdictions.¹ There is little question that these occurrences have dramatically affected (and will continue to affect) the fields of both international law and international relations. At the international level, the constitution and existence of judicial bodies which are capable of enforcing international commitments, interpreting international treaties and settling international conflicts has facilitated the growth of legal norms and cooperative regimes, which nowadays govern important areas of international law and politics, such as economic relations, human rights and armed conflict. International courts (understood in this article as independent judicial bodies, created by an international instrument, and invested with the authority to apply international law to

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specific cases brought before them)² have thus become important policy instruments that serve, in some respects, as the lynchpin of a new rule-based international order, which increasingly displaces the previous power-based international order.³

The increased centrality of international courts in the life of the international community invites, however, a critical assessment of their performance: Are international courts effective tools for international governance? Do they in fact 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 as those produced by international courts have been generated by other, less costly or time-consuming mechanisms?⁴

² Romano defines an international judicial body as a body entrusted with five features: a) permanence; b) established by an international instrument; c) decides cases on the basis of international law; d) decided cases according to pre-existing rules of procedures; and e) a process leading to a binding decision. See Romano, supra note 1, at 712. See also Erik Voeten, ‘The Politics of International Judicial Appointments’, (2009) 9 Chi. J. Int’l L. 387, at 389 - (International Courts are created "by definition" by multiple governments); Jose E. Alvarez, International Organizations As Law-Makers (New York: Oxford University Press, 2006) at 458; Shany, supra note 1, at 12, (international tribunals are bodies manned by independent decision-makers and created by international legislative processes 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, on-line edition, (R. Wolfrum ed., 2008), (defining international courts and tribunals as "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").


⁴ See generally, Neil Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy (University of Chicago Press, Chicago: 1994), at 5 (“It is institutional choice that connects goals with their legal or public policy results”).
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A growing body of legal literature has turned its attention to just such questions of effectiveness in recent years. For example, it has been alleged by two legal 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." Applying this standard, the authors concluded that independent courts such as the International Criminal Court (ICC), International Tribunal for the Law of the Sea (ITLOS) and the WTO dispute resolution system have relatively low prospects of success (when measured against compliance with their judgment, their usage rates and the overall success of the treaty regime in question). In response, it was argued by two no less prominent authors that judicial independence is just one of thirteen factors that may contribute to court effectiveness. Moreover, the responding authors claimed

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7 See Posner and Yoo, supra note 6, at 73-74.

8 Laurence Helfer and Anne-Marie Slaughter. ' Why States Create International Tribunals: A Response to Professors Posner and Yoo', (2005) 93 Calif. L. Rev. 899, at 906. The other factors identified by Helfer and Slaughter are: composition of the tribunal, the court's caseload or functional capacity, independent fact finding capability, formal authority, awareness of audience, instrumentalism, quality of legal reasoning, judicial cross-fertilization and dialogue, form of opinion, nature of the violations, the existence of autonomous domestic institutions, and the relative cultural and political homogeneity of member states.
that compliance may be a poor proxy of judicial effectiveness if viewed in detachment 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 which could explain increased or decreased court effectiveness. This literature also presents, at times, interesting empirical data to sustain claims of judicial effectiveness or ineffectiveness.\(^10\) Nevertheless, a significant portion of this literature possesses an 'Achilles heel', to be found in the crude and/or intuitive definitions of "effectiveness" that are employed, which often equate effectiveness with compliance with court judgments. Yet, complicated links exist between compliance with judicial decisions and effectiveness.\(^11\) Compliance rates may depend as much on the nature of the remedies issued by a court as on the perceived quality of the court's organs or procedures. Thus, a "low-aiming" court, which issues minimalist remedies, may generate high levels of compliance, yet have a little impact on the state of the world.\(^12\)

Although compliance with the underlying legal norms may be a more appropriate approach to understanding judicial effectiveness,\(^13\) isolating the contribution of judicial processes to long-term compliance with legal norms could be extremely challenging.\(^14\) As a result it may remain unclear how and to what extent international courts promote norm-compliance. Moreover, identifying effectiveness with norm-compliance may stand in tension with some other goals assumed by international

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\(^9\) See Helfer and Slaughter, \textit{supra} note 8, at 918.

\(^10\) See e.g., Posner and Yoo, \textit{supra} note 6, at 7; Ku and Nzelibe, \textit{supra} note 5, at 780.

\(^11\) For a comparable discussion of the relationship between compliance and effectiveness, see Harold K. Jacobson and Edith Brown-Weiss, \textit{‘A Framework of Analysis’ in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS}. 1, at 5 (Edith Brown Weiss and Harold K Jacobson eds., 2000), (“Countries may be in compliance with a treaty, but the treaty may nevertheless be ineffective in attaining its objectives”).

\(^12\) See e.g., Guzman, \textit{supra} note 5, at 187. Guzman similarly criticizes reliance on “usage rates” as a proxy for compliance, noting that it ignores the “shadow effect” of courts, which results in cases being settled out-of-court instead of being litigated. See also Jacobson and Brown-Weiss, \textit{supra} note 11, at 188.

\(^13\) See Jacobson and Brown-Weiss, \textit{supra} note 11, at 188.

courts: Dispute resolution may at times involve settlements that deviate from existing law, for example.\textsuperscript{15} Insisting on compliance with the legal status quo ex ante as a measure of effectiveness may thus fail to capture a court’s dispute settling or law-development role.\textsuperscript{16} As a result, a better understanding of the concept of international court effectiveness, which exceeds the notion of compliance-inducement, is arguably warranted.

The methodological problems stemming from the lack of a clear definition of effectiveness in some of the relevant literature are further compounded by general assumptions employed by certain writers about the role of international courts in the life of the international community, which seem to transpose the role that courts play in national legal systems onto the international realm.\textsuperscript{17} The combination of an underdeveloped understanding of what ought to constitute effective international courts and the theoretical and practical difficulties associated with actually measuring such criteria, may lead to unsatisfying results and to misunderstandings about the effectiveness of international courts.

Yet, methodological problems similar, by and large, to the ones mentioned above have attracted considerable attention over a long period of time in the social science literature. In this academic discipline, one may find a vast body of studies dealing

\textsuperscript{15} See e.g., Gabčikovo-Nagymaros (Hungary v. Slovakia) 1997 ICJ Rep. 7, 78, (September 25). (“the Parties together should look afresh at the effects on the environment of the operation of the Gabčikovo 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”).


\textsuperscript{17} See e.g., Helfer and Slaughter, supra note 5, at 290 (defining effectiveness of supranational courts as ability to compel compliance, essentially using domestic courts as a model for effectiveness); Antonio Cassese, 'Is the ICC Still Having Teething Problems?' (2006) 4 J. Int'l Crim. Just. 434, at 441. 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").
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with how to assess the effectiveness of organizations in general, and public or governmental organizations in particular (such literature is normally classified in sociology under organizational studies or under public administration studies). This literature appears to provide a number of conceptual frameworks and empirical indicators that could be applied towards 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 and provide new tools to measure effectiveness, as well as to improve our understanding of the methodological limits of such an exercise.

The present article surveys some key notions used in social science literature relating to the methodology for measuring the effectiveness of public organizations and discusses their possible application to international courts. In doing so, I hope to contribute to the establishment of a more sophisticated analytical framework for discussing international court effectiveness than those which are offered in the existing international law literature. In Part One, I discuss the notion of "organizational effectiveness" and explain the choice of a goal-based definition of effectiveness as the most suitable approach for evaluating international courts. I then survey a number of ways to classify organizational goals and illustrate some of the difficulties and ambiguities that measuring effectiveness on the basis of goal-attainment may nonetheless entail. In Part Two, I introduce some key methodological moves used by the social science literature in order to measure institutional effectiveness after the goals of the organization have been identified. Such moves include the fleshing out of different operational categories relating to the evaluated organization's structure, process and outcome. In Part Three, I discuss how the methods of analysis developed in the social science literature could be applied to the study of international courts, given the unique attributes and context for their operation, and suggest some elements that should be integrated into future research seeking to develop a suitable research methodology.

To be clear, the present article does not attempt to offer any conclusions as to whether international courts in general, or any specific international court in particular, are "effective". Nor does it take a position on the question whether the international
community actually is, or should be, interested in developing more effective international courts – a question that relates, *inter alia*, to the “balance of power” between states and institutions of international governance and among the latter institutions.¹⁸ My main interest in this article is, instead, to develop a research agenda that could advance an inter-disciplinary approach towards addressing the question of international court effectiveness. The proposed framework could lay the foundations for future analytical and empirical work that would be more specific in its focus (e.g., focusing on specific goals or on a specific court). Indeed, the present researcher currently coordinates a number of specific research projects by junior researchers that seek to apply in specific contexts the general framework proposed herein.

