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# Can You Hear Me Now? The Case for Extending the International Judicial Network

Cesare P.R. Romano\*

“Justice is the first virtue of social institutions, as truth is of systems of thought.”

John Rawls, *A Theory of Justice* 3 (Belknap 1999).

## I. INTRODUCTION

In July 2008, on the eve of yet another G8 meeting, *The Economist* questioned whether the world-governing organizations, most of which were born out of the ruins of the Second World War, and buttressed by myriad “conventions, conferences, courts, declarations, dispute-mechanisms, [and] special mandates . . . governing everything from human rights to anti-dumping complaints,” were in serious need of reorganization.<sup>1</sup> The magazine’s lead article, *What a Way to Run the World*, sounded the alarm: “as global problems proliferate and information whips around the world ever faster, the organizational response looks ever shabbier, slower and feebler. The world’s governing bodies need to change.”<sup>2</sup> Its cover depicted a caricature of the famous painting *The Tower of Babel*, by Peter Brueghel the Elder.<sup>3</sup> To the upward-spiraling yet incomplete building of Brueghel’s vision, the magazine had added funny cartoonlike balloons, coming from clearly clueless world leaders inside the tower. One

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1 *Wrestling for Influence*, 388 *Economist* 33, 33 (July 5, 2008).

2 *What a Way to Run the World*, 388 *Economist* 13, 13 (July 5, 2008).

3 Id (cover illustration) (caricaturizing Pieter Brueghel the Elder, *Tower of Babel* (1563)).

balloon, this time coming from someone outside the tower, sardonically commented: "Makes Babel look able."

This Article intends to take stock of almost two decades of tumultuous multiplication of judicial institutions, which has led to at least more than a dozen fully functioning international courts and several dozen quasi-judicial, implementation-control and sundry dispute-settlement bodies. The growth has been organic and unplanned. The stated aim of this panoply of bodies and procedures is to ensure that international law is observed and that disputes arising out of its implementation or interpretation are settled peacefully and in an orderly fashion. But one could ask whether, and to what extent, this remarkable growth of bodies and procedures has brought humanity any closer to the attainment of justice, one of the oldest and loftiest goals of human societies.

The relatively new phenomenon of the rise of a network of international courts and tribunals has been analyzed through numerous lenses: legal, of course, but also international relations, political science, sociology, even economics. However, philosophy has not yet caught up with it. Indeed, international justice has only relatively recently become a concern of political philosophy. A sustained effort has been gradually made, particularly during the past thirty years, to develop ethical analyses of international relations drawing upon the traditional concerns of domestic justice. Liberal political philosophy, which posits moral egalitarianism (that is, that all human beings, simply by virtue of their status as humans, are entitled to equal consideration), has been particularly challenged. Traditionally, liberal political philosophy has applied its egalitarian guarantees only within the confines of the national state. Most liberal theories of justice are hardly applicable to the entire population of the world. They work only when applied to this or that national polity, a small subset of humanity living within the same boundaries, or, at most, within the family of Western democracies. Yet citizenship and residency are as morally arbitrary as gender or race, as no one chooses parents or place of birth. While liberal political philosophy, during the twentieth century, has successfully challenged humanity to go beyond gender and race, the fact that access to justice still depends on the random factor of where, or from whom, one is born remains an intractable conundrum for liberal egalitarianism.

In a scramble for an answer, liberal political philosophy has wavered between two extremes. The first is that national borders matter; maybe they are even all that matters. Thus, liberal impartiality is only properly applied within the national context.<sup>4</sup> The second position, antithetical to the first, recognizes that if

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<sup>4</sup> See, for example, David Miller, *On Nationality* (Clarendon 1995); Avishai Margalit and Joseph Raz, *National Self-Determination*, in Will Kymlicka, ed, *The Rights of Minority Cultures* 79 (Oxford 1995); Will Kymlicka, *Liberalism, Community, and Culture* (Clarendon 1989); Yael Tamir, *Liberal Nationalism*

liberalism is to aspire to be a coherent and serviceable school of thought it must come to terms with its global aspirations. That requires flat out refusing that arbitrary borders and citizenship might determine access to justice.<sup>5</sup> Yet “nationalists,” if they can be so dubbed, overstate the importance of borders, while “cosmopolitans” tend to assume away whatever moral relevance those same borders have.<sup>6</sup>

This Article would like to build some middle ground between these two powerful strains of liberal political philosophy by arguing that, when it comes to access to justice, the national-international dichotomy is not as crucial as it might seem *prima facie*. Indeed, it provides common ground between the two positions by arguing that international and national dispensers of justice are not antithetical and mutually exclusive but rather increasingly integrated and that, in any event, the international level is subordinate to the national one. The growth of a network of international courts and tribunals increasingly provides individuals across the globe with access to remedies that they could not have domestically, partially redressing inequalities and the moral arbitrariness of citizenship and birth. At the same time, it suggests that this growing network of providers of justice is still very much in the earliest stages of development and that inconsistency, redundancy, and failure still abound across the whole architecture. The journey has just begun.

This Article does not raise issues only of interest to political philosophy. It challenges some important international law analytical frameworks. International

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(Princeton 1993); Joseph Raz, *The Morality of Freedom* (Clarendon 1986); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame Press 2d ed 1984); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic 1983); Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge 1982).

- <sup>5</sup> See, for example, Michael Blake, *Reciprocity, Stability, and Intervention: The Ethics of Disequilibrium*, in Deen K. Chatterjee and Don E. Scheid, eds, *Ethics and Foreign Intervention* 53 (Cambridge 2003); Thomas W. Pogge, ed, *Global Justice* (Blackwell 2001); Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 *Phil & Pub Aff* 257 (2001); Michael Blake, *International Criminal Adjudication and the Right to Punish*, 11 *Pub Aff Q* 203 (1997); Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 *Ethics* 48 (1992); Thomas W. Pogge, *Realizing Rawls* (Cornell 1989); Charles R. Beitz et al, eds, *International Ethics* (Princeton 1985); Peter Singer, *Famine, Affluence, and Morality*, in Beitz et al, eds, *International Ethics* 247 (Princeton 1985); Charles R. Beitz, *Political Theory and International Relations* (Princeton 1979); Thomas M. Scanlon, Jr., *Rawls's Theory of Justice*, 121 *U Pa L Rev* 1020 (1973).
- <sup>6</sup> Toward the end of the 1990s, John Rawls tried to mediate between these two antithetical positions by replacing the classical liberal concern for impartiality with a related, but different, concern for reciprocity and toleration, arguing that egalitarianism, when applied to the global context, is misplaced. Whatever distributive principles exist internationally, they will not be as demanding as the egalitarian principles applicable in the domestic context. See generally John Rawls, *The Law of Peoples* (Harvard 1999).

courts and tribunals are still largely conceptualized as “dispute settlers.”<sup>7</sup> I argue in this paper that far from being merely elaborate institutionalized alternatives to negotiated settlement or outright violence, international courts and tribunals serve as “agents of justice,” whose impact transcends the given parties to a case. Also, it could be argued that international law is going to be complied with, and disputes are going to be settled, only to the extent the international bodies and processes are legitimate and fair, or in other words, just.<sup>8</sup> But that cannot happen until the network of international courts has been extended to ensure that most people, if not all, can have access to international judicial remedies whenever national courts are not available or are not able to dispense justice credibly.

The Article is divided in four sections. In Section II, some fundamental logical and philosophical concepts are sketched and philosophical premises laid. The first is that every legal system necessitates a judicial system, for only courts of law can credibly dispense justice. Therefore, if the international legal system aspires to be a *legal order* (that is, a community based on the rule of law, a social order where everyone is subject to laws and they are enforced impartially), it ought to be endowed with courts. In 1995, celebrating the effervescent complexity of international law, Thomas Franck noted that, “[l]ike any maturing legal system, international law has entered its post-ontological era. Its lawyers need no longer defend the very existence of international law.”<sup>9</sup> International law is law, but then the question is whether international law can graduate to become a legal order. The quantum leap is an open ontological challenge that still needs to be met.

The second is that, existence of international courts notwithstanding, the primary responsibility to dispense justice is at the national level. The international level is only supplementary, even though it has a reason to be of its own. It is only a second best, a safety net to ensure that if justice cannot be done nationally there might be a further remedy.

The third idea I propose is that justice is not a unitary concept, but the aggregation of three separate notions: distributive, corrective, and retributive justice. Since the Second World War, and even more since the end of the Cold War, progress has been uneven along these three dimensions. Thus, disaggregating the unitary concept makes it possible to better appreciate how far

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<sup>7</sup> See José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 *Tex Intl L J* 405 (2003). See also David D. Caron, *Framing Political Theory of International Courts and Tribunals: Reflections at the Centennial*, 100 *Am Socy Intl L Proc* 55 (2006); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 *NYU J Intl L & Pol* 709, 748–51 (1998–99).

<sup>8</sup> See generally Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford 1990).

<sup>9</sup> Thomas M. Franck, *Fairness in International Law and Institutions* 6 (Clarendon 1995).

humanity has or has not progressed toward ensuring that effective justice is available to all.

Section III reviews progress made to date internationally along these three dimensions. As will be explained, while no progress has been made on the distributive justice front, much has been done for retributive justice and even more has been done for corrective justice.

Section IV identifies challenges, gaps, and failures that require study and action. First, while I stress the importance of ensuring that justice is done at the national level, this section shows that the primary dispenser of justice might often fail. I then analyze the supplementary international network, and point out six reasons why the emerging international judicial network falls short of a judicial order; the main reason is that availability and acceptance of jurisdiction of international courts and tribunals vary greatly across the globe.

The final section attempts to outline a strategy to foster the growth of judicial systems that can ensure that justice is available to all. I deliberately set aims high to provide, rather than a step-by-step guide, a general sense of direction toward which progress can and should be made. It is a grand strategy rather than a tactical plan, but some immediately implementable ideas have also been provided.

## II. SOME TOOLS OF ANALYSIS

### A. EVERY LEGAL SYSTEM NECESSITATES A JUDICIAL SYSTEM TO BE A LEGAL ORDER

Regardless of social structures of power and organization, at all latitudes, longitudes, and time, dispensing justice has always been the duty and privilege of the sovereign. However, as the modern concept of democracy gradually displaced monarchy as the main organizing principle of human societies—from the sovereign being “the Monarch” to the sovereign being “the People”—dispensing justice has increasingly been viewed as the task of certain specific bodies within the state’s legal order. These are courts of law: official, public fora, established by lawful authority by the sovereign to adjudicate disputes and to dispense civil, administrative, and criminal justice under the law.

Since the age of the Enlightenment, philosophers of law have claimed that for a legal order to be such, it must be equipped with a court, or a system of courts (that is, a judicial system), enjoying compulsory jurisdiction and binding powers.<sup>10</sup> Indeed, “where there is a right there must be a remedy” (*ubi jus ibi*

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<sup>10</sup> Early “positivists” adhered to this view, like John Austin, who believed that only those commands issued by a political superior to whom the majority of people in the society are in the habit of obedience, and which are enforced by a threatened sanction, could qualify, strictly speaking, as

*remedium*) is a fundamental pillar of all human legal orders (civil law, common law, or customary or religious law), and, as such, it is a principle of law “recognized by all civilized nations.”<sup>11</sup>

## B. INTERNATIONAL COURTS ARE SUPPLEMENTARY TO NATIONAL COURTS, WHICH REMAIN THE PRIMARY DISPENSERS OF JUSTICE

If every legal order must be completed by a judicial system, the idea that some areas of activity, or some entities (states, individuals, or otherwise), might be at the same time part of the legal order but not subject to any judicial system

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law. Outside posited law, as it frequently happens, the sovereign delegates powers of discretion to judges, powers which are only to be used when there are no appropriate general rules to apply to the particular case. John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (Weidenfeld and Nicholson 1954).

It is even truer in the case of the “realists” like John C. Gray and Oliver W. Holmes, according to whom the decisions of judges and nothing else constitute the law. All else—the rules and principles of law, the statutes, the maxims of morality and equity, custom, and even the body of judicial precedent—is relegated to the status of sources of law, sources from which judges laying down the law can draw. See generally John Chipman Gray, *The Nature and Sources of the Law* (Macmillan 2d ed 1921); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv L Rev 457 (1897).

Courts and judges play an essential role in legal systems in the view of other thinkers on the periphery of the “realist” movement, such as Roscoe Pound and Benjamin Cardozo. Neo-positivists in the mold of H.L.A. Hart claim that the creation of “secondary rules,” the essential function of which is to create, identify, and confirm legitimacy on the “primary rules,” marks the transition from a pre-legal society to a legal system. Without the secondary rules, there would be no way of resolving doubts or disputes about them, no way of changing or adapting them to new circumstances, no one to authoritatively determine they have been violated, and to authorize punishment for their violation. H.L.A. Hart, *The Concept of Law* (Clarendon 1961).

According to Joseph Raz, every system of law is designed to satisfy two basic needs, which are indispensable for the maintenance of social order: the regulation of human conduct and the peaceful settlement of disputes. While in modern, evolved societies the first function is primarily achieved through lawmaking institutions, the second is normally secured by courts and other judicial and quasi-judicial procedures. Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Clarendon 2d ed 1980).

