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International Courts and Tribunals: Price, Financing and Output

by

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1 Introduction

The aim of this paper is twofold. First, it provides data to answer three basic questions: How much is spent on international courts and tribunals every year (the price); where does that money come from (the financing); and what does that money buy (the output). Second, it attempts to correlate these three factors, laying the ground-work for future interdisciplinary international law-economics-political science research in this key area of contemporary international relations.[1]

This apparently straightforward task is, however, fraught with difficulties and pitfalls that warrant several caveats and disclaimers.

This is probably the first attempt to comprehensively map the costs and financing of the international judicial sector. Sailing in uncharted waters is inherently dangerous and haphazard. Addressing the question of the cost of international justice and its financing was one of the first goals set for the Center on International Cooperation's Project on International Courts and Tribunals (PICT) when it was launched in 1997, but the complexity of the matter and the rapidly evolving nature of the phenomenon to be studied delayed the preparation of this study until now.[2]

Two developments since the launch of PICT have however made it a somewhat less wayward exercise. First, as compared to 1997 there is a much larger set of bodies to study and, therefore, a larger set of data from which meaningful conclusions can be drawn. Second, in the past few years greater

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[1] Although the discipline of Law and Economics is about forty-years old, quite surprisingly it is only very recently that scholars have started trying to apply Law and Economics methods to International Law and International Relations. Bhandari, J. S./Sykes, A. O., (eds.), *Economic Dimensions in International Law: Comparative and Empirical Perspectives*, Cambridge, CUP, 1997. Dunoff, J. L./Trachtman, J. P., "Economic Analysis of International Law", *Yale Journal of International Law*, Vol. 24, 1999, pp. 1–59; Trachtman, J. P./More, em, P., "Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right is it Anyway?", *Harvard Journal of International Law*, Vol. 44, 2003, pp. 221–250; Vaubel, R./Willet, T. (eds.), *The Political Economy of International Organizations. A Public Choice Approach*, Boulder, CO: Westview Press, 1991. Much remains to be done.

[2] For an earlier attempt, see: Romano, C., *The Cost of International Justice*, Background study prepared for the PICT launching conference, London, 1997. http://www.nyu.edu/pages/cic/publications/work paprs/publ work paprs1.html

attention has been paid by economists to the question of the costs and financing of international or global public goods.[3] Still, much remains to be studied in this field and economists, legal scholars and political scientists should develop a common research agenda to attain this end.

Currently there is a large number of bodies that perform international judicial and quasi-judicial functions. Depending on which criteria of classification are adopted one can count about one hundred such bodies (some active, others less so), and, within this large group, almost two dozen international courts and tribunals.[4] More are created every year.

Although there is a large and growing literature on international public goods, the nature of international courts and tribunals and the output of their work has attracted little or no attention per se. Either it has been subsumed under the umbrella of the wide array of activities that the main international organizations carry out such as with peace-keeping or the monitoring of compliance with international regimes, or it has been ignored altogether.

Admittedly, international courts and tribunals are so varied, and their outcomes sometimes so difficult to quantify and describe, that this might defy attempts to pigeonhole them in the various possible taxonomies of public goods.

Economics defines a public good by its two basic characteristics, namely:

- *non-rivalry*: use of the good by someone does not reduce the availability of the good for others; and
- *non-excludability*: once a good has been produced, it is impossible (or too costly) to exclude third-parties from its benefits.

The questions of what types of goods international courts and tribunals and the products of their activities are; whether and to what degree these goods meet the non-rivalry and non-excludability tests; and what the consequences that derive from this are, warrant a separate study and will therefore only be marginally touched upon here.

This study will concentrate only on a specific group of the constantly expanding array of international judicial and quasi-judicial bodies. Their public nature (as contrasted to the club nature of many of the excluded bodies) is most evident. These are the courts and tribunals whose work often has consequences that extend beyond the narrow confines of the given dispute

[3] Sandler, T., "On Financing Global and International Public Goods," in Ferroni M./Mody A., (eds.), *International Public Goods: Incentives, Measurement, and Financing,* Dordecht, NL: Kluwer 2002, pp. 81–117; Kaul, I./Grunberg, I./Stern, M., (eds.), *Global Public Goods: International Cooperation in the 21st Century,* New York: Oxford University Press, 1999.

[4] For a definition of international court or tribunal, see Romano, C., "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle", *NYU Journal of International Law and Politics*, Vol. 31, 1999, pp. 709–751.

and the parties to the case, and resonate throughout the whole edifice of international law. Thus, arbitral tribunals which administer à-la carte justice and whose judgments can be kept secret by the parties, will not be examined here. They are eminently club goods, and fail the test of non-excludability. For the same reason, this study will not analyze the cost and financing of judicial bodies attached to regional economic integration agreements (like the European Court of Justice, or the Court of Justice of the Common Market for Eastern and Southern Africa) which carry out public functions within the confines of the respective political and/or economic integration areas but have a lesser impact on the development of international law at large.

In sum, this study will consider the following bodies, gathered in three distinct groups:

I) Inter-State judicial bodies

- International Court of Justice (ICJ)
- International Tribunal for the Law of the Sea (ITLOS)
- Appellate Body of the World Trade Organization (ABWTO)

II) Human rights judicial bodies

- European Court of Human Rights (ECHR)
- Inter-American Court of Human Rights (IACHR)

III) International and internationalized criminal judicial bodies

- International Criminal Court (ICC)
- International Criminal Tribunal for the Former Yugoslavia (ICTY)
- International Criminal Tribunal for Rwanda (ICTR)
- Special Court for Sierra Leone (SCSL)
- Serious Crimes Panels in the Courts of East Timor (ET)
- Internationalized Panels in the Courts of Kosovo (Kos)

For reasons of conciseness, this study will only make brief mention to why and when these bodies where established, what they do, what their jurisdiction is, how they are structured and so forth. More information on this can be found in specialized international legal scholarship.[5]

[5] Sands, P./Mackenzie, R./Shany, Y. (eds.), *Manual On International Courts And Tribunals*, London, Butterworths, 1999; Oellers-Frahm, K./Wuhler, N. (eds.) *Dispute Settlement in Public International Law: Texts and Materials*, New York, Springer-Verlag, 2001, 2nd ed.

These groups will be tackled using the same methodology with the aim of answering the three basic questions:

- How much money is spent on international courts and tribunals? (The price)
- Where does that money come from? Are there are alternatives? (The financing)
- What does that money buy? (The output)

Each of these three questions needs a little explanation. First, when we talk about the cost of international justice we refer only to the budgets of the various organs[6]. However, courts and tribunals budgets are not the whole story. They do not tell, for example, how much it costs using these bodies to plaintiffs or defendants. This element is particularly volatile because it depends upon several unpredictable factors like, to cite the most obvious, the complexity of the case, the number of lawyers and experts a party chooses to use, and the location and length of the hearings. Moreover, one should keep in mind the key difference between fixed costs, which by definition do not vary with the caseload (for example the costs incurred for the maintenance of the court room, registrar, secretarial services etc.), and variable costs which are determined by the number of cases filed (such as translation, evidence gathering, detention of indictees, etc.). Second, in assessing financing we tried to extrapolate the contributions of the most significant individual States to each court from budgets and from the assessment scales of each of the various courts and tribunals. The figures provided are thus not authoritative. In the case of European States we provided both the aggregate figure of the 15 member States of the European Communities/European Union before May 1st, 2004 (that is to say before the most recent enlargement of the Union to the East and South) and the figures of some individual States, usually the greatest contributors. As the ten new States combined increase the EU's GDP by only 9.1%, their contribution to the budgets of the courts and tribunals considered in this study is secondary. The questions of supplementary financing (usually voluntary) and arrears of payments are also addressed.

Third, as concerns the question of output, this is, of course, a highly debatable issue. Answering the question of what the money spent on international judicial bodies buys implies a subjective judgment on the output produced. A simple accounting of the number of judgments, orders, and settlements reached every year by each body would not tell much. If the preferences of the users of the good are to be taken as indication of the value of that good, considering the mushrooming number of international judicial

[6] The most recently available budgets have been used in each case and so budgets do not necessarily refer to the same baseline year.

bodies, and their caseloads, international justice (that is to say, the final good generally produced by international courts and tribunals) is in as high demand as ever.

Finally, for each group a general assessment will wrap up each of the three basic sections and try to summarize the main observations made and bring together costs, financing and output.

Three appended charts provide the reader a summation of the basic data and figures put forward in the paper, along with sources:

- Chart 1: Budgets, and contributions of the U.S. and EU members.
- Chart 2: The number of governments contributing to each court's budget and what percentage the budget of the given court is of the budget of the organization to which the court is attached to.
- Chart 3: How courts and tribunals are financed.

A general conclusion wraps up the way in which international judicial bodies are financed and puts forward, when feasible, a series of policy-making considerations.

I) State vs. State judicial bodies

- International Court of Justice (ICJ)
- International Tribunal for the Law of the Sea (ITLOS)
- Appellate Body of the World Trade Organization (ABWTO)

The bodies in this group are utilized mainly by sovereign States to litigate disputes amongst themselves. There are some exceptions, though. Certain international organizations, such as the European Community (EC) also have standing before the WTO dispute settlement system. Also, under limited circumstances, certain international organizations and corporations can appear before the ITLOS, but to date only the EC has participated and then in only one case. Finally, some of the specialized United Nations (UN) agencies and main organs can request an advisory opinion from the ICJ.

Costs

The budget of the ICJ for the year 2003 was $ 12 961 300; that of the ITLOS for 2004 is $ 8 039 000; and that of the ABWTO for the year 2004 is $ 3 635 368 (see Chart 1). A number of factors relating to the structure of these bodies must be taken into consideration when looking at these figures.

The ICJ is one of the six main organs of the United Nations. The Statute of the Court is part of the UN Charter.[7] Its jurisdiction, in theory, is universal, but in practice it can only be exercised over those States who have consented to it.

The ITLOS does not have a linkage with the United Nations as tight as that of the ICJ. It is an organ of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[8] and cooperates and coordinates with the UN, but it is formally an autonomous international body. Although the UNLOS does not have universal reach, it has been widely ratified (to date 145 ratifications). Amongst industrialized countries with significant sea-related activities, Denmark, Turkey, Israel and the United States are the only that have not ratified to date.

The budget of the ABWTO is significantly lower than that of the ICJ and the ITLOS. This can be explained by taking into consideration that the Appellate Body is only the upper tier of the whole WTO dispute settlement procedure. Whenever disputes arise between the 146 WTO member states, a complex dispute settlement procedure is set in motion that entails, in brief, first consultations, then a decision by a panel of experts selected by the parties, and finally adoption of the ruling (unless rejected by consensus) by the WTO Dispute Settlement Body (a body where all member States are represented). Only if one of the parties to the dispute believes that the ruling of the panel was legally wrong, it can request the case to be reviewed by the Appellate Body.

To approximate a realistic figure of the cost of the WTO dispute settlement procedure as a whole, one should add to the Appellate Body budget line the budgets of the Dispute Settlement Panels ($ 938175). The total would then climb to $ 4573543. Still, one cannot discount the value of being organically part of a larger international organization, in this case the WTO, as contrasted to the ITLOS and, to a lesser extent, the ICJ. For instance, the WTO dispute settlement system does not have its own premises, unlike the ITLOS and the ICJ.

In sum, the budgets of these three organs are comparable, at least when contrasted to other groups of bodies. Staffing and budget items are also in the same ballpark. The ICJ has 15 judges, and a staff of 96. The ITLOS has 21 judges and a staff of 37. The WTO Appellate Body has seven members, and a staff of 13.

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[7] Charter Of The United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

[8] United Nations Convention on the Law of the Sea (UNCLOS), concluded in Montego Bay on December 10, 1982, ILM, Vol. 21 (1982), at 1261 and UN Doc. A/COF 62/122.

At the ICJ, 30% of the budget is spent on judges (eg emoluments, pensions, travel), 54.6% on the registry (eg staff salaries, consultants, travel, hospitality etc), and 15.4% on operations support (eg printing, translations, premises maintenance/rental, equipment). At ITLOS, figures are 34% on judges, 43% on registry and 23% on operations support. Broken-down figures for the WTO are not available and, in any event, a similar comparison with the ICJ and ITLOS would be misleading because, expenses like the maintenance of premises, printing, translation or libraries are items that appear under the WTO general budget and not the WTO dispute settlement system's.

For historical comparison, from 1922 to 1940 the chief items of the budget of the Permanent Court of International Justice were judges emoluments (60%), the Registry (20%), pensions (10%), rent of premises (5%) and administration (2%).[9] The greater percentage allocated to the current registry budget as contrasted against the historical figures reflects the fact that contemporary courts and tribunals require larger support personnel than their antecessor because of their greater caseloads and the needs of publicity and outreach.

Financing

The bodies in this group can be utilized only by States and, in limited circumstances, international organizations. Their costs are part of States' contributions to the budget of the organization to which the given judicial body is attached or, in the case of ITLOS, a direct contribution.

The ICJ is an organ of the United Nations. As such, ICJ expenditures are part of the regular budget of the UN and are borne by all UN members according to a scale of assessment. Since the inception of the organization, the UN scale of assessment has been based on the so-called "capacity to pay" principle, so that the richest States pay more and the poorest less. The "capacity to pay" of a member State is measured mainly by national income or Gross National Product (GNP), not income per capita, adjusted by factors such as external debt and population. The scale of assessment is subject to certain fixed maximum and minimum levels. As of 2001, no State bears more than 22% or less than 0.001% of the budget.