**Part One: What Constitutes Organizational "Effectiveness"?**

Whether it is intended to appraise organizational performance, or affect organizational design or procedures,¹⁹ a key conceptual hurdle that any research into organizational effectiveness has to address is what constitutes an "effective organization", or in other words, what does one consider "organizational effectiveness" to be. Although some argue that there may be as many models of effectiveness as there are studies of organizational effectiveness,²⁰ the dominant definition of effectiveness in the social science literature appears to be based on the "rational system approach", which offers a rather straight forward formulation: "an action is effective if it accomplishes its specific objective aim."²¹ Of course, this performance-standard normally has to be assessed over predefined units of time. Consequently, in order to measure the effectiveness of an organization according to the "rational system approach", one has to identify the organization's aims or goals²² - i.e., the desired outcomes it ought to

¹⁸ See Guzman, *supra* note 5, at 189.
¹⁹ W. R. Scott, *Organizations: Rational, Natural and Open Systems* 5th ed. (Pearson Prentice Hall, 2002), at 350 ("effectiveness is argued by some theorists to be a determinant as well as a consequence of organizational structure").
generate, and ascertain the time frame over which some or all of these goals can reasonably be expected to be met.\footnote{Mark H. Moore, Creating Public Value: Strategic Management in Government (Harvard University Press: 1995), at 95-99; Sharon M. Oster, Strategic Management for Nonprofit Organizations: Theory and Cases (Oxford University Press, USA: 1995), at 27-28.}

Significantly, under the "rational system approach", the desirability of the goals themselves is not questioned (the capacity to attain them can, however, be doubted). Hence, the project of assessing effectiveness pursuant to this approach is predominantly descriptive and analytical.\footnote{Young offers the term “equity” as encapsulating a normative assessment of the collective behavior facilitated by social institutions. Oran R. Young, 'The Effectiveness of International Institutions: Hard Cases and Critical Variables' in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS. 160, at 164, (J.N, Rosenau & E.O. Czempiel eds., 1992).} Still, as is shown below, normative considerations cannot be divorced altogether from an analysis of judicial performance.\footnote{See Scott, supra note 199, at 351.} Moreover, the underlying premise of this “rational system” approach, and of the present research – i.e., that organizations need to meet their goals and faithfully execute their mandate, contains an implicit normative statement about the desirability of organizational conduct in general, and about the proper conduct of international courts in particular.

1.1 What Types of Goals Exist?
Charles Perrow, an influential organization studies theorist, distinguishes between the "official goals" and the "operative goals" of the evaluated organization in his writings on organizational effectiveness.\footnote{Charles Perrow, 'The Analysis of Goals in Complex Organizations', 26(6) American Sociological Review 854 (1961), at 854-866.} Whilst official goals are the formally-stated general purposes of the organization (these goals often tend to be vague and open-ended),\footnote{Melissa Forbes and Laurence E. Lynn Jr 'Organizational Effectiveness and Government Performance: A New Look at the Empirical Literature’ (Draft of 20 Nov. 2006), at 8. See also Stewart Clegg & David Dunkerley, Organization, Class and Control (Routledge & Kegan Paul, London: 1980), at 309- (defining "official 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"). See also Hal G. Rainey, Understanding and Managing Public Organizations, 2nd ed.}
operative goals reflect the specific policies that the organization actually prioritizes.\(^{28}\)

Identifying official goals may be a relatively easy task (although, as shown below, understanding their precise meaning and implications may be difficult); at the same time, ascertaining the operative goals of an organization may often require a complex qualitative analysis of the organization's actual operations.\(^{29}\)

Note however, that the distinction between official and operative goals offered by Perrow is not always clear, nor does the distinction appear to be exhaustive. Arguably, a number of additional classifications, which partly overlap with the aforementioned distinction, could be introduced in order to obtain greater clarity in identifying institutional goals:

1) external/internal goals – some goals are set by external stakeholders (e.g., the general public or its elected representatives), whereas other goals are internal in the sense that they have been laid down by actors belonging to the organization itself (e.g., employees or management);\(^{30}\)

2) Ultimate ends/intermediate goals – certain goals represent an independent end in themselves, whereas other goals are merely strategic in nature – i.e.,

\(^{28}\) Operative goals tend to "designate the ends sought through the actual operating policies of the organization; they tell us what the organization is actually trying to do, regardless of what the official goals say are the aims". Charles Perrow, ‘The Analysis of Goals in Complex Organizations’, 26 American Sociological Review (1961) 854, at 855. \See also\ Rainey, supra note 27, at 127 ("Operative goals are the relatively specific immediate ends an organization seeks, reflected in its actual operations and procedures").

\(^{29}\) Another relevant distinction is between for-profit and non-profit or public organizations. Whereas revenue is a principle objective of the former, attainment of the mission, in full or in part, is the main objective of the latter organizations. Mark H. Moore, ‘Managing for Value: Organizational Strategy in For-Profit, Nonprofit, and Governmental Organizations’, (2000) 29 Nonprofit and Voluntary Sector Quarterly (Suppl. 1) 183, at 193.

\(^{30}\) A similar distinction introduced in this regard by Perrow and Gross is between output goals – corresponding to the expectations of external referents (e.g., customers or investors), and support goals that address the needs of internal referents, that maintain the operation of the organization (e.g. directors or employees). Charles Perrow, Organizational Analysis: A Sociological View (Tavistock Press: 1970), at 134; Edward Gross, ‘The Definition of Organizational Goals’, (1969) 20 British Journal of Sociology 277, at 282.
they are conducive to the attainment of the overarching purposes of the organization;\(^{31}\)

3) explicit/implicit/unstated goals – some goals are explicitly identified in instruments promulgated by the organization or its stakeholders, other goals can be surmised from the said instruments, and yet another set of goals may have been embraced by the organization in question, or its stakeholders, independently of any formal text. This last distinction only partly overlaps with Perrow's classical distinction between official and operative goals: While all official goals are explicit, not all explicit goals are official in nature (some operative goals may be explicit, for example). Moreover, unstated goals often reflect stakeholder beliefs in important inherent goals of certain organizations (that police organizations should generate deterrence, for example).

Although these distinctions should always be kept in mind, formulating a specific research project may entail difficult choices as to how, and in what order, the different classifications which the research should follow ought to be arranged.\(^{32}\) Such choices may be influenced by the perceived degree of relevance of particular classifications to the reviewed organization and the purpose of the research. For example, a research project designed to offer policy makers that created a public organization and continue to sponsor its operations (i.e., the ‘mandate providers’) a critical perspective on their brainchild's performance may emphasize the external goals set by the same policy makers as the starting point or principal benchmark of the analysis. At the same time, a research project designed to help a public organization improve the services it offers the relevant community may downplay the significance of the formal source from which different goals originate (i.e., external or internal), or its method of articulation (i.e., explicit, implicit or unstated), and emphasize the relationship between intermediate goals and ultimate ends instead.

\(^{31}\) Seashore and Yuchtman propose to divide goals into three hierarchical categories: ultimate criteria (which may be immeasurable), penultimate criteria and subsidiary variables (states and processes). S. E. Seashore and E. Yuchtman, 'Factorial Analysis of Organizational Performance', (1967) 12 Administrative Science Quarterly 377, at 378-379.

1.2 The Problem of Goal Ambiguity

A critical problem that one ought to consider when attempting to measure the effectiveness of an organization by way of focusing on its degree of goal-attainment is the existence of "goal ambiguity", or in other words, the possibility that competing understandings of an organization's aims exist. Such ambiguity (which at the international law level is often the result of political difficulties in establishing clearer goals), may present itself at four different levels:

a) Mission comprehension ambiguity – some official goals are formulated in vague language that gives rise to conflicting interpretations of their meaning. As a result, the actual goals of the organization may be contested;

b) Operative goal ambiguity – the general nature of some official goals leaves considerable lack of clarity and interpretative discretion on how to translate such goals into more specific operational goals;

c) Evaluative goal ambiguity – some goals are inherently less amenable to objective measurement and invite interpretive leeway as to the selection of relevant measurement criteria and methods. (It may be noted that some writers have claimed that public organizations suffer from inherent evaluative goal ambiguity, and, as a result, that one cannot measure their objective impacts, but rely instead on unclear proxies of effectiveness such as workloads); and

d) Priority goal ambiguity - complex public organizations often strive to attain a plurality of goals, without having designated clear hierarchy among them. This state of affairs creates ambiguity as to which goals should be accorded preference in the event of conflict, or competition over organizational resources. Note that even when preference is accorded to a certain goal, it may remain unclear how to translate such a preference into specific resource-

35 Chun and Rainey, supra note 33, at 535 et seq.
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allocation decisions. Moreover, when the organization's goals are inconsistent, certain goals will over time be fulfilled – almost by definition – to only a partial degree. Under such circumstances, it may be difficult, if not impossible, to assess the overall effectiveness of the organization. One may therefore have to settle for partial or "piecemeal" effectiveness assessment in such cases.36

Goal ambiguity is positively correlated to the complexity of the problems faced by the organization in question.37 This is because 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 political consensus by the official goal-setters. (Arguably, consensus could have facilitated more explicit guidance and reduced goal ambiguity). Addressing complex problems may also require the delegation of open-ended discretionary authority from the mandate providers to the organization's bureaucracy, thus increasing the organization's operative goal ambiguity.

