

CHAPTER SIXTEEN

JUDICIAL INDEPENDENCE AS AN INDICATOR OF INTERNATIONAL COURT EFFECTIVENESS: A GOAL-BASED APPROACH

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I. INTRODUCTION

In a provocative article that was published in 2005 in the *California Law Review*, Eric Posner and John Yoo argued that there is no evidence that independent international courts are more effective than dependent ones. In fact, they suggested that the reverse may be true, that is, independent courts could be less effective than their dependent counterparts.¹ According to Posner and Yoo, international courts may fulfill a useful function – providing disputant parties with information about facts or legal norms, which may help them resolve their differences; however, the effectiveness of such courts – which in Posner and Yoo's eyes is measured by usage rates, compliance rates and the overall success of the overarching treaty regime – may be negatively correlated to judicial independence:

Conventional wisdom holds that independence at the international level, like independence at the domestic level, is the key to the rule of law as well as the success of formalized international dispute resolution. We argue, by contrast, that independent tribunals pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties. Indeed, states will be reluctant to use international tribunals unless they have control over the judges. On our view, independence prevents international tribunals from being effective.²

Laurence Helfer and Anne-Marie Slaughter published a response article shortly thereafter, in which they challenged the hypothesis and methodology employed

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¹ Eric A. Posner and John C. Yoo, 'Judicial Independence in International Tribunals', 93 *Calif. L. Rev.* (2005) 1, 72.

² *Ibid.*, at 7.

by Posner and Yoo, as well as their ultimate conclusions.³ According to Helfer and Slaughter, the most effective international courts are independent ones; thus, Posner and Yoo's theoretical conjectures cannot be reconciled with real empirical data, as well as with states' actual preferences. This is hardly surprising since:

1) ... agreeing to an independent tribunal signals the depth of a state's commitment to a particular international regime in a way that makes it more likely that it will secure the benefits of that regime; and (2) ... independent judges - while certainly less bound by political concerns than their dependent counterparts and more able to base their decisions on legal principle - are hardly "lone rangers." They are influenced by a host of structural, political and discursive constraints that states can manipulate *ex ante* and *ex post*, as well as by the pressures of professional and personal socialization within a global judicial community.⁴

My purpose in this chapter is to try and contribute to the debate on the relationship between judicial independence and international court effectiveness, by applying to it a model for international judicial effectiveness I have developed elsewhere.⁵ In doing so, I hope to illustrate some of the problems attendant to the "broad brush" positions taken by Posner and Yoo (and, at times, also by Helfer and Slaughter). Consequently, I posit that the proper questions we should be discussing is not whether judicial independence is generally conducive to international court effectiveness (a correlation which Posner and Yoo fail to prove in a statistically meaningful manner, and Helfer and Slaughter do not explicitly claim);⁶ but rather, more nuanced ones, such as: Which international courts are better served by judicial independence? What level of actual independence should courts strive to attain? What image of independence should they seek to project?

Note that this contribution focuses exclusively on the relationship between judicial independence – understood hereby as the protection of the decision-making power of judges and other senior court officials (such as prosecutors and registrars) from control and interference by other actors,⁷ and international

³ Laurence H Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', 93 *Calif. L. Rev.* (2005) 899.

⁴ *Ibid.*, at 955. For a response by Posner and Yoo to these arguments, see Eric A. Posner and John C. Yoo, 'Reply to Helfer and Slaughter', 93 *Calif. L. Rev.* (2005) 957.

⁵ See Yuval Shany, 'Assessing the Effectiveness of International Courts: Can the Unquantifiable Be Quantified?' (September 1, 2010). Hebrew University International Law Research Paper No. 03-10. Available at SSRN: <http://ssrn.com/abstract=1669954>.

⁶ See Posner and Yoo, *supra* note 1, at 54.

⁷ See e.g., B.J. van Heyst, 'The Netherlands', in *Judicial Independence: The Contemporary Debate* (Shimon Shetreet and Jules Deschênes, eds., 1985), at 241 ("judicial independence means that in deciding cases that come before them, members of the judiciary are free from interference by the executive and legislative powers, political and social pressure groups, litigants and fellow members of the judiciary").

court effectiveness. I will not address the related question of the relationship between international court effectiveness and judicial impartiality – understood hereby as an unjustifiable judicial preference affecting judicial decisions in a manner prejudicial to one or more of the parties to litigation.⁸ Still, since the concepts of judicial independence and judicial impartiality are closely related and inter-connected, much of the analysis conducted below could be relevant to a discussion of international court effectiveness centered on judicial impartiality.