Neo-naturalists like Ronald Dworkin claim that principles of justice and fairness have the dimension of “weight.” It is the judge who carries out the critical function of weighing one rule of law, or legal principle, against other rules or principles. Judges, as the mouthpiece of the law, are the essential pivots of Dworkin’s legal theory. Ronald Dworkin, *Law’s Empire* (Belknap 1986).

Only the most extreme naturalist theories, bordering on anarchic thought, attempt to explain how a legal system can exist without courts and judges. These theories rely on the intrinsic and obvious justness of laws themselves, which therefore need no third party to settle disagreements over their content or meaning.

<sup>11</sup> Principles of law recognized by civilized nations are a source of international law. Statute of the International Court of Justice, (1945) art 38(1)(c), 59 Stat 1055, 1060.

would be illogical.<sup>12</sup> Yet, at the international level, this has been exactly the case for much of modern history. It is only during the second half of the twentieth century that institutions between and above states' legal orders were created to dispense justice. This emerging "international judicial network" (let's call it such since "system" implies a level of coordination that does not exist yet) has a rationale of its own. It serves a community distinct from the ones living within the boundaries of this or that sovereign state, and fulfills needs that cannot be fulfilled by national courts. Still, it is nonetheless always supplementary to national judicial systems. It is a fallback option, a last resort.

The primary responsibility to dispense justice, nationally and globally, still belongs to national courts and authorities. Indeed, as a principle of customary international law, access to international judicial remedies is always conditional upon exhaustion of domestic remedies.<sup>13</sup> Direct resort to international jurisdictions is permissible only when there is no possibility for recourse in a domestic jurisdiction.<sup>14</sup> Sometimes domestic courts do not exist (for example, because they have been closed down by war), are unable to dispense justice impartially, or lack jurisdiction over one of the parties (for example, the defendant is shielded by the sovereign immunity doctrine). In these cases, the individual can bypass the domestic level and directly access competent international jurisdictions, should they exist.<sup>15</sup> Besides, the supplementary nature of international courts to domestic ones is both a matter of logical and practical convenience;<sup>16</sup> it ensures that claims are addressed at the lowest possible level of

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<sup>12</sup> "The international legal order we need will come into being only if it is absolutely general and admits of no exceptions." Monique Chemillier-Gendreau, *Dream of a Global Legal Order*, *Le Monde Diplomatique* 5 (July 1999) (Barbara Wilson, trans).

<sup>13</sup> See generally Chittharanjan F. Amerasinghe, *Local Remedies in International Law* (Cambridge 2004); Henry G. Schermers, *Exhaustion of Domestic Remedies*, in Nisuke Ando, Edward McWhinney, and Rudiger Wolfrum, eds, *Liber Amicorum: Judge Shigeru Oda* 947 (Kluwer Law 2002). See also P.R. Gandhi, *Some Aspects of the Exhaustion of Domestic Remedies Rule under the Jurisprudence of the Human Rights Committee*, 44 *Ger YB Intl L* 485, 485–97 (2001); Riccardo Pisillo Mazzeschi, *Exhaustion of Domestic Remedies and State Responsibility for Violation of Human Rights*, 10 *Ital YB Intl L* 17, 17–43 (2000).

<sup>14</sup> In the case of disputes between sovereign states, the obstacle is usually sovereign immunities (see, for example, *Monaco v Mississippi*, 292 US 313 (1934)), which is why it is necessary to have international courts that do not belong to the legal order of any state. But even in that case, resort is conditional upon exhaustion of other transactional and negotiated forms of settlement.

<sup>15</sup> See, for example, Exceptions to the Exhaustion of Domestic Remedies (arts 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am Ct HR (ser A) No 11 (Aug 10, 1990).

<sup>16</sup> William Ockham's (1285–1349) so-called "Razor": "*Entia non sunt multiplicanda praeter necessitatem*." Ockham's razor, arguing for logical simplicity, has been used in various domains throughout the centuries. Roger Ariew, *Ockham's Razor: A Historical and Philosophical Analysis of Ockham's Principle of*



complexity, and it is a corollary of the principle of sovereignty, which is the ordering principle of the international community.<sup>17</sup>

### C. THREE DIMENSIONS OF JUSTICE

Finally, the third necessary premise is that although justice is a polymorph concept, and models of law and social constructs often influence the discourse about justice, at least since Aristotle it has generally been understood that there are at a minimum three main contexts for talking about justice:<sup>18</sup>

Retributive Justice: concerns the ethical appropriateness of punishment for wrongdoing. It encompasses both backward-looking (retaliation) and forward-looking (deterrence) elements. This is the so-called “criminal justice.”

Corrective Justice: concerns the ethical appropriateness of rectifying imbalances in benefits and burdens caused by a loss or a gain. This is the so-called “civil justice.”

Distributive Justice: concerns the ethical appropriateness of redistributing goods and benefits (for example, wealth, power, reward, or respect) between actors who are not in equal situations at the start. This is the so-called “social justice.”

These notions are not mutually exclusive, but rather represent different dimensions of the idea of justice. Crucially, they are all based on the fundamental postulate that everyone should be treated equally. In other words, everyone has the same entitlement to justice. Without the assumption of equality in entitlement there could be no corrective justice (which is about rectifying imbalances to restore the status quo ante), no distributive justice (which exactly

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*Parsimony* (1976) (unpublished PhD dissertation, University of Illinois) (on file with the University of Illinois Library, also available at ProQuest).

<sup>17</sup> United Nations Charter, art 2, ¶ 1. For an analysis of the scope of the principle of sovereignty in contemporary international law, see *Military and Paramilitary Activities (Nicar v US)*, 1986 ICJ 14, ¶ 111–12 (June 27, 1986). See generally Jo-Anne Pemberton, *Sovereignty: Interpretations* (Palgrave Macmillan 2008).

<sup>18</sup> See generally Marie-Benedicte Dembour and Tobias Kelly, eds, *Paths to International Justice: Social and Legal Perspectives* (Cambridge 2007); Louise Mallinder, *Can Amnesties and International Justice Be Reconciled?*, 1 Intl J Transitional Just 208 (2007); Michael P. Scharf, *The Iraqi High Tribunal: A Viable Experiment in International Justice?*, 5 J Intl Crim Just 258 (2007); John Merrills, *The Globalisation of International Justice*, in Douglas Lewis, ed, *Global Governance and the Quest for Justice Volume 1: International and Regional Organisations* 69 (Hart 2006); David Schmitz, *Elements of Justice* (Cambridge 2006); Harry Brighouse, *Justice* (Polity 2005); James Konow, *Which Is the Fairest One of All? A Positive Analysis of Justice Theories*, 41 J Econ Literature 1188 (2003); Dorothy V. Jones, *Toward a Just World: The Critical Years in the Search for International Justice* (Chicago 2002); Jeremy Rabkin, *Worlds Apart on International Justice*, 15 Leiden J Intl L 835 (2002); Nigel D. White, *The United Nations System: Toward International Justice* (Lynne Rienner 2002); Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford 2d ed 2002); Brian Barry, *Theories of Justice* (California 1989).

aims at addressing inequalities) and no retributive justice (which otherwise would be arbitrary and therefore a mere exercise of power).

During the past fifteen years, most scholars have preferred talking about international justice as a unitary and generic concept, but that clouds the fact that internationally progress has been highly uneven along the three axes.<sup>19</sup> The Aristotelian tripartite classification can provide better insight into the dynamics of the evolution of the international legal order and highlight inconsistencies and gaps in the growing global judicial architecture.

### III. PROGRESS TO DATE TOWARD JUSTICE AT THE INTERNATIONAL LEVEL

All international bodies and institutions in the field of human rights can be described as agents of one of these three dimensions of justice; some, of course, might straddle two or more.<sup>20</sup>

#### A. DISTRIBUTIVE JUSTICE

Distributive justice is the area where the least progress has been made internationally.<sup>21</sup> The “New International Economic Order,” propounded by developing countries in the 1970s and 1980s, did not produce much besides nonbinding declarations, such as the UN General Assembly’s Declaration on the Establishment of a New International Economic Order,<sup>22</sup> and some partly viable mechanisms, such as the Common Fund for Commodities,<sup>23</sup> which started operating in 1989. Certain subject-matter-specific treaties, like the United Nations Convention on the Law of the Sea, adopted in 1982 and entered into

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<sup>19</sup> I will not address here the issue of progress toward the domestic achievement of justice, as it would be time consuming and it would require more time and space than available.

<sup>20</sup> For example, truth and reconciliation commissions are essentially agents of corrective justice, but there are also some retributive aspects to their work (for example, the public shaming caused by admission of crimes). See generally Naomi Roht-Arriaza and Javier Mariezcurrena, eds, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge 2006).

<sup>21</sup> Progress at the national level toward distributive justice will not be discussed here. On the concept of distributive justice, see Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard 2004). On the role of distributive justice in global politics, see generally Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, eds, *Justice and Global Politics* (Cambridge 2006); Craig N. Murphy, *What the Third World Wants: An Interpretation of the Development and Meaning of the New International Economic Order*, in Paul F. Diehl, ed, *The Politics of Global Governance: International Organizations in an Interdependent World* 261 (Lynne Rienner 2d ed 2001).

<sup>22</sup> General Assembly Res No S-6/3201, UN Doc A/RES/S-6/3201 (1974).

<sup>23</sup> Agreement Establishing the Common Fund for Commodities (1980), 19 ILM 896.

force in 1994, also contain some measures of distributive justice but, to date, have had little practical impact.<sup>24</sup>

The world is not redistributing resources to the extent most countries do domestically. Just to give an idea, according to the Organization for Economic Co-Operation and Development, the world organization that gathers statistics about most developed, industrialized countries, in 2007, all transfers from all governments, multilateral agencies, and the private sector, for all kinds of aid activities (including projects and programs, cash transfers, deliveries of goods, training courses, research projects, debt relief operations, and contributions to nongovernmental organizations (“NGOs”)) amounted to just \$470 billion, less than half of the GDP of Indonesia in 2005.<sup>25</sup> The US is the world’s largest contributor of official development assistance in absolute terms<sup>26</sup> but the smallest among developed countries as a percentage of its GDP.<sup>27</sup> Although the UN has set an extremely low target for development aid, at just 0.7 percent of GDP,<sup>28</sup> currently only five countries meet that goal.<sup>29</sup>

It is not only resources that are not being redistributed. Power, reward, and respect do not get shared, either. The world organizations, which together constitute the backbone of the international architecture, are crystallized in an equilibrium of power that reflects political realities of the time in which they

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<sup>24</sup> United Nations Convention on the Law of the Sea (1982), 1833 UN Treaty Ser 3, 397 (1994). For instance, Part XI of the Law of the Sea Convention (about exploitation of mineral resources on the high seas) contained significant provisions about transfer of technology and revenue from developed countries to developing countries. However, industrialized countries, and in particular the US, raised several objections to the implementation of these provisions and made ratification conditional upon their revision. Part XI was eventually amended by the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, (1994) 33 ILM 1309.

<sup>25</sup> See Query Wizard for International Development Statistics, Organisation for Economic Co-Operation and Development, available online at <<http://stats.oecd.org/qwids>> (visited Apr 17, 2009). For more up-to-date figures, see *Giving More Generously*, Economist (March 31, 2009), available online at <[http://www.economist.com/research/articlesBySubject/displaystory.cfm?subjectid=7933596&story\\_id=13400406](http://www.economist.com/research/articlesBySubject/displaystory.cfm?subjectid=7933596&story_id=13400406)> (visited April 17, 2009). “Rich countries in the OECD’s Development Assistance Committee gave \$119.8 billion in foreign aid last year, according to preliminary estimates released on Monday March 30<sup>th</sup> [2009]. This is over 10 percent more than in 2007 and is the highest amount ever given. The 22 countries in the DAC devoted an average of 0.47 percent of GDP to aid, up from 0.45 percent in 2007, though this is still considerably below the United Nations target of 0.7 percent.” Id.

<sup>26</sup> Query Wizard for International Development Statistics, Organisation for Economic Co-Operation and Development (cited in note 25) (donating \$15.7 billion in 2003).

<sup>27</sup> Id. (donating 0.14 percent of the GDP in 2003).

<sup>28</sup> Id.

<sup>29</sup> Id. Norway is in the lead with just 0.92 percent.

were created (most at the end of the Second World War) and not contemporary reality.<sup>30</sup> Yet “the excuse of complexity is no answer to the demand for equity.”<sup>31</sup>

There are many reasons why distributive justice is so lacking internationally.<sup>32</sup> However, this is not the place to dwell on that public failure, since no judicial institution has been created to ensure that even those modest measures of distributive justice that exist be implemented.<sup>33</sup>

## B. RETRIBUTIVE JUSTICE

Retributive justice is the area in which the most spectacular strides have been made internationally in the past fifteen years.<sup>34</sup> The array of institutions and methods is staggering, particularly considering how seldom war crimes and gross violations of human rights were prosecuted during the Cold War (1945–1991). There is a permanent International Criminal Court (“ICC”),<sup>35</sup> two ad hoc criminal tribunals established by the UN Security Council (for the former Yugoslavia and for Rwanda);<sup>36</sup> three hybrid courts, one for Sierra Leone, one for Cambodia, and one to try the assassins of former Lebanese Prime Minister Rafez Hariri; plus a series of domestic courts working under different degrees of international supervision and/or participation (in East Timor until 2005, in Kosovo, in Bosnia-Herzegovina, and arguably also in Iraq).<sup>37</sup>

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<sup>30</sup> For a recent overview, see *Wrestling for Influence*, 388 *Economist* at 33 (cited in note 1).