The UN budget for the period 2002–2003 was $ 2.63 billion (excluding peace-keeping expenses, which are funded through another budget and a different scale of assessment).[10] This means that the ICJ, one of the six fundamental organs of the organization and its main judicial branch, receives just

[9] Hudson, M., *International Tribunals : Past and Future*, Washington, D.C., Carnegie Endowment for International Peace and Brookings Institution, 1944, at 63.

[10] UNGA Res. A/RES/57/293A–C (February 13, 2003), Programme budget for the biennium 2002–2003.

0.49% of the whole regular UN budget.[11] The United States, being the single largest UN contributor, thus paid $ 2851486 to the ICJ in 2003. The 15 EC member States combined paid 36.84%, or $ 4774942.[12] A country like Nicaragua, which ranks at the bottom of UN contributors, but which has been party to a number of cases in the past twenty years, paid only $ 129.60 in 2003 towards the functioning and existence of the Court.

The ITLOS is not an organ of the United Nations. Its budget is financed by contributions of those States that have ratified the UNCLOS. As in the case of the UN, expenses are shared on the basis of a scale of assessment which, for convenience sake, is the same as the one used for the UN regular budget, adjusted for the different membership composition.

The richest member pays 24% and the poorest 0.01% of the budget. Since the US is not party to the UNCLOS, the single greatest contributor to the ITLOS is Japan, that is to say the second greatest contributor to the UN. Japan's total assessed contribution to ITLOS for 2004 was $ 1910640. The EC members combined (with the exclusion of Denmark, which has not ratified UNCLOS) contribute half (49.58%) of the ITLOS budget, which corresponds in 2004 to $ 3947357.[13] Moreover, because the EC is party to the UNCLOS in its own right, in 2004 the organization contributed $ 78000 split pro rata amongst its members.[14]

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[11] For sake of comparison, the UN regular budget in 1946 was $ 21.5 million. Childers E./Urquhart, B., *Renewing the United Nations System*, Dag Hammarskjold Foundation, Uppsala, Sweden, 1994, p. 143.
It is interesting to note that the average budget of the PCIJ in the period 1922–1040 was NFL 1115000 or $ 511467 as calculated using an average of the USD/NFL exchange rate for that period. Nowadays, that would correspond to $ 6026407, or about half of the current ICJ budget. At the same time, the 1938 budget of the League of Nations was CHF 37000000, or $ 8466819, which today are $ 107794329. That is less than one twenty-fifth of the current UN budget. In relative terms the PICJ was 5.5% of the League budget. It weighted on the mother organization 11 times more than the ICJ does on the UN. These calculations have been made by relying on the data given by Hudson, supra, p. 63 and 65, and the tools made available by the Economic History resources website: http://www.eh.net/ehresources/.

[12] One should also add the fact that the ICJ, as several other international courts, is located on the territory of one of the EC member States (The Netherlands) and thus receives a number of free services from the Dutch government, whose value should be added to the total.

[13] One should also add the fact that The ITLOS, is located on the territory of one of the EC member States (Germany) and thus receives a number of free services from the German government, whose value should be added to the total.

[14] This contribution is not on top of the ITLOS budget but it is subtracted from the ITLOS overall budget before the budget is assessed to the various members. The relevant reports of the Meeting of States Parties to the UNCLOS does not explain what formula had been used to reach this figure (the amount is a little more than the contribution of Norway).

Small countries, like St. Vincent and the Grenadines or Panama, who practice "flag-of-convenience", and therefore have appeared in cases before the Tribunal, were assessed $ 796 and $ 1968 respectively in 2004.

It should be noted that actual costs to members in 2004 were significantly lower than the $ 8039000 assessed. Indeed, in 2001 ITLOS made savings of $ 833269, plus it had credits of $ 2356865 from the Staff Assessment Account.[15] Hence, the total costs to members in 2004 were only $ 4848866.

The WTO derives the quasi-totality of the income for its annual budget from contributions by its members.[16] These are established according to a formula based on their share of international trade, which means that the United States, the 15 EC members, Japan and China (including Hong Kong and Macao) pay respectively 15.74%, 39.27%, 6.39% and 6.51% of the total.[17] As the total budget for the WTO in 2004 is $ 124712072[18], and the figure for the total cost of the WTO dispute settlement system in 2004 was established to be $ 4573543, this means the US contributed $ 720325, the 15 EC members $ 1796283, Japan $ 291639 and China $ 298066. Developing countries like the Philippines, India or Brazil, which have all resorted to the WTO dispute settlement process, bear respectively 0.56%, 0.79% and 0.95% or the costs of the organization. This translates to an average annual contribution to the WTO dispute settlement system of about $ 26000 to $ 43500.

Besides assessed contribution these bodies also benefit from donations and assistance (from time to time) for activities unrelated to the litigation process. For instance, the Peace Palace, which hosts the International Court of Justice was built as a courtesy of Andrew Carnegie to host the Permanent Court of Arbitration.[19] A new wing was built at the expense of The Netherlands in

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[15] Certain States do not exempt their citizens ad residents from tax liability on earnings from international organizations. In order to address the issue of national taxes on emoluments, the Tribunal maintains a Staff Assessment Account, where money deduced from salaries of the Tribunal's officials are placed. See SPLOS/103 (25 June 2003), para. 55–63.

[16] Miscellaneous income is earned from rental fees and sales of WTO print and electronic publications. The WTO also manages a number of trust funds, which have been contributed by Members. These are used in support of special activities for technical cooperation and training meant to enable least-developed and developing countries to make better use of the WTO and draw greater benefit from the multilateral trading system.

[17] While the EC is member of the WTO on its own right, it does not contribute to the budget. The 40.52% figure is the sum of the individual shares of the current fifteen members of the EC.

[18] This figure has been obtained by converting the CHF 161776500 budget to US dollars (conversion rate....).

[19] An agreement between the UN and the Carnegie Foundation determines the conditions under which the court uses these premises, providing for the payment to the Foundation of an annual contribution. The Agreement was approved by the UNGA in Resolution 84(I) of December, 11, 1946.

1978. Similarly, the building hosting the ITLOS was built and donated by the German government, and in 2003 the International Foundation for the Law of the Sea was created to promote the Tribunal and assist in the further implementation of the UNCLOS. The foundation was established with the support of the Free and Hanseatic City of Hamburg and the German government.

All the three bodies considered in this section have funds, organizations or procedures in place to facilitate the submission of disputes by developing countries which rely mainly on money from developed countries. Both the ICJ and the ITLOS have trust funds to help developing countries defray litigation costs.

The ICJ trust fund was created in 1989 but has attracted little attention by both donors and users. Basically anyone can contribute to it (States, Intergovernmental Organizations, national institutions and NGOs as well as individuals or corporations), but, despite this, the fund is languishing. As at July 31, 2003, the total balance of the fund was $ 1836162. The last two donors were Finland and Mexico, with $ 20156 and $ 4855 each (incidentally, one must notice that Mexico's contribution to the fund was made at a time when it had a case against the USA pending before the Court).

Yet, even if funds were plentiful, they would hardly be used. Indeed, in 15 years of existence only four States have approached it, and one did not draw on the sums promised because of the complexity of the procedure involved.[20] The amounts sought were aimed at defraying costs associated with the implementation of the Court's judgment (eg fees and incidental expenses of counsel and scientific advisers, printing maps, acquiring satellite pictures and demarcating the boundary). The amounts disbursed are not known, but in 2001 the UN Secretary-General reported that "only limited financial assistance [was given] ... in view of the Fund's limited assets".[21] In 2002 the Committee on Transnational Dispute Resolution of the International Law Association American Branch prepared a report assessing the reasons for the meager record of the ICJ Trust Fund.[22] Besides the fact that the existence of the Trust Fund itself is relatively unknown, and that fund-raising for it can be greatly improved, the Committee identified the main reason for the underutilization to be that, to be eligible to apply for funds, a dispute must have been brought before the Court by special agreement between the two parties. Cases originating from unilateral application are excluded. Indeed, since the

[20] Report of the ICJ (2002–2003), A/58/4, para 311.

[21] UN Doc. A/56/456 (October 10, 2001), Secretary General's Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice, Report of the Secretary General, para. 7.

[22] ILAAB Committee on Transnational Dispute Resolution, "A Study and Evaluation of the Un Secretary General's Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice", *Chinese Journal of International Law*, Vol. 3, 2002, pp. 234–279.

creation of the Trust Fund only eight cases out of 43 have met this strict criteria.

Taking stock from the ICJ lesson, in 2000 the UN General Assembly requested the Secretary-General to establish and administer a voluntary fund to assist States in the settlement of disputes through the ITLOS. The ITLOS Trust Fund does not have the same strictures of the ICJ Trust Fund in terms of access, and a large list of donors can contribute to it. Currently, there is $ 55 000 in the Fund, donated by the UK and Finland. However, no applications have been filed yet, probably because scarce use is made of the ITLOS itself, as will be explained later.

The WTO has taken a radically different approach to the question of helping developing countries to litigate cases. Instead of subsidizing litigation costs, the emphasis is put on strengthening human resources and lawyering capacity. First of all, the WTO Secretariat carries out special training courses for interested members concerning the dispute settlement procedure and practice, and, in cases involving developing countries, it provides technical and legal assistance on request. However, the involvement of WTO staff in litigation before WTO bodies raised issues of impartiality, independence, and confidence. This, combined with the manifest insufficiency of the resources available within the WTO Secretariat, led a group of 32 developed and developing countries (9 developed countries, 22 developing countries and 1 country with an economy in transition) to establish the Advisory Centre on WTO Law (ACWL) in 1999.[23] The ACWL is an intergovernmental organization based in Geneva, like the WTO, but separate from it. Its purpose is to provide legal training, support and advice on WTO law and dispute settlement to developing countries (including countries with economies in transition), in particular to the least developed countries.

The ACWL is financed by a mix of contributions and user-paid fees. The core of the financial structure of the ACWL is an Endowment Fund. Each of the developed country members of the Centre (ie, Canada, Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Sweden and the United Kingdom) has contributed $ 1 000 000 or more to the Fund and/or at least committed to pay $ 1 250 000 in multiyear contributions to finance expenditures in the first five years of operations.

Developing countries and economies in transition pay a one-time financial contribution to the fund, which is $ 300 000 for high income countries (eg, South Korea, Mexico, Singapore, Brunei), $ 100 000 for middle income (eg, Argentina, Morocco, Nigeria, India), and $ 50 000 for the low income (eg, Bolivia, Nicaragua, Senegal). Least developed countries do not contribute and receive priority in the provision of the ACWL's services.

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[23] Agreement Establishing the Advisory Center on WTO Law. http://www.acwl.ch/e/tools/doc e.aspx. Site last visited November 15, 2004.

Fees for ACWL Members for legal services in WTO dispute settlement proceedings range from $ 100 per hour for the low income countries to $ 150 per hour for middle income and $ 200 for high income countries. Least developed countries pay $ 25 per hour. Developed countries do not have access to the legal services of the ACWL.

The ACWL may also accept, under strict conditions, contributions from other governmental and non-governmental sources for specific purposes that are not related to dispute settlement cases, such as training and the traineeship programs. For instance, the ACWL has received funding from the World Bank to finance the ACWL six-month Training Program in 2002 on WTO dispute settlement procedures.

Output

What does the money spent on the ICJ, the ITLOS and the WTO buy?

The ICJ justifies its existence in several ways. First, it provides a forum for the settlement of all kinds of disputes between States. Typically the issues that crowd the Court docket are the use of force, diplomatic protection and boundary delimitation. Whether disputes are actually settled as a result of litigation in the Court is something that cannot be guaranteed. That depends on many factors which are beyond the Court's control. In the past decade the ICJ has been asked to render judgments and opinions on aspects of the wars in the former Yugoslavia and the Congo, the Lockerbie bombing, and several boundary delimitations, to name a few.

Second, it provides the UN with its own organ to obtain considered legal advice on issues of relevant interest to the organization. In the past the UN has sought the opinion of the ICJ on issues as disparate as immunities of its own personnel, member States' rights and obligations, interpretations of agreements between the organization and member States, legality of the threat or use of nuclear weapons, and the wall constructed in occupied Palestine. Most of the time the UN and its organs have made good use of the Court's advice.

Finally, since the ICJ is the principal judicial organ of the world's primary international organization, and the only one with universal membership, the Court's judgments have an impact that goes well beyond the given dispute or advice. In international law, the judgments of international courts and tribunals are not binding precedents. There is no such a thing as a *stare decisis* doctrine like in the US legal system. Still, judgments of the ICJ are looked at as particularly significant interpretations and clarifications of international law. In this sense, the ICJ plays a pivotal role (some might argue it is even an excessive role considering its shortcomings and limitations) in the ascertainment, consolidation and even progressive development of international law.

Throughout its long history, the caseload of the Court has had ups and downs. In the past decade the ICJ has faced a rising tide in its workload,

mainly generated by developing and former communist countries, and the trend is still on the rise. In the 1990s, 34 cases involving almost 40 different States and 3 advisory opinions were submitted to the Court.[24] Currently the Court is as busy as ever with 21 cases and one advisory opinion on the docket.[25]

In the case of the ITLOS, there is a substantial gap between what it could do and what it actually does. Indeed, while the Tribunal closely resembles the ICJ in its structure, because of some particular basic choices made by the drafters of the UNCLOS it plays, and will probably always play, a lesser role than it could.