II. THE EFFECTIVENESS MODEL

A leading definition of organizational effectiveness found in the social sciences literature suggests that an effective organization is one that accomplishes its goals.⁹ This approach, often referred to in the literature as the ‘rational system’ approach, requires the identification of organizational goals at a preliminary stage of the analysis aimed at evaluating the level of organizational effectiveness. In a previous research paper, I have discussed some of the challenges of applying the ‘rational system’ approach to the study of international courts: the existence of multiple constituencies, the ambiguity and elasticity of judicial goals, and the long-term nature of their impact – to name just a few.¹⁰ As a result, I limited the goal-based analysis I undertook to one set of goal-setters (the mandate providers that create courts and fund and monitor their continued existence – typically states and international organizations); at the same time, I proposed considering alongside goal-attainment other performance indicators developed in the social sciences literature, such as cost-effectiveness (the ratio between resource investment and outcomes) and efficiency (the overall utility of the operation of the court in question, in light of the positive or negative side-effects generated by its operation).¹¹

Since the study of international court effectiveness relates not only to performance-evaluation, but also assists in institutional design and in assessing the desirability of structural and procedural reforms, the effectiveness model I

⁸ See e.g., Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (2003) at 1.

⁹ See e.g., Chester I. Barnard, *The Function of the Executive* (1938/1968 reprint) at 20; James L. Price, ‘The Study of Organizational Effectiveness’, (1972) 13 *Sociological Quarterly* 3, at 3–7; Amitai Etzioni, *Modern Organizations* (1964), at 8; Jeffrey Pfeffer, *Organizations and Organization Theory* (HarperCollins, 1982), at 41; Raymond F. Zammuto, *Assessing Organizational Effectiveness* (1982), at 12.

¹⁰ Shany, *supra* note 5, at text accompanying notes 32–51.

¹¹ *Ibid.*, at text accompanying notes 40–44. Some of these evaluation methods are captured by the ‘open systems’ approach also used in the study of organizational effectiveness. See e.g., W. R. Scott and G. F. Davis, *Organizations and Organizing: Rational, Natural, and Open Systems Perspectives?* (2006), at 31.

have canvassed does not merely assess the relationship between judicial goals and outcomes; it also strives to understand the operative dynamics within international courts, which facilitate or hinder certain outcomes. Consequently, the effectiveness model identifies three 'operational categories' – judicial structure (or input), process and outcome, and posits that through 'reverse engineering' one may understand the contribution of specific structural or procedural aspects to judicial performance.¹² In the same vein, understanding the relationship between judicial structure, process and outcome, may enable us to use structural and procedural indicators (such as the number of cases submitted to the court, or actual adherence to due process standards) in order to better assess, predict and shape judicial outcomes.

Two immediate implications of the effectiveness model for the debate over the relationship between judicial independence and international court effectiveness are as follows: a) Since the concept of judicial effectiveness is an elusive one, unequivocal conclusions as to whether higher degrees of judicial independence promote or hinder effectiveness should be viewed with some apprehension; b) Since international courts have distinct goals and operate in unique institutional and political settings, the need for judicial independence may vary across legal contexts. In other words, the attainment of different goals by different courts may support, at different points in time, different levels of judicial independence.

1. *Judicial independence as a structural feature*

As described below, the effectiveness model distinguishes between structural, procedural and outcome features in the operation of international courts.¹³ The structure of the court represents the total powers or capacities it possesses, which may be employed in order to serve its functions and attain its goals.¹⁴ The court's structure thus reflects its overall potential. By contrast, process features pertain to the manner in which the court's 'assets' are employed – that is, the effort invested by the court in the course of its operation.¹⁵ The combination of structure and process produces outcomes – specific impacts on the court's external environment (e.g., the resolution of a conflict, compliance with a norm, increased cooperation),¹⁶ which can then be assessed and evaluated.

¹² Shany, *supra* note 5, at text accompanying notes 64–70.

¹³ Pamela S. Tolbert and Richard Hall, *Organizations: Structures, Processes and Outcomes* 10th ed., (2009), at 17.

¹⁴ Shany, *supra* note 5, at text accompanying note 65.

¹⁵ *Ibid.*, at text accompanying note 66.

¹⁶ *Ibid.*, at text accompanying note 95.

How could judicial independence fit in such a model? Judicial independence is, first and foremost, a notion and an image (or a myth) generated, in turn, by a series of norms or practices governing or relating to the operation of international courts. For instance, Mackenzie and Sands identify two salient independence-generating or enhancing factors, whose application in the context of international courts raises certain challenges:¹⁷ (a) judicial selection-processes;¹⁸ and (b) possible interference in the work of the court by political organs.¹⁹ Posner and Yoo allude to other independence-related features, such as the fixed terms of judges, their protection from salary decreases and the existence of compulsory jurisdiction (as opposed to *ad hoc* jurisdiction).²⁰ Slaughter and Helfer have identified yet additional factors, such as willingness to decide against governments,²¹ and limits on the employment of judges by the parties.²² For the sake of completion, one may consider other relevant independence-generating or enhancing factors, such as the court's freedom to determine its internal administration, the confidentiality of its deliberations, the elaboration of judicial service conditions in legally binding instruments, the conferment of diplomatic privileges and immunities upon international judges, and the court's adequate budgeting.²³

Most, though certainly not all, of the factors listed above are structural in nature that pre-date the court's actual operation (they govern its method of establishment and initial powers conferred thereupon and not the manner in which the court's powers are actually exercised). Specifically, these factors regulate the powers possessed by the court and its judges (or, more frequently, render it more difficult for other actors to restrict such powers or influence their application), and advance an institutional design, which enshrines freedom from outside interference.