<sup>31</sup> *Id.* at 34.

<sup>32</sup> See generally John Rawls, *Law of Peoples: A Realistic Utopia?* (Wiley-Blackwell 2006) (Rex Martin and David A. Reidy, eds); Samuel Freeman, *The Law of Peoples, Social Cooperation, Human Rights and Distributive Justice*, 23 *Soc Phil and Poly* 29 (2006).

<sup>33</sup> In theory, certain international judicial bodies, like the International Court of Justice (“ICJ”) or the International Tribunal for the Law of the Sea, could dispense distributive justice. For example, they could do so when deciding *ex aequo et bono* (meaning “according to the right and good” or “according to equity and conscience”) on, for instance, boundary delimitations. However, in practice those judicial bodies have never been asked to actually decide a case *ex aequo et bono*, and, even if they were, decisions taken on an *ex aequo et bono* basis could be construed more as exercises in corrective justice rather than distributive justice.

<sup>34</sup> See generally Ronald C. Slye and Beth Van Schaack, *International Criminal Law and Its Enforcement, Cases and Materials* (2007); Antonio Cassese, *International Criminal Law* (Oxford 2d ed 2008).

<sup>35</sup> Rome Statute of the International Criminal Court, preamble (1998), 37 *ILM* 999 (“Rome Statute”).

<sup>36</sup> See Security Council Res No 827, UN Doc S/RES/827 (1993); Security Council Res No 955, UN Doc S/RES/955 (1994).

<sup>37</sup> See Cesare Romano, *Mixed Criminal Tribunals*, in Rudiger Wolfrum, ed, *The Max Planck Encyclopedia of Public International Law* (Oxford 2008), available online at <<http://www.mpepil.com>> (visited Apr 17, 2009).

Progress in retributive justice for international crimes (war crimes and crimes against humanity) has also been made at the national level.<sup>38</sup> Certain countries have resurrected, or have adopted, “long-arm laws,” and some have gone even as far as enabling national judges to decide cases about acts committed by foreigners, against foreigners and abroad (from universal jurisdiction statutes<sup>39</sup> to the US Alien Tort Claims Act<sup>40</sup>).

Yet that is not all, as the range of tools available to dispense retributive justice is even wider than strictly prosecutorial means. It expands to areas beyond the classical forms of criminal punishment (detention) to encompass other dimensions of justice, such as corrective or restorative justice. This is the case, for instance, for truth and reconciliation commissions (and the associated amnesties), of which there are at least a dozen.<sup>41</sup> But one should also mention the increasingly disused practice of exile.<sup>42</sup>

The expanding array of institutions and means has been both the cause and the effect of the expansion of international criminal law (both procedural and substantive), thus making sure that progress is entrenched. Yet, while this is the dimension of justice where the most spectacular progress has been made by capturing people’s imagination and media attention, the number of people affected by these developments remains relatively small. If one adds the population of all states which have benefited from international criminal prosecutions, the total reaches at most around 130 million, or 2 percent of the world population.<sup>43</sup> Granted, some might argue that the benefit of the advent of

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<sup>38</sup> Arguably, progress at the domestic level is also a result of progress at the international level. See *Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases—DOMAC*, available online at <<http://www.ru.is/?PageID=6837>> (visited Apr 17, 2009).

<sup>39</sup> See generally Antonio Cassese, *Foreword*, 4 J Intl Crim Just 559 (2006); Claus Kreß, *Universal Jurisdiction over International Crimes and the Institut de Droit International*, 4 J Intl Crim Just 561 (2006); Hervé Ascensio, *The Spanish Constitutional Tribunal’s Decision in Guatemalan Generals: Unconditional Universality is Back*, 4 J Intl Crim Just 586 (2006); Christine A.E. Bakker, *Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?*, 4 J Intl Crim Just 595 (2006); Salvatore Zappalá, *The German Federal Prosecutor’s Decision Not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?*, 4 J Intl Crim Just 602 (2006); Stephen Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Penn 2004).

<sup>40</sup> 28 USC § 1350 (2003). See generally Ralph G. Steinhardt and Anthony D’Amato, eds, *The Alien Tort Claims Act: An Analytical Anthology* (Brill 1999).

<sup>41</sup> For a complete list, see Lavinia Stan and Nadya Nedelsky, eds, *Encyclopedia of Transitional Justice* (Cambridge forthcoming).

<sup>42</sup> Interestingly, the forthcoming *Encyclopedia of Transitional Justice* does not include an entry for “Exile.” See *id.*

<sup>43</sup> This is roughly the sum of the populations of the former Yugoslavia (in millions, Serbia 10.1, Croatia 4.5, Bosnia 4.6, Slovenia 2, Macedonia 2, Montenegro 0.6) along with Rwanda 10.4, Sierra Leone 6.4, Cambodia 14.5, Timor-Leste 1.1. To this I added the populations of those countries under International Criminal Court (“ICC”) investigation (Democratic Republic of Congo 68,

international criminal courts is much larger, potentially extending to the whole globe. For every international criminal punished, many more may be deterred. However, the deterring power of international criminal prosecutions is still largely assumed and not proven.<sup>44</sup>

### C. CORRECTIVE JUSTICE

In contrast to retributive justice, progress made in the area of corrective justice, at least quantitatively, has had a much wider impact. Most of the world population, at some level and in some form, has been affected by developments in this area.

The list of international “dispensers of corrective justice” is even longer than that of international “dispensers of retributive justice,” and, in many ways, it is not an obvious list. There are currently three regional human rights courts, which, in order of level of activity and number of states over which they have jurisdiction (from the highest to the lowest), are the European Court of Human Rights (“ECtHR”),<sup>45</sup> the Inter-American Court of Human Rights (“IACtHR”),<sup>46</sup> and the African Court of Human and Peoples’ Rights.<sup>47</sup> These courts together have jurisdiction over ninety-six states, accounting for more than one third of the world’s population.<sup>48</sup> Unlike criminal courts, these courts cannot sanction human rights violations with criminal punishment. They can only provide

Sudan 41, Uganda 32, and Central African Republic 4.5). See Central Intelligence Agency, *The World Factbook*, available online at <<https://www.cia.gov/library/publications/the-world-factbook/>> (visited on Apr 17, 2009).

- <sup>44</sup> See generally David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *Fordham Intl L J* 473 (1999). Consider Wasana Punyasena, *Conflict Prevention and the International Criminal Court: Deterrence in a Changing World*, 14 *Mich St J Intl L & Prac* 39 (2006) and Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 *Finnish YB Intl L* 249 (2001).
- <sup>45</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (1953), 213 UN Treaty Ser 221 (“ECHR”) (amended by Protocol 11 to the European Convention on Human Rights, 33 *ILM* 943 (“Protocol 11”).
- <sup>46</sup> The American Convention on Human Rights (1969), 9 *ILM* 673 (1970) (“American Convention”).
- <sup>47</sup> African Charter on Human and Peoples’ Rights (1981), 21 *ILM* 58 (1982); Protocol to the African Charter of Human and Peoples’ Rights, arts 1–3 (1998), available online at <[http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/africancourt-humanrights.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/africancourt-humanrights.pdf)> (visited Apr 17, 2009).
- <sup>48</sup> Forty-seven states are currently subject to the jurisdiction of the European Court of Human Rights (“ECtHR”). Twenty-five Organization of American States members have ratified the American Charter and accepted the Inter-American Court of Human Rights’ (“IACtHR”) jurisdiction. Twenty-four African states have ratified the protocol establishing the African Court of Human and Peoples’ Rights. See *List of Countries that Have Ratified*, available online at <[http://www.achpr.org/english/ratifications/ratification\\_court.pdf](http://www.achpr.org/english/ratifications/ratification_court.pdf)> (visited Apr 17, 2009). However, the African Court has not yet become operational.

remedies by declaring violations, ordering specific performance, and sometimes ordering compensation. There is also a remarkable array of quasi-judicial and implementation-control bodies, such as the various committees established under the UN human rights treaties.<sup>49</sup> There are in total about two dozen, counting both the global and regional levels. While these bodies cannot issue binding rulings, they have, to varying degrees, the capacity to dispense corrective justice by way of declaratory relief.<sup>50</sup>

There are also about fifteen international administrative tribunals that make it possible for employees of international organizations to have their claims heard against employers who, due to immunities, are out of reach of domestic courts.<sup>51</sup> There are also at least three procedures to make sure that international banks follow their own policies and guidelines, providing a sort of equitable remedy to those negatively affected by the projects financed by these entities.<sup>52</sup> Further, one can count at least six international bodies established to hear claims and compensate victims of several “political catastrophes” (for example, the Iranian Revolution, the 1990 invasion of Kuwait, the Holocaust, the Eritrea-Ethiopia War, and the breakup of Yugoslavia).<sup>53</sup>

Then, there are not-so-obvious providers of corrective justice. These are the courts and procedures established within the framework of several regional economic and political integration agreements, such as the European Court of Justice (“ECJ”), the Court of Justice of the Economic Community of West African States, the Caribbean Court of Justice, the Court of Justice of the Andean Community, and at least a dozen more.<sup>54</sup> Individuals, and their companies or associations, can bring claims against either their own national states or organs of the given agreement before these courts and, if successful, obtain vindication of their rights (such as the prohibition of discrimination).

Finally, even the dispute-settlement system of the World Trade Organization (“WTO”), which came into being in 1995, could be looked at as an agent of corrective justice. Though the WTO is typically attacked for being

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<sup>49</sup> See Romano, 31 NYU J Intl L & Pol at 739–48 (cited in note 7) (“Synoptic Chart”). The chart has since been updated. The most recent version (Nov 3, 2004) is available online at <[http://www.pict-pcti.org/publications/synoptic\\_chart/synop\\_c4.pdf](http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf)> (visited Apr 17, 2009), reprinted in José E. Alvarez, *International Organizations as Law-Makers* 404–47 (Oxford 2005).

<sup>50</sup> See generally Dinah Shelton, *Remedies in International Human Rights Law* (Oxford 2d ed 2005).

<sup>51</sup> See Synoptic Chart (cited in note 49).

<sup>52</sup> See *id.* (listing the World Bank Inspection Panel, Inter-American Development Bank Independent Investigation Mechanism, Asian Development Bank Inspection Policy).

<sup>53</sup> See *id.* (listing the Iran–United States Claims Tribunal, United Nations Compensation Commission, Claims Resolution Tribunal for Dormant Accounts in Switzerland, German Forced Labour Compensation Programme, Eritrea-Ethiopia Claims Commission).

<sup>54</sup> See generally *id.*

impervious to human rights concerns<sup>55</sup> and the WTO legal framework is denounced for being an impediment to states' efforts to ensure compliance of human rights abroad, the rules and procedures of the WTO might actually help the human rights struggle.<sup>56</sup> For instance, WTO rules and its dispute-settlement machinery protect the freedom to participate in markets and freedom from trade-disrupting arbitrary governmental procedures.<sup>57</sup> Discriminatory tariffs, or the dumping of goods with the ensuing loss of market shares, cause very tangible damage to workers and shareholders. Granted, only the governments of WTO member states, and not their citizens, may access that forum. However, it is through the medium of claims brought and won by their governments against "nullification or impairment of benefits" accruing under the General Agreement on Tariffs and Trade/WTO agreements that those workers and shareholders may have their own economic and social rights vindicated.<sup>58</sup> On a higher level, the system contributes to development and to the realization of broader economic, social, and cultural rights, by stimulating economic growth and helping to generate the resources that are needed for the fulfillment of such rights.

#### IV. GAPS AND FAILURES: IDENTIFYING SUPPLY SHORTAGES

Nowadays it is obvious that there are many opportunities to obtain justice, both domestically and internationally, far more than ever in the history of humankind. However, gaps and failures still abound. The international judicial network is still in its infancy. Most international courts were created less than twenty years ago. Internationally, we are still far away from the full realization of

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<sup>55</sup> See, for example, Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (Flamingo 2000).

<sup>56</sup> See generally James Harrison, *The Human Rights Impact of the World Trade Organisation* (Hart Limited 2007); Thomas Cottier, *Human Rights and International Trade* (Oxford 2006) (commenting on human rights and the WTO).

<sup>57</sup> Ariel Aaronson and Jamie M. Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking* (Cambridge 2008).

<sup>58</sup> General Agreement on Tariffs and Trade (1947), art XXIII.1, 61 Stat A2051. Sometimes governments might be tempted to use human rights arguments to adopt discriminatory antitrade measures. For instance, in 2005, the European Community challenged Brazil's ban on imports of rethreaded tires. Brazil argued that it had banned these imports because there is no safe way to dispose of these tires and it had a constitutional duty to protect its citizens' right to health. Brazil was one of the first countries to argue that a trade ban is necessary to protect the life and health of its people. It also argued that it had no reasonable alternative to the trade ban to protect the right of health. The Dispute Settlement Panel and later the Appellate Body held that, although the ban was necessary to protect health and the environment, it was applied in a WTO-inconsistent manner because imports from other Mercosur countries (the economic regional organization of which Brazil is a member) were exempted from these measures. See World Trade Organization, Report of the Panel, *Brazil—Measures Affecting Imports of Rethreaded Tyres*, WTO Doc No WT/DS332/R (June 12, 2007).



the principle *ibi jus ibi remedium*, particularly if the holder of the right is an individual, for there are many rights which lack a remedy because there is no competent forum to grant relief.