Another factor that may affect goal ambiguity is the age of the organization and changes made to its mandate over time (often in response to perceived successes and failures of the organization). Official mandates that are revised from time to time tend to become increasingly specific in a way that reduces operative goal ambiguity concerns. Still, the tendency to gradually "overburden" organizations with an increasing number of functions, in response to changing needs or circumstances,38 without comprehensively revising their mandate (or structure), may increase their priority goal ambiguity.39

1.3 Other Conceptual Problems

36 See Scott, supra note 199, at 370 ("We must agree to settle for modest and limited measures of specific aspects of organizational structures, processes and outcomes").
37 Chun and Rainey, supra note 33, at 12.
38 For a comparable discussion, see C. Wallander and R. Keohane, ‘Risk, Threat and Security Institutions’, in IMPERFECT UNIONS: SECURITY INSTITUTIONS OVER TIME AND SPACE; 21, at 33, (H. Haftendorn, R. Keohane and C. Wallander eds., 1999) (changing conditions may result in the evolution of existing security institutions).
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Several additional conceptual issues, which entail further complexities, need to be discussed at this stage. (Another important conceptual issue, relating to identifying the proper goal-setting stakeholders is discussed in section 2.2 below). First of all, in the context of goal-attainment, one should address the problem of unexpected results. An organization may fulfill all of its goals, and yet the considerable costs and negative externalities that it generates may offset any benefits associated with goal attainment. At the same time, an organization may fail to meet its designated goals, whilst nevertheless creating unforeseen or unintended benefits that compensate for its apparent failures. At an even higher level of abstraction, one may question whether the organization's resources could have been employed to advance other, alternative projects, which may have generated better or worse consequences.

A comprehensive approach to assessing organizational effectiveness – especially one geared towards considering the reform of existing institutions - should arguably take into account such unforeseen (or underestimated) costs and benefits. The term "inefficiency" (as opposed to ineffectiveness) will be used here to describe unintended costs of this kind, whereas the term "efficiency" (as opposed to effectiveness) may be used to describe net benefits accrued independently of the organization's goals. In addition, one may also measure the cost-effectiveness of the organization – i.e., the relationship between inputs and outputs – in order to form an opinion on its relative effectiveness and efficiency.

Second, we should be mindful of the distinction between goals and motives. The questions what should an organization achieve and why should it achieve which it sets

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40 See e.g., Jacobson and Brown-Weiss, supra note 11, at 5 (noting that an anti-pollution treaty proscribing some pollutant may lead to the employment of even more polluting substitutes).
41 See Barnard, supra note 21, at 19-20.
43 Peter F. Drucker, Managing the Non-Profit Organization (HarperCollins: 1990), at 155 ("Efficiency is doing things right whereas effectiveness is doing the right things"). But see Young, supra note 24, at 164 (describing inefficiency as pareto sub-optimal performance).
44 Bart Prakken, Information, Organization and Information Systems Design (Kluwer Academic, Netherlands; 2000), at 45 ("Effectiveness makes clear whether that target is reached while ignoring the means that were used ").
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out to, do not always fully overlap. This is particularly the case when relevant stakeholders that were involved in the process of creating the organization possessed interests which diverge from that of the organization itself (or from that of some of the other stakeholders). For example, a public organization may be created by Parliament as part of an agenda for shifting power away from one part of government to the other. Although the changes in the allocation of power can explain the reasons behind the creation of the organization (and perhaps also some of its structural attributes), these explanations are often not translated into a concrete set of expectations that the organization is required to meet throughout its ongoing operations, nor into the public justifications for its creation and continued existence. Since goals tend to be more transparent, accessible and common to large numbers of stakeholders than motives (which may be hidden, unstated and idiosyncratic), it would seem preferable if a research into organizational effectiveness designed to provide a collective of public actors (the mandate providers) with evaluative tools would focus on goals as the primary yardstick for performance evaluation. The identification of the specific motives which led some mandate providers to support the establishment of the organization should serve, therefore, only as subsidiary means of ascertaining organizational goals.

Thirdly, one ought to carefully select the appropriate unit of time for measuring effectiveness. Different organizations may have distinct life cycles and fluctuations in their performance over time (which may be explained by a variety of internal and external factors).\(^45\) Hence, selection of the measured time unit can have a crucial impact on the outcome of the goal-attainment assessment process. For example, including the first years of the organization's operations in the assessment – a period during which the organization invested in its long-term infrastructure and struggled with various "growing pains", may skew the findings of cost-effectiveness. In the same vein, examining performance in a single period of assessment which encompasses the organization’s entire lifespan may obscure positive and negative trends in performance and goal-attainment. Still, an excessive focus on certain periods in the organization's life may also raise difficulties. Such a focus may, at times, overshadow the "bigger picture" of the organization's effectiveness, cost-effectiveness

\(^{45}\) See Scott, supra note 199, at p. 352; See also Young, supra note 24, at 179 (discussing institutional robustness in light of changes over time).
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and efficiency; and it may also fail to accurately capture delayed outcomes, attributable to earlier-in-time organizational operations.\(^{46}\)

Furthermore, as was already noted, goals often change throughout the life of the assessed organization – possibly in response to its actual performance (that may reduce or raise stakeholder expectations) or changes in the external environment (e.g., increase or decrease in the resources available to the organization, the emergence of other organizations with overlapping mandates, changing needs of relevant stakeholders etc.).\(^{47}\) Designation of the measured time unit must therefore be sensitive to the possibility of goal-shifting as well.

Finally, there remains the issue of "veil piercing". Since public organizations, like all other organizations, are merely social constructs, it is at least arguable that one should not necessarily focus on the goals of the organizations, but rather on the goals of the sub-units within the organization and the individuals comprising it. Such an investigation may capture more accurately the actual social forces that shape "organizational preferences".

Although the observation that organizations can be disaggregated into constitutive units and individuals that pursue their own distinct agendas is no doubt valid.\(^{48}\) the ability to extend the proposed approach to other more specific objects of study, does not negate the possibility of applying it to a public organization as a whole. In fact, from a sociological point of view, one could argue that organizations serve as focal points for the distinct expectations of their sub-units and members,\(^{49}\) and that an organization's success largely depends on its ability to generate a unity of purpose (or a coalition of interests), which transcends the idiosyncratic interests and goals of its

\(^{46}\) See Scott, supra note 19, at 365 ("Some organizations insist that their full effects may not be apparent for long periods following their performance").


\(^{48}\) Scott describes organizations meeting this description as "organized anarchies"-Scott, supra note 199, at 355.

\(^{49}\) Cf. Stephen D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, (1982) 36 International Organization 185, at 186 (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 relation").
constitutive sub-groups and the individuals comprising it.\textsuperscript{50} In all events, abundant support can be found in the social sciences literature for the proposition that a public organization can be expected to meet certain ascertainable goals, as such, and thus represents a legitimate unit for an effectiveness study.\textsuperscript{51}

1.4 Other Definitions of Effectiveness

Although the "rational system approach" described above represents the most common approach towards the study of effectiveness that is applied in the social science literature, it is certainly not the only method of defining and studying effectiveness. Another approach, which may also be relevant for a research project seeking to better understand the value of the public goods generated by international courts, emphasizes the relationship between the organization and the environment with which it interacts (the "open systems approach").\textsuperscript{52} According to this approach, the effectiveness of the organization depends on the net benefits (or costs) that it generates for its social environment. An effective banking institution, for example, may be one that contributes to a prosperous economic climate, whilst an effective academic institution may be one that fosters the creation of intellectual groups within society. A specific application of the “open systems” approach can be found in the work of Oran Young that focuses on international institutions and define effectiveness as a “measure of the role of social institutions in shaping or molding behavior in international society”.\textsuperscript{53} In this context too, questions of individual and collective state compliance with applicable rules may also loom large in the analysis.\textsuperscript{54}

While the "open systems approach" is sensible and intuitive, its ability to offer meaningful benchmarks for performance evaluation appears to be more limited than the more specific goal-attainment analysis proposed by the “rational system approach”. This is particularly the case when one is dealing with complex

\textsuperscript{50} L. Cummings, ‘Emergence of the Instrumental Organization’ in NEW PERSPECTIVES ON ORGANIZATIONAL EFFECTIVENESS, 56, at 60, (P.S. Goodman. and J.M. Pennings eds.,1977); See Scott, supra note 199, at 354.
\textsuperscript{51} See Scott, supra note 199, at 353; See also Yuchtman and Seashore, supra note 31, at 896.
\textsuperscript{52} W. R. Scott and G. F. Davis, Organizations and Organizing: Rational, Natural, and Open Systems Perspectives (Pearson Prentice Hall: 2006), at 31.
\textsuperscript{53} See Young, supra note 24, at 161.
\textsuperscript{54} See Young, supra note 24, at 162-163.
environments, such as the international environments with which international courts interact. Identifying change in conduct and establishing causation in these kinds of multi-variant environments may be an extremely difficult and ambitious endeavor to undertake.\footnote{55} Furthermore, the lack of a normative foothold, in the form of a list of organizational goals, may render the mapping of impacts too unwieldy and not sufficiently amenable to a purposeful analysis of institutional design.