For example, robust criteria for judicial selection may limit the ability of states and international organizations to nominate judges whose decisions they would then control; the diplomatic privileges and immunities conferred upon judges limit the ability of the host state, in which the court is seated, to harass and pressurize judges; and the availability of adequate budgets minimizes

¹⁷ Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge', 44 *Harv. J. Int'l L.* (2003) 271.

¹⁸ *Ibid.*, at 276–279. For a more recent study on the topic, see Ruth Mackenzie *et al.*, *Selecting International Judges: Principle, Process and Politics* (2010).

¹⁹ Mackenzie and Sands, *supra* note 17, at 283–284.

²⁰ Posner and Yoo, *supra* note 1, at 7.

²¹ Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale L.J.* (1997) 273, 313.

²² *Ibid.*, at 346.

²³ See The Burgh House Principles on the Independence of the International Judiciary (2004), http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf.

the risk that the court's financial sponsors would try to interfere in its judicial decisions through explicit or implicit threats of withdrawing financial support if certain outcomes were to be reached. Thus, it looks as if judicial independence constitutes an intangible 'asset' (or, according to Posner and Yoo, an intangible liability) – the capacity to operate without interference, accompanied by a reputation for having such a capacity. Such a reputation may be enhanced or eroded by the court's actual operations (see below).

Understanding key aspects of judicial independence as structural features implies that studying the relationship between judicial independence and international court effectiveness should focus considerable attention on court structures – the formal and informal norms that shield the courts and judges from outside control and interference, and the different resources that the court has at its availability to resist attempts for control and interference. In the same vein, to the extent that judicial independence constitutes a structural feature, attempts to modify the level of independence may warrant a structural reform – i.e., changes in the court's institutional design.

2. *Judicial independence as a process feature*

While most of the independence-creating or enhancing factors listed above relate to the court's structure – i.e., to its capacity to act independently, some of the mentioned factors are more closely related to the process taking place before the court – that is, the actual exercise of the court's powers (or, actual interferences by other actors in judicial procedures). This may be the case, for example, if there are indications of attempts by political bodies to interfere with judicial decisions or influence the allocation of specific judges to specific cases,²⁴ or if confidentiality of judicial deliberations is actually breached in a manner that causes judges to become more susceptible to outside pressure.²⁵

Identifying process factors affecting independence would require a different focus of study than a study concentrating on structural factors – focusing less on legal texts and available resources, and more on observation of actual practices of interaction between the court and other actors. Reform proposals directed at independence-related process features could be made at two levels: changes in actual practices, or modification of the structures that have facilitated, or at least did not prevent the practices in need of reform.

²⁴ See, for instance, the discussion of the possible interference by the WTO General Counsel in the *Amicus Curiae* admissibility procedures in the *Asbestos* litigation before the WTO Appellate Body in Mackenzie and Sands, *supra* note 17, at 284.

²⁵ For the link between confidentiality of deliberations and judicial independence, see Helfer and Slaughter, *supra* note 21, at 327.

3. Outcome-related factors

Although judicial independence pertains to the conditions governing the decision-making process, and does not concern the outcomes of this process *per se*, studying the actual outcomes generated by the international court in question may provide us with important insights in judicial independence. Most significantly, the court's record in generating decisions running contrary to the interests of powerful states and other constituencies may be indicative of its independence or lack thereof. Such record of clashes with power would also, most probably, impact the court's independent image. Thus, a 'feedback loop' is created in the course of the court's operation (a chain of operative categories involving structure-process-outcome-structure):²⁶ For example, indications of actual interference in judicial decision making (a process indicator), or a series of controversial decisions issued by the court deemed as catering to the interest of powerful states (an outcome indicator) may suggest that the court in question is less than fully independent, or that an informal structure of dependency has been created. Consequently, the perceived value of the court's independence 'assets' decrease – a development that may impact its ability to attract new cases or generate compliance (states possessing high levels of control or influence over the court may react differently in this regard from states possessing low levels of control or influence) – and modifies its goal-attainment potential. In the same vein, a solid record of 'speaking law to power' may increase the court's independent image – a development that is likely to affect its goal-attaining capabilities and the quality of its outcomes.