### A. DOMESTIC LEVEL

As mentioned above, the natural judge is the local judge. The judge closer to the victims and the perpetrators has primary responsibility and is in the best position to dispense justice. Yet the local judge might not be practical, or might be tainted by an inherent bias, as in the case of international trade disputes. Or the local judge might not be available. Countries torn apart by civil strife typically do not have a functioning judiciary. Or the local judge might not be accessible, and legal and socioeconomic impediments might make resort to courts of law difficult, if not impossible, to some. Or the local judge might not be effective, either because she is not supported by the enforcement powers of the government (which has a monopoly on force and its use for coercion) or is unable to provide justice because she is not impartial. In many countries of the world, the natural judge is affected by one of these flaws and thus cannot satisfy demands for justice and fairness.<sup>59</sup>

Moreover, local judges apply national laws. International law is applied only insofar as it is part of national law. International law might recognize fundamental human rights, but these rights can be upheld by the local judge only if they have been incorporated in the domestic legal order. In an ideal world, all countries would automatically incorporate domestically all of international law. In reality, most of the time there is some degree of discrepancy between domestic and international laws.<sup>60</sup> For instance, a given national law that is fully consistent with the domestic legal system could still violate international law.<sup>61</sup> Or, sometimes, even when international standards are incorporated domestically, they might be trumped by conflicting provisions of domestic law that occupy a higher place in the national hierarchy of legal sources.<sup>62</sup>

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<sup>59</sup> Freedom House, the influential think tank that keeps statistics about democracy and freedom around the world, recently rated respect for rule of law in 192 states on a scale of 0 (lowest) to 16. Only 8 states received scores of 16. Only 83 received scores greater than 10. 89 scored 7 or below. See, for example, *Freedom in the World Aggregate and Subcategory Scores* (2006), available online at <<http://www.freedomhouse.org/template.cfm?page=276.15&year=2006>> (visited Apr 17, 2009).

<sup>60</sup> See Malcolm Shaw, *International Law* 138–79 (Cambridge 2008).

<sup>61</sup> Arguably, such is the case of the Military Commissions Act of 2006, Pub L No 109-366, 120 Stat 2600 (to be codified in scattered sections of 10, 18, 28, and 42 USC).

<sup>62</sup> *Id.*

Individuals might fail to obtain justice because their cases fall through the gap existing between the international legal system and domestic legal systems. For instance, although the UK ratified the European Convention of Human Rights (“ECHR”) in 1951, the convention was not incorporated in the domestic legal system for almost fifty years. Individuals had no remedies in UK courts for its violations, nor, if they turned to the ECtHR, could they ask a UK judge to give effect to a ruling of that international court in their favor.<sup>63</sup> The 1998 Human Rights Act made it unlawful for any public body to act in a way that is incompatible with the ECHR.<sup>64</sup> It also required UK judges to take account of decisions of the European Court.<sup>65</sup> However, in cases of conflict between UK law and the ECHR, UK law still prevails. Under the Human Rights Act, UK judges must interpret legislation, as far as possible, in a way that is compatible with the ECHR, but if such interpretation is not possible they are not allowed to override the legislation.<sup>66</sup> All they can do is to issue a declaration of incompatibility, which does not affect the validity of an Act of Parliament.<sup>67</sup>

If the ultimate goal is to dispense justice to most people, if not everyone, then it is clear that the greatest challenges, and the greatest gains, are at the national level. The activities that are most likely to directly improve the livelihood of hundreds of millions are programs of judicial reform, ensuring police forces act under strict rule-of-law parameters, and independence of the judiciary.<sup>68</sup> This might not be enough, however, and it may be necessary to satisfy the demand for justice through other sources as well in the interim until respect of rule of law has taken roots in most of the world.

There are two alternative providers of justice that can supplement inadequate domestic sources. Yet both have shortcomings, too.

The first is national courts of foreign countries. In theory, no international crime (war crimes, crimes against humanity, genocide, but also certain internationally criminalized acts like terrorism, hijackings, or bombings) should go unpunished. Even if a country is unable or unwilling to prosecute, by virtue

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<sup>63</sup> See, for example, *Regina v Secretary of State for the Home Dept, Ex Parte Brind and Others*, 1 AC 696, 697 (HL 1991) (UK).

<sup>64</sup> Human Rights Act (1998), 1998 ch 42, art 6 (Eng). It came into force on Oct 2, 2000.

<sup>65</sup> *Id.*, at art 2.1.a.

<sup>66</sup> *Id.*, at art 3.

<sup>67</sup> *Id.*, at art 4.

<sup>68</sup> For an overview of activities in this field around the world, see Per Bergling, *Rule of Law on the International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Co-Operation* (Intersentia 2006). For an example of a nongovernmental organization particularly active in the field of legal and judicial national reform, see The Center for International Legal Cooperation, *Current Projects*, available online at <<http://www.cilc.nl/projects.html>> (visited Apr 17, 2009).

of the principle *aut dedere aut judicare* (that is, “extradite or prosecute”), it must either prosecute or surrender to a jurisdiction willing to prosecute.<sup>69</sup> In practice, however, the *aut dedere* principle is not always honored, as it is not infrequent for countries to shield perpetrators of international crimes from retributive justice (either their own, such as Francisco Franco in Spain, or those of other countries, such as the Ugandan dictator Idi Amin who ended his days in Saudi Arabia).

In some cases, courts of certain countries might be available to supplement domestic courts both in the case of compensatory justice (for example, the US Alien Tort Claims Act<sup>70</sup>) and in the case of retributive justice (for example, through universal jurisdiction or other “long-arm” statutes).<sup>71</sup> However, legal, political, and moral considerations limit the availability of foreign courts to dispense justice to foreigners for wrongs suffered abroad at the hand of foreigners.<sup>72</sup> It touches sensitive nerves, especially when the judge is in a former colonial power and the judged and the victims are in the former colony, like in the case of the request of extradition from the UK, made by a Spanish judge, of the former Chilean dictator Augusto Pinochet.

The second supplemental provider is international courts and tribunals. Yet the international network, which is supposed to act as a safety net for those who cannot obtain justice domestically, is at best a work-in-progress, full of gaps, loopholes, and inconsistencies, namely: (1) not everyone has access to international jurisdictions; (2) international legal remedies are available only for the violation of certain rights; (3) existing fora can provide only some kind of justice (for example, retributive or corrective); (4) judicial remedies might be available for violations by some but not for those by others; (5) fora might be available, but there might be no matching right; and (6) fora might exist, but delivery of justice might be so delayed as to amount to a denial of justice.

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<sup>69</sup> See generally Cherif M. Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff 1995).

<sup>70</sup> “The district courts shall have original jurisdiction of any *civil action* by an alien *for a tort only*, committed in violation of the law of nations or a treaty of the United States.” 28 USC § 1350 (2003) (emphasis added).

<sup>71</sup> See, for example, 28 USC § 1350 (1789).

<sup>72</sup> See generally Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford 2004); Georges Abi-Saab, *The Proper Role of Universal Jurisdiction*, 1 J Intl Crim Just 569 (2003).

## B. INTERNATIONAL LEVEL

### 1. Not Everyone Has Access to International Jurisdictions

There is no international court with compulsory jurisdiction over all states. The jurisdiction of any international court depends on its voluntary acceptance by states, and currently no court's jurisdiction has been accepted by all states.<sup>73</sup>

The WTO dispute-settlement system covers 153 members, including the European Communities, and Hong Kong and Macao, but that is not so much a court of law as it is a dispute-settlement system.<sup>74</sup> Further, as it was said, individuals have no access to it. The European Community, plus 157 states, have ratified the Law of the Sea Convention.<sup>75</sup> However, the International Tribunal for the Law of the Sea ("ITLOS") has compulsory jurisdiction over only certain categories of disputes.<sup>76</sup> Only twenty-seven states have indicated consent to have any other disputes arising under the Convention decided by ITLOS.<sup>77</sup> The ICJ does not have compulsory jurisdiction, *per se*. States can make optional declarations accepting the court's jurisdiction but, currently, only 66 out of 192

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<sup>73</sup> "No state can, without its consent, be compelled to submit its disputes . . . to arbitration, or any other kind of pacific settlement." Status of the Eastern Carelia (*Fin v Russ*), 1923 PCIJ (ser B) No 5 at 27 (July 23, 1923). However, there is a clear trend toward locking in states' consent to jurisdiction and making it less dependent on ad hoc expressions of consent. See generally Cesare Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 NYU J Intl L & Pol 791 (2007).

<sup>74</sup> WTO, *Members and Observers*, available online at <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> (visited Apr 8, 2009). The WTO dispute settlement system is comprised of two levels: a first level where disputes are decided by arbitral panels and a second level where appeals against arbitral awards are heard by the WTO Appellate Body. Only the Appellate Body approximates a true court of law, while the arbitral tribunals are just ad hoc.

<sup>75</sup> The most recent version of the list of ratifications is available online. See United Nations Convention of the Law of the Sea (cited in note 24); Oceans and Law of the Sea, *Settlement of Disputes Mechanism*, available online at <[http://www.un.org/Depts/los/settlement\\_of\\_disputes/choice\\_procedure.htm](http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm)> (visited Apr 17, 2009).

<sup>76</sup> Article 297 excludes from compulsory jurisdiction certain disputes arising out of the exploration and exploitation of the seabed and disputes concerning coastal states' sovereign rights with respect to the living resources in their exclusive economic zone. United Nations Convention on the Law of the Sea, art 297(3)(a). Also, when signing, ratifying, or acceding to the UNCLOS, or anytime thereafter, states have the possibility of opting out of compulsory dispute-settlement procedures in the case of disputes concerning sea boundary delimitations, historic bays or titles, military and law enforcement activities, and issues relating to the maintenance of peace and security that are being dealt with by the UN Security Council. United Nations Convention on the Law of the Sea, art 298 (cited in note 24).

<sup>77</sup> To be precise, three of the states have indicated ITLOS only for the prompt release of detained vessels or their crews. Oceans and Law of the Sea, *Settlement of Disputes Mechanism* (cited in note 75).

UN members have done so (and often with many reservations).<sup>78</sup> The ICC has jurisdiction over just more than half the states of the world (108), but its jurisdiction could be extended by fiat of the Security Council to any other state, as happened in the case of Sudan.<sup>79</sup>

In addition to international courts, there is the regional level of judicial bodies (supplementing but not replacing international courts). Yet, to borrow the lingo of mobile phone providers, there are significant variations in coverage from region to region. Let's start with compensatory justice.

Europe is the continent that has probably the best "international judicial" coverage: full in the West and a little less in the East. After the devastations suffered during the Second World War, Europeans seem to have had a Kantian epiphany, launching a continent-wide quest for peace, security, and prosperity, first in the West and then, after the end of the Cold War, extending to the East. The construction of Europe essentially rests on two main judicial pillars: the ECJ and the ECtHR.<sup>80</sup> Forty-seven European states, including many of the former Soviet Union, are subject to the jurisdiction of the ECtHR, the only notable exception being Belarus.<sup>81</sup> Twenty-seven of these are also subject to the jurisdiction of the ECJ,<sup>82</sup> and three are subject to the European Free Trade Association Court, an appendix of the EC/EU project.<sup>83</sup> At the Eastern end of

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<sup>78</sup> Nowadays, only 66 out of 192 UN members have made an optional declaration accepting the ICJ's jurisdiction. ICJ, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, available online at <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&PHPSESSID=78b633524ede27e0f0b5efeac1341705>> (visited Apr 8, 2009). Besides optional declarations, states can accept the ICJ's jurisdiction either by ad hoc agreement or by inserting clauses in treaties designating the ICJ as the forum of choice in the case of disputes. Statute of the International Court of Justice (1945), art 36, 59 Stat 1031.

<sup>79</sup> ICC, *The States Parties to the Rome Statute*, available online at <<http://www.icc-cpi.int/statesparties.html>> (visited Apr 17, 2009). The number might be higher if one considers that the UN Security Council might refer situations involving states not party to the Rome Statute to the ICC Prosecutor, like in the case of Sudan. Security Council Res 1593, UN Doc S/RES/1593 (2005).

<sup>80</sup> See generally Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford 2004).

<sup>81</sup> ECtHR, *Some Facts and Figures* (1998–2008), available online at <<http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresENG10ansNov.pdf>> (visited Apr 17, 2009).

<sup>82</sup> European Union, *The Court of Justice*, available online at <<http://curia.europa.eu/en/transitpage.htm>> (visited Apr 17, 2009). To this, one should also add the Court of First Instance and the European Union Civil Service Tribunals, which are distinct branches of the European judiciary.