Still, the "open systems approach" does lend support to the notion that the aforementioned indications of efficiency/inefficiency that reflect the organization's interaction with its environment are relevant (at some level) to a project designed to evaluate organizational effectiveness. Moreover, the "rational system" and "open system" approaches overlap to the degree that the goals of the public organizations are tied to their social environments: A governmental department entrusted with processing social security claims may be expected to increase social welfare across the relevant polity, for example; in such cases, the two approaches share similar problems of measurement.

Another approach to effectiveness developed in the social sciences literature regards the ultimate goal of organizations as that of obtaining sufficient resources to sustain their continued functioning\footnote{56} or the exploitation of their environments for the acquisition of uncommon or valued resources (the "system resources approach").\footnote{57} Although the "system resources approach", which is in some respects a derivative of the "open systems approach", can offer certain interesting insights on organizational performance, its definition of effectiveness appears unsuitable for a legal study such as the present one. This is because the present study of the effectiveness of international courts departs, as already noted, from a normative assumption about the potential importance of goal-attainment, and although, I do not plan to second-guess the desirability of the goals set by the mandate providers, such goals are likely to derive from a plausible conception of the public good.\footnote{58} At the same time, the "system

\footnote{55 See Young, \textit{supra} note 24, at 163.}
\footnote{56 See Seashore and Yuchtman, \textit{supra} note 31, at 393.}
\footnote{57 S.E. Seashore and E. Yuchtman 'A System Resource Approach on Organizational Effectiveness' (1967) 32 \textit{American Sociological Review} 891, at 898.}
\footnote{58 See Herman L. Boschken, 'Organizational Performance and Multiple Constituencies', (1994) 54 \textit{Public Administration Review} 308, at 311; Terry Connolly,
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resources approach" and its focus on organizational self-survival is devoid of normatively, and offers limited tools for a critical evaluation of organizational performance by external stakeholders.

The long-term existence of an organization is not meaningless, however, even under the "rational system approach". Longevity can suggest that core stakeholders have continued to perceive the court in question as a useful or successful one59 (although, termination of the operations of an existing court may not necessarily denote its perceived ineffectiveness).60 In other words, survival may serve as an (imperfect) proxy for effectiveness.61 Moreover, the use of a court by the parties to litigation, which is one of the proxies for effectiveness identified in some of the literature,62 may be analogized to resource attainment, and could be indicative of the perceived effectiveness of the court – i.e., its goal-attainment prospects, in the eyes of relevant stakeholders. Finally, it should be noted that resource-attainment and goal-attainment are linked to one another: The survival of the court and its empowerment (even self-

Edward Conlon & Stewart Jay Deutsch, 'Organizational Effectiveness: A Multiple Constituency Approach', (1980) 5 Academy of Management Review 211, at 213-214. 59 See e.g., Young, supra note 24, at 166-169 (describing the longevity of the Svelbard regime in the face of strong political upheavals as indicative of its robustness). 60 The operation of a court may be terminated because it is perceived as effective but lacking in cost-effectiveness or efficiency. See e.g., David Wippman, 'The Costs of International Justice', (2006) 100 AJIL 861, at 862 (“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”); Dominic Raab, ‘Evaluating the ICTY and Its Completion Strategy’, (2005) 3 J Int'l Crim. Just. 82, 84 (“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”). Nevertheless, a court may also be dismantled because it has attained its principal goals. Indeed, the decision to complete the work of the ICTY may also be driven, at least in part, by a perception that the Tribunal has accomplished a good part of its mission. See Raab, ibid (“progress 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”). 61 See e.g., David McKeVitt and Alan Lawton, Public Sector Management: Theory, Critique and Practice (The Open University: 1994), at 226. But see M. W. Meyer and L. G. Zucker, Permanently Failing Organizations (Sage, Newbury Park, CA: 1989), at 133- (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). 62 See e.g., Posner and Yoo, supra note 6, at 28.
aggrandizement), may improve its prospects for goal-attainment. Hence, increasing the material capabilities available to international courts may be regarded as intermediate goals which courts may set for themselves in order to attain the ultimate ends for which they were created.\textsuperscript{63}

**Part II. How Should Effectiveness be Measured?**

2.1 *Identifying Operational Categories*

When measuring organization effectiveness, the social sciences literature usually evaluates three distinct aspects of the organization's operations (sometimes referred to as "operational categories"), namely: **Structure** (or input), **process** and **outcome**.\textsuperscript{64} According to the "rational system approach", an examination of effectiveness should consider: whether the tangible and intangible resources available to the organization actually enable it to meet its objectives (structure);\textsuperscript{65} whether the organizational process facilitates the aim of the organization (process);\textsuperscript{66} and whether the outputs and their social effects are consistent with the organization's goals (outcome).\textsuperscript{67}

Only the third question is directly related to evaluating whether an organization actually meets its goals, or in other words, functions as an "effective" organization. Measuring the impacts of public organizations however, may be extremely difficult (and some say, impossible). This is because the goals of public organizations tend to be ambiguous and the public goods they generate are hard to quantify (contrary to private organizations that tend to generate quantifiable profits or losses). The performance of public organizations also tends to be more dependent on their external environment than private corporations, thus further complicating a cause-and-effect


\textsuperscript{64} See e.g., Pamela S. Tolbert and Richard Hall, *Organizations: Structures, Processes and Outcomes* 10\textsuperscript{th} ed., (Prentice Hall: 2009), at 17.


\textsuperscript{66} Ibid., at 303.

\textsuperscript{67} See Rainey, *supra* note 27, at 129; See also Tolbert and Hall, *supra* note 64, at 187.
analysis and calculations of efficiency. A better understanding of structure and process can therefore help, as a form of reverse engineering, in assessing the feasibility of effective outcomes. Moreover, exploring structures and processes may help in diagnosing problems which explain what ostensibly appears to be sub-optimal performance on the part of the evaluated organization. Finally, such structural and process indicators may also provide important insights on the cost-effectiveness of the organization – that is, whether it is possible to fulfill the prescribed goals with fewer resources or better procedures.

Evaluation of the organization's structure, process, and outcomes is to be facilitated by specific quantitative and qualitative indicators that serve as proxies for measuring organizational effectiveness. The number of potential indicators is however, 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 outcome). While many (if not most) of the indicators identified by these researchers would be of little use to a research project focusing exclusively on international courts, some indicators used to assess the effectiveness of domestic public organizations (and, in particular, the effectiveness of domestic courts), may nonetheless be of considerable relevance to the present research project.

68 Forbes and Lynn, supra note 27, at 9.
69 See Sowa et al, supra note 32, at 715 (“To improve outcomes, organizations need to understand how their structures and processes enable or hinder those outcomes”).
70 See Moore, supra note 23, at 33-36.
71 See Forbes and Lynn, supra note 27, at 11.
72 A number of research projects, conducted at both national and international levels, have developed standards and criteria for assessing the effectiveness of domestic courts. One may mention in this regard the following initiatives: a) The International Framework for Court Excellence (2009), at http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf (looking at the following seven areas of court performance – court management and leadership; court policies; human, materials and financial resources; court proceedings; client needs and satisfaction; affordable and accessible court services; public trust and confidence); b) The European Commission for the Efficiency of Justice, (CEPEJ) Working Group on Quality of Justice Evaluation Scheme (2007), Council of Europe Doc. CEPEJ (2007), at 10 (looking at demographic and economic data, access to justice and courts, organization of the court system, fair trial, career of judges and prosecutors, lawyers, alternative dispute resolution, enforcement of court decisions,
In any event, it is important to acknowledge that identifying relevant indicators for specific organizations, and then selecting, prioritizing and categorizing them, are based to a large extent on normative assumptions concerning the functions and operations of the relevant organization, which may be open to challenge. In the same vein, certain methods of indicator classification would be inevitably controversial, since they involve aspects that relate to more than one operational category (for example, assessing whether an organization actually follows its procedures may be viewed as either an assessment of process or outcome).

As suggested above, an examination which focuses exclusively on the question of whether organizations meet their goals would too narrowly limit our perspective on the organizations' social utility. In order to form a more comprehensive assessment, one may further try to evaluate any unplanned or unforeseen benefits and costs associated with the organization's operation, and discuss the cost-effectiveness of the organization’s outcomes. Indicators would need to be developed for the purpose of measuring these additional performance criteria as well.