In the same vein, the relations between the different operative categories comprising the effectiveness model are such that one can evaluate more advanced stages of the operative category-chain in order to better understand the nature and quality of antecedent links in the same chain. Hence, evaluation of outcomes may offer us valuable insights on the quality of process, and evaluation of outcomes and process may serve as indicators for the adequacy of the structures that have been put in place.

III. THE RELATIONSHIP BETWEEN JUDICIAL INDEPENDENCE AND EFFECTIVENESS

After presenting the effectiveness model and discussing the role of judicial independence within it, I will now move to offer a number of observations

²⁶ For a comparable discussion of 'feedback loops' in the operation of international courts, see Alec Stone Sweet, *The Judicial Construction of Europe* (2004) 55.

on the relationship between judicial independence and international court effectiveness. As already noted, the effectiveness model requires a highly nuanced, essentially court-specific assessment of effectiveness – an effort which exceeds the limits of the present contribution. Still, by referring to a number of generic goals of international courts I hope to illustrate some of the ways in which judicial independence may be positively or negatively correlated to effectiveness. In a subsequent section I will use as short case studies two occasions in which the institutional independence of the ICTY and ICTR was put to the test, and attempt to use the typology introduced in previous sections in order to analyze and assess the Tribunals' performance in those instances.

1. *The goals of international courts*

My research into international judicial effectiveness posits that most international courts are created in order to advance the following four principal overarching goals (referred to in my work as 'ends' or 'ultimate ends').²⁷ Such goals provide us, *inter alia*, with a critical angle to assess judicial performance and to establish the contribution of judicial independence towards judicial goal attainment:

- a) Promoting compliance with the governing international norms (primary norm-compliance)
- b) Resolving and preventing international disputes and problems (dispute resolution or problem-solving)
- c) Contributing to the operation of related political institutions and cooperative regimes (regime support)
- d) Legitimizing associated international norms and institutions (regime legitimization)

Of course, these ends are formulated in an open-ended manner and are non-exclusive in nature; they can also accommodate a plethora of more specific goals (such as deterrence, norm-internalization, normative development, etc.), and support even more abstract ultimate ends (such as increasing legal security or political integration). Moreover, the ends listed hereby overlap with one another and are often inter-related (e.g., regime legitimization, for instance, promotes norm-compliance and *vice versa*). As a result, one specific feature of judicial structure or process may simultaneously advance more than one end.

²⁷ See e.g., Yuval Shany, 'Compliance with Decisions of International Courts as Indicative of their Effectiveness: A Goal-Based Analysis', http://www.effective-intl-adjudication.org/admin/Reports/b9e3ecd1499068e738666d041bd05459Shany_ESIL2010_Draft_Paper.pdf, at text accompanying notes 19–20.

At the same time, some ends may be in tension with one another, and specific attributes that promote one end may adversely affect the realization of another (for example, appointing diplomats as judges may detract from the quality of the court's norm interpretation function, but improve the prospects of generating a settlement capable of definitively resolving the dispute in question).²⁸

Acknowledging the multi-faceted nature of the goals of international courts should encourage us to take with some degree of skepticism Posner and Yoo's assertion that dependent international courts may be more effective than independent ones. Posner and Yoo may be right in observing that dependent judges may be more closely attuned to the interests of the disputing parties than independent judges, and that, as a result, dependent judges may be better situated to facilitate a judicial settlement which would not be resisted by the parties (Posner and Yoo argue that independent judges may sacrifice the parties' dispute resolution needs in order to advance the normative goals of the broader legal and political regime).²⁹ Still, the premise they rely on – i.e., that international courts are primarily dispute resolution bodies, is rather dubious. In fact, most international courts operating in the field of economic relations (e.g., the WTO dispute settlement mechanism, the European Court of Justice, and the numerous regional courts in Latin America and Africa) are parts of legal regimes that prioritize the regime needs over the immediate interests of the parties to disputes; in the same vein, international courts operating in the field of human rights and criminal law, are primarily created in order to enhance the enforceability of certain legal norms, reflective of important common values, and their dispute resolution role is thus relatively modest.³⁰

When viewed from this perspective, it is plausible to maintain that judicial independence may be positively correlated to the success of the overarching regime in which the court operates. If international regimes succeed to the degree that they are able to create stable normative and institutional environments that prioritize the interests of the regime (which coincide with the long term interests of its members) over the short-term interests of the individual member states,³¹ then it is not surprising that States joining such regimes agree

²⁸ See e.g., William A Kerr, 'Trade Dispute Settlement Mechanisms: The NAFTA versus the WTO'; in *The WTO and the Regulation of International Trade: Recent Trade Disputes between the European Union and the United States* (Nicholas Perdakis and Robert Read, eds., 2005) 49, 50.