<sup>83</sup> On the relationship between the European Community and the European Economic Area and between the European Court of Justice and the European Free Trade Association Court, see, for example, Thordis Ingadottir, *The EEA Agreement and Homogenous Jurisprudence: The Two-Pillar Role Given to the EFTA Court and the Court of Justice of the European Communities*, 2 YB Intl Law and Jurisprudence 193 (2002).

the continent, one should mention the little-known Economic Court of the Commonwealth of Independent States, which has been struggling to make its voice heard and respected in a region of the world where the rule of law is still mightily struggling.<sup>84</sup> Finally, one could also add to the list a handful of bodies which either have never been used or have long been dormant, such as the Benelux Economic Union Court of Justice,<sup>85</sup> the European Nuclear Energy Tribunal,<sup>86</sup> and the Organization on Security and Cooperation in Europe's Court of Conciliation and Arbitration.<sup>87</sup>

Continuing with the mobile phone metaphor, Africa has good coverage but far too many dropped calls. In the struggle to achieve a certain degree of stability and prosperity, Africa has given birth to a large number of international judicial institutions.<sup>88</sup> Besides the nascent African Union Court of Human and Peoples' Rights and the African Court of Justice—both of which have, at least potentially, continent-wide reach—there are several subregional courts, such as the Arab Maghreb Union Judicial Authority, the Common Market of Eastern and Southern Africa Court of Justice, the East African Community Court of Justice, the Economic Community of Central African States Court of Justice, the Economic and Monetary Community of Central Africa Court of Justice, the Economic Community of West African States Court of Justice, the Organization for the Harmonization of African Business Law Common Court of Justice and Arbitration, the Southern African Development Community Tribunal, and the West African Economic and Monetary Union Court of Justice. Be that as it may, the fact that many of these courts have either been nonstarters, floundered after a few years, or are languishing with a paltry docket, also indicates that the

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<sup>84</sup> Charter of the Commonwealth of Independent States (1993), art 32, 1819 UN Treaty Ser 31139. On the CIS Court and the struggle to make its voice heard and respected, see Sergei Y. Marochikin, *International Law in the Courts for the Russian Federation: Practice of Application*, 6 Chinese J Intl L 329 (2007).

<sup>85</sup> Treaty Instituting the Benelux Economic Union (1958), 381 UN Treaty Ser 165.

<sup>86</sup> The European Nuclear Energy Tribunal is the judicial body of the Organisation for Economic Co-operation and Development ("OECD") Nuclear Energy Agency. The OECD Nuclear Energy Agency was established in 1957 by the Council of the OECD (at that time still named Organization for European Economic Cooperation, or OEEC). The European Nuclear Energy Tribunal was created pursuant to the 1957 Convention on the Establishment of a Security Control in the Field of Nuclear Energy (1957), UKTS 8 (1960), to adjudicate disputes of states parties and private enterprises with the Nuclear Energy Agency. The Tribunal does not seem to have been called upon to deal with any cases.

<sup>87</sup> Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe (1993), arts 1–2, 32 ILM 557, 557. On the Organization for Security and Co-operation in Europe Court of Conciliation and Arbitration, see generally Lucius Caflisch, ed, *The Peaceful Settlement of Disputes between States: Universal and European Perspectives* (Springer 1998).

<sup>88</sup> For an overview of African international courts and tribunals, see *African International Courts and Tribunals*, available online at <<http://www.aict-ctia.org/>> (visited Apr 17, 2009).

commitment to independent third-party adjudication and international rule of law might be, at least for the ruling elites, only skin-deep.

In the Americas, the situation is mixed, and coverage tends to improve as one travels south. Only twenty-five out of a total of thirty-five states-members of the Organization of American States (“OAS”) have accepted the IACtHR’s jurisdiction (Canada and the US have not).<sup>89</sup> The continent is also home to several more (and not overlapping) regional judicial bodies, like the Mercosur Permanent Review Tribunal (five member states),<sup>90</sup> the Court of Justice of the Andean Community (four members),<sup>91</sup> and the Central American Court of Justice (seven members),<sup>92</sup> which have varying degrees of accessibility, effectiveness, and compliance. One must also mention that the North American Free Trade Agreement is endowed with procedures to ensure redress when certain rights (mostly economic rights and the right to property) are violated, but so far this covers only North America.<sup>93</sup>

Retributive justice coverage tends to extend to the same areas, and to the same extent, as compensatory justice. Thus, thirty-nine European states are party to the Rome Statute of the ICC, including all countries in Western Europe except the Czech Republic.<sup>94</sup> Numerically, Europe is the most represented region in the Assembly of States Parties. The continent is also home to the International Criminal Tribunal for Yugoslavia (“ICTY”), which, however, has jurisdiction only over seven former Yugoslav republics. Thirty African states (out of fifty-four) have ratified the Rome Statute.<sup>95</sup> Africa is also the site of all

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<sup>89</sup> *American Convention on Human Rights, General Information of the Treaty*, available online at <<http://www.oas.org/juridico/english/Sigs/b-32.html>> (visited Apr 25, 2009).

<sup>90</sup> *Secretary Mercosur*, available online at <<http://www.mercosur.int/msweb/principal/contenido.asp>> (visited Apr 17, 2009).

<sup>91</sup> Tribunal de Justicia de la Comunidad Andina, *Designación de Presidente del Tribunal para el Año 2009*, available online at <<http://www.tribunalandino.org.ec/>> (visited Apr 17, 2009).

<sup>92</sup> *Corte Centroamericana de Justicia*, available online at <<http://www.ccej.org.ni/>> (visited Apr 17, 2009).

<sup>93</sup> North American Free Trade Agreement (1992), ch 11, 32 ILM 639, 641–652 (1993). The Dominican Republic–Central America Free Trade Agreement might expand it, but it is not endowed with similar dispute-settlement procedures. The Dominican Republic–Central America–United States Free Trade Agreement (Aug 5, 2004), available online at <[http://www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html)> (visited Apr 17, 2009). See also United States–Chile Free Trade Agreement (June 6, 2003), available online at <[http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html)> (visited Apr 17, 2009); United States–Singapore Free Trade Agreement (Jan 15, 2003), available online at <[http://www.ustr.gov/Trade\\_Agreements/Bilateral/Singapore\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html)> (visited Apr 17, 2009).

<sup>94</sup> See Rome Statute (cited in note 35).

<sup>95</sup> *Id.*

ongoing investigations by the ICC Prosecutor, which, for practical purposes and for the time being, makes the ICC an African international criminal court of sorts. The International Criminal Tribunal for Rwanda (“ICTR”) and the Special Court for Sierra Leone are aimed only at those two countries. At best, it can be argued that they also help stabilize neighboring Burundi and Liberia. In the Americas, twenty-four countries have ratified the Rome Statute (including Canada),<sup>96</sup> but, thanks to the relative political stability the continent reached after the end of the Cold War, the only ongoing ICC investigation is in Colombia and there are no hybrid courts in the Americas.<sup>97</sup>

In the vast Asia-Pacific region, home to 64 percent of the world population, only thirteen states have become states parties to the ICC.<sup>98</sup> The paltry acceptance of the ICC probably correlates with the absence of regional courts of any sort (human rights, economic integration or otherwise) in these parts of the world. The only three limited exceptions to date are with the Serious Crimes Unit/Panel in East Timor (2000–2005), the Extraordinary Chambers in the Courts of Cambodia (2003–present), and the Special Tribunal for Lebanon (2006–present), but they are not considered models of international justice for different reasons.<sup>99</sup> The Asia-Pacific region has largely remained at the outskirts of the phenomenon.

In sum, while several states have accepted the jurisdiction of multiple international judicial bodies, most are subject to the jurisdiction of none or only one or two. It follows that the overwhelming majority of people of the world do not have the chance of having their cases submitted to the scrutiny of an international judicial body, should they not be able to obtain justice at the national level.

This brings us back to the fundamental conundrum of liberal political philosophy. Inequality in the distribution of justice contradicts the very postulate

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<sup>96</sup> Id.

<sup>97</sup> “In accordance with the Rome Statute, Prosecutor Moreno Ocampo and his team will continue the ongoing examination of the investigations and proceedings in Colombia, focusing particularly on the people who may be considered among those most responsible for crimes within the jurisdiction of the ICC.” ICC, *ICC Prosecutor Visits Columbia*, ICC-OTP-20080821-PR347, available online at <[http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/icc%20prosecutor%20visits%20colombia?lan=en-GB](http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/icc%20prosecutor%20visits%20colombia?lan=en-GB)> (visited Apr 17, 2009).

<sup>98</sup> ICC, *Asian States*, available online at <<http://www2.icc-cpi.int/Menus/ASP/states+parties/Asian+States/>> (visited Apr 17, 2009).

<sup>99</sup> See generally Padraic J. Glaspy, *Justice Delayed?: Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, 21 Harv Hum Rts J 143 (2008); Sylvia de Bertodano, *Current Developments In Internationalized Courts: East Timor—Justice Denied*, 2 J Intl Crim Just 910 (2004); Cesare Romano, Andre Nollkaemper, and Jann K. Kleffner, eds, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford 2004).



requiring equal access for all unless there are cogent reasons for differential treatment. Consider this: any Belgian has access to first-rate domestic courts. Should that not be enough, depending on the matter, she could turn to the ECJ, the ECtHR, the Benelux Court of Justice, the UN Human Rights Committee, the ICC, a few dozen human rights bodies (both regional and global), the WTO through the medium of her government, or the ICJ. And if that is not enough, if her sense of justice has been offended by atrocities committed by an African government against its own citizens, she can even get satisfaction by seeing one of her national magistrates prosecute those crimes far away, relying on principles of universal jurisdiction.<sup>100</sup>

Then there are people who, like US or Japanese citizens, can count on top-of-the-line domestic legal remedies, but who have relatively little access to providers of justice at the international level, as their government might have an ambivalent attitude toward international judicial bodies, favoring judicial overview in certain areas, like trade, but not in other areas.<sup>101</sup> If national courts do not deliver, there is often no further recourse.

Finally, there are those who lack access to justice and remedies, both domestically and internationally. Those in this category might include peoples in less-developed nations, like Eritreans and Uzbeks, but also those in more-developed nations, like Iranians and the Chinese. If those individuals cannot obtain justice from their own courts, which is not an unlikely event, they have little or no option at all internationally.

## 2. International Legal Remedies Are Available Only for the Violation of Certain Rights

Progress in the dispensing of justice at the international level is not only geographically uneven; it also disproportionately affects certain areas of human activity. Many areas of international relations, while showing increasing degrees of legalization, have not been judicialized.<sup>102</sup> For instance, in many cases—international financial and monetary relations, the protection of the environment, military and security affairs, the regulation of transcontinental migrations, cooperation in the fields of health, telecommunications and the

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<sup>100</sup> See generally *Public Prosecutor v the "Butare Four"* (Assize Court of Brussels 2001) (Belgium); Luc Reydam, *Belgium's First Application of Universal Jurisdiction: The Butare Four Case*, 1 J Intl Crim Just 428 (2003); Tom Ongena and Ignace Van Daele, *Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium*, 15 Leiden J Intl L 687 (2002).

<sup>101</sup> On US attitudes and behaviors toward international courts, see generally Cesare Romano, ed, *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge forthcoming 2009).

<sup>102</sup> Judith Goldstein et al, *Introduction: Legalization and World Politics*, 54 Intl Org 385, 387–91 (2000) (noting uneven growth in legalization and judicialization).

internet—diplomatic bargaining still plays the predominant role. It is clear that in all these areas, individuals' human rights are directly affected, but so far remedies and competent fora are lacking at the international level.

Besides, one must consider that, whenever available, international dispensers of retributive justice exist only for international crimes and gross violations of human rights. A victim of an ordinary crime who fails to obtain justice domestically presently has no fallback remedy available internationally. It is clear why focusing on those most responsible and on the most serious crimes is expedient, as justice must be made in a context of scarce resources.<sup>103</sup> It is also clear why NGOs have focused their efforts on obtaining retributive justice for gross violations, as prosecuting these cases usually brings high visibility and dramatic results.

However, assume there are two persons, both of whom are tortured. Both are in countries where they cannot expect to obtain retributive justice for their suffering. Yet one has been tortured within the framework of large-scale gross violations, such as in Argentina under the military junta (1976–83). The other has not, because, for instance, she was abused in a police station in Italy after having been arrested during the riots in Genoa during the 2001 G8 summit. It was just an isolated act, or perhaps a recurrent event but with no consistent pattern. In the current system, the former has a chance to obtain retributive justice for her torturer internationally (provided there is a court which has jurisdiction, which, as was shown, might not be the case), while the latter has no chance at all. There is no logical or morally compelling explanation why one should have a chance to obtain justice while the other should not get that chance. Torture is torture. Again, if the hallmark of a proper legal order is equal justice for all, internationally we are still clearly in the presence of a system of laws but not yet of a legal order.

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<sup>103</sup> “The Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.” Statute of the Special Court for Sierra Leone (2000), art 1, ¶ 1, available online at <<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MjEw%3d&tabid=200>> (visited Apr 17, 2009). “The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions.” Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (2003), art 1, available online at <[http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement\\_between\\_UN\\_and\\_RGCC.pdf](http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGCC.pdf)> (visited Apr 17, 2009). The statutes of the ICTY and ICTR do not limit jurisdiction to those most responsible, but de facto, the prosecutor’s strategy in both instances has been to generally focus on the top echelons of the political and military leadership.