2.2 Multi-level Governance
One of the unique attributes of public organizations is the fact that they function within complex social environments, which generate strong dynamics that impact notaries and the functioning of the justice system; c) The National Center for State Courts CourTools, at http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm (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, court employee satisfaction, and cost per case); and d) The Quality Benchmarks identified by the Quality Project in Finland, at http://www.oikeus.fi/uploads/6tegx.pdf (focusing on judicial process, the judicial decision, treatment of the parties and the public, promptness of the proceedings, competence and professional skills of the judges and organization and management of adjudication).

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their work. The "chain of delegation" theory may represent a particularly useful approach to understanding the interplay between public organizations, other public bodies and their respective constituencies. According to this approach, different aspects of the public organization's operation involve interactions with different stakeholders. For example: citizen preferences and interests lead to the election of representatives; choices made by these representatives lead to the establishment of public organizations, and also to formal authority being granted to such organizations; the organizations' constitutive instruments and supervisory bodies then delegate discretionary powers to managers, administrators and so on; and these managers and administrators delegate executive powers to workers of lower rank and service providers. Workers and service providers then generate outputs, the impacts of which are assessed by different stakeholders. These assessments shape new citizen preferences and interests, and so on.

Viewed from this perspective, it is possible to situate effectiveness indicators not only in the three aforementioned operational categories (namely, structure, process and outcome), but also in relation to different links in the chain of delegation – i.e., according to their manner of interaction with distinct constituencies. Structural indicators typically appertain to the formal authority of the public organization and the scope of managerial powers granted thereto. Meanwhile, process indicators focus on the manner in which managerial powers are actually exercised, as well as on the quality of performance at the "street level"; whilst outcome indicators measure actual outputs, their social impacts and perceptions of the relevant stakeholders (such as other social institutions and society at large).

The very goals of the organizations may change as one moves along the chain of delegation, with different constituencies setting divergent expectations or desired performance standards (for example, employees of public organizations may have very different expectations of the organization than the general public or the

76 See Forbes and Lynn, supra note 27, at 6.
77 See Sowa et al, supra note 32, at 719 (proposing to measure “perceptual measures” of outcomes alongside more objective outcomes).
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politicians that created it).\textsuperscript{78} As a result, it may be impossible for an organization to satisfy the expectations of all its stakeholders.\textsuperscript{79} Although, ideally, a comprehensive analysis of organizational effectiveness (which also looks at cost-effectiveness and efficiency), ought to entail the examination of previously- and newly-formulated stakeholder preferences, actual impacts on, and perceptions of impact by all relevant stakeholders, and any ensuing changes in the articulation of formal authority, such a comprehensive examination may be impractical as ascertaining some sets of preferences and impacts could prove to be extremely difficult and burdensome. Here too, a choice of one link in the “chain of delegation” – one dominant set of stakeholders, as a principal object of study may be necessary. Still, such a choice entails normative implications: the prioritization of one set of goals over other competing sets may derive from certain beliefs about the overriding importance of meeting the expectations of some stakeholders and, in turn, about the elevated normative status of such stakeholders.

Part Three: Application to International Courts

3.1 Identifying the Goals of International Courts

Applying methods that measure the effectiveness of public organizations, which were developed in the social science literature to the evaluation of effectiveness of international courts, may provide us with new research possibilities in the field of international law and international institutions. Most significantly, the emphasis on organizational goals in assessing effectiveness requires us to invest considerable intellectual effort in identifying the specific goals of each international court from the vantage point of the relevant stakeholders. Such an approach invites an institution-specific (and stakeholder-specific) analysis of effectiveness, as opposed to the "thick brush" approach used to describe the goals of international court in some of the relevant legal literature.

3. 1 The Goals of International Courts

\textsuperscript{78} See Perrow, ‘Organizational Analysis', \textit{supra} note 26, at 134; Gross, \textit{supra} note 30, at 282.

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. As already noted, the social science literature normally distinguishes between official goals and operative goals – that is to say, between the stated general goals of the organization (which are often vague and open ended), and the more specific benchmarks which the organization itself develops in order to meet its official goals. So, for example, the official goals of an international court may be the settlement of disputes between states, or fighting impunity. These general goals may then be translated over time into more specific operative goals, such as expediting proceedings, or increasing the number of prosecutions for international crimes before the court.

Moreover, as noted above, when identifying and analyzing organizational goals, one should also consider the external or internal identity of the goal-setter, and the independent or strategic nature of the goals, including their explicit, implicit or unstated attributes. Using the aforementioned "chain of delegation" theory may also help in categorizing the different goals in accordance with the different "operational categories" discussed in Part I, and in identifying the stakeholders served by the relevant goal-attainment efforts.

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80 Council of Europe, Explanatory Report to Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, at para. 37, at http://conventions.coe.int/Treaty/en/Reports/Html/194.htm (“these elements of the reform seek 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, UN Doc. A/54/187 S/1999/846 (1999), at para. 116 (“This 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”).

Ultimately, a series of specific questions needs to be formulated in accordance with the objectives of the research. The present research framework envisions a series of policy-oriented research projects that are designed to offer one dominant category of stakeholders in the operation of international courts – namely, the mandate-providers (the organizations and member states that jointly create, control and support international courts) - methodological tools to assess whether such courts meet the expectations that have led to their creation and continued existence. Given the political and legal control exercised by the mandate provider over the operation of international courts, such an assessment may facilitate reforms in the mandate, structure and process of existing courts. It may also enable us to draw conclusions that would affect the institutional design of future international courts by future mandate providers. Note again however, that the current framework does not aspire to normatively assess the soundness of the expectations placed by stakeholders in international courts or the social desirability of such expectations (although the effectiveness analysis tools it offers could throw new light on some of these questions).

The set of questions proposed below thus corresponds to the stated goals of the present research:

**Firstly**, it may be useful to try and identify the various external goals set for the relevant tribunal by its mandate-providers. Such goals include explicit and implicit official goals, as well as the more specific intermediate goals laid down by the mandate-providers in the court’s constitutive instruments. Such external goals represent the gamut of expectations that the court’s direct creators and/or primary funders and backers convey to the court in question. In political terms, these external goals may constitute a principal benchmark against which the court’s record of achievement will actually be tested; and in normative terms, the proposition that

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82 See in this regard the words of caution issued by Scott: "Researchers who attempt to assess the effectiveness of organizations are not immune to these political processes. Which and whose criteria we choose to emphasize in our studies of organizations will depend on our own interests in undertaking the study. We must be willing to state clearly what criteria we propose to employ, recognizing that whatever they are and whoever espouses them, they are always normative conceptions, serving some interests more than others, and likely to be both limited and controversial." - Scott, *supra* note 199, at 356.
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courts should faithfully execute their mandates appears sound and legitimate. Finally, from a purely methodological point of view, external goals set by the mandate-providers also offer a relatively clear point of departure for studying the effectiveness of international courts.

The other distinctions discussed above, such as the distinction between official and operational goals, as well as between different levels of goal generality (i.e., ultimate ends v. strategic intermediate goals), are less suitable for a project designed to gauge the attainment of the mandate-providers' expectations than the aforementioned external/internal distinction. This is because, unlike the latter, the former distinctions do not isolate the mandate-providers as the principal goal-setting stakeholders and are thus less compatible with the goals of the present research. Still, such distinctions may be useful as subsidiary means for highlighting overlaps and conflicts between different organizational goals; in offering a normative context for understanding the relative importance of different goals; and in providing a critical perspective for actual prioritization decisions (operative goals).

Secondly, it is also useful to establish the operative internal goals identified by the courts themselves (judges, registrars, prosecutors, etc.). While courts are not the primary stakeholders whose expectations serve as the principal yardstick for measuring effectiveness under the present research framework, their direct involvement in shaping their structure, process and outcome, renders them a key player in facilitating or hindering the fulfillment of the goals set by the mandate providers. Hence, it could be helpful to identify such self-determined goals and to conduct a normative evaluation of whether such internal goals are compatible with the external goals set by the court's mandate-providers. It is expected that self-determined goals will tend to be more specific in contents, as well as more closely "tailored" to the capabilities and practical needs of the institution itself (creating programs aimed at increasing judicial output, for example)83 than the external goals set by the mandate-providers, who may have formulated their expectations from the court before it began to operate (and were consequently limited in knowledge of the actual challenges the

83 Report of the ICJ to the UN General Assembly (1 August 2006-31 July 2007), UN Doc. A/62/4 (2007), at para. 239 (President Higgins explained that the aim of the Court was “to increase further [its] throughput in the coming year”).
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institution would be required to meet. The greater proximity between goal-setters and goal-implementers and the greater specificity such a relationship entails may render internal goals more influential on actual court performance. This observation is attributed in part to the fact that specific operative goals may be more amenable to measurement and assessment than official goals. (Some normative assessment of the skewing effect of measurable operative goals on goal prioritization may be warranted). In short, identifying and measuring the fulfillment of internal goals may ultimately help us identify and measure the attainment of external goals.