The UNCLOS is the linchpin of the legal regime governing the world's oceans and one of the most complex agreements of our times. Yet, unlike most contemporary international regimes, its dispute settlement procedure is not only unusually labyrinthine but also acephalous, or perhaps, more correctly, multi-cephalous, like an hydra. By design it does not have at its core a judicial body that can authoritatively interpret its provisions, but rather an array of bodies, ad hoc and permanent, with no hierarchical order. There are four possible fora for dispute settlement: the ICJ, the ITLOS, and two special Arbitral Tribunals constituted in accordance with Annex VII and VIII of the Convention. If the parties to a dispute have made an optional declaration specifying a particular choice of forum, and their choices coincide, that body will automatically be chosen as the forum for the settlement of the dispute. But if their choices do not coincide the forum for settlement will be by default an Annex VII Arbitral Tribunal, not the ITLOS.

Certainly, when the UNCLOS was negotiated in the 1970s there were good and sound reasons to draft the dispute settlement clause in that way. Those were the years of the Cold War and no State wished to be bound to any particular adjudicative body in the case of a dispute. Moreover, the opprobrium of the *South West Africa* cases were still very much present in the mind of too many States,[26] and in developing countries in particular, and the ICJ was shunned. Few States favored the idea of giving a permanent international judicial body any role whatsoever in international governance, least of all to an ICJ look-alike.

However, there are two niches in which the ITLOS does not have significant competition. First, where the authorities of a State party to the UNCLOS have detained a vessel flying the flag of another State party, and it

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[24] If the cluster of cases brought by Yugoslavia against 10 NATO members is counted as one, the number of cases submitted in the 1990s decreases to 24.

[25] If the cluster of cases brought by Yugoslavia against 10 NATO members is counted as one, the number of pending cases is 14.

[26] *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa), Judgment of 18 July 1966.

is alleged that the detaining State has not complied with the provisions of the UNCLOS for the prompt release of the vessel or its crew upon the posting of a bond, the question of release from detention may be submitted to the ITLOS.[27] The procedure before the Tribunal does not include a determination of the substance of the underlying dispute nor does it prejudice the merits of any case before the appropriate domestic court of the arresting State. Its only purpose is to provide for the quick release of a vessel to avoid unnecessary loss for the ship owner or others affected by the detention, and the release of the crew out of humanitarian considerations.

Second, depending the constitution of one of the arbitral tribunals to which a dispute on the UNCLOS might be submitted, the ITLOS can order provisional measures to the parties to ensure the situation does not aggravate before the case is heard.[28]

Although the ITLOS is still relatively young, having started operation only in late 1996, and its track-record is still small, it looks like these subordinate but unique functions will be its main output. To date, the ITLOS has decided only one substantive case, while it has ordered prompt release in six cases and provisional measures in three.[29]

Finally, as far as concerns the WTO, the importance of the dispute settlement system in the new organization cannot be overstated. Since 1995, with the transition from GATT to WTO and the transformation of the dispute settlement procedure from diplomatic and voluntary, to automatic, confrontational, and legally binding, the dispute settlement system has become the linchpin of the international trade regime.

Over nine years of existence, 304 disputes have been referred to the WTO dispute settlement procedure. Of these, about 80 resulted in the adoption of Dispute Settlement Panel reports and about 50 in Appellate Body reports. They involved goods as diverse as aircraft and brooms, cars and bananas, computers and underwear, footwear and gasoline, macaroni and genetically

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[27] Article 292 of UNCLOS.

[28] Article 290.2 of UNCLOS.

[29] To date the Court has decided on the merits only one case: The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea). It has been seize with request for prompt release in six cases: The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release; The "Camouco" Case (Panama v. France), Prompt Release; The "Monte Confurco" Case (Seychelles v. France), Prompt Release; The "Grand Prince" Case (Belize v. France), Prompt Release; The "Chaisiri Reefer 2" Case (Panama v. Yemen), Prompt Release; The "Volga" Case (Russian Federation v. Australia), Prompt Release. It has been requested to indicate provisional measures in three cases: Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures; The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures; Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures.

modified grains. Several of those disputes were worth billions of dollars and involved complex issues eventually affecting tens of thousands of jobs, public health and the environment internationally. By far the EC, US and Japan have been the most frequent users (either as plaintiffs of defendants) of the procedure, but developing countries have also played a significant role, appearing in a number of disputes greater than what their share of world trade might suggest.[30]

In the words of the former WTO Director-General Mike Moore "It is a resounding vote of confidence in the WTO's dispute settlement system that governments, both large and small, have so often sought solutions to difficult problems through our organization". The dispute settlement system is"... the backbone of the multilateral trading system, created by governments themselves in the conviction that a solid mechanism of dispute settlement ensures that carefully negotiated trade rules are respected and enforced. The system is designed to uphold international trading rules, thereby also giving a better deal to workers and consumers."[31]

Assessment

Since the ICJ is, of the bodies considered in this paper, the one with the longest continuous history it might be interesting to look at its budgets since inception. The first annual budget of the ICJ, in 1946, was $ 477 724.[32] Adjusted to the purchasing power of the US dollar in 2003 this figure corresponds to $ 4 512 011, which is roughly one-third of the current ICJ budget. In real terms, the budget of the ICJ has grown more or less constantly since 1946. Yet, if the ICJ budget has grown threefold in almost 60 years of existence such a growth has not necessarily mirrored the growth in case load. The budget has actually lagged quite far behind. The current case load of the Court, with 21 cases and advisory opinions pending, is not just three times higher than, say, the average caseload in the 1960s when the budget of the court was on average around six million dollars, it is almost eight times higher.

Since the early nineties, when the caseload of the ICJ started expanding, each and every President of the ICJ has started his annual report to the UN General Assembly with an urgent plea for more funding. In 2000, one of them, Judge Gilbert Guillaume, launched an unprecedented alarm "In many countries, the judiciary presides in sumptuous historic monuments but at times lacks the financial resources necessary for its mission. This is the case of the International Court of Justice. It is for you to decide whether the Court, the

[30] Romano, C., "International Justice and Developing Countries: A Quantitative Analysis", *Law and Practice of International Courts and Tribunals*, Vol. 1, No. 2, 2002, pp. 367–399, at 396–397.

[31] WTO press release/180 (5 June 2000).

[32] The ICJ switched to biannual budgets in 1976.

principal judicial organ of the United Nations, is to die a slow death or whether you will give it the wherewithal to live."[33]

The General Assembly heeded the call and the budget was increased from $ 10218000 in 1999 to 12961300 in 2003 (in real terms this is an increase of $ 1673078 or about 16%).[34] Yet this happened only after hard bargaining and the increase was still below the amount requested by the Court.[35] The ICJ is no longer facing the dramatic situation of 1999 when, due to a cluster of cases brought by Yugoslavia against ten NATO members caused by the bombing in the Kosovo campaign, it was hit with the highest number of new cases ever. But it is still fair to say that it has to fight nail and tooth for every single dollar. In the past few years it has concentrated its energies on trying to convince the UN to provide judges with law clerks to assist them with research, and information-technology personnel to meet the needs of the internet and technological development.

Even the most outspoken critics have to admit that for all its defects, shortcomings and occasional mishaps, the Court has indeed occasionally contributed, and still contributes, to calming severely compromised situations or avoiding the degeneration of specific problems into larger political issues. Certainly, a few states, and influential ones for that matter, have snubbed it or refused to cooperate or have taken judgments badly. But the great majority of them do respect its authority. Even the US, despite all the clamor of the *Nicaragua* case,[36] has appeared before the Court several times since without much fuss, and then in disputes with bitter enemies like Iran[37] or Libya[38], or

[33] A/55/PV.41.

[34] The budget the Court presented the General Assembly for the biennium 2004–2005 is $ 31537900. http://www.icj-cij.org/icjwww/igeneralinformation/igeninf Annual Reports/iicj annual report 2003-2004.pdf. Site last visited November 17, 2004.

[35] In the 2003-2004 ICJ Report to the General Assembly (para. 276–277), President Shi respectfully remarked that while, with respect to the budget for the biennium 2004–2005, because of ongoing and increased reliance on advanced information technology, the Court had requested an expansion of its Computerized Division from one to two positions, this request had been turned down by the Assembly's Advisory Committee on Administrative and Budgetary Questions. On the other hand, the General Assembly gave the court the chance to transform five Law Clerk positions from temporary to established posts ad increase its security personnel of two units. http://www.icj-cij.org/icjwww/igeneralinformation/igeninf Annual Reports/iicj annual report 2003-2004.pdf. Site last visited November 17, 2004.

[36] *Case Concerning The Military And Paramilitary Activities In And Against Nicaragua* (Nicaragua *V.* United States Of America), Judgment of 27 June 1986.

[37] E.g. *Case Concerning Oil Platforms* (Islamic Republic Of Iran *V.* United States Of America), Judgment of 6 November 2003; Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America).

[38] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America).

allies like Germany[39], Mexico[40] and Italy[41]. Again, while ICJ judges might at times have been either too cautious or too proactive, its contribution to the ascertainment and formation of international law cannot be easily dismissed. Considering the services it has rendered, and continues to render to the UN and the international community at large, the price paid for having it does seem very reasonable.

For one Court overburdened there is another plainly underemployed. Currently the ITLOS is on stand-by. It has only one case on the docket, but, for the time being, that case has been suspended by request of the parties.[42] Considering it has a budget which is about 65% of that of the ICJ, it can be reasonably concluded that the Tribunal is vastly underutilized as compared to its potential. A complement of 21 judges to hear requests for the release of a vessel now and then is, admittedly, judicial overkill.

Currently, the ITLOS works mainly as an ancillary chamber for the Arbitral Tribunals. These need to be set up on an ad hoc basis and are expensive as the parties bear the full cost of litigation. If they were referring the matter to the Tribunal they could spread fixed costs throughout the whole UNCLOS membership. However, as it was explained, to release this potential the UNCLOS will need to be amended and the Tribunal repositioned at the center of the dispute settlement system. The Tribunal needs also to "market" itself better. To start with it could borrow, or even lease, its brand new and glaring premises to those arbitral tribunals to which it is losing business. The last two major arbitrations conducted under the UNCLOS, in which the Tribunal was asked to order provisional measures, were held in Washington DC at the International Center for the Settlement of Investment Disputes,[43] and in The Hague at the Permanent Court of Arbitration.[44]

Yet, it could be argued that, by its mere existence, the Tribunal is still having beneficial effects on the overall international judicial system. For instance, it could be argued that the fact that when the ICJ in the *LaGrand* case in 2001 finally decided to put an end to a half-century long argument on whether its interim measures are binding for the parties instead of mere exhortations, its judgment was aimed at warding off the competition of ITLOS, whose interim measures are unambiguously binding. By finally putting an end to a long, but

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[39] *LaGrand Case*, (Germany v. United States Of America), Judgment of 27 June 2001.

[40] *Case Concerning Avena And Other Mexican Nationals*, (Mexico v. United States Of America), Judgment of 31 March 2004.

[41] *Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), Judgment of 20 July 1989.

[42] *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile/European Community).

[43] *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan).

[44] *The MOX Plant Case* (Ireland v. United Kingdom).

also unnecessary, disputation, the ICJ has surely reinforced its authority and strengthened its hand with the parties.

Finally, with respect to the WTO dispute settlement system, although States have been, and at times are still, nervous about giving the last word on momentous disputes to three blindly selected members of the Appellate Body, none of whom shares their own nationality, no one could argue that States would be better off forgoing the present system and reverting to the GATT procedures. So far the new judicialized system has paid off handsomely. More can be done, though, especially to help developing countries take full advantage of it. Some steps have been undertaken with the establishment of the Advisory Center on WTO Law.[45] Other more structural adjustments to the dispute settlement machinery are needed, though. As long as the result of the procedure is only an authorization to retaliate by imposing tariffs to the goods of the offender, and not monetary compensation, it is unlikely that developing countries will dare to fully take on the trading giants.

II) Human rights judicial bodies

- European Court of Human Rights (ECHR)
- Inter-American Court of Human Rights (IACHR)

In general, the function of the bodies in this group is to hear complaints filed by individuals (either in their personal capacity or gathered together in legal entities) about human rights violations committed by their national States. While they can also hear complaints filed by States against other States, this type of case is rare.[46] Unlike those in the previous group, these two bodies are regional courts. Their jurisdiction is limited to the territory of the member states of two regional organizations: the Council of Europe and the Organization of American States (OAS).

It is necessary to recall some facts about these two bodies to properly understand the structure of their costs and financing. The membership of the Council of Europe has greatly expanded since the end of the Cold War. Currently it comprises 45 states, including Russia and Turkey. The only significant European State not a member is Byelorussia. The membership of the

[45] Agreement Establishing the Advisory Center on WTO Law. http://www.acwl.ch/e/tools/doc e.aspx. Site last visited November 15, 2004.

[46] In the European system, only 13 inter-state applications had been lodge as of February 2002. In the Inter-American system, nine States have recognized the jurisdiction of the Court over inter-State complaints, but it has never been exercised.

Organization of American States comprises almost all the States of the Americas (35 in total).[47]

However, while in the former case, membership of the organization implies, ipso facto, acceptance of the European Convention of Human Rights[48] and the ECHR jurisdiction, in the case of the OAS that is not the same. The IACHR has jurisdiction only if OAS member states have ratified the American Convention on Human Rights[49] and have given their consent to the Court's jurisdiction.[50] Only 24 members of the OAS member states have ratified the American Convention, and 21 have accepted the Court's jurisdiction. To date, those who have chosen to remain aloof of the system are the United States, Canada, and most Caribbean countries.