### 3. Existing Fora Can Provide Only Some Kind of Justice (for example, Retributive or Corrective).

In our age, some victims of human rights abuses might be able to obtain compensatory justice or retributive justice, but rarely both. For instance, while human rights violations in Chechnya are within the jurisdiction of the ECtHR, that Court dispenses corrective justice, declaring violations of the ECHR and ordering often modest reparations, but it cannot dispense retributive justice.<sup>104</sup> There is no international criminal tribunal with jurisdiction to prosecute war crimes and crimes against humanity committed either by Russian troops or Chechen insurgents.<sup>105</sup> Conversely, a victim of international crimes committed in Rwanda might obtain retribution for her victimizer, but cannot expect to be compensated for the wrongs suffered. Negotiators of the Rome Statute tried to fill the gap by including provisions about victim compensation, but whether the ICC will be able in reality to secure funds to provide victims more than just a nominal sum remains to be seen.<sup>106</sup>

### 4. Judicial Remedies Might Be Available for Violations by Some but Not by Others

Again, legal remedies can be available against some violators of human rights, but not against all. To illustrate, one of the most recent developments in human rights and international humanitarian law is the emergence of the so-called principle of the “responsibility to protect.”<sup>107</sup> In essence, each individual state has the responsibility to protect its own populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. However, should peaceful means be inadequate and national authorities manifestly fail to protect their populations, the international community, through the UN, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means to help protect populations from genocide, war crimes, ethnic cleansing,

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<sup>104</sup> See generally *Bazorkina v Russia*, App No 69481/01, Eur Ct HR (2006); *Isayeva, Yusupova and Bazayeva v Russia*, App Nos 57947/00, 57948/00, and 57949/00, Eur Ct HR (2005); *Khashiyev and Akayeva v Russia*, App Nos 57942/00 and 57945/00, Eur Ct HR (2005).

<sup>105</sup> Russia has not ratified the Rome Statute. Since Russia is a member of the Security Council with veto powers, there is no chance that the ICC might exercise jurisdiction.

<sup>106</sup> Rome Statute, art 79 (cited in note 35). See Ana Salado-Osuna, *The Victims of Human Rights Violations in Armed Conflicts: Right to Justice, Truth and Compensation*, in Pablo Antonio Fernández-Sánchez, ed, *The New Challenges of Humanitarian Law in Armed Conflicts: In Honour of Professor Juan Antonio Carrillo-Salcedo* (Martinus Nijhoff 2005).

<sup>107</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Dec 18, 2001), available online at <<http://www.iciss.ca/pdf/Commission-Report.pdf>> (visited Apr 17, 2009). See generally Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings 2008).

and crimes against humanity.<sup>108</sup> In our age, those who are supposed to be the beneficiaries of the emerging “responsibility to protect” might have a remedy against the leaders of their own government who victimized them (for instance through the ICC, if the ICC has jurisdiction in the specific instance). However, they still have no remedy against the international community, the Security Council, and its members, if, for whatever reason, they fail to live up to their responsibility to protect.<sup>109</sup>

### 5. Fora Might Be Available, but There Might Be No Matching Right

Fora might exist but the substantive law they can apply might be outdated and might not reflect the issues of the contemporary world. Indeed, sometimes progress toward the building of a judicial system might outpace progress in the development of the underlying legal system.

The problem is illustrated by the filing of a petition against the US by several Inuits to the Inter-American Commission on Human Rights seeking relief from alleged violations of the American Charter of Human Rights resulting from global warming.<sup>110</sup> It is both obvious that the Inuits, the indigenous peoples of the Arctic region, are going to be devastated by the effects of global warming and that they want justice: surely corrective and maybe even retributive, should it lead to a de facto genocide. The alleged offender is the US, which is both a major emitter of greenhouse gases and a country that, to this date, has declined to commit to binding obligations to reduce them. However, it is equally obvious, even from a cursory look, that their petition has little chance of prevailing.<sup>111</sup> First, climate change is not directly attributable to acts or omissions of the US. The US might be one of the largest emitters of greenhouse

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<sup>108</sup> World Health Organization, *2005 World Summit Outcome*, UN Doc A/60/L1 at ¶¶ 138–39 (2005); Security Council Res No 1674, UN Doc S/RES/1674 (2006) (“Reaffirm[s] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and commits the Security Council to action to protect civilians in armed conflict).

<sup>109</sup> For an example of failure to implement the responsibility to protect and the lack of remedies against inaction by the Security Council, see *Failure to Protect: a Call for the UN Security Council to Act in North Korea*, Council on Foreign Relations, available online at <[http://www.cfr.org/publication/11903/failure\\_to\\_protect.html](http://www.cfr.org/publication/11903/failure_to_protect.html)> (visited Apr 17, 2009).

<sup>110</sup> *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (Dec 7, 2005), available online at <<http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>> (visited Apr 17, 2009). The Commission held hearings in March 2007. The case was still pending at the time of this writing.

<sup>111</sup> See generally Eric Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U Pa L Rev 1925, (2007). See also Hari M. Osofski, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights*, 31 Am Indian L Rev 675 (2006–07).

gases, but it is not the only one, nor the largest. Second, and more to the point, the Commission has to construe several provisions of the American Convention (for example, rights to the benefits of culture; to property; to the preservation of health, life, physical integrity, security, and means of subsistence; and to residence, movement, and inviolability of the home) so as to give the Inuits an overarching “right not to be affected by climate change,” a right which does not exist and which is unlikely to withstand close legal scrutiny.

The problem is that major human rights treaties, and in particular those over which existing international judicial bodies have jurisdiction, are increasingly outdated. The ECHR was adopted in 1950. The American Convention was adopted in 1969. The African Charter on Human and Peoples’ Rights was adopted in 1981. Granted, their scope has been expanded by subsequent protocols. For instance, Protocol 1 to the ECHR added the right to the peaceful enjoyment of one’s possessions, the right to education, and the right to regular, free and fair elections. Protocol 4 prohibits the imprisonment of people for breach of a contract, provides a right to freely move within a country once lawfully there and a right to leave any country, and prohibits the expulsion of nationals and the collective expulsion of foreigners, and so on. However, the rights over which these courts have jurisdiction are essentially civil and political ones.<sup>112</sup> “Third generation” human rights, such as a right to a healthy environment, a right to natural resources, a right to intergenerational equity and sustainability—such as those in essence invoked by the Inuits—have not yet been sufficiently entrenched in the international legal system to be justiciable.<sup>113</sup> In sum, as long as human rights courts apply treaties that have been drafted between the 1950s and the 1970s, the rights they can vindicate will remain necessarily confined to the core human rights, leaving many aspects of human life untouched

#### 6. Fora Might Exist, but Delivery of Justice Might Be So Delayed as to Amount to a Denial of Justice

Finally, to continue with the mobile phone network metaphor, it might be the case that courts exist, are available, and have jurisdiction over the state in question and the subject-matter, but that the network is busy. The IACtHR and

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<sup>112</sup> The ECtHR does not have jurisdiction over violations of the European Social Charter. These are considered by the European Committee of Social Rights, a body which issues nonbinding recommendations. In the Americas, the Inter-American Court has jurisdiction over violations of the Additional Protocol to The American Convention on Human Rights in the Area of Economic, Social and Cultural Rights’ “Protocol Of San Salvador,” albeit most of its docket is made of cases arising out of the core American Convention itself.

<sup>113</sup> See generally, Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development of Obfuscation of International Human Rights Law*, 29 *Neth Intl L Rev* 307 (1982).

the ECtHR are victims of their own success as their respective caseloads have mushroomed in the past few years. In the case of the ECtHR it has reached staggering proportions, resembling more the caseload of a very busy high-level domestic court than a last-instance international jurisdiction. On November 1, 2008, a staggering 95,900 applications were pending.<sup>114</sup> In 2008, it remarkably managed to issue 1,205 judgments, a workload that no other international court faces.<sup>115</sup> Be that as it may, that is still far from what is needed to make it possible for the court to ever work its way out of its massive backlog. Nowadays it takes several years at the ECtHR for a case to be decided. The situation at the IACtHR is no rosier. Since the adoption of the 2000 Rules of Procedure, which increased the number of sessions the IACtHR holds every year, the average time of proceedings for contentious cases (the average time from application to judgment on reparations) is twenty-one months. It had peaked at forty months before the rules were amended.<sup>116</sup> However, in the American system of protection of human rights, cases are heard first by the Inter-American Commission, which has, itself, quite a considerable backlog.<sup>117</sup> Considering that before accessing these fora an individual must have exhausted all available local remedies, which might also take several years, and that, ironically, a significant number of cases (particularly in Europe) deal exactly with delays of justice at the national level, it is easy to see how delays in justice internationally might de facto deprive individuals of a forum.<sup>118</sup>

## V. CLOSING THE GAP: TOWARD A STRATEGY TO ENSURE JUSTICE TO MOST

Despite the remarkable progress made between the end of the twentieth and the beginning of the twenty-first century in ensuring that as many as

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<sup>114</sup> ECtHR, *Some Facts and Figures* at 4 (cited in note 81).

<sup>115</sup> *Id.* The figure is also remarkable if compared to the rulings issued by constitutional courts domestically. For instance, in 2007, the US Supreme Court received 8,241 filings; seventy-five cases were argued and seventy-two were disposed of in sixty-seven signed opinions. United States Supreme Court, *2008 Year-End Report on the Federal Judiciary*, 10 (2008), available online at <<http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf>> (visited Apr 17, 2009).

<sup>116</sup> IACtHR, *Annual Report* 72 (2005), available online at <<http://www1.umn.edu/humanrts/iachr/Annals/annual-06.pdf>> (visited Apr 17, 2009).

<sup>117</sup> American Convention on Human Rights (1978), art 57, 1144 UN Treaty Ser 123, 158. Protocol 11 to the ECHR abolished the Commission, shortening the time between the filing of a petition by an individual and a ruling by the Court but with the unintended consequence of dramatically increasing the court's docket.

<sup>118</sup> The irony is that, in some cases, the individuals re-experience the very deprivation of justice that is the subject of their complaint—denial of hearing within a reasonable time—by bringing the case to the international courts.

possible can obtain justice, most still do not have access to justice domestically, internationally, or both. Even considerations of social justice aside, we are still “not living in a just world.”<sup>119</sup>

Availability of legal remedies, and availability to all, is necessary if the international legal system is to become an international legal order. The fundamental postulate of all notions of justice is that everyone should be treated equally, thus everyone should have equal access to justice unless there are compelling reasons for differential treatment. The question is, thus, what is the best strategy to ensure justice to all (or, at a minimum, availability of providers of justice to most)?

First, the level at which the greatest improvements can be made, possibly at the lowest cost, is the domestic level. Programs of judicial reform, and in general, advancement of democracy, are by far the best ways to ensure that justice is accessible to all. Whenever states are not in the position to dispense justice to their own citizens, the international community should be ready to assist local efforts, like in the case of hybrid criminal tribunals. Resort to courts of foreign states to obtain justice (corrective or retributive) is also a viable alternative, albeit not one devoid of moral and legal pitfalls. External assistance and relief are a second best.

Efficiency and simplicity are not the only reasons why local courts are best positioned to dispense justice. An effective strategy aimed at increasing availability of international judicial remedies must start at the local level first. Indeed, justice is a public good with some specific features.<sup>120</sup> National courts are “base goods” while international courts seem to be what economists call “complementary goods.” Like coffee and cream, demand for the former raises demand for the latter. It is no substitute, like coffee and tea, where higher demand of one decreases demand for the other. Indeed, states that have the most effective legal remedies domestically usually are also those that are most likely to create and accept the jurisdiction of international bodies. Democracies seem to be much more likely to establish, or submit to, the jurisdiction of international courts and tribunals than nondemocratic regimes. Therefore, efforts to increase supply of justice internationally, without ensuring greater supply domestically at the same time, are going to have very limited success.

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<sup>119</sup> Thomas Nagel, *The Problem of Global Justice*, 33 *Phil & Pub Aff* 113, 113–47 (2005).

<sup>120</sup> On “public goods” see generally, Paul A. Samuelson, *A Diagrammatic Exposition of a Theory of Public Expenditure*, 37 *Rev Econ & Stat* 350 (1955); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 *Rev Econ & Stat* 387 (1954). See also Inge Kaul, Isabelle Grunberg, and Marc A. Stern, eds, *Global Public Goods: International Cooperation in the 21st Century* (Oxford 1999) (proposing international justice is a global public good); Cesare Romano, *The United States and International Courts: Getting the Cost-Benefit Analysis Right*, in Romano, ed, *The Sword and the Scales* (cited in note 101).

Moreover, progress made at the international level without progress at the domestic level may result in patently absurd and unjust situations. The best examples of this are in Rwanda and in Kosovo. Those most responsible for the crimes committed in those regions, the high-level decisionmakers, benefit from patently better conditions of detention than those further down the chain of command who are subject to national justice. Also, while the ICTR cannot sentence anyone to capital punishment,<sup>121</sup> Rwandan courts can.<sup>122</sup> Thus, we might have the paradoxical situation that the Prime Minister of Rwanda, who ordered millions to be killed, is sentenced to detention in an air conditioned cell in The Hague, or Sweden, and the captain of the police who killed a dozen himself is sentenced to death, after a long wait on death row in a hole in a Rwandan prison.<sup>123</sup>

A system of international judicial remedies is emerging, supplementing the domestic remedies. However, as we saw, the network is far from complete. Its incompleteness is, in itself, a source of injustice. Further development of the international network can be achieved in three ways: by expanding the jurisdiction of “global courts,” by expanding that of regional courts, or both. Again, for the very same reasons why justice should be dispensed first at the local rather than the international level, global courts are only second-best to regional courts. Indeed, most courts that have emerged in the past fifteen years are regional courts, not global ones. Greater progress can be made in the most cost-effective way at the regional level than at the global level.