Finally, one should look at unstated goals - that is to say, goals which the court’s official mandate or internal guidelines fail to establish, but which have subsequently been developed at either the mandate-providers or the court’s own initiative (possibly in response to stakeholder expectations). Note that unstated goals differ from implicit goals, in that the latter can be derived by way of interpretation from the official or operative goals of the court. As noted before, unstated goals may often reflect what may be regarded as inherent goals – in our case, goals inherent to the operation of international courts, such as interpreting norms or legitimizing the exercise of governmental power. At the same time, unstated goals may vary considerably from the court’s stated goals and generate tensions between the original mandate-providers’ expectations of the court and its actual policies.

While identifying some unstated goals of international courts could be difficult or controversial (partly because individual judges may have idiosyncratic conceptions of the court’s unstated goals, which are not shared by the bench as a whole), such acts

84 See Scott, supra note 199, at 354.
86 Guzman refers to such tribunals as “runaway tribunals”. See Guzman, supra note 5, at 179-180.
87 For a discussion of an analogous problem, see Treves, supra note 85, at 186-187 (discussing the possibility of difference of opinion among judges on what would constitute legitimacy-enhancing strategies).
of identification can help us develop a more complete understanding of the complex social functions actually assumed by courts. They may also more accurately explain the degree of success of courts in obtaining resources from states and other stakeholders, and their actual operational priorities.

One can expect that some stated or unstated goals are common to all international courts, and correspond to conventional expectations about what courts can and should do. For example, all courts are expected to resolve disputes over the interpretation of legal texts, the relevant facts and the application of the law to those facts. More broadly, international courts, like their national counterparts, are expected to confer legitimacy on the social institutions or political system that established them, and to partake in the advancement of the rule of law. Such generic goals sometimes constitute the ultimate ends – or the raison d'être for creating the court in question and/or preferring judicial avenues over other institutional avenues for addressing certain policy problems. Yet, at other times, such general goals are merely intermediate in nature, and facilitate the attainment of the other, ultimate ends. Furthermore, courts belonging to the same category of courts (e.g., human rights courts, economic integration courts and international criminal courts), are likely to have a relatively large number of similar goals – not least because their mandate-providers draw inspiration from each others' experiences.

Still, some court goals are likely to be distinctive in nature in the sense that they cater for the particular needs, interests, and expectations of particular mandate-providers. For example, the EFTA court takes on the unique role of harmonizing EEA law with EU law. Moreover, most international courts operate within the framework of specific regimes (such as the EU, the WTO or the Council of Europe) and institutional relationships of this kind are crucial to a full understanding of these courts' specific goals. Arguably, "regime courts" may be expected to contribute to attaining the

88 Guzman regards “information dissemination” as the core function of international tribunals. Guzman, supra note 5, at 179-180.
90 On the relationship between goal choice and institution choice, see Komesar, supra note 4, at 49.
91 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, 31 Jan 1994, art. 3, OJ L344.
specific goals of the overarching regime in which they operate (and such expectations will be reflected in the court's explicit, implicit or unstated goals);\(^{92}\) at the same time, other regime norms and institutions may contribute to the attainment of these very same goals. Hence, only a contextualized court-specific analysis can provide comprehensive, though necessarily less transposable, evaluation of the actual performance of international courts.\(^{93}\)

In any event, mapping the various goals of different international courts entails a significant academic effort (Annex I and II of this article illustrate how the mapping of goals from one dispute resolution mechanism – namely, the WTO Dispute Settlement Body – and one group of courts – namely, international criminal courts – could look like). Furthermore, mapping of goals represents only one stage in establishing benchmarks for assessing court effectiveness. Future research projects ought to attempt to develop a methodology for identifying, where possible, standards for assessing the degree to which relevant goals are attained (outcome indicators) in ways that would meet valid statistical and analytical standards. A supplementary qualitative analysis may also useful in this regard for providing a meaningful context to any specific quantitative findings.\(^{94}\) Where quantitative methods are unavailable, reliance should be made exclusively on less rigid qualitative criteria.

### 3.2 Measuring Outcomes

The key to assessing the effectiveness of international courts according to the "rational system approach” involves evaluation of judicial outcomes. While some outputs generated by international courts are relatively easy to capture (the number of

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\(^{92}\) See e.g., Understanding on Rules and Procedures Governing the Settlement of Disputes Art. 3(2), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments–Results of the Uruguay Round, 33 I.L.M. 1123 (1994) (hereinafter 'DSU’) (“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”).

\(^{93}\) 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 24, at 163 (“the effectiveness of institutional arrangements [may differ] from one issue-area to another, one spatial setting to another, or one time period to another”).

decisions issued by courts within a given time frame, for example), others raise more complicated evaluation problems (such as the development of a coherent jurisprudence). In any event, it is imperative that we distinguish between outputs – the direct products of the organization's operation – and outcomes – the impacts of such outputs on the external state of the world. While measuring outputs may assist us in evaluating outcomes, application of the "rational system approach" to international courts ultimately requires us to juxtapose goals (or desired ends) and outcomes (or actual ends), not outputs. In other words, 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 the normative impact of international courts on the internal laws and practices of the state parties; the court’s normative contribution to a specific legal regime as well as to general international law; increased deterrence; strengthening compliance with international norms; harmonizing different legal regimes; and promoting processes of national reconciliation, could be extremely difficult. Whether such changes in the state of the world have occurred may be very hard to capture, and almost impossible to quantify or subject to an objective assessment. Moreover, since these changes take place in the context of complicated political and legal environments, isolating the contribution of the courts towards their occurrence (or, in other words, tracing the exact chain of causation) may be near to impossible.

Nevertheless, although the precise measurement of outcomes (or even intermediate outcomes) is impractical, the social science literature suggests that the application of the "rational system approach" can significantly improve our understanding of the performance of public organizations, their promise and their limits. Such improved understanding occurs, not least importantly, by compelling courts, stakeholders and

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95 Tony Bovaird and Elke Löffler, *Public Management and Governance*, 2nd ed. (Routledge: 2009), at 154 ("Outcomes are events occurrences or changes in conditions, behavior or attitudes. Outcomes are not what the programmer or the organization did, but the consequences of what the programmer or the organization did").

96 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*, 2nd ed. (Urban Institute: 2006), at 18.
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academic critics to engage in a discourse on the goals of international courts and their consequent attainability.\(^97\) The proposed framework analysis can also 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 performance of a single court in different points in time, thereby offering some more meaningful evaluations as to relative effectiveness.\(^98\) In any event, significant research would clearly be needed in the coming years to develop suitable methodological tools to identify, quantify and analyze indicators of outcome effectiveness in relation to different international courts.

3.3. Unintended/Unforeseen Costs and Benefits

As previously noted, international courts can also generate unexpected outcomes that represent certain social costs and/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 directly-related outcomes (such as jurisdictional conflicts between different international courts)\(^99\) and indirectly related outcomes, such as the possible derailment of peace processes as a result of the refusal of international criminal courts to respect national amnesties.\(^100\) In this regard, one

\(^{97}\) See e.g., Scott, supra note 19, at p. 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 specific formulations of it”).

\(^{98}\) See Scott, supra note 19, at 364.


should also acknowledge the indirect costs associated with "paths not taken". If one can establish that the creation and operation of international courts had stymied the pursuit of other, more promising international efforts (if the creation of an international criminal court had served as a substitute for humanitarian intervention to prevent more crimes from occurring, for example), then the establishment of such courts may have actually generated a net cost.

At the same time, one should also look at unexpected direct and indirect benefits generated by the operation of international courts. Some direct outcomes (such as national capacity building through the transfer of expertise from international courts, the development of an historical record of events, and informal socialization between courts and other relevant actors) may not have been part of the official or even operative goals of international courts. They could therefore be viewed as unintended benefits. Furthermore, some indirect beneficial outcomes may also be identified. The establishment of some international courts has inspired the

101 See e.g., Alexander, supra note 5, at 36-42; Philipp Kastner, 'The ICC in Darfur—Savior or Spoiler?', (2007) 14 ILSA J. Int'l & Comp. L. 145, at 152. See more generally, Hugh Rockoff, 'History and Economics', in ENGAGING THE PAST: THE USES OF HISTORY ACROSS THE SOCIAL SCIENCES, at 67, (E.H. Monkkonen ed., 1994) (“If outcomes are path-dependent, and the choice between alternative paths are 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”).
subsequent creation of similar additional courts (for example, the ICTY and the ICTR were an underlying influence on the establishment of the ICC). Furthermore, the fact that court adjudication raises the international profile of certain problems (such as WTO jurisprudence attracting attention to the relationship between trade and environment), which thereby encourages international cooperation to resolve them, may be viewed as an unexpected benefit that could compensate for certain sub-optimal features in the operation of the reviewed court.