The fact that this section focuses only on these two human rights courts needs some explanation. First, while there are a number of international bodies, both at regional and international level that monitor compliance with international human rights instruments and that can at times hear individual's complaints, the European Court of Human Rights and the Inter-American Court of Human Rights are different from all those bodies because the outcome of a case brought before them is a binding decision that creates legal obligations for States, as opposed to a non-binding report or recommendation. While this does not intend to belittle the impact of quasi-judicial human rights bodies on the implementation and advancement of human rights, a legally binding outcome is a fundamental characteristic of judicial bodies that sets them apart from any other institution.

Second, although at the time of writing a third international human rights court was about to be established (the African Court of Human and People's Rights)[51] it will not be discussed here because of its novelty and the fact that it is not yet operational.

Costs

The 2004 budget of the ECHR is €39190600 ($ 50063647).[52] That of the IACHR is $ 1391300 or, to put it into perspective, one thirty-sixth of its European counterpart. (see Chart 1)

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[47] The only exceptions are some territories and islands in the Caribbean in a semi-sovereign state or dependencies. Cuba is a member but was suspended from the organization in 1962.

[48] European Convention on Human Rights and Fundamental Freedoms, CETS No. 005, concluded in Rome on November 4th, 1050.

[49] American Convention on Human Rights, *O.A.S. Treaty Series* No. 36, 1144 *U.N.T.S.* 123 entered into force July 18, 1978, *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

[50] States can also give their consent ad hoc for a specific case.

[51] The Protocol to the African Charter of Human and Peoples' Rights entered into force on January 25, 2004.

[52] Conversion rate used (1.27 USD per Euro).

True, these gross figures need to be adjusted to take into consideration the fact that since the mid-1990s the two courts have had a significantly different structure. In the inter-American system, for an individual's complaint to reach the Court it needs to be submitted first to the Inter-American Commission of Human Rights. Only if the Commission finds in favor of the individual and does not manage to settle the case with the concerned State might the Commission, at its discretion, refer the case to the Court. The same used to be the case in the European system until the European Commission of Human Rights stage was eliminated altogether by the entry into force of Protocol 11 to the European Convention of Human Rights and Fundamental Freedoms.[53] Thus, since in the inter-American system the Commission acts as "first degree of jurisdiction" in human rights cases, to properly assess costs it is necessary to take into consideration also the Commission's budget. The 2004 budget of the Inter-American Commission is $ 3429900, more than double that of the Inter-American Court. Hence the Inter-American Court and Commission's combined budget is $ 4821200.

By the same token most, if not all, activities of the Council of Europe deal with human rights issues. In particular, one budget item is mostly related to those of the ECHR. In 2004 the Council allocated to "compliance with the Court's judgments and executions" € 1326500 ($ 1685849), a sum higher than what the OAS spends on the whole IACHR alone.

Even after these adjustments, the difference between the resources spent on the European and Inter-American systems of human rights guarantees of human rights remains striking. The Council of Europe is, of course, a larger and richer regional international organization. The 2004 Council of Europe's budget is € 180500000 ($ 230155550) while that of the OAS is $ 87304346. Be that as it may, the Inter-American human rights system accounts for just 5.5% of the whole OAS expenditures (1.59% Court and 3.91% Commission), while the ECHR weights for 21.7% of the budget of the Council. All considered, European states spend 36 times more than their American counterparts on the principal judicial human rights body of their region (or more than ten times as much, if the IACHR and Commission's budgets are combined).

The fact that the budget of the IACHR is just a fraction of that of the ECHR is, of course, justified by the great difference in activity of the two courts, as will be illustrated below. Significant differences in caseload are necessarily reflected in equally large differences in staffing. The ECHR is staffed by 45 full-time judges (one for each member State of the Council of Europe), organized into four sections. Chambers of seven judges are constituted within each section, and a Grand Chamber of seventeen judges to hear particularly momentous cases. This army of judges is supported by 416

[53] Protocol No. 11 (ETS No. 155).

personnel of which 145 are on contracts of limited duration.[54] Conversely, the IACHR has only seven part-time judges, and, like in the case of the ICJ and the ITLOS, those States who do not have a sitting judge of their own nationality when a case concerning them is heard can appoint ad hoc judges.

In recent years the caseload of both courts has significantly increased. The entry into force of Protocol 11,[55] in 1998, opened the floodgates of complaints at the ECHR. The number of applications registered has risen from 5981 in 1998 to 27281 in 2003 (an increase of about 456%). While in 1998 the Court delivered 105 judgments, in 2003 it gave 703 judgments (about 669% increase).

In the same period the caseload of the IACHR has significantly increased, too. In the past six years, the IACHR has rendered 3 opinions and 50 judgments on preliminary objections, merits, and reparations (an average of 8.8 per year). This should be compared to a total of 16 advisory opinions and 47 judgments in the period 1979–1998 (an average of 3.3 per year and an increase of more than 150%).

What is truly remarkable is that this workload is borne by part-time judges who sit for a total of four sessions of about two weeks each (a total of about 55 days, weekends included). To cope with the increased caseload the IACHR amended its rules of procedure in November 2003 to increase the length of the Court's sessions from two to four weeks each.[56] This means that judges should be able to spend twice as much time deciding cases as before.

Yet there is a substantial difference in the amount of resources mobilized by the Council of Europe and the OAS to meet the increased use of their judicial human rights bodies. Compare the ECHR 1998 and 2004 budgets. Six years ago it was FRF 152000000 ($ 25297147). Today it is almost double, or € 39190600 ($ 50063647). Even when this figure is adjusted by the current high value of the Euro and inflation, it is a remarkable increase.

During the same period the budget of the IACHR has grown by only 26% from $ 1095800 to $ 1391300. However, as $ 1095800 in 1998 corresponded to $ 1237281 in 2003 the IACHR in reality has experienced an even smaller real budget increase of just $ 154020, or just 14%.

The gap between resources needed by the IACHR and resources allocated has increased worryingly to the point of financial crisis. For 2001 the Court presented a budget of $ 1521700 and was appropriated $ 1284700 (– $ 237000). For 2002 the Court requested what had been appropriated the year before, but instead it was given even less ($ 1354700, or a shrinkage of – $ 167000). For 2003 it requested $ 1856246 and it was allocated $ 1420400

[54] At the ECHR, judges account for 20.9% of the budget (eg emoluments, training, travel), the Registry 71.2% (eg staff salaries, overtime, staff leave etc.) and operational costs are 7.9% (eg translations, reproduction of documents, etc.).

[55] Supra.

[56] http://www.cidh.oas.org/Basicos/basic16.htm

(– $ 435 846). Five months after the adoption of the 2003 budget, in November 2002 the General Assembly of the OAS had to approve a one time allocation of $ 600 000 to be used by the Court specifically for non recurrent expenses to save the Court from financial breakdown.[57]

The situation finally exploded when the last budget of the OAS (2004) was approved. As it was said, to meet the demands of a rapidly growing caseload in 2003 the Court amended its rules of procedure, doubling the length of its sessions. This reform was carried out at the request of the OAS General Assembly. Obviously, this requires more resources. Recognizing this, at the beginning of 2003 the Permanent Council of the OAS adopted a resolution (Res. 835) presented by 18 States, including all the major contributors to the organization, instructing the General Secretariat to increase the budget of the Court by $ 400 000 and that of the Commission by $ 600 000.[58]

This was very generous, indeed, but in reality those States asked the OAS General Secretariat to do the impossible. First, this had to be done within the limits set by the organization's existing budget, thus these resources had to be found either in incomes of the organization (rental, interest or others) or savings. This means, that, at best, this would have been a temporary patch. Second, this was requested while an unexpected hole was opening in the budget. As a result of an audit, salaries of the OAS personnel in Washington DC had been found to be at a level below those of the UN. The OAS regulations mandate that they must be in line, and to correct this defect the General Secretariat had to tap in those very same resources that should have been allocated to the human rights system.

For 2004, in order to implement the new rules and allow longer sessions, the Court requested a $ 3 000 000 budget. In the end, it was given only $ 1 391 300, which is not only less than half of what it asked, but also about $ 25 000 less than what it had the previous year. This triggered a virtual mutiny of the Court. On the eve of the approval of the OAS budget, the Judges and Executive Directors of the Court wrote to the OAS Secretary-General to make it clear that "...the Court and all of our personnel will not accept responsibility for the institutional collapse that will occur beginning in the year 2004, owing to the serious budgetary restrictions that have been imposed upon the Tribunal...".[59] In this situation, it is clear that the Court will not be able to implement the amendments to its rules of procedure nor increase the length of its sessions. Even the current calendar is at risk as the Court might simply have to cancel one of the four two-week scheduled sessions to remain

[57] CP/Res 831 (1342/02).

[58] Organization of American States, Permanent Council, Increasing the 2004 Program-Budget Appropriation for the Inter-American Human Rights System, OEA/Ser.G/CP/Res. 835 (1352/03) (29 January 2003).

[59] Letter of November 20, 2003 to the OAS Secretary-General by the Inter-American Court of Human Rights, first para.

within the limits of its budgetary allocations. At the same time, cases will keep on flowing in. As the Court remarked, "...[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."[60]

Financing

The bodies in this group are utilized mostly by individuals (directly as in the case of Europe, or indirectly as in the case of the Americas) to seek redress for human rights violations committed by their own governments. Yet, the costs for these bodies are borne only by States' contributions to the budget of the organization to which the given judicial body is attached. In both cases, the scales of assessment of the organizations are based on the "capacity-to-pay" principle, whereby largest economies pay a larger share than small economies.

The scale of assessment of the Council of Europe has a ceiling but no real floor. The largest economies pay 12.39% each. They are not only France, Germany, Italy, and the UK, which also figure in the top seven contributors to the UN budget, but also Russia, which pays only 1.2% of the UN budget. The poorest European countries, (eg Albania, Armenia, Moldova) pay 0.12%. Tiny, but wealthy, states like Liechtenstein, Andorra and San Marino pay 0.0537%, 0.0597% and 0.0264% respectively. Translated into dollar terms, this means that for 2004 the highest contributors pay $ 6202885 each to the ECHR budget, Albania and Moldova $ 60076, and San Marino $ 13216. The total share of the ECHR budget for the 15 EC members combined is 59.51%, or $ 29792848.

The contributions to the OAS budget are much less equally distributed. By far the greatest single contributor is the USA bearing more than half of the budget of the organization (59.47%) alone. The next greatest contributors are Canada (12.36%), Brazil (8.55%), Mexico (6.08%) and Argentina (4.90%). Together, the top five contributors to the OAS bear 91.36% of the organization's budget. The smallest contributors are Antigua and Barbuda, Dominica, Guyana, Saint Kitts and Nevis and St. Vincent and the Grenadines with 0.02% each. Although OAS members are not *ipso facto* subject to the jurisdiction of the IACHR (but they are subject to the scrutiny of the IA Commission), they all contribute to the expenses of the Court. The Court's budget is part of the regular budget of the organization. Thus, in 2004, the US is contributing $ 2867167 to the IA human rights system (of which $ 827406 goes to the Court and $ 2039761 to the Commission). Guyana and the other smallest contributors pay $ 964.24 collectively.

Both Courts also benefit from voluntary contributions in various forms from miscellaneous sources, both governmental and non-governmental. Yet

[60] Idem, para. 6.

these contributions are not used to finance core expenses of the Court (eg judges salaries), but only ancillary services (eg public outreach, media, publications, training). For instance, from 2001 to 2003 Germany donated about € 450000 ($ 571500) annually to the ECHR. The Government of Costa Rica contributes annually to the IACHR $ 100000 as part of its commitment as host State.

Admittedly, the insufficient growth of the IACHR is just one aspect of the larger problem of a stagnating OAS budget. In the past few years the OAS has experienced virtually zero budgetary growth, if not a shrinkage when adjusted by inflation. The budget submitted to member states in 2004 requests an increase of 3%. Provided this modest increase is approved, it will barely offset inflation, rising health care costs, and other statutory requirements.

The budget has become a hostage of politics. Before 2002 the main blockage to budgetary increases was believed to be the fact that arrears owing to the OAS were so high that many countries which were up to date in their payments refused to consider an increase in the budget until other members paid their arrears. With the United States repaying its arrears of approximately $ 20 million, this contention lost some steam. Currently, the total owed to the OAS by its members is $ 14550310 (about 18% of the OAS Regular Fund execution).[61] Some States, like Bolivia, Colombia, the Dominican Republic, Haiti, Nicaragua, and Uruguay are repaying with an extended payment plan. Others, like Argentina, which is also the single largest debtor owing almost $ 11 million, have economic situations that impair their ability to pay.

Arrears aside, the main obstacle to budgetary increases has become the incapacity of OAS member states to reach an agreement on a new scale of assessment. Considering the sums involved, the US has offered to pick up the extra financial burden to relieve the organization, but this has been refused by many States on the grounds that the US already plays too weighty a role in the organizations' finances and politics.

As long as the OAS is in such a dire financial situation there is little or no hope that the Inter-American human rights system might be allocated the resources it desperately needs. Unless the budget of the Court is substantially increased there is little chance that the new and longer judicial calendar will be implemented at all with the result that the backlog of the Court will balloon over the next few years.