²⁹ Posner and Yoo, *supra* note 1, at 7. For a discussion, see Yuval Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', 20 *Eur. J. Int'l L.* (1999) 73, 81.

³⁰ For a discussion of goal prioritization, see Yuval Shany, 'One Law to Rule Them All: Should International Courts be viewed as Guardians of Procedural Order and Legal Uniformity?', in *Unity or Fragmentation of International Law: the Role of International and National Tribunals* (Andre Nollkaemper and Ole Kristian Fauchald, eds., Forthcoming in 2011).

³¹ See e.g., Robert Koehane, 'The Demand for International Regimes', in *International Regimes* (Stephen D. Krasner, ed., 1983) 141, 146.

to surrender absolute control over certain areas subject to international cooperation.³² In this context, the creation of independent courts arguably plays an important role in the establishment and strengthening of regimes – accepting independent judicial review removes from the purview of state control the interpretation and application of the regime’s legal norms; it also constitutes a useful method by which states signal their commitment to the success of the regime.³³ Thus, it is somewhat counter-intuitive to claim that courts operating in regimes, such as the EU or WTO, should remain subject to the control of the very same states that agreed to create a cooperative regime, operating beyond their direct control. In other words, Posner and Yoo miss the mark with regard to regime courts: Since a move away from state control is, to a large extent, the *raison d’être* of sophisticated international regimes of economic cooperation, loss of control over the regime’s judiciary – i.e., judicial independence in litigation involving the interpretation and application of regime norms, must be viewed as consistent with the long-term interests of all members who acceded to the regime and in accordance with their expectations about participation in the regime.

In the same vein, human rights and international criminal courts operate in legal environments where states have agreed to surrender control over the interpretation and application of certain international norms of great moral and political importance. The establishment of international courts to monitor states’ human rights records and suppress the perpetration of serious international crimes by their nationals is designed to remove such issues from the traditional purview of state sovereignty and self-judgment to an international realm of supervision and enforcement – a move signaling a high degree of normative commitment.³⁴ Again, it is counter-intuitive to claim that such courts would be better off without a high degree of judicial independence. Put differently, a move to judicial dependency would undercut the practical and symbolic value of removing norms in the field of human rights and criminal law from the purview of state control.

At a higher degree of abstraction, one may posit that international courts created in order to support legal norms and institutions would succeed in their task only if they are able to confer upon them a certain degree of legitimacy.³⁵

³² See generally, Michael Barnett and Martha Finnemore, *Rules for the World, International Organizations in Global Politics* (2004).

³³ See e.g., Tom Ginsburg, ‘Locking in Democracy: Constitutions, Commitment, and International Law’, 38 *N.Y.U. J. Int’l L. & Pol.* (2006) 707, 741; Helfer and Slaughter, *supra* note 3, at 955.

³⁴ See e.g., Gordon Silberstein, ‘Judicial Review’, *Encyclopedia of Political Science* (Mark Bevir, ed., 2010) 730, 731.

³⁵ See e.g., Robert Howse, *The WTO System: Law, Politics and Legitimacy* (2007) 213; Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2000) at 4;

Judicial independence, symbolizing procedural fairness and connoting a professional and unbiased decision-making process, increases the legitimacy-pull of the legal norms that international courts apply, and strengthens the image of institutions they monitor. Furthermore, in order to preserve their own authority – a prerequisite for goal-attainment, international courts need to engage in a process of self-legitimization; and judicial independence plays a role in this respect as well.³⁶ Only legitimate courts can legitimate regime norms and institutions.³⁷

But even with regard to international courts' dispute settlement functions *per se*, Posner and Yoo's position on the redundancy, if not counter-productiveness of judicial independence is not fully convincing. The judicial settlement of international disputes through international arbitration or court adjudication has been developed over the centuries as a reaction to the inability of traditional, diplomatic methods of dispute resolution – processes subject to the parties' ultimate control, to resolve sensitive and volatile international disputes. Courts have therefore been created as part of a conscious decision by disputing parties to surrender control over certain conflicts to a third-party adjudicatory mechanism – a move justified by the perception that the costs associated with the prolongation of the unresolved conflict outweigh the risk of losing in adjudication.³⁸ In other words, a body of independent judges represents, in suitable cases, an alternative method for dispute resolution to the tried and failed control-based (and narrow interest-driven) dispute settlement approaches. Restricting judicial independence thus appears to undercut, at least to some degree, the very impetus for creating international courts in the first place.