As noted above, the willingness to factor in unexpected impacts of international courts enables us to develop a better informed and far more comprehensive assessment of their performance. This does introduce, however, additional methodological complications, which may not be fully amenable to solution.

3.4 Examining Structures
The difficulties in measuring the actual outcomes generated by international courts increase the relative importance of structure indicators (sometimes referred to as "inputs"), and process indicators. Structure indicators may help, by way of "reverse engineering", in evaluating the capacity of international courts to meet their goals. They may also help in explaining some of the perceived discrepancies between outcomes and goals. Nonetheless, one must observe that structural indicators are "twice removed" from outputs, and that their actual impact on the latter is mediated by the quality of the process put into place, and affected by a myriad of environmental factors which either facilitate or hinder total goal attainment.

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108 For support, see Guzman, supra note 5, at 203 (“Tribunal design can influence outcomes”).
109 See Scott, supra note 19, at 367.
While every court is likely to feature a different list of structural indicators, it may be possible to identify and classify some indicators that are expected to be found in all or almost all international courts. Such structural attributes may explain, in part, the choice of courts as the vehicle selected by the mandate-providers for attainment of the specific goals they have identified:\textsuperscript{110} 

- Legal powers – jurisdiction, binding nature of decisions, applicable law, ancillary powers (including fact-finding powers),\textsuperscript{111} right of access, number of parties to constitutive instruments, enforcement machinery.
- Personnel capacity – number of judges, number of employees, legal assistance procedures, actual and perceived quality of personnel (qualifications, experience, professional background)\textsuperscript{112}
- Resources – short term budget, long term budget, facilities and other tangible resources.
- Structural Independence – potential for judicial independence, institutional independence, reputation for impartiality.
- Usage Potential – conditions that may underlie expectations for actual usage (e.g., propensity of member states to litigate, relevance of the problem area addressed by the court).

Another important structural factor is the possibility of transforming judicial structures or procedures in response to changing needs or circumstances.\textsuperscript{113} Such transformation may occur, to the extent in which the court is authorized to reform its own structures or procedures, through the exercise of the court’s own legal powers, or, more likely, through direct or indirect recourse by the court to the mandate providers pursuant to the aforementioned “chain of delegation” theory. In all cases, \hfill  

\textsuperscript{110} See Komesar, \textit{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).
\textsuperscript{111} See Young, \textit{supra} note 24, at 176 (noting the critical importance of transparency – i.e., the monitoring of compliance with governing rules, in assessing the effect of social institutions on individual and collective state behavior).
\textsuperscript{112} Guzman emphasizes the perceived quality of the judges. Guzman, \textit{supra} note 5, at 206. While perceptions of quality may be particularly important from a compliance-inducing point of view, my approach to effectiveness is broader, and justifies considering objective indicia of judicial quality as well.
\textsuperscript{113} See Young, \textit{supra} note 24, at 179 (emphasizing the importance of transformation rules for institutional effectiveness).
the ease in which changes can be made may affect the court’s ability to attain its goals.

Finally, a more complete picture of the structural attributes of international courts would emerge after exploring the legal, institutional, political, economic, ideological and cultural environments in which such courts operate, as it appears that the de jure and de facto powers of the court derive, to a large extent, from these background conditions. The differences, for example, between the records of achievement of courts in Europe, as compared to those outside Europe, may appertain as much to the "pro-rule of law" climate found in Europe, as to any intrinsic factor related to the structure of the relevant courts.

3.5 Examining Process
Like structural indicators, examination of the processes employed by international courts may also help us in both understanding court-effectiveness and explaining 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, explain why a judicial process was deemed appropriate by the mandate providers). For example, the pace at which proceedings before the court take place may predict to some extent its ability to resolve a large number of disputes, provide normative guidance on a variety of issues, and promote enforcement – i.e., generate relevant outcomes. Likewise, assessing adherence to standards of due process can further contribute to a better understanding of a court’s legitimacy in the eyes of certain target audiences, and ultimately the impact of its decisions on relevant constituencies. Still, one should

114 These factors are referred to by Young as exogenous factors governing effectiveness (as opposed to endogenous structural factors). Young, supra note 24, at 176. See also Jacobson and Brown-Weiss, supra note 11, at 7.
115 See Helfer and Slaughter, supra note 5, at 298, 367. See also Young’s discussion of government’s capacity to govern and distribution of power and inter-dependence among participants in an international regime as factors controlling the effectiveness of institutions striving to influence their conduct (Young, supra note 24, at 183-190) and Jacobson and Brown-Weiss’ discussion of the centrality of the international environment and country related factors in assessing the effectiveness of international environmental regimes. See Jacobson and Brown-Weiss, supra note 11, at 528-535.
116 Note that legitimacy may, ultimately, be a subjective notion- Mitchel Lasser, ‘Transforming Deliberations’, in THE LEGITIMACY OF HIGHEST COURTS
acknowledge that an examination of the process may be a sub-optimal proxy for a goal-attainment centered investigation into effectiveness. This is because such an examination is often based on the same incorrect assumptions of the relationship between process and outcomes that are employed by the courts themselves (such as the notion that more prosecutions lead to greater deterrence or that expedited proceedings lead to fewer not more disputes, etc.).

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 justice. Although such literature focuses on justice and not on effectiveness, the criteria it identifies may serve as a useful starting point for analysis of court effectiveness as well. Procedural justice criteria are concerned with evaluation of the structural aspects of the court procedures—e.g., 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, identifying deviations from court procedures), compliance monitoring, and actual judicial independence. Interpersonal justice criteria evaluates the way in which participants in the process are treated (i.e. fair/respectful treatment, etc.). Finally, informational justice refers to the transparency of the process and invites an assessment of the quality of the court's reasoning.

RULINGS, supra note 63, at 33, 37. But see Ian Clark, Legitimacy in International Society (Oxford University Press: 2005), at 20- (defining legitimacy as the “political space marked out by the boundaries of legality, morality and constitutionality”). See Scott, supra note 19, at 366 (“[process measures] assess conformity to a given program but not the adequacy or correctness of the programs themselves”); Ivan Illich, Deschooling Society (Marion Boyars: 1972), at 9 (“[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 19, at 367 (“[in] organizations confronting strong institutional pressures… to a large degree process is substance”).


Gramatikov et al, supra note 118, at 11.

Employee involvement may also be an important component in the process. Robert J. Vandenberg, Hettie A. Richardson &
Whereas some of the aforementioned indicators are objective in nature and can be determined with relative ease, other less tangible indicators may have to be assessed in the light of their perceived propriety in the eyes of the parties and other stakeholders.

Conclusions
Measuring the effectiveness of international courts is a serious challenge – arguably, more challenging than some of the existing international law literature has so far acknowledged. It requires a thorough analysis of the different goals of international courts, and the development of measurable criteria and indicators, supplemented by quantitative analysis. In addition, future research ought to measure and evaluate, where possible, the intended and unintended outcomes of international courts, their structures and processes. Such an endeavor may, if successful, provide important insights on the effectiveness, cost-effectiveness and efficiency of international courts. It may also serve as the basis for reform proposals: either of judicial structures (e.g., increase or decrease of jurisdictional powers), process (e.g., introduction of timelines, increase or decrease of the role of third parties), and ultimately, outcomes. Such reform proposals may aim to influence different levels of governance – the constitutive instrument drafting level, the high-level or low level management of court business, or the perceptions of outcomes by relevant stakeholders.

In contradistinction to parts of the existing international law literature, I posit, in light of the social science literature, that the study of court effectiveness must be based on the specific goals set for each and every court by the responsible policy makers, and sometimes also by the institution itself. Still, 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 them (for example, one can compare the work of the International Criminal Tribunal for Yugoslavia to that of the International Criminal Tribunal for Rwanda, and the work of the European Court of Justice to that of the EFTA court). Moreover, some aspects of the operation of international courts


Gramatikov et al, supra note 118, at 11.
are modeled after domestic courts and invite comparison in this regard as well. Comparisons may also be helpful for measuring fluctuations in the effectiveness of a single judicial institution over time.

Still, at the end of the day, one has to admit that the success prospects of the research agenda introduced here are still unclear. Although application of the insights developed in the social science literature can, no doubt, improve our analytical understanding of international courts and their social functions, and encourage a healthy discussion of the social roles of international courts (which has been often lacking both in theory and practice), whether effectiveness can actually be precisely and comprehensively quantified or meaningfully assessed remains unclear.
Annex I

The goals of the WTO dispute settlement system

Ultimate ends

1. Promoting the security and predictability of the multilateral trade regime

2. Ensuring and preserving the balance of rights and interests between the member states

3. Advancing the goals of the WTO*

* Annex I is based on the work of Ms. Sivan Shlomo, a PhD candidate at the Faculty of Law, Hebrew University of Jerusalem. The following segment does not purport to exhaust discussion of the goals of the DSB courts—an endeavor that requires more space and much more research work. As can be expected, considerable goal ambiguity appertains to the unstated goals listed here (3-4, 10-14) and their very existence is controversial; the field research undertaken has not removed the uncertainty surrounding their existence.