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[61] Argentina: $ 10874000, Barbados: $ 33700, Bolivia: $ 218947, Colombia: $ 291556, Dominica: $ 4700, Dom. Rep.: $ 1293233, Haiti: $ 124975, Jamaica: $ 67200, Nicaragua: $ 623378, Paraguay: $ 369261, Suriname: $ 260800, Uruguay: $ 388200.

Output

The quantitative output of the ECHR resembles that of a domestic court more than that of an international judicial body. Every citizen of a member State of the Council of Europe can, once domestic remedies have been exhausted, file an application to the ECHR claiming a violation of the European Convention on Human Rights and Fundamental Freedoms. Hence, the ECHR has about 800 million potential applicants (three times as much as the whole US population).

In 2003, the Court received 35613 applications. Of these, 27281 were allocated to a decision-making body leading to 18034 decisions and 703 judgments. In 1998, at the eve of opening the doors to individuals directly, those figures were 18164 applications, 5981 of which were allocated to a decision-making body, 4420 decisions and 105 judgments. In 2003 the highest number of judgments concerned Italy (106), mostly for violations of Article 6 of the European Convention (due process and right to a fair trial), Turkey and France with 76 judgments each, Poland (44), Romania (24) and Greece (23).

Conversely, the quantitative output of the IACHR is still in the ballpark of a traditional international judicial body like the ICJ. As it was said, the Court's jurisdiction extends only to those States that have given their consent. Moreover, cases reach the Court only after they have been considered by the Commission and only if the Commission concludes that referral to the Court is warranted. In 2002 the IACHR received seven new cases, one request for an advisory opinion and seven requests for provisional measures. The Court was also monitoring compliance with judgments rendered in 27 previous cases and with provisional measures ordered in 20 others. Eight cases were at the merits or possible reparations stage, three were at the preliminary objections stage, one was at a preliminary stage, and an advisory opinion was being heard. Still, the fact that all this work is carried out by part-time judges is truly remarkable.

Yet, beyond docket accountancy, what does the money spent on human rights courts buy? The mushrooming caseload of both courts indicates that there is a strong demand for the goods these bodies deliver.

The ECHR achievements have been quite staggering. Its case-law exerts an ever deeper influence both on the laws and social realities of the European States, on the international human rights system beyond Europe and on the legal systems of several other States throughout the world. To illustrate, in several European States the European Charter has constitutional or super-constitutional raking, and binding interpretations of the Charter by the ECHR therefore have huge and immediate impact. The jurisprudence of the ECHR has significantly influenced that of the UN human rights bodies, as well as the IACHR. On issues like the death penalty, extradition and the definition of cruel and inhuman punishment even the US Supreme Court has felt compelled to take note of the jurisprudence of the ECHR (even if only to distance

itself from it). The ECHR may have an even greater unacknowledged and perhaps unrecognized influence.

In the Americas the IACHR plays a more restricted and modest role than its European counterpart but it is making remarkable progress nevertheless. Between 1987 and February of 2002 it rendered 32 decisions on the merits of contentious cases and 18 advisory opinions. Most dealt with core human rights issues such as forced disappearances, extra-judicial executions, arbitrary detention resulting in the death of the detainees, torture, and other inhumane treatment. The *Velásquez Rodríguez* case,[62] on the question of forced disappearances in Honduras, has proven to be one of the most cited and influential decisions of any human rights tribunal both in other international systems, universal and regional, and domestically. Although such extreme cases still find their way onto the Court's docket, recently it has been dealing with a more diversified and progressive range of issues, including the wrongful dismissal of judges and civil servants, censorship, the withdrawal of citizenship and removal from positions of authority of government critics, land rights of indigenous peoples, and welfare.

The record of compliance with the two Courts' decisions compares favourably with the record of national courts. In the case of the ECHR it is very high, even comparable to that of any of the courts of the western European States. The Council of Europe's Council of Ministers constantly monitors compliance with the Court's decisions. In many cases, decisions of the Court have direct legal effect domestically and are routinely implemented by national courts and authorities.

In the inter-American system there is no formal mechanism for monitoring the execution of the Court's decisions, partly because of a lack of funds and partly because the Court, at the moment, is only a part-time organization. It is only recently that the Court has begun to include a report on the enforcement of its decisions in its Annual Report to the General Assembly of the OAS. If a government does not comply with a decision of the Court, the General Assembly of the OAS can, as a last resort, apply political pressure, but it has never done so.

Be that as it may, considering the downright hostility of certain governments subject to the judicial scrutiny of the IACHR, the record of compliance has been satisfactory. Every prisoner whose release has been ordered has in fact been released. Compliance with decisions awarding damages is substantial, and although compliance with orders setting aside wrongful court decrees (such as those wrongfully charging victims or absolving perpetrators of responsibility) is not perfect, it is pretty good considering the national standards of many of the countries in the region.

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[62] *Velasquez Rodriguez Case*, Judgment of July 29, 1988, *Inter-Am.Ct.H.R. (Ser. C)* No. 4 (1988).

Assessment

Conceived as regional international judicial organs with limited jurisdiction and even more limited powers, both the ECHR and the IACHR have gradually acquired a status and authority that transcends their original limits. Yet, the difference between the two regional human rights systems and the unequal importance given to judicial bodies is remarkable. While Europeans seem to count on the ECHR as defender of last resort of their freedoms and rights and to bring human rights standards in Eastern Europe to a par with those of the West, the Americans do not seem to have the same plan for their own hemisphere.

Admittedly it is easy to depict the ECHR as being at a superior stage of development compared to the IACHR. That the IACHR has to walk down the same path of the ECHR is neither a necessity nor automatic but, even allowing for conscious or unconscious different grand human rights strategic plans, the fact remains that while the ECHR is given the resources to carry out its mission, the IACHR is slowly choking.

The financial and structural measures taken in the late 1990s to strengthen the ECHR's efficiency are beginning to have an effect. While there is still a mind-boggling gap between the number of cases being filed and the number of judgments rendered, since 2001 the number of judgments has grown significantly more rapidly than the number of new cases filed. In May 2004, Protocol 14 to the European Convention was opened for signature.[63] The Protocol aims to enable the European system of human rights to cope with the strain of the eastward expansion without diluting the previous achievements. It contains measures to prevent violations at national level, improve domestic remedies, make the filtering and processing of applications as efficient as possible and, finally, improve and speed up the execution of decisions. This will probably require further resources on top of the $ 50 million per year that is already spent, but so far member States of the Council of Europe have seemed to be convinced that it is worth the investment.

The same cannot be said for the inter-American system. The stagnation of the OAS regular budget is putting the human rights system in crisis. In the past few years the issue has been intensively discussed by member States, especially amongst the top five contributors who bear 91% of the whole budget. However, to date, an agreement has not been reached due to the two abovementioned stumbling blocks: negative economic conjuncture, which has hardly hit the whole hemisphere, and incapacity to reform the scale of assessment.

Still, one should consider that the 2004 budget for the IACHR is $ 1 391 300 and that it would take only twice as much to enable the Court to fulfill the

[63] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention CETS No. 194.

crucial functions assigned to it by the American Convention of Human Rights. That is less than $ 1 000 000 extra for the United States, and not even $ 1000 more for countries like Guyana. Those are ridiculously small amounts. Or one should consider that the Court's budget is just 1.59% of the whole OAS budget and that giving it what it needs would not require a massive reallocation of resources within the organization. Perhaps the real reason for the failure to increase the budget is the fact that in far too many countries of the Americas, after years of progress, democracy and human rights are on the retreat.

III) International and internationalized criminal judicial bodies

- International Criminal Court (ICC)
- International Criminal Tribunal for the Former Yugoslavia (ICTY)
- International Criminal Tribunal for Rwanda (ICTR)
- Special Court for Sierra Leone (SCSL)
- Serious Crimes Panels in the Courts of East Timor (ET)
- Internationalized Panels in the Courts of Kosovo (Kos)

The bodies in this group are rather heterogeneous. To employ the taxonomy of natural sciences one can say that, within the wider class of international judicial bodies, they belong to a specific order: "international criminal bodies". Their goal is to sanction serious violations of international law (in particular international humanitarian law and human rights law) committed by individuals and, as a consequence, deter future violations and help reestablish the rule of law. To do so, they impose criminal penalties. This is the critical feature that sets this group apart from all other international judicial bodies.

All the international criminal bodies have been established in the past decade and are the product of the awakening of international criminal law after an almost half-century long sleep since the Nuremberg and Tokyo trials. All of them are either a creature of the UN (ICTY and ICTR), or have been created with the backing and participation of the UN (SCSL, ET and Kos), or have been etched within the UN but have an independent life (ICC). In particular, the ICTY and ICTR respond directly to the UN Security Council; the internationalized bodies are part of,[64] or are dependent on the presence[65] of UN-approved peace keeping missions; and the ICC is a self-standing

[64] United Nations Mission in Kosovo – UNMIK, the United Nations Mission of Support in East Timor- UNMISET, and the United Nations Transitional Administration in East Timor – UNTAET.

[65] United Nations Assistance Mission for Sierra Leone – UNAMSIL.

international organization with its own membership which is different from that of the UN (89 States).

This order of international judicial bodies can be divided in three families:

a) ad hoc international criminal bodies with restricted jurisdiction (ICTY and ICTR);

b) permanent criminal bodies with potential universal jurisdiction (ICC); and

c) internationalized criminal bodies which are hybrid in nature combining domestic and international components (SCSL, ET and Kos).

Although this section analyzes all of them together, because of some substantial differences in their structure, mandate and organization their treatment will be somewhat compartmentalized.

Finally, one should keep in mind that the bodies considered in this section are at different stages of their life. The ICTY and ICTR have reached maturity and plans for bringing them to termination by around 2010–2011 are being considered. The ICC has just been established and its first investigations are in the very early phases. The internationalized bodies have a programmed lifespan of only a few years and are about to approach their mid-life mark. Finally, a seventh body, the Extraordinary Chambers in the Courts of Cambodia for trials of surviving members of the Khmer Rouge leadership, to date has not yet been launched and, therefore, only brief mention will be made of it here.

Costs

In 2002–2003 the net budget of the ICTY was $ 254 603 800 and that of the ICTR was $ 187 262 900 (ie respectively $ 127 301 900, and $ 93 631 450 per year). The 2004 budget for the ICC is € 53 071 846 ($ 66 562 709). The cost for the Serious Crimes Unit (SCU) and the Serious Crimes Panel for 2002 was about $ 6 300 000. The cost of internationalized panels in the Courts of Kosovo in 2003 could be estimated at $ 15 200 000 million. Finally, the 2003–2004 budget of the SCSL is about $ 34 700 000 (per year). The sum of the yearly budgets of these six bodies reaches $ 343 million (see Charter 1). Finally, should the Extraordinary Chambers in the Court of Cambodia become a reality, it is estimated that about $ 60 million will be required for its assumed three years of operation (i.e. about 20 million per year).[66] The total would climb to $ 363 million per year.

Two facts are immediately evident. First, as compared to other groups of judicial bodies analyzed in this paper, a significant amount of resources is spent each year to ensure the prosecution of war crimes and crimes against humanity in certain areas of the globe. International criminal justice is more

[66] UN Wire, Cost of Khmer Rouge Tribunal Pass $ 60 million, June 16, 2004.

expensive than that produced by non-criminal judicial bodies. Unlike non-criminal tribunals, where the budget is divided between the two fundamental components of judges and the Registry, criminal tribunals also have a third component: the office of the Prosecutor. The budget of criminal tribunals includes items that are not present in those of the other bodies considered in this paper, such as the cost of the defense of indictees, which is in general covered by the court itself, the cost of running the detention unit, costs associated with managing witnesses, and security. Evidence gathering is also very expensive and in non-criminal tribunals evidence is collected and presented solely by the parties.

The regular UN budget for 2002–2003 was $ 2.63 billion, while that for peace-keeping for 2002 alone was $ 2.6 billion. This means that the ICTY and ICTR combined weighted for about 16,8% of the regular budget, or 8,4% of the peace-keeping budget, or even just 5.6% of the two combined. Similarly, it should be kept in mind that from 1992 to 1998 the international community spent between $ 49 to 70 billion to end the conflict in Bosnia. The cost of the United Nations Mission in Kosovo for its first four years of operation was $ 1.5 billion and the cost of the United Nations Transitional Administration for East Timor reached $ 1.6 billion mid year 2003. Similarly, the cost of the UN Mission in Sierra Leone hovers around $ 2 billion. The budgets of international and internationalized criminal courts are just a fraction of what has been spent to end those conflicts.

Second, there is a significant difference between the budgets of the internationalized bodies and those of the fully international ones. Internationalized courts and tribunals are cheaper than fully international ones. The combined yearly budgets of the three existing internationalized bodies totals about $ 56.2 million, which is not yet half of the yearly budget of the ICTY alone, and is even less than that of the ICC which is just about to start operating. Whether they are more cost-efficient is still to be proven.