2. Goal-attainment and constrained independence

Still, where Posner and Yoo may be right after all is that judgments issued by independent judges in disregard of important interests of the disputing parties might antagonize them and lead to under-utilization of the court and reduced compliance with its judgments. Similarly, the attractiveness of legal regimes in

Hans Morgenthau, *Politics Among Nations: the Struggle for Power and Peace*, (7th edition, 1993) at 3; Nienke Grossman, Legitimacy and International Adjudicative Bodies, 41 *Geo. Wash. Int'l L. Rev.* (2009) 107, 150 *et seq.*

³⁶ For a discussion of organizational 'maintenance goals,' see Stewart Clegg and David Dunkerley, *Organization, Class and Control* (1980) 316; Russell K Schutt, *Organization in a Changing Environment: Unionization of Welfare Employees* (1986) 24.

³⁷ See Tom Ginsburg, 'International Judicial Lawmaking,' in *International Conflict Resolution* (Stefan Voigt *et al*, eds., 2006) 155, 172 (describing the legitimacy of courts and the regimes in which they operate as 'bundled together').

³⁸ See Shany, *supra* note 29, at 79.

the eyes of existing and potential parties thereto, as well as other relevant constituencies, may suffer if regime institutions, including regime courts, would be viewed as insensitive to the disputing parties' crucial needs and interests. Ultimately, failure by truly independent judges to accommodate, in full or in part, important state interests may also raise questions of legitimacy – courts will enjoy support and be accepted as authoritative only if their existence is perceived by states to be beneficial, at least in the long run.³⁹ A chronic gap between judicial outcomes and 'client' preferences, may thus erode the status of the court in the eyes of its constituents, and could undermine its effectiveness: Norms might be less complied with, disputes would not be referred to judicial settlement, and defections from legal regimes might occur. So, if judicial independence may be simultaneously a source of legitimacy in the eyes of some constituencies, and a cause of illegitimacy in the eyes of others, how much judicial independence should an international court actually seek to attain?

The notion of 'constrained independence' advanced by Helfer and Slaughter⁴⁰ represents an interesting solution to the conundrum of reconciling independence with certain responsiveness to party needs and interests (or accountability).⁴¹ Preserving a meaningful degree of structural and procedural judicial independence that would enable the court in question to credibly claim a reputation for judicial independence appears to be an important method for maintaining judicial legitimacy. At the same time, a host of subtle signaling devices may be put in place to convey to the court, directly or indirectly, the expectations of its constituents. The court is not obliged, of course, to follow such signals, but under certain conditions would meet strong incentives to accommodate them, at least to some extent. The upshot of this may be that Posner and Yoo are correct in criticizing the usefulness of absolute judicial independence (although it may be useful to sustain such a myth); at the same time, Helfer and Slaughter appear to be correct in observing that Posner and Yoo's criticism is directed against a 'straw man' – that is, in the real world, no international court or judge is an 'island' completely free from influence and threats of sanction.⁴²

The focus of our attention should therefore shift from discussing the existence and desirability of an 'ideal type' of judicial independence – a discussion

³⁹ See Jean-Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (2002) at 25. For a comparable notion, see Lauren B. Edelman and Mark C. Suchman, 'When the 'Haves' Hold Court: The Internalization of Disputing in Organizational Fields', 33 *Law & Society Review* (1999) 941, 968.

⁴⁰ Helfer and Slaughter, *supra* note 3, at 929–930.

⁴¹ For a discussion, see Ronli Sifris, 'Weighing Judicial Independence against Judicial Accountability: Do the Scales of the International Criminal Court Balance?', 8 *Chi.-Kent J. Int'l & Comp. L.* (2008) 88.

⁴² Helfer and Slaughter, *supra* note 3, at 929–930.

premised on a monolithic understating of the international judicial function, to a study of the nuts and bolts of the constraints put on international courts in the unique institutional and normative environments in which they operate. In this context, normative questions pertaining to the adequacy of the constraints in place, as well as their implications for judicial effectiveness may arise. The next section, dealing in brief with two case studies relating to the political constraints under which the ICTY and ICTR have operated, exemplifies such a discussion of the relationship between constrained independence and judicial effectiveness.

IV. CONSTRAINED INDEPENDENCE IN ACTION: ICTY v NATO, ICTR v RWANDA

In her recently published memoir, Carla Del Ponte, the former Chief Prosecutor of the ICTY and ICTR discusses two instances in which proceedings before the two Tribunals encountered strong political resistance, which were deemed by the Office of the Prosecutor too powerful to resist. The first of the two cases pertains to the investigation of NATO leaders and service members for alleged crimes committed during the bombing campaign of Yugoslavia in 1999 (in response to the earlier crimes committed by the Yugoslav forces in Kosovo). Del Ponte's predecessor, Louis Arbour, assigned the various allegations raised against NATO to a special committee entrusted with issuing recommendations on whether to prosecute any of the alleged crimes. The committee's report, which was issued in 2000, recommended not to open any criminal investigations, citing with relation to some incidents lack of evidence of a criminal intent, and with relation to others lack of clarity in the applicable legal standards.⁴³ A number of commentators have strongly criticized the report for its overly-cautious approach, suggesting that the committee went out of its way to get NATO 'off the hook'.⁴⁴

Del Ponte decided to accept the recommendation and to terminate the investigation into the NATO bombing campaign. In her book, she explains the inevitability of the decision:

No one in NATO ever pressured me to refrain from investigating the bombing campaign or from undertaking a prosecution based upon it. But I quickly

⁴³ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), <http://www.icty.org/sid/10052>.