Besides, there is a clear correlation between the absence of regional courts in the Asia/Pacific region and the fact that this is the region that proportionally has the lowest number of states having ratified the Rome Statute. Again, regional courts are a “base good” and global courts are complementary to them. By

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<sup>121</sup> International Criminal Tribunal for Rwanda Statute, art 23, 33 ILM 1598 (“ICTR Statute”) (“The penalty imposed by the Trial Chamber shall be limited to imprisonment.”).

<sup>122</sup> See Mark Drumbl and Kenneth Gallant, *Sentencing Policies and Practices in the International Criminal Tribunals*, 15 Fed Sent R 140, 140–41 (2002) (“The ‘general practice regarding prison sentences in the courts of Rwanda’ includes the death penalty. In fact, a number of death sentences have been carried out against notorious genocidal murderers convicted in domestic trials in Rwanda.”).

<sup>123</sup> According to the Statute of the Tribunal, sentences of imprisonment “shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the ICTR. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the ICTR.” ICTR Statute, art 26. The Tribunal has already signed agreements with the governments of Mali, the Republic of Benin, Swaziland, Italy, Sweden, France, and Rwanda under which these countries have agreed to incarcerate persons convicted by the Tribunal. See generally ICTR, available online at <<http://69.94.11.53/default.htm>> (visited Apr 17, 2009). “This leads to a paradox: the high-level organizers of the Rwandan genocide over whom the ICTR has custody may receive lower sentences than those less serious offenders tried by national courts.” Drumbl and Gallant, *Sentencing Policies and Practices* at 141 (cited in note 122).



fostering the emergence of regional courts, states of the Asia/Pacific region might be socialized to international adjudication and justice with positive cascade effects at the global level.<sup>124</sup> Two areas might be fertile ground for an attempt to foster the creation of regional human rights courts in the Asia/Pacific region: the Pacific islands and a cluster of nations in South-East Asia.<sup>125</sup>

In recent years, the Association of Southeast Asian Nations (“ASEAN”) has made halting progress toward the creation of a subregional human rights structure.<sup>126</sup> This sub-regional organization is in the process of considering the

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<sup>124</sup> See Ellen Lutz and Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, in Laura Dickinson, ed, *International Law and Society: Empirical Approaches to Human Rights* 319 (Ashgate 2007). See also Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (forthcoming 2009).

<sup>125</sup> The General Council of the Nonviolent Radical Party, Transnational and Transparty, which met at the European Parliament, in December 2007, adopted the following motion:

The General Council of the Nonviolent Radical Party, Transnational and Transparty

- taking into account the progress accomplished in the field of international justice during the last twenty years which represent only the beginning of the reforms needed at the global level to affirm the Rule of Law;

- considering that the progress made in the field of international criminal justice has not being followed by parallel processes in the non-criminal field at international level, such as on Human Rights issues;

- urges its governing bodies to support through every possible political means the implementation of the African Court for Human and People Rights, which still has to be linked to a future African Court of Justice, and to promote the creation of Human Rights regional courts based upon the model of those of Oceania and Inter-American Courts for Human Rights, starting from those of Oceania and for the democratic countries of South- East Asia. General Council of the Nonviolent Radical Party, Transnational and Transparty, *Mozione Particolare Sulle Corti Regionali Dei Diritti Umani*.

*Particular Motion on the Regional Courts of Human Rights* (Dec 11, 2007), available online at <<http://www.radioradicale.it/mozione-particolare-sulle-corti-regionali-dei-diritti-umani-0>> (visited Apr 17, 2009).

As a result, the Rapporteur on Human Rights, Mr. Marco Cappato, presented a motion calling

on the Commission and the Council, therefore, to take priority action—along the same lines as for the establishment of the International Criminal Court—to support the activities of all courts involved in protecting human rights; considers, in particular, that maximum support should be given to the work of the Inter-American Court of Human Rights and the African Court on Human and Peoples’ Rights, and that steps should be taken to help facilitate the establishment of a Court of Human Rights between non-authoritarian and non-dictatorial states in Asia and the Pacific.

Marco Cappato, *Motion for a European Parliament Resolution on the Annual Report on Human Rights in the World 2007 and the European Union’s Policy on the Matter*, ¶ 6 (2007), available online at <<http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARTL&mode=XML&language=EN&reference=PE400.468>> (visited Apr 17, 2009).

<sup>126</sup> ASEAN comprises Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. ASEAN, *Member Countries*, <<http://www.aseansec.org/74.htm>> (visited Apr 17, 2009).

creation of a human rights body.<sup>127</sup> As the Working Group for an ASEAN Human Rights Mechanism noted, “In all regional human rights systems, a human rights court has already been established to adjudicate cases concerning human rights. An ASEAN human rights body should be nothing less than what is [sic] the accepted norms and standards in other regions, such as in Africa, Inter-Americas and Europe.”<sup>128</sup> Be that as it may, ASEAN immediately set its aim much lower: “given the diversities existing among ASEAN Member States, both in political and economic aspects, it is desirable that a progressive evolutionary approach be taken.”<sup>129</sup> As a result, the Working Group proposed the creation of a Commission that would have only recommendatory powers and initially only address women and children’s rights.<sup>130</sup> This Commission would subsequently be entrusted with the task of drafting an ASEAN Declaration or Convention on Human Rights,<sup>131</sup> whose implementation would be guaranteed by the Commission (the same or possibly a different and new one),<sup>132</sup> while an optional protocol would create an ASEAN Court on Human Rights.<sup>133</sup> The ASEAN members with the strongest human rights records (that is, the Philippines, Indonesia, Malaysia, and Thailand) are driving the process, but ultimate success of the project is far from guaranteed and, in any event, years away.

A second region where efforts to create human rights courts should be focused is Oceania. East Timor, Fiji, Papua New Guinea, Solomon Islands, Vanuatu, the Federated States of Micronesia, Kiribati, Nauru, Palau, Samoa, Tonga, and Tuvalu are homogeneous and at comparable levels of development to adopt a regional charter of human rights and create a common

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<sup>127</sup> The creation of this body was originally considered at the 26th ASEAN Ministerial Meeting in Singapore in 1993. The ASEAN Charter, adopted on November 20, 2007, at Article 14, provides for the creation of such a body. *ASEAN Charter*, available online at <<http://www.aseansec.org/ASEAN-Charter.pdf>> (visited Apr 25, 2009).

<sup>128</sup> Working Group for an ASEAN Human Rights Mechanism, *Proposed Elements for the Terms of Reference of an ASEAN Human Rights Body*, ¶ 8, available online at <<http://aseanhrmech.org/downloads/WGsubmissiontoHLP.pdf>> (visited Apr 17, 2009).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*, ¶ 18. For details see also *Draft Agreement on the Establishment of the ASEAN Human Rights Commission*, available online at <<http://www.aseanhrmech.org/downloads/draft-agreement.pdf>> (visited Apr 17, 2009). For an analysis of the proposed ASEAN Human Rights Commission, see Sarah Lou Y. Arriola, *Proposing an ASEAN Human Rights Commission: A Critical Analysis*, 48 *Ateneo Law Journal* 906 (2004); Suzannah Linton, *ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children*, 30 *Hum Rts Q* 436 (2008).

<sup>131</sup> *Proposed Elements for the Terms of Reference of an ASEAN Human Rights Body*, ¶ 18.b (cited in note 128).

<sup>132</sup> *Id.*, ¶ 18.c.

<sup>133</sup> *Id.*, ¶ 18.d.

judicial body to enforce it.<sup>134</sup> France might accept jurisdiction limited to its Pacific territories. The US might do the same. New Zealand might accept jurisdiction, and/or might do the same for the Pacific islands it controls. The same is valid for Australia.

It should be mentioned that Arab countries have also made tentative steps toward the creation of a subregional human rights framework. The Arab Charter on Human Rights, after an aborted initial attempt, was adopted by the League of Arab States in 2004, and entered into force in 2008.<sup>135</sup> However, the Arab Charter contains only a bare-bones mechanism to ensure implementation of human rights obligations. An Arab Human Rights Committee would discuss periodic reports on measures taken by the Arab League member states to give effect to the rights and freedoms recognized in the charter and would make recommendations.<sup>136</sup> A binding mechanism, hinged on a court, is still a far-flung eventuality.<sup>137</sup>

Then again, as much as domestic courts might fail and therefore need to be supplemented by international courts, regional courts might fail to emerge (like in Asia) and therefore there is still a need for courts on the global level.

It is very unlikely that there will ever be a global court enjoying compulsory jurisdiction over all states. This would require a radical redistribution of power between nations that is unthinkable in the current age. Indeed, from a liberal point of view one might wish that it would never happen, as it would necessitate also a concentration of legislative and executive power worldwide in one single government: either the "Global Empire" or the "Global Federation." Still, courts whose jurisdiction is not limited to any specific region and that aspire to achieve universality are necessary to link and bridge the gap between regions.

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<sup>134</sup> It should be noted that East Timor is a candidate for ASEAN membership. See Mohd N. Yusoff, *Timor Leste Preparing for ASEAN Membership* (Feb 2, 2009), *Bernama*, available online at <<http://www.bernama.com/bernama/v5/newsworld.php?id=387218>> (visited Apr 17, 2009); Hegel Goutier, *Timor's Key Concern: Preparing for ASEAN Membership*, 3 *The Courier* 45, 46 (2007), available online at <<http://www.acp-eucourier.info/fileadmin/issues/2007/03/TheCourier-2007-03.pdf>> (visited Apr 17, 2009) (interviewing Timor-Leste's President regarding his intent to pursue ASEAN membership).

<sup>135</sup> Arab Charter on Human Rights, 18 *Hum Rts L J* 151 (1997). It never entered into force. It was subsequently revised by the League of Arab States. Arab Charter on Human Rights (2004), 12 *Intl Hum Rts Rep* 893 (2005) ("(Revised) Arab Charter"). For more on the revised Arab Charter on Human Rights, see Mervat Rishmawi, *The Revised Arab Charter on Human Rights: A Step Forward?*, 5 *Hum Rts L Rev* 361 (2005).

<sup>136</sup> (Revised) Arab Charter, art 45 (cited in note 135).

<sup>137</sup> As a part of the process of revision of the Arab Charter on Human Rights, the Secretary-General of the Arab league proposed the establishment of an Arab Court of Justice. "The proposed statute of the Arab Court of Justice would give it competence regarding human rights issues, as well as in disputes related to principles of international law." Rishmawi, 5 *Hum Rts L Rev* at 361 (cited in note 135).

Without them, the international legal system would lose its unity, giving rise to multiple international legal orders on a regional scale and accelerating fragmentation.<sup>138</sup>

Currently there are four such courts. The ICJ, the ITLOS, and the WTO's Appellate Body are classical international courts that settle disputes between sovereign states. As such, they can be considered more as agents of diplomacy than justice, the continuation of a trend that is by now more than two centuries old: from arbitration to compulsory adjudication of disputes between sovereign states. The ICC, the fourth to emerge, is a radical departure. It is different because it does not settle disputes between states, but rather dispenses justice to individuals, punishing criminals and, possibly, compensating victims. It is truly the first court of humanity, a breakthrough that only twenty years ago would have been unimaginable. Yet this astonishing development has only affected one facet of justice (criminal) and has left largely untouched the corrective dimension (civil).

The ICC suffers from several legal and political limitations and still has to prove itself as a dispenser of retributive justice. Surely more can be done to ensure that a greater number of states accepts its jurisdiction. Yet, the revolution has passed and now it is more a question of entrenching its results than breaking new paths. One might wonder, therefore, if the time has come to foster a similar development, one that focuses on corrective justice, such as an International Human Rights Court.<sup>139</sup> The decisions of this court would have legally binding effect, and its jurisdiction would be compulsory once a state has ratified the constituting treaty. Like regional human rights courts, it would not mete out criminal punishment, but rather would declare violations of human rights brought to its attention by individuals, directly or indirectly, and, possibly, order just compensation or specific performance. This court could be the judicial arm of a new international human rights compact, merging the three components of the International Bill of Human Rights (that is, the International Covenant on Civil and Political Rights ("ICCPR"),<sup>140</sup> the International Covenant on

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<sup>138</sup> See generally Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law?: Postmodern Anxieties*, 15 *Leiden J Intl L* 553 (2002).

<sup>139</sup> For proposals as to how this court could be structured, see Stefan Trechsel, *A World Court for Human Rights?*, 1 *Nw U J Intl Rts* 3 (2003); Nanette Dumas, *Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals*, 12 *Hastings Intl & Comp L Rev* 585 (1990). See generally the papers prepared for the project of the Swiss Government to commemorate the 60th anniversary of the Universal Declaration of Human Rights: Martin Scheinin, *Towards a World Human Rights Court*; Manfred Nowak and Julia Kozma, *Research Proposal Relating to a World Court of Human Rights* <<http://www.udhr60.ch/report/hrCourt-Nowak.pdf>> (visited Apr 17, 2009).

<sup>140</sup> International Covenant on Civil and Political Rights, GA Res 2200A (XXI) at 52, UN GAOR, 21st Sess, Supp No 16, UN Doc A/6316 (1966), 999 UN Treaty Ser 171 (Mar 23, 1976) (hereinafter ICCPR).