Breaking down their budgets can provide some interesting insights. In the case of the fully international criminal courts and tribunals, the Registry has by far the greatest share totaling between two-thirds and three-fourths of the total (73.4% at ICTR, 67.4% at ICTY, and 61% at ICC). The great majority of these tribunals' personnel are employed by the registry (60% at ICTY, 70% at ICTR, and 57% at ICC). The Registry is responsible for facilities, legal filings and archives, operation of the legal aid program for indigent defendants, security, managing the detention center, assisting and protecting victims and witnesses, and communications to and from the tribunal. The office of the Prosecutor takes about one fourth of the total budget (24.4% at ICTR, 28.8% at ICTY, and 27% at ICC), and is responsible for the conduct of investigations (colleting evidence, identifying witnesses, exhuming mass graves), preparing indictments and presenting prosecutions before the judges. Finally, the Chambers, meaning mostly the salaries and allowances of judges, are just a

few percentage points of the total budgets (2.2% at ICTR, 3.8% at ICTY, and 12% at ICC). The comparison with non-criminal courts and tribunals, like the ICJ or the ITLOS, and even the human rights courts, is striking. In international criminal courts chambers are a significantly smaller share of the total, a percentage that might easily overshadow the importance of this organ with respect to overall capacity of the court to deliver.

Fees to defense counsel and general operating expenses are each approximately 13% of the overall budget of the two tribunals. The cost of translation has been increasing steadily and now accounts for 13%, but the largest single expense item for the ICTY and the ICTR has always been staffing, ranging from 45% to 60% of the total. In the case of the ICC it is only 42.8%, but only because the Court is in its setting up phase. The ICTY employs 16 permanent judges, while the ICTR has 11. Five of the ICTY judges and two of the ICTR judges also form the Appeals Chamber that the two tribunals share. In order to increase the number of trials nine *ad litem* judges, that is to say judges who sit on one or several specific trials for a maximum term of three years, were introduced in 2002. The same arrangement was approved for the ICTR in 2003 and there is currently one *ad litem* serving there (up to nine such positions were authorized). The total personnel for the ICTY is 1238, that of the ICTR is 872, and that of ICC 388.

Breaking down the budgets of internationalized criminal courts is a much less straightforward exercise. Either the information is not publicly available or it is dispersed and buried in the budgets of the UN peacekeeping missions of which they form part. Still, by some extrapolation it is possible to conclude that in the case of internationalized criminal bodies salaries both for international and national personnel are also by far the greatest item of expenditure, while operational expenses are generally around 10% of the total. Yet there is a striking difference between the fully international and the cheaper internationalized bodies. While in the case of the latter, the bulk of the expenses come from the Office of the Prosecutor, as it was noted the opposite is true of the ICTY and ICTR where the Registry is responsible for close to 70% of the costs. The most expensive objects of expenditure for the ICTY and ICTR registries are translation costs (close to 13%) and defense costs at the same percentage. It is no surprise that these are exactly the same items which some of the internationalized criminal tribunals are desperately lacking and whose shortage casts serious doubts on the ultimate fairness of those bodies.

Financing

One of the fundamental differences between fully international and internationalized bodies is where the money that finances their operation comes from.

The ICTY, ICTR and ICC are financed in the same way as all the other bodies considered in this study. That is to say, States who are members of the

organization to which the tribunals are attached or parties to the applicable statute are assessed a share of the total budget which is calculated on their capacity to pay.

When the ICTY and ICTR were created it was debated whether the appropriations should be assessed to UN member States on the basis of the regular budget or on the basis of its peacekeeping budget. A compromise was eventually reached: half of the appropriations are assessed to the member States on the basis of the UN regular budget scale (which is used for the ICJ, for instance) and the other half on the basis of the peacekeeping budget rate. The scale of assessment for peacekeeping expenditures grants all developing States a substantial discount off the regular assessment rate. It reallocates the difference to the five permanent members of the Security Council to reflect their special responsibility for maintaining international peace and security.

Thus, the single greatest contributor to the ICTY and ICTR budgets is the United States. For 2003 the Unites States was assessed 22% of the regular budget and 27% of the peacekeeping budget. This translates, for 2002–2003, into $ 62377931 for the ICTY and $ 45879410 for the ICTR. The 15 EC member States together contribute 38.43%, or $ 97857607 for the ICTY and $ 71974496 for the ICTR. Countries like Bosnia Herzegovina or Rwanda whose assessed shares are 0,0024% and 0,00055% respectively, contributed $ 6110 for the ICTY and $ 1029 for the ICTR.

The ICC, which is not a UN body, unlike the ICTY and ICTR, also has its expenses assessed to those States that have ratified its statute. The ICC scale of assessment is based on the scale of assessment of the UN regular budget, taking into account, as in the case of the ITLOS, the fact that the first and second contributors to the UN budget (the US and Japan) are not party to the Statute of the Court. As a consequence, the single greatest contributor to the ICC budget is Germany with 19.3% or $ 11013850 in 2004, while the 15 EC member States combined bear the overwhelming majority of the Court's costs (72,78%, or $ 41535880 in 2004). By comparison, this is significantly higher than the share paid by the EC member States for the ECHR or that paid by the US for the IACHR. A country like the Democratic Republic of Congo, which has ratified the ICC statute and which will probably benefit from it by having certain situations in its own territory submitted to the scrutiny of the Court, in 2004 pays 0.0019% or $ 1127.

Internationalized criminal bodies are financed in a significantly different way, and the Special Court of Sierra Leone is a special case in its own right. First of all, they are not fully internationally funded but rather rely on a mix of international and national contributions. Local authorities might pay for items like the salary of local judges (but even those are subsidized by the UN).

In the case of East Timor and Kosovo, the majority of the costs are written under the budget of the relevant UN peacekeeping missions, which means that UN members are assessed these costs in accordance to the peace-keeping

scale. Thus, the biggest contributor is the United States with 27% or $ 1701000 for East Timor and $ 4104000 for Kosovo, while the 15 EC members contribute together 39,7%, which means $ 2501730 for East Timor and $ 6035920 for Kosovo.

As contrasted to any other body considered in this study, including the other internationalized courts, the Special Court for Sierra Leone has some questionable badges of distinction. First, it relies solely on voluntary contributions. The parties to its founding treaty, that is to say the UN and Sierra Leone, do not shoulder any financial responsibility. The idea of making the Special Court totally reliant on the goodwill of some States rather than on assessed and legally binding contributions largely originates from a reluctance to replicate the experience of the ICTY and ICTR. Amongst key States, the "keep-it-cheap" and "make-it-possible-for-an-easy-bail-out" became a mantra when the creation of a mechanism to make those responsible for the atrocities committed during the ten year long war in Sierra Leone was considered.

That an international court cannot function on voluntary contributions alone has always been very clear in the mind of the UN Secretary General. During negotiations leading to the establishment of the Special Court, the Secretary General repeatedly pointed out that, without long-term assurances of continuous availability of funds, risks, in terms of moral responsibility, loss of credibility of the UN, and its exposure to legal liability, are very high.

Time proved the Secretary General right. Despite the Special Court is operating on a three-year budget of about $ 80 million, an enterprise considerably cheaper than ICTY or the ICTR, raising those funds has proven extremely arduous.

Funds for the first and second year were slow coming in, and only after the Secretary General had spent considerable time pleading for them. At the beginning of 2004, out of a total need of about $ 30 million, only less than two million dollars had been pledged for the Special Court third year of operations (July 1, 2004 – June 30, 2005). It is clear that without urgent action, in a few months the Special Court would have been insolvent.

In March 2004, after having consulted with the Security Council, the Secretary General asked the General Assembly to approve a subvention of up to $ 40 million ($ 16.7 million for the period July – December 2004 and $ 23.3 million to the period January – December 2005). In particular, the Special Court estimated it needs $ 30 million to complete proceedings, and $ 10 million to close down its operations by the end of 2005. Funds for this subvention do not come from the UN regular budget, but rather from some un-earmarked funds the Secretary General has available for special political missions. The General Assembly approved the subvention on the understanding that any funds appropriated would be refunded to the UN should sufficient voluntary contributions be received.

Amidst this financial crisis, and after about two years of investigations, in June 2004 the first trial, that of the former deputy Defense Minister Sam Hinga Norman, started. Altogether, to date 13 individuals have been indicted, and considering the time and financial constraints placed on the Court, it is unlikely other persons will be charged.

It is already clear that the Special Court will not be able to complete all trials and possible appeals before the end of 2005 and that funds will have to be raised beyond the projected budget. Considering finding resources to cover current costs has proven to be extremely arduous, the prospect of having to go above and beyond what was originally planned leaves very few donor governments thrilled at the UN.

The experiment with voluntary contributions has clearly failed. There seems to be little alternative to having the expenses of ad hoc international criminal courts and tribunals assessed to all UN members.

The saga of the funding of the Special Court is already casting a long shadow over the funding arrangements for the proposed hybrid court for Cambodia to try the surviving Khmer Rouge. While initially discussions at the UN indicated that the Khmer Rouge court was going to be financed by voluntary contributions, too, after the ordeal of the Special Court funding had to be reconsidered. As currently planned, while the salaries and cost of the Cambodian judges and Cambodian personnel are to be funded by the government of Cambodia, the salaries and cost of the international judges and staff are to be defrayed by the United Nations through assessed contributions. The UN is expected to meet 75% of the costs and Cambodia is seeking help from donor nations for its share. Australia has made a pledge of $ 2.2 million but to date it is the only country to have done so.

Funding by voluntary contributions is quite rare among other international courts and tribunals. As has been seen, international courts other than criminal courts, such as the ICJ or the ITLOS, only rely on voluntary contributions to facilitate access to them or to defray certain litigation costs, but not to finance general operations. In the criminal field, the ICTY and ICTR have accepted voluntary contributions, however these remain only a fraction of the regular budget of the tribunals and are only used to cover extra-budgetary expenses.

At the ICC voluntary contributions can be used only as *additional* funds, and there are strict criteria on their acceptance. Voluntary contributions earmarked by donors will be treated as trust funds or special accounts and kept separate from the general fund of the Court. That is to say they will not credit the budget of the Court and thus cannot reduce assessed contributions by States parties.

Reliance on voluntary personnel is also generally unknown at international courts and tribunals. During the early years of the ICTY and ICTR voluntary personnel were widely accepted. This practice came to be highly criticized and

many States raised concerns about the perceived independence of such personnel because they were most often government employees. It was also argued that they negatively affected the international character of the tribunals since voluntary personnel were seconded primarily by developed countries (eg United States, Canada, etc). In response to this criticism, the General Assembly ended the practice and voluntary personnel contracts were allowed to lapse in 1998. This policy is reflected also in the Rome Statute which specifies that the ICC can employ voluntary personnel only in exceptional circumstances.

Whether financed by assessed or voluntary contributions, the fact is that both international and internationalized tribunals have, indeed, suffered through highly belated payments. As of December 2001 the unpaid assessment to the ICTY and ICTR was $ 43.8 million ($ 14.7 million owed by the United States and $ 14 million by the Russian Federation). The assessments for the first financial period of the ICC were due on 1 January 2003. In February the outstanding contributions totaled € 21 771 633, a staggering 66% of total assessments. Assessed contributions to the peace-keeping budget, which incorporates the cost of the international panels in Kosovo and East Timor, likewise suffer from overdue payments. As of June 2002, outstanding contributions to the United Nations Mission in Kosovo (UNMIK) were $ 97.3 million representing 8% of the total assessed contributions (with only 72 Member States having paid in full). At the same time, outstanding contributions to UN missions in East Timor and Sierra Leone were $ 101 million, representing 8% of the total assessed contributions, with only 25 members having paid in full.

Output

Before presenting the quantitative output of the bodies considered in this section, it is necessary to keep in mind two facts. First, they do not replace national courts but exist alongside, or as an alternative to domestic prosecution. The jurisdiction of the ICTY and ICTR is concurrent with that of national courts and at any time they can claim primacy over national courts and take over investigations and proceedings at any stage. The jurisdiction of the ICC is only complementary to that of national courts and can kick in only where national trials are not carried out or are a mockery. With respect to internationalized courts, the relationship between national courts and internationalized courts differs from case to case, but it can be safely said that they have largely been separated and isolated from the national courts. The jurisdiction of internationalized courts is mostly of an exclusive nature. To the extent that jurisdiction is concurrent with national courts (East Timor and Sierra Leone), the internationalized court has primacy and can request the deferral of a case.

Second, the rationale of these bodies is not to prosecute each and every instance of international crimes committed in the concerned territory. Rather their focus is on the most serious crimes of concern to the international community as a whole and on those most highly responsible for them. Although the ICTY and ICTR in their early years did not limit their attention to the senior officials only, the focus has shifted as several high profile indictees have been secured, including the former Yugoslavian President Slobodan Milosevic.

Because of these two considerations, it is only logical that the caseload of these criminal bodies does not comprise hundreds or thousands of cases, but rather only a few dozen of the most egregious ones.

Thus, in the case of the ICTY's 12 years of existence, as of April 2004 102 accused had appeared before the tribunal: 33 at pre-trial stage, 7 at trial stage and 50 have been tried (16 are still at appeal stage, 8 have already served their sentence, 13 are serving sentence, 7 are waiting transfer to serve sentence, and 5 have been acquitted).[67] Twenty-one indictees remain at large. The Prosecutor expects to finalize all investigations by 2004, complete first instance trials by 2008, and appeals trials by 2010.

In the case of the ICTR, as of April 2004 the tribunal has handed down 15 judgments involving 21 accused. Another 21 are currently on trial in 7 cases. Twenty-one are in detention waiting for the commencement of their trial. Fifteen indictees are at large.[68] The ICTR has the same exit strategy as the ICTY.

Considering the internationalized bodies are a much more recent addition to the international judiciary, they fare remarkably well when compared to the output of the ICTY and ICTR. In East Timor, as of February 2003, the SCU had filed 58 indictments against 225 individuals, and 32 judgments had been handed down. As of June 2002, the justice system in Kosovo had dealt with 17 cases in which acts of war crime and genocide have been charged and prosecuted. Local prosecutors filed 13 of the 17 indictments and international trial panels have issued 10 judgments.

Finally, in the case of Sierra Leone, thirteen individuals had been indicted by early 2004. There are 9 indictees awaiting trial at the Court's detention center in Freetown. Two indictees have died, and two indictees are at large. The first trial begun in July 2004.

Be that as it may, what does about $ 363 million a year actually buy at the end of the day? One consideration alone should suffice: the end of impunity for war crimes and gross violations of human rights. The establishment of the

[67] See information on ICTY website at *www.un.org/icty/index.html* (site last visited April 2004).

[68] See information on ICTR website at *www.un.org/ictr/index.html* (site last visited April 2004).

ICTY, in political circumstances that are probably impossible to replicate, not only reawakened international criminal law from the long sleep in which it had fallen after the Nuremberg and Tokyo trails, but also pushed the envelope further by moving away from victors' justice to a truly internationally based, and thus more credible, legitimate and impartial, legal system. Until their creation, perpetrators of war crimes and gross human rights violations were simply free to roam and travel. Nowadays they are at best prisoners in their own countries or can travel only at great risk because they know that their impunity is no longer widely tolerated.

Without the ICTY there would not have been an ICTR. Without the two of them there would not have been the ICC, which was established exactly to address criticism leveled at the ad hoc nature and limited geographical and temporal scope of those endeavors. As a temporary fix until the ICC could start operating and enlarge its support and jurisdiction, but also as a political reaction to it, internationalized criminal courts were created. Pictured in this way, the bodies considered in this section are not alternatives to each other and some therefore cannot be singled out as more important than another. They are all interlocking and interdependent parts of a larger machine; a costly one, admittedly, but one that we could not conceivably do without anymore.

The resurgence of international criminal law brought about by these bodies has opened the way for setting important precedents of international criminal and humanitarian law. Many legal issues considered, or still under consideration, by various criminal bodies had never actually been adjudicated before. For instance, the ICTY and ICTR have issued several indictments relating to sexual violence whose status had previously been uncertain under international criminal law. Some landmark cases have been the September 1998 conviction by the ICTR of the Mayor of Taba, Jean-Paul Akayesu, for crimes against humanity and genocide, including crimes resulting from sexual violence, and the conviction by the ICTY of Radomar Kovac for violations of the laws or customs of war and crimes against humanity as a result of rape, outrages on personal dignity and enslavement. Without those judgments we would probably be still wondering whether those heinous practices are indeed international crimes.

Similarly, the Special Court for Sierra Leone is perfectly positioned for developing a jurisprudence that sanctions the use of children as soldiers, or the systematic mutilation of enemy combatants and civilian populations.

More pragmatically, one could gauge the work done by these bodies against their stated goals which are to bring to justice those persons most responsible for serious violations of international humanitarian law; to contribute to the restoration of peace by promoting reconciliation in the concerned territories; to deter further crimes; and to render justice to the victims.

Amongst those indicted, under arrest or sentenced by the bodies considered in this paper, there are several top political and military Bosniac, Serbian, Kosovan, Croatian, Rwandan, Sierra Leonese, Liberian, East Timorese and Indonesian leaders, including, to name a few, Slobodan Milosevic, former President of Yugoslavia, the former Prime Minister of Rwanda, Jean Kambanda, and the former President of Liberia, Charles Taylor. Admittedly, many others are still defying attempts to bring them to justice. Some, like Radovan Karadzic, the President of the Republika Srpska and head of the Serbian Democratic Party (SDS) went into hiding while others, like General Wiranto, Commander of the Indonesian Armed Forces and Defence Minister, are brazenly defying international attempts to apprehend them. But once an international criminal justice system is in place, and it can count on the continuing support of States, international organizations and public opinion, it will only be a matter of time before, soon or later, they are all netted. The only hope they have to escape justice is to die before a tribunal is set up and has brought about their arrest, as happened to Pol Pot and Franjo Tudjman.

Whether the work of these bodies actually contributes to restoration of peace by promoting reconciliation in the concerned territories is probably too early to say.[69] International courts and tribunals have surely helped the people of many of the countries concerned to get rid of unscrupulous individuals who otherwise might have mortgaged their future with their mere presence or participation in public life and politics. Also, one must consider that often these international criminal bodies do not operate in a vacuum, but rather are just the judicial face of larger reconciliation endeavors.

Equally, the jury is still out, no pun intended, on whether they can deter future crimes. The ICTY has had jurisdiction over the whole of the territory of the former Yugoslavia since 1991. This has not prevented the powder keg of Kosovo to explode, but it did probably induce leaders in Macedonia to consider their options more carefully and has surely nudged politics in several of the former Yugoslavian republics in a pro-democratic direction. The jurisdiction of the ICTR is limited to facts that occurred in 1994, but nothing bars the Security Council from giving it a new lease of life to consider similar events that have happened or might happen in neighboring Burundi, where Tutsi and Hutus are snarling at each other. Perhaps this distinctive possibility has prevented conflict in that country from going down the same bloody route. Whether the ICC will deter crimes by its very presence is still, and for the time being, more an article of faith than a fact. When someone is ready to kill millions to achieve his goals, it is unlikely that he will balk at the possibility that one day he might end up in a clean and air-conditioned jail in The Hague. But his subordinates might.

[69] For an attempt in this direction see, Sutter, D., *The Deterrent Effects of International Criminal Courts* (Saarbruecken papers...)

In the end, the $ 363 million the world spent around the year 2003 to have an array of international criminal bodies in place is probably the price to be paid to lessen our guilty feelings towards the hundreds of thousands of victims of those massacres, and provide those who have lost all with a modicum of justice.

Assessment

By any standard, the cost of fully international criminal courts and tribunals is considerable. To date, the ICTY and ICTR have cost UN members a total of $ 1.3 billion ($ 728.8 million for ICTY and $ 581 million for ICTR). Provided the ICTY and ICTR complete their work by the current expected date of 2010–11 their total cost over 17–18 years of life will probably top at least $ 2.5 billion ($ 1.5 billion for ICTY and $ 1 billion for the ICTR). Moreover, if the ICC starts operating, trials are being held and people are detained, it will likely do so at the beat of at least $ 100 million a year, and probably significantly more than that.

These figures make more than one State balk at the prospect of a proliferation of similar bodies, and unfortunately cost-related issues by and large shape the way in which the international criminal regime is evolving. This issue will only intensify. Currently, an internationalized criminal tribunal to try Khmer Rouge leaders is in the making. Add that and there will be for sometime at least seven or eight international criminal bodies. Judging from these numbers, one could conclude that similar judicial bodies are now considered fundamental components of the international community's efforts to fight against impunity, secure international peace and security, and contribute to the processes of national reconciliation. That might reflect lofty aspirations, but the hard-boiled reality is that each of those has its own budget, and all draw from the same pockets.

Already financial commitment to the cause of international criminal justice seems to be withering. While the costs of the ICTY and ICTR are incorporated in the budget of the UN and therefore supported by all the UN member States according to a capacity-to-pay principle, the more recent tribunals have increasingly become reliant, in part or in entirety, on the goodwill of a few. Voluntary contributions raise serious questions regarding the viability of those bodies, their perceived independence, impartiality and, ultimately, their public nature.

When confronted with new and old situations calling for justice, instead of creating fully international criminal bodies à-la the ICTY and ICTR, new, and admittedly cheaper, arrangements have been devised. Judging from their low operational costs which are a fraction of that of their predecessors and their largely comparable number of indictments and judgments, one could assume internationalized bodies are extremely efficient organizations.

Unfortunately their savings are made at the expense of the most vulnerable: the defendants and the victims of their crimes. A few examples will suffice. The Serious Crimes Panel in East Timor has been faced with an extreme lack of resources. Judges have little or no instruments to do their work, such as office space, computers, access to internet research facilities, books, libraries, clerks and administrative support. Judgments are not always published or translated. There is also an acute lack of defense lawyers. Similarly, the legal and administrative support for the international panels in Kosovo is inadequate, which leads to complications and delays in their work. Support staff for international judges and prosecutors is lacking. As in East Timor, the UNMIK budget does not cover costs related to defense counsel. It is amazingly left to the local (Kosovan) budget to pay for it. Perhaps it is because of the outcry that this has caused that the UN has decided to cover the costs related to remuneration of defense counsel in the Extraordinary Chambers in Cambodia (if and when they become reality).

Other financial aspects of the internationalized tribunals are also problematic. The international judges of the internationalized tribunals are paid less than their colleagues serving at other international courts, which in part explains some of the difficulties in recruiting qualified judges to these tribunals. Short-term contracts and the financial instability of the institutions they serve makes recruitment even more difficult. This has resulted in a lack of judges and high turnover leading to delayed proceedings, delayed justice, and ultimately higher costs. Moreover, national judges sitting on the same panels as international judges do not necessarily enjoy equal treatment as their counterparts. For instance, the cost of a national judge on the Serious Crimes Panel in East Timor was $ 4332 in 2001, while the cost of the two international judges combined was $ 213 000. The same policy was adopted in Kosovo, while the Special Court in Sierra Leone chose to pay all its judges the same salary.

The Serious Crimes Panels in East Timor and the international panels in Kosovo have been integrated into the national judicial system of the respective countries, which at the time either did not exist or was in total disarray. This has had a severe impact on the funding and operating of these tribunals. Even when they have their own administrative system, as in the case of the Special Court of Sierra Leone, the lack of transparency in financial matters is troublesome.

Victims are also treated very poorly. While fully international criminal bodies are taking bold steps forward by acknowledging the right of victims to receive reparations including compensation, internationalized bodies have made a leap back. None of the internationalized tribunals provide reparations to victims. The Serious Crimes Panels in East Timor are to have a trust fund for victims funded by forfeiture collected from the convicted persons, but it has never been established. Similarly, in the case of Sierra Leone, a special

fund for war victims is contemplated in the Lomè Peace Accord, but that fund has similarly never been established.

Cost-efficiency is something that should always be sought, but criminal justice has never been done on a shoestring.

2 Conclusions

The sum of the most recent budgets of the eleven judicial bodies considered in this study is around $ 420 million. More than three-fourths of that is spent on international criminal justice.

Is international justice expensive or cheap? While these words are nowhere to be found in the dictionary of economics, they surely have great weight in the world of politics. They imply comparisons. They imply answering the question: what value do we attach to the goods produced by these bodies as contrasted to other goods that could have been produced with the same amount of money? One can compare that figure to a billionaire's own assets, those of a big philanthropy, like the Ford Foundation, the budget of the New York Police Department, the cost of the Iraq War, or that of even just one fighter jet. Very likely it is going to be just a fraction of each of those. One can compare it to vaccinating one child, or saving one species from extinction, and probably you will be able to conclude that with that money you could have vaccinated millions of children and saved hundreds of species.

Or, more to the point, you can compare it to the cost of several high profile trials and investigations. For instance, the final bill for the Lockerbie trial (two suspects and the trial lasted for one year) is believed to be around $ 80 million. The Oklahoma City bombing investigation, and subsequent trial lasting two years, cost US taxpayers $ 82.5 million. The cost of the Whitewater and Monica Lewinsky investigations reached $ 62.5 million over five years. The four-year investigation by the FBI and National Transportation Safety Board into the crash of TWA Flight 800 cost $ 33 million and the cost of the 31-month investigation into the Olympic Park bombing in Atlanta was $ 24.6 million. The cost of guaranteeing the security of the judges who will have to try Saddam Hussein has been recently estimated to $ 50 million. The figure of the trial costs will likely be much higher.

These figures tell it all and nothing at the same time. Whether the international judiciary is cheap or expensive is not the real issue. The question is what we buy with that money, whether the quantity and quality of the goods in question (judicial bodies and international justice) is what we need, and whether we are allocating the resources necessary to achieve the goals we seem to have given ourselves by creating international courts and tribunals in the first place.

What $ 420 million a year buys is an array of institutions and procedures that, on the whole, provide unique international public goods: peaceful alternatives to the use of force or diplomatic coercion to settle disputes between states; greater implementation of international law towards the building of the rule of law on a global scale; and closing the shameful impunity gap that allows far too many dictators, criminals, and thugs of all sorts to get away with war crimes and crimes against humanity. In the end, these bodies are probably nothing but the foundations of a coherent international order based on justice; an order where all participants (being either sovereign States, individuals, multinational corporations, or other bodies) can be held accountable for their actions or seek redress through an impartial, independent, objective and law-based body; a move away from a world where only States count and the mighty rule, in favor of an order where certain fundamental common values are shared, protected and enforceable by all members of a wide society, composed by States, International Organizations and individuals in all their legal incarnations.

Whether the quantity of the goods in question is what we need or, to put it in other words, whether there are enough international judicial bodies, and whether they are used as much as they should be, is a question that cannot be answered in the abstract. As long as international courts and tribunals of all sorts keep on being established it is evident that there is at least a perceived need for more of them. Growth can also be due to dissatisfaction with existing bodies and the need to create alternatives to those. As long as the number of cases decided every year by the components of the international judicial constellation keeps on increasing, it is a signal that international justice is a good in demand, and that this demand needs to be satisfied.

The question of whether we are allocating the resources necessary to achieve the goals we seem to have given ourselves by creating international courts and tribunals in the first place is a much less subjective one. It boils down to determining whether current levels and means of financing are adequate to ensure international judicial bodies do their job properly.

The impact of scarce and unreliable financing

In the long run and in aggregate, international judicial bodies are probably given what they need in terms of financing to accomplish their missions. Evidence suggests that when the caseload of a body increases, sooner or later the amount of resources allocated to that body is also increased, although there does not seem to be a linear correlation between the two. To the extent that judicial bodies are actually used, they will be eventually allocated resources, albeit often strictly the minimum, to handle all the cases submitted to them. If resources are cut, it would suggest that this is the consequence rather than the cause of the reduced demand of their services. Yet, in the short and medium term, while politics do their workings and resources are mustered,

there might be a significant discrepancy between what a judicial body needs and the resources given to it.

There is a fundamental difference between international criminal bodies and the other non-criminal judicial bodies. The mission of the former is broad (eg prosecuting those most responsible for crimes in a given region during a given time) and allows for a considerable margin of leeway in how to achieve it. That of the latter group is, however, to decide upon each and every case submitted to them. If the case, or the request for an opinion, is admissible they have no leeway not to decide the matter. In other words, the source of cases of criminal bodies is mostly endogenous (it is the Prosecutor, an organ of the Court, that decides which and how many people to indict and bring to trial), while the source of cases of non-criminal bodies is always exogenous (those entities that have standing ultimately decide how many cases are submitted). Thus, insufficient financing affects the bodies of the two groups slightly differently.

In the cases of non-criminal bodies scarce financing results, first of all, in delays. As there are only so many cases a court can handle with the resources it is given, if the number of submitted cases increases and funding does not, the result is backlog. However, judges might be under the combined pressure of stingy states and the need to justify the meager resources they are given by handling more cases thrown at them. Does this lead to flawed settlements? In a word, might poor courts ultimately provide poor judgments? That is something that does not appear to be the case, but there is no evidence for the contrary either.

In criminal bodies it is the Prosecutor who decides which and how many cases to bring to trial, but even this decision has to be taken within the confines of the Court's overall budget. Thus, in criminal bodies tight budgets mean, firstly, that the Prosecutor will have to make difficult choices between investigations, which could raise serious questions about his or her perceived independence and the integrity of the court itself. Second, it delays investigations and arrests and causes interruptions in trial proceedings. Yet, when the budget gets tight it is usually those who cannot complain who are the first to pay the price, namely the defendants and victims. Delays jeopardize the defendant's fundamental human right to a fair and speedy trial. Victim and witness protection could also be jeopardized and they cannot receive assistance or compensation for the abuses they have suffered.

Both in the case of criminal and non-criminal judicial bodies, when there are budget squeezes the first activities to be reduced are information to the public and their promotion and cooperation with other bodies. Public awareness of the existence of reliable avenues beyond domestic courts and of what they do is essential if their role is to be preserved. In the internet age this is all the more crucial.

In sum, as the President of the International Court of Justice told the UN General of Assembly in 2000, "...an international judicial body is not able to

adjust its programs to available resources – the process has to be the other way around."[70] Resources must be adjusted to meet the legitimate expectations of those who seek justice. According to the United Nations Basic Principles on the Independence of the Judiciary adequate and reliable funding is a cornerstone for the independence of a judiciary: 'It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions'.[71]

How judicial bodies are currently financed: Pros and cons.

Obligatory contributions

Courts of law, as a matter of constitutional principle, are financed by taxation. This is dictated by economics and justice. They are public goods and produce a public good. If market forces alone were left to determine whether these goods are produced the result would be that they would not. The free-rider problem and the prisoners dilemma make it so that, if left to their own devices, individuals would never produce them. The result would be rational for the individual but suboptimal for the community as a whole.

At a national level, public authorities attempt to obviate these market failures by intervening and producing the good in question, and to do so they raise taxes. Funding by taxation of the community at large is not only necessary to address this "market failure", but it is also the only legitimate way to finance them as it vests every individual with their up-keep.

At the international level, the same reasoning can be largely applied. States cooperate to create international courts and tribunals. When they do not, or chose not to, or in alternative to these bodies, judicial entrepreneurs can step in (ie arbitration) to fill the void. It remains to be seen what system of providing for international justice is more efficient (public v. private). Typically, international judicial bodies are financed by obligatory contributions of those States that have either ratified the judicial body's statute or are members of the international organization of which the judicial body is an organ. Ultimately the fact that contributions to budgets are shared by a large number of states might enhance the independence of the court.[72]

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[70] Address by the HE Judge Gilbert Guillaume, President of the International Court of Justice, to the UN General Assembly (26 October 2000), A/55/PV.41.

[71] The principles were adopted by the United Nations Congress on the Prevention of Crime and Treatment of Offenders, and endorsed by the UN General Assembly; see UNGA Res 40/32 (29 November 1985) and 40/146 (13 December 1985) principles 7 and 11. The principles were drafted for national courts, but can be applied, mutatis mutandis, to international judicial bodies as well.

[72] Of course, the degree of independence of a court is determined by a much larger set of factors. On this issue, see Posner, E., *The Politics of the International Court of Justice* , Saarbruecken papers.

Making financing of international judicial bodies part of the financing of a larger international organization, as is the case with the ICJ, the ECHR and the IACHR has clear advantages. First of all it provides a more secure basis of funding. Second it is likely to have a larger funding basis than it would have had if only those States that have accepted that body's jurisdiction would contribute to its expenses. Finally, a judicial body is useful as long as it is used, and it is more likely to be used if States have a continuing responsibility for meeting its financial needs and the fresh interest which a discharge of responsibility is likely to engender.

However, divorcing the financing of judicial bodies from that of the organizations they might be attached to has beneficial effects because it isolates them from larger struggles marring the organization. Arrears to the budget of the organization will not turn into arrears to the judicial body's budget. Arrears owed by the US to the UN in the late 1990s, and whose payment was blocked by squabbling in Capitol Hill between pro-lifers and pro-choicers, indirectly affected the ICJ budget as well. The fact that the IACHR budget (and for that matter that of the IA Commission) is part of the budget of the OAS has double asphyxiating effects. First, it makes it difficult for the inter-American human rights protection system budget to grow because doing so, within the given limits, would reduce allocations to other programs. Second, it makes it hostage to larger political problems that prevent the growth of the budget of the OAS itself. The ITLOS and the ICC are not financed through the UN budget exactly because of US opposition to those bodies, and it could not be otherwise.

As a matter of fact, funding by taxation of the membership (ie obligatory contributions) is no guarantee for steady and reliable income. While under international law payment of assessed contributions is mandatory,[73] the history of the many international organizations teaches that issues of non-payment are not moot. Arrears are a problem in most judicial bodies considered in this study, and payments due to the organization and those due to the judicial body cannot be divorced in so far as the budgets of the latter are part of the former.

Article 19 of the United Nations Charter and Article 112.8 of the Rome Statute of the ICC address the defaults on assessed contributions. Both articles make a member State lose its voting right if the amount of its arrears equals or exceeds the amount of contributions due for two full years. In the OAS there is no sanction for members with overdue obligations, and at times arrears of the organization have run as high as 25%. A more aggressive

[73] The International Court of Justice stressed in its Advisory Opinion on Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), that the power to apportion expenses among parties also creates the obligation of each state to bear that part of the expenses apportioned to it: *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion [1962].

strategy to ensure prompt payment should be considered. Penalties, when available, should be firmly enforced. In addition, incentives and disincentives could be introduced, such as interest payments, limiting the recruitment of staff from States in arrear, or restricted procurement opportunities. Then again, non-payment of dues is a greater problem that transcends that of the funding of judicial bodies and goes to the core of international cooperation and sovereignty. Currently there are far too many States that seem to be at odds with the idea of sharing sovereignty, implicit in the concept of international cooperation, and reserve to themselves the right to suspend payments that are legally due to organizations of which they are members, or import into the organization national political squabbles over their own national budgets.

Regardless of whether the budget of the judicial body is part of the budget of a larger international organization or is self-standing, the total needs to be apportioned to the various members. Directly or indirectly, all expenses of the bodies considered in this study are allocated on the basis of scales of assessment. They are either designed to reflect a capacity to pay principle, or the special interests and duties of certain states. Each has different floors and ceilings.

Allocation of expenses on the basis of scales of assessment reflects redistributive and fairness concerns. Because rich states pay by far the largest share, for any given body the poorest countries' bill is minuscule, reaching a couple of thousands of dollars per year at most. To them courts and tribunals are a highly subsidized good, and a good for which they are showing a great taste.

However, scales of assessment prevent States that are particularly willing to fund a given judicial body above and beyond their contributions to do so. This effectively means that judicial bodies can be made hostage to a few states that are particularly ill-disposed towards them and their functions. Voluntary and supplementary funds are usually a way to funnel funds external to the main operating budget, but they have minimal impact exactly because they cannot touch upon the body's core expenses.

An alternative to scales of assessment is to resort to classes of contribution, where each State chooses which class to be in. This used to be the way in which the Permanent Court of Arbitration was funded until the end of World War I. This is the way the World Intellectual Property Organization is financed. There are 14 different classes. The highest corresponds to 25 units of contribution and the smallest 1/32 of a unit. The US, France, the UK, Japan and Germany have chosen the top class. No one has selected the second, and the other large economies are in the third and fourth classes.

Admittedly, it is a problematic way to apportion the expenses of an international organization. States can choose a low class in order to save money, and this can give rise to fluctuations and unpredictability over the long term. It

does not work in large and expensive organizations where States will not feel ashamed of picking a lower class, but it might work in the case of an international judicial body, particularly a criminal one, where appearing as an enthusiastic supporter of the endeavor might be more important than making savings.

Voluntary contributions

The alternative to obligatory contributions is voluntary funding. For the reasons detailed above this is a second best solution and it is not surprising that it is extremely rare in the world of international justice. The plight of the Special Court for Sierra Leone exemplifies the pros and cons of voluntary contributions.

Probably the Special Court could not have been established on a compulsory financial basis. When discussing the setting up of the Special Court the experience of the ICTR and ICTY, with their large and rapidly growing budgets, made several key States cringe at the possibility of establishing another body of the same budgetary proportions.

Funding by voluntary contributions was necessary to get the whole project off the ground, but two years into its operation it has become clear that the goodwill of some States is neither a viable nor sustainable basis for its continued functioning. In March 2004 the UN Secretary-General wrote to the Security Council Presidents that the Court faced a budget gap of $ 20 to $ 22 million for its third year of operations (July 2004 – June 2005), and that covering the shortfall by way of assessed contributions by all UN members was the only viable alternative.

The theoretical advantage of voluntary funding is that it correlates financial support to political support. In a centralized budget States will find one or more objectionable items that might make the judicial body hostage. However, voluntary funding has fragmenting effects on the organization. The voluntary character keeps out indifferent states. Voluntary contributions are by their nature highly volatile and unreliable. They run fast and easily into donor fatigue. They cannot provide long-term and secure funding which is fundamental for the establishment and operation of any international tribunal For these reasons, voluntary funding should be employed only for auxiliary programs (eg trust funds to subsidize litigation costs, or assistance to victims).

Alternatives to assessed contributions and voluntary funding

All international judicial bodies, past and present, are financed by way of States' contributions, obligatory or, rarely, voluntary. As far as the bulk of expenses of the judicial body is concerned, there is no real and desirable alternative to State contributions. From time to time alternative schemes which would give international organizations their own financial resources (eg Tobin tax, lotteries, giving the option to individuals to give a percentage of

their taxes to this or that body, interests accruing to various accounts, etc.) are proposed but are very rarely implemented. In the world of international organizations there are very few that are funded by resources other than States' contributions (eg the EU/EC or WIPO), and even in those cases they are independently financed only in part. States loath relinquishing ultimate control of organizations to which they might have given significant powers or surrendered aspects of their sovereignty.

Similar schemes basically stem from two ideas: first the idea that international judicial bodies cannot really be independent so long as they are sustained by governments' contributions, and second the fact that governments, in general, maintain judicial bodies on a tight budget for which they have to fight tooth and nail.

The first concern is well-meant, though ultimately ill-founded. While it is governments who pay the piper, they do not necessarily call the tune. That fact that human rights judicial bodies are financed by governments does not prevent judges of those bodies from doing their work in full independence. Ultimately, because budgets are shared over a large number of States, no one of them, no matter how powerful, should be able to influence the bench decisively. International courts and tribunals do, from time to time, take decisions that greatly displease governments, and sometimes very influential ones. There is no evidence that budgetary concerns decisively influence international judicial decision-making.

However, as it was said, international judicial bodies, at least in the short-medium run, might be underfunded. If there is no real or desirable alternative to funding by States, then there are some possible alternatives, partial or complete, to obligatory or voluntary funding that might go a long way towards offsetting these problems.

One possibility would be the creation of an endowment or some sort of guarantee, or even a mere working capital fund. This is a step which would go a long way towards addressing the concerns about the ultimate independence of international judicial bodies, ensure long-term viability, and allow judicial bodies much more budgetary and operational flexibility than they currently enjoy. It would save member States endless negotiating time, too.

Considering that the budget of the largest international criminal bodies, like the ICTY, ICTR and ICC, hovers around $ 100 million per year, an endowment for these bodies would be difficult to materialize. The amounts that would need to be made available would approximate the whole yearly budget of the UN itself. Even that