⁴⁴ See e.g., Timothy W Waters, 'Unexploded Bomb: Voice, Silence, and Consequence at The Hague Tribunals: A Legal and Rhetorical Critique', 35 *N.Y.U. J. Int'l L. & Pol.* (2003) 1015; Andreas Lauresen, 'NATO, the War over Kosovo, and the ICTY Investigation', 17 *Am. U. Int'l L. Rev.* (2002) 765.

concluded that it was impossible to investigate NATO, because NATO and its member states would not cooperate with us. They would not provide us access to the files and documents. Over and above this, however, I understood that I had collided with the edge of the political universe in which the Tribunal was allowed to function. If I went forward with an investigation of NATO, I would not only fail in this investigative effort, I would render my office incapable of continuing to investigate and prosecute the crimes committed by the local forces during the wars of the 1990s. Security for the Tribunal's work in Bosnia and Herzegovina as well as in Kosovo depended upon NATO. The Tribunal's forensics teams were only able to exhume mass graves because they enjoyed NATO escorts. Arrests of fugitives depended upon NATO-country intelligence as well as NATO ground and air support.⁴⁵

In other words, Del Ponte acknowledged the constrained independence of the ICTY, as determined by its structure (e.g., budget, mandate, and lack of independent enforcement capabilities) and tied it to the Tribunal's effectiveness – i.e., its ability to attain the goal of ending impunity in the Balkans. The Tribunal's existence and its ability to attain the goals for which it was created was only rendered possible by virtue of the support of key states; in particular, the ability of the Office of the Prosecutor to employ its procedures (e.g., exhume graves, gain custody over suspects, etc.) depended on NATO's active support. Thus, the formal independence enjoyed by the ICTY and the Prosecutor,⁴⁶ was not backed by a structural configuration of power that would enable the Tribunal to actually operate free of pressure and interference. Under such condition, an attempt by the Prosecutor to break her independence constraints by way of asserting the independence of the Office of the Prosecutor vis-à-vis NATO and 'speaking law to power' would have undercut, not strengthened the Tribunal's goal-attainment prospects – i.e., its effectiveness.

A troubling lesson derived from this incident is that independence in decision-making may contribute to court effectiveness only as long as judicial (or prosecutorial) decisions do not conflict with important interests held by powerful states. Thus, in the NATO case, the legitimacy of Tribunal in the eyes of less powerful constituencies (the states of the Balkan, neutral observers, etc.), which a strong version of judicial independence may have sustained, had to be sacrificed in order to preserve the political support afforded by a more powerful constituency – NATO member states, which was necessary, in turn, for the purpose of attaining the Tribunal's overall goals.

⁴⁵ Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (2009), at 60.

⁴⁶ Statute of the International Tribunal for Yugoslavia, art. 16(2), adopted on 25 May 1993 by SC Resolution 827 ("The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source").

The second incident described by Del Ponte's memoir pertains to the reaction of the Rwandan authorities to the ICTR's Appeals Chamber's decision of 3 November 1999, dismissing the indictment and ordering the release of Jean Bosco Barayagwiza – one of the suspects in the *Radio Mille Collines* case (a case dealing with incitement to genocide by directors of mass media establishments in Rwanda).⁴⁷ The Appeals Chamber based its decision on violations of the due process rights of the accused, which the Prosecution committed – in particular, violating his right to be promptly charged. The reaction of the government of Rwanda to the decision was swift and harsh: it suspended all cooperation with the Tribunal – thus derailing its actual ability to access evidence and witnesses for all pending trials, and effectively cutting the Tribunal's life-line.⁴⁸

Del Ponte had to act quickly: She submitted an extraordinary motion to review the decision to release – a move of dubious procedural regularity, which she justified in the following terms:

I, too, was disturbed that Barayagwiza would escape justice on this procedural question and not face a full trial. But I was more concerned with the real danger that, because of the Barayagwiza fiasco, the Rwandan government would retaliate against the Rwanda Tribunal itself by permanently refusing to cooperate with its work; this would deal a major setback to the cause of international justice in general.⁴⁹

The Appeals Chamber agreed to reopen the case and decided on 31 March 2000 to reverse its previous decision and to restore the proceedings against Barayagwiza.⁵⁰ Employing a somewhat strained analysis,⁵¹ the judges held that new facts brought to their attention by the Prosecutor have persuaded them the due process violations suffered by Barayagwiza have been less serious than was originally believed, and did not justify, consequently, a dismissal of the indictment and release.

Tellingly perhaps, the Chamber devoted a few sentences to the issue of judicial independence:

Before proceeding to consider the Motion for Review, the Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte, made a statement regarding the reaction of the government of Rwanda to

⁴⁷ *Barayagwiza v Prosecutor*, case ICTR-97-19, Appeals Chamber Decision of 3 Nov. 1999.

⁴⁸ See e.g., Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 142.

⁴⁹ Del Ponte, *supra* note 45, at 73.

⁵⁰ *Prosecutor v Barayagwiza*, case, ICTR-97-19, Appeals Chamber Decision of 31 March 2000 (Prosecutor's Request for Review or Reconsideration).

⁵¹ Cryer, *supra* note 48, at 142.

the Decision. She stated that: “The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999.” Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as “amicus curiae” to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review. The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.⁵²

In other words, the Tribunal was aware of the connection between the outcome of the case and its judicial independence image; but unlike Del Ponte, who openly admitted that the “real danger” was permanent Rwandan lack of cooperation, the judges claimed that this factor played no role in their actual decision. While it may be the case that Rwanda’s threats were never openly discussed by the judges in their deliberations,⁵³ and that the Tribunal’s judicial independence structural and procedural features remained intact, the idea of constrained independence revolves around subtle messages and signals, which affect judicial perceptions about the outer limits of judicial legitimacy in the eyes of influential constituencies (in this case, the government of Rwanda). It is incredulous to believe that such considerations did not play a part – consciously or sub-consciously, in the judges ultimate decision to reverse the decision of 3 November 1999.⁵⁴

While one may accuse the Tribunal of hypocrisy, if not outright dishonesty, in denying any impact by Rwanda’s threats on the 31 March 2000 decision, this appears to me to be too harsh of a judgment on the Tribunal. The Tribunal attempted to walk a fine line between the hard reality that required it to offer a high degree of responsiveness to Rwanda’s expectations, and the need to preserve the myth of absolute judicial independence (which is a structural asset, contributing, in turn, to judicial effectiveness). In this particular context, where legitimacy and effectiveness vectors point in a multiplicity of diametrically opposed directions, striking a fully satisfactory balance may have been impossible, and the truth about such impossibility too painful to bear: Complete transparency about the need to consider ‘real world’ constraints, would have

⁵² *Prosecutor v Barayagwiza*, at para. 34.

⁵³ Schabas wryly notes that the individual opinions by judges Vohrah and Nieto-Navia that insist on that Rwanda’s threat played no part in the judicial deliberation appear to insist too much on this point. Schabas wryly notes that the individual opinions by judges Vohrah and Nieto-Navia that insist on that Rwanda’s threat played no part in the judicial deliberation appear to insist too much on this point. William A Schabas, ‘International Decision: Barayagwiza V. Prosecutor (Prosecutor’s Request for Review or Reconsideration)’, 92 *AJIL* (2000) 563, 568.

⁵⁴ See e.g., *Ibid*, at 570–571.

arguably harmed the myth of judicial independence and might have eroded the Tribunal legitimacy; a rigid application of an absolute notion of judicial independence would have deprived the Tribunal of Rwanda's crucial cooperation. Under these circumstances, a flexible approach to judicial independence, covered up by a 'white lie', may have represented a reasonable goal-attainment or damage-control strategy.

V. CONCLUSION

Judicial independence is related to international judicial effectiveness in complicated ways. Courts thrive on legitimacy in the eyes of relevant constituencies, and judicial independence – connoting notions of fairness and justice, and fostering professionalism and trustworthiness – are important elements in generating the signals and symbols that provide courts with the support they need in order to function. Still, the relationship between the independence of international courts – complex institutions with myriad goals – and their effectiveness is not linear in nature. In order to attain their goals – i.e., operate effectively to advance norm compliance, dispute resolution, regime support and legitimating, international courts have to generate self-legitimacy (inter alia, through nurturing a reputation for judicial independence), but at the same time be responsive to the expectation of key constituents. Thus, a structural and procedural framework of constrained independence is perhaps a more adequate framework – both normatively and practically, for discussing the actual choices faced by international courts that a caricature-like choice between absolute judicial dependence and independence.

The practice of the ICTY and ICTR suggests that striking the balance between independence and responsiveness (or accountability) to the needs of the principal stakeholders may be quite difficult in certain cases, where the operation of international courts threatens to clash with the political circumstances that allow their existence. It also suggests that, in the face of strong and irreconcilable pressures, attempts to preserve the myth of judicial independence for self-legitimating reasons may generate at the very same time considerable legitimacy costs (loss of transparency, accusations of dishonesty).