Economic, Social and Cultural Rights,<sup>141</sup> and the Universal Declaration<sup>142</sup>), which would codify about sixty years of international practice.<sup>143</sup>

The adoption of such a new universal human rights compact would be a truly major effort as it would require the renegotiation and rewriting of all international human rights law. Alternatively, and more simply, the United Nations' Human Rights Committee, which oversees implementation of the ICCPR, could be transformed into such a court. To date, the ICCPR has been ratified by 164 states,<sup>144</sup> and 111 of those have ratified the Optional Protocol giving individuals the right to submit claims to the Human Rights Committee.<sup>145</sup> It is already an international court of sorts<sup>146</sup> but for one crucial aspect: it issues only nonbinding "observations."<sup>147</sup> If its "observations" were given binding effect, we would have added an international "civil" leg, besides the criminal one, to the international legal order. It would be interesting to explore how many of those 111 states would still allow individuals to bring complaints to the Human Rights Committee if such an amendment were made.<sup>148</sup>

Indeed, there is much to be said for adding a corrective justice dimension on a global scale. International criminal courts are like fire trucks: big, flashy, expensive, and they arrive on the scene where the building is already burning. Human rights courts, however, are like fire alarms. While deterrence of gross human rights violations by criminal tribunals is still assumed rather than proved,

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<sup>141</sup> International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), at 49, UN GAOR, 21st Sess, Supp No 16, UN Doc A/6316 (1966), 993 UN Treaty Ser 3 (1976).

<sup>142</sup> See UN GAOR 3d Sess, 1st mtg, UN Doc A/810 (1948) Declaration of Human Rights, GA Res 217A, at 71, UN GAOR, 3d Sess, 1st plen Mtg, UN Doc A/810 (1948).

<sup>143</sup> For a possible example see 2048 Project of the University of California-Berkeley, School of Law, Draft International Convention on Human Rights, available online at <[http://draftinghumanrights.berkeley.edu/draft\\_conv](http://draftinghumanrights.berkeley.edu/draft_conv)> (visited Apr 17, 2009).

<sup>144</sup> ICCPR (cited in note 140); United Nations, *Chapter IV, Human Rights, 4. International Covenant on Civil and Political Rights*, available online at <<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=322&chapter=4&lang=en>> (visited Apr 17, 2009) (listing all countries that have ratified to date).

<sup>145</sup> Optional Protocol to the International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 59, UN Doc A/6316 (1966), 999 UN Treaty Ser 302 (Mar 23, 1976); United Nations, *Chapter IV, Human Rights, 5. Optional Protocol to the International Covenant on Civil and Political Rights*, available online at <<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=323&chapter=4&lang=en>> (visited Apr 17, 2009) (listing all countries that have ratified to date).

<sup>146</sup> See Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L J 273 (1997) (including the Human Rights Committee in its discussion on international courts).

<sup>147</sup> ICCPR, art 41 (cited in note 140).

<sup>148</sup> Interestingly, the ICC and the Human Rights Commission tend to have similar levels of acceptance.

stress on corrective justice has a proven record for slowing down or reversing the descent of states into the abyss of civil war and conflict. Those countries where corrective justice is accessible, or where faulty national processes are kept in check by effective international processes, rarely suffer the kind of catastrophes that necessitate international retributive justice. Germany did not go from being a liberal, law-abiding country to Nazism in one night. It had a period of several years in between where corrective justice was either unavailable or unavailable to some. That is where a difference can be made.<sup>149</sup>

Besides, it is a matter of fairness and justice (again). Every year, governments spend hundreds of millions of dollars to ensure that the worst of the worst—those whom history has already declared politically guilty—get a fair trial before an international court.<sup>150</sup> Humanity needs also to find a way to make sure that at least some of the faceless who are innocent and get caught in flawed national trials do have a chance to have their due process rights vindicated. While we may not be able to provide them a fair trial, we can make sure that if they do not have a measure of corrective justice nationally they can have it internationally.

The emergence of a jurisdiction dispensing corrective justice on a global level would be a major breakthrough, one even bigger than the advent of an international criminal jurisdiction, as it could potentially affect not only a few hundred millions like international criminal courts do, but billions. It might be quixotic, but everything is quixotic this side of a revolution.

Finally, before the network of international dispensers of justice is expanded, it is necessary to make sure that existing nodes remain active and effective. Two groups of bodies are in need of particular attention: regional human rights courts and hybrid criminal tribunals.

The three regional human rights courts need attention, each for different reasons. The ECtHR is in urgent need of reform to be saved by a swelling

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<sup>149</sup> In 2004, UN Secretary General Kofi Annan announced his future appointment of a Special Advisor on Genocide Prevention and launched an Action Plan to Prevent Genocide. The Five Point Action Plan regrettably neglected including strengthening the network of human rights courts. It included (1) preventing armed conflict which usually provides the context for genocide, (2) protection of civilians in armed conflict including a mandate for UN peacekeepers to protect civilians, (3) ending impunity through judicial action in both national and international courts, (4) information gathering and early warning through a UN Special Advisor for Genocide Prevention making recommendations to the UN Security Council on actions to prevent or halt genocide, and (5) swift and decisive action along a continuum of steps, including military action. United Nations, "Risk of Genocide is Frighteningly Real," *Secretary-General Tells Human Rights Commission As He Launches Action Plan to Prevent Genocide* (July 4, 2004), available online at <<http://www.un.org/News/Press/docs/2004/sgsm9245.doc.htm>> (visited Apr 17, 2009).

<sup>150</sup> Cesare Romano, *The Price of International Justice*, 4 L & Prac Intl Cts & Tribunals 281 (2005).

docket, the IACtHR needs resources, and the African Court needs political action to become operational.

First, the ECtHR needs to be saved from its success. It is swamped by a flood of cases.<sup>151</sup> It is already the international court with the largest bench (forty-seven), but even a legion of judges could not cope with such a massive caseload. The national level is both the source of the backlog problem and where the easiest fix could be found. The rights and freedoms enshrined in the Convention must be protected first and foremost at the national level, the ECtHR being only a supplementary level of jurisdiction to national ones. However, paradoxically, of the 9,398 judgments issued between 1998 and 2008 by the Court, more than half regarded failures of domestic courts. In particular, 2,440 dealt with right to a fair trial and 3,313 with length of proceedings.<sup>152</sup> On the positive side, more than half of all judgments delivered by the Court between 1998 and 2008 concerned only four of the Council of Europe's forty-seven member states, making it possible to focus attention on judicial and/or political reform of those few members (Italy and Turkey foremost) to provide substantial relief to the whole European human rights machinery.<sup>153</sup>

Protocol 14 to the ECHR was adopted in 2004 to reduce the time spent by the Court on clearly inadmissible and repetitive applications, so as to enable the Court to concentrate on those cases that raise important human rights issues.<sup>154</sup> Besides several procedural changes to this effect, Protocol 14 makes it possible for the EU to ratify the ECHR, finally giving citizens of member states the possibility to bring complaints directly against the Union itself, whenever they have suffered human rights violations because of decisions taken by Union organs, instead of the several member states, which had little or no say in the decisions that led to the violation.<sup>155</sup>

However, to enter into force the protocol requires ratification by all parties to the ECHR.<sup>156</sup> Forty-six out of forty-seven states have ratified it, while the

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<sup>151</sup> ECtHR, *Some Facts and Figures* at 4 (cited in note 81).

<sup>152</sup> *Id.* at 6, 13.

<sup>153</sup> *Id.* at 5. Turkey (1,875) and Italy (1,789) foremost, and then France (613) and Poland (601). It is frustrating to observe that, of the 1792 cases in Italy, 992 dealt essentially with the same issue: the incapacity of Italian courts to administer justice within a reasonable time.

<sup>154</sup> *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention* (2004), ETS No 194, available online at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>> (visited Apr 17, 2009) ("Protocol 14"). See also Christina G. Hioureas, *Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights*, 24 *Berkeley J Intl L* 718 (2006).

<sup>155</sup> Protocol 14, art 7 (cited in note 154) (modifying article 59 of the ECHR).

<sup>156</sup> *Id.*, art 19.

Russian Duma rejected it on December 22, 2006.<sup>157</sup> It is no coincidence that 26.7 percent (25,600) of the 95,900 applications pending before the Court are against Russia.<sup>158</sup> It is clear that Russia is playing an abominable game, trying to bully the Court and all other forty-six member states by holding hostage ratification of Protocol 14. European governments must find a way to convince the Italians to finally fix their judiciary and the Russians to ratify Protocol 14. Should that not happen, the ECtHR, one of the proudest achievements of Western Europe and the fundamental buttress of civil and political rights and freedoms, risks paralysis and, de facto, a denial of the possibility of seeking internationally corrective justice to more than 800 million people.<sup>159</sup>

Second, the IACtHR needs to be given the resources necessary to carry out its mission. With the smallest budget of any international judicial body, but a docket with dozens of cases, it is truly a miracle it has not floundered yet. It is only due to the personal commitment of its judges and small staff that it soldiers on. Without urgent and immediate help its voice might be lost. Programs of assistance to the court, both through the OAS, and also through individual member states and NGOs, should be developed.

However, while the ECtHR is generally given the resources to cope with the mounting caseload and, Protocol 14 notwithstanding, can count on the cooperation of a majority of states to adopt the necessary structural reforms, the IACtHR is not in a similar situation. To the contrary, it is literally asphyxiating. It operates on a budget of just a little less than two million dollars, likely making it the international court with the smallest budget.<sup>160</sup> As the IACtHR wrote to the OAS Secretary General in 2003, “[we] must be candid and express with total clarity that the system is on the verge of collapse. The old adage ‘justice delayed is justice denied’ is at the point of becoming reality in our own Inter-American System.”<sup>161</sup> The situation, more than five years later, has not substantially changed.

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<sup>157</sup> Vera Ponomareva, *Russia's Evasion of Human Rights Protocol Denies Justice to All European Citizens*, Bellona (May 20, 2007) (Maria Kaminskaya, trans), available online at <[http://www.bellona.org/articles/articles\\_2007/justice\\_european](http://www.bellona.org/articles/articles_2007/justice_european)> (visited Apr 17, 2009).

<sup>158</sup> ECtHR, *Some Facts and Figures* at 4 (cited in note 81).

<sup>159</sup> On the contribution of the ECHR to peace and democracy in Europe, see Michael D. Goldhaber, *A People's History of the European Court of Human Rights* (Rutgers 2007).

<sup>160</sup> To be precise, the IACtHR's 2009 budget is \$1.78 million. Organization of American States, *2009 Program Budget of the Organization*, available online at <<http://www.oas.org/budget/2009/Budget%20Approved%202009%20English.pdf>> (visited Apr 17, 2009).

<sup>161</sup> *Letter from the Inter-American Court of Human Rights to the OAS Secretary-General*, ¶ 6 (Nov 20, 2003) (on file with author), available online at <[http://www.derechos.org/nizkor/costa\\_rica/doc/oea2.html](http://www.derechos.org/nizkor/costa_rica/doc/oea2.html)> (visited Apr 17, 2009).



Third, the nascent African Court of Human and Peoples' Rights faces completely different challenges as it is just taking its first steps. It must be assisted, by governments and NGOs, to establish itself as an authoritative and credible dispenser of corrective justice for the whole African continent. Once (if) merged with the Court of Justice of the African Union, it could play an even larger role. But we need to ensure that it does not become yet another broken promise, joining too many other regional African courts in the scrap yard.

The hybrid courts need continuous support. It is regrettable that they are all funded through voluntary contributions.<sup>162</sup> They are, by all means, courts with a tin cup, both for the meager budget they have but also because they need a major campaign every few months to ensure resources allowing them to carry out their assigned task are available.<sup>163</sup> As long as the ICC does not reach wide consensus in the international community, hybrid courts are likely to be the only hope for those who expect criminal retribution for war crimes and crimes against humanity. Their flexibility and adaptability makes them a potential fit for an endless number of situations, but attention of public opinion and donors tends to vanish quickly, leaving them to plow on without support after a launch with grand fanfare.

Finally, there is a need to continue to study and improve understanding of the international judicial network. International courts and tribunals have developed enormously in the past two decades, but the construction of the top level of the pyramid (or Babel tower, if one is pessimistic like *The Economist*) has been done ad hoc and without a blueprint. There is a continuing need to map the network, in all its manifestations. Greater thought should be given to how this amazing array of dispensers of international justice can be made to work together to become a proper international judicial system. This will require both top-down action (by the UN, the International Law Commission, and states to develop better legal principles of coordination between jurisdictions, harmonize statutes, avoid overlap and the like), and bottom-up action (for example, coordination between international judges amongst different courts either as a matter of legal comity, or through the building of social networks).<sup>164</sup>

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<sup>162</sup> Ingadottir, 2 YB Intl Law and Jurisprudence at 271 (cited in note 83).

<sup>163</sup> See, for example, Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone, Accomplishments, Shortcomings, and Needed Support*, (2004), available online at <<http://hrw.org/reports/2004/sierraleone0904/>> (visited Apr 17, 2009).

<sup>164</sup> For suggestions as to how this system, integrating both the national and the international level, might emerge, see generally José E. Alvarez, *International Organizations as Law-Makers* (Oxford 2005); Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv Intl L J 191 (2003); José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 Tex Intl L J 440 (2003); Jenny S. Martinez, *Towards an International Judicial System*, 56 Stan L Rev 429 (2003); Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford 2003); William W. Burke-White, *A*

Without this, humanity is doomed to build the Babel tower. It will take quite some time before an “international legal order” emerges, but it is a task that cannot be postponed any longer.

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*Community of Courts: Towards a System of International Criminal Law Enforcement*, 24 Mich J Intl L 1 (2002).



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