4. Legitimizing the operation of the WTO*126

* Potential unstated goal

Intermediate-Goals

5. Law interpretation127

6. Prompt resolution of dispute128

7. Inducing the positive resolution of disputes129


128 See DSU Art. 3(3) (“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.”); W.J. Davey, ‘The WTO Dispute Settlement System: The First Ten Years’, (2005) 8 Int’l. Econ. L. 17, at 45 (“prompt settlement is said to be essential” to WTO DSM); John H. Jackson, ‘The Case of the World Trade Organization’, (2008) 84 International Affairs 437, at 438 -(the WTO DSM aims for “prompt settlement and satisfactory settlement”); Van Den Bossche, supra note 124, at 171.

8. Rule-oriented resolution of disputes

9. Inducing compliance or enhancing the credibility of WTO undertakings

10. Discouraging Unilateralism

http://www.princeton.edu/~cldavis/files/WTOeffectiveness_DavisAPSA08.pdf (evaluating “how well the WTO dispute mechanism achieves the goal to resolve trade disputes”).

130 John H. Jackson, ‘International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?’, (2004) 98 Am. J. Int’l L. 109, at 116 (“DSU Article 3, paragraph 2 states that a central element of the WTO is ‘providing security and predictability to the multilateral trading system.’ This provision clearly refers to the desirability of having the DS system support a "rule-oriented" or "rule-based" design”); Krishna Srinivasan, ‘The dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian, and Legal Perspectives’, (2007) 30 The World Economy 1033, at 1056- (“the ‘diplomatic’ DSM of GATT was replaced by a ‘legalistic’ DSM of the WTO. It was believed that a more legalistic and rule-based system would be of greater value than a power-based diplomatic system to the economically and politically weaker members, mainly developing and small countries”); Haider Khan and Yibei Liu, ‘Making a Rule-Based Trading Regime Work: Globalization and the WTO Dispute Settlement Mechanism’, at 3, 13-14 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995933 (“Relative to the power-based GATT system, the DSM of the WTO moves toward a more rule-oriented mechanism. Many scholars expect that the reformed rule-based system can better protect developing countries from the unilateral exercises launched by strong powers, thus enhancing the equality in international trade.”). See e.g., Keisuke, supra note 129, at 216 (discussing whether WTO DSM is "leveling the playing field" between developing and developed countries in trade disputes).

131 See DSU Art. 3(7) (“In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.”); Jackson, supra note 124 at 116, 120 (describing measures DSM can invoke to ensure compliance); Davey, supra note 123, at 2 (stating that “[c]learly the goal of the dispute settlement system should be to promote compliance with WTO rules”); McRae, supra note 5, at 7 (WTO dispute settlement “provides an orderly mechanism for deciding whether a Member has complied with its obligations”); Horn and Mavroidis, supra note 129, at 207 (“the resolution of disputes may indeed be the main purpose of a dispute settlement mechanism. However, it seems reasonable to assume that its purpose is not only to induce settlement, but also to promote a desirable form of implementation of the agreement”); Giovanni Maggi, ‘The Role of Multilateral Institutions in International Trade Cooperation’, (1999) 89 Am. Econ. Rev. 190, at 190-91 (describing DSM’s monitoring role in verifying violations of trade agreements).

132 See DSU, Art. 23 (requiring Member states to resolve all disputes through the DSU, rather than on their own); Keisuke, supra note 129, at 215 (“Another purpose for which the WTO dispute settlement system was constructed was to fend off unilateralism.”); Van Den Bossche, supra note 124, at 171-172; Stewart, supra note 124, at 2777-2779, 2810; 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.”).


Maggi and Staiger, supra note 127, at 11-12 (describing DSP roles of modification and gap-filling of trade agreements); Goldstein and Steinberg, supra note 125, at 19-34 (describing law-making role of WTO DSP).

McRae, ‘Treaty interpretation and the development of international trade law by the WTO Appellate Body’, in (G. Sacerdoti et al eds.,) supra note 125, at 360.

Working Draft

* Potential unstated goal

Annex II

The goals of international criminal courts

Criminal justice goals

Ultimate Ends

1. Inducing compliance with ICL (specific and general deterrence)
2. Reducing impunity
3. Satisfying victim needs
4. Promoting peace and security/reconciliation

138 Annex II is based on the work of Mr. Gilad Noam, a PhD candidate at the Faculty of Law, Hebrew University of Jerusalem. The following segment does not purport to exhaust discussion of the goals of international criminal courts – an endeavor that requires more space and much more research work.

139 The Preamble of the Rome Statute of the International Criminal Court provides, inter alia, that the States Parties "determined to put an end to impunity... and thus to contribute to the prevention of such crimes". On the difficulty to provide deterrence in the context of international criminal justice, see: Ku and Nzelibe, supra note 5; Alexander, supra note 5.

140 Preamble of the Rome Statute of the International Criminal Court, ibid.


142 In the Security Council's Resolution establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), it was stated that the Security Council is "convinced that in the particular circumstances of the former Yugoslavia the
5. Conveying a message of international condemnation of atrocious crime
6. Developing international criminal law*
7. Legitimizing the application of international criminal law*

Intermediate goals

8. Encouraging local proceedings against ICL violators (inter alia through capacity building)\(^{144}\)

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 (1993), Preamble, para. 6. Similarly, with regard to the establishment of the International Criminal Tribunal for Rwanda (ICTR) the Security Council declared that it is “Convinced 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 (1994). In the third paragraph of the Preamble to the Rome Statute, the State Parties are "recognizing that such grave crimes threaten the peace, security and well-being of the world". The fact that 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 jurisdiction of the ICC may also reflect that one of the ICC goals is to promote peace and security. See Rome Statute, Article 13(b). However, Article 16 of the Rome Statute assumes that there may be circumstances in which the criminal proceedings may be undesirable from international peace and security perspective ("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"). On the tension between criminal justice and achieving peace and reconciliation, see Danilo Zolo, ‘Peace through Criminal Law?’, (2004) 2 Journal of International Criminal Justice 727; Linda M. Keller, ‘Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms’, (2008) 23 Conn. J. Int'l L. 209; Jens David Ohlin, ‘Peace, Security, and Prosecutorial Discretion’, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT, at 185, (C. Stahn and G. Sluiter eds., 2009).

\(^{143}\) See, e.g. in the official website of the ICTY: "Since its establishment more than a decade ago, the Tribunal has consistently and systematically developed international humanitarian law. The Tribunal’s work and achievements have inspired the creation of other international criminal courts, including the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court. The Tribunal has proved that efficient and transparent international justice is viable....The legal precedents set by the Tribunal have expanded the boundaries of international humanitarian and international criminal law, both in terms of substance and procedure”. Some Achievements of the ICTY, available at http://www.icty.org/sid/324.
9. When necessary (no local proceedings), holding accountable those bearing the greatest responsibility (investigating, putting on trial, convicting the guilty expeditiously)

10. Projecting an Image of fairness or legitimacy

11. Developing a historical record of events


145 See, e.g.: The Rome Statute, Article 64(2) ("The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses"); see also Article 83 with regard to proceedings on appeal. Considering the central role of the Prosecutor in selecting situations and cases, considerations of fairness and legitimacy are central in the prosecutorial discretion phase when situations and cases are selected. See The Rome Statute, Art. 53; Office of the Prosecutor, *Policy Paper on the Interests of Justice* (September 2007). On prosecutorial discretion in international criminal law, see Luc Cote, ‘Reflections on the Exercise ofProsecutorial Discretion in International Criminal Law’, (2005) 3 *Journal of International Criminal Justice* 162; Hassan B. Jallow, ‘Prosecutorial Discretion and International Criminal Justice’, (2005) 3 *Journal of International Criminal Justice* 145.

146 See, e.g. Some of the Achievements of the ICTY, available at http://www.icty.org/sid/324 ("The Tribunal’s judgments have contributed to creating a historical record, combating denial and preventing attempts at revisionism and provided the basis for future transitional justice initiatives in the region. As the work of the ICTY progresses, important elements of a historical record of the conflicts in the former Yugoslavia in the 1990s have emerged. The ICTY has established crucial facts about crimes, once subject to dispute, beyond a reasonable doubt...The detail in which the ICTY’s judgments describe the crimes and the involvement of those convicted make it impossible for anyone to dispute the reality of the horrors that took place in and around Bratunac, Brčko, Čelebići, Dubrovnik, Foča, Prijedor, Sarajevo, Srebrenica and Zvornik, to name but a few. As other trials are completed, further facts
Potential (unstated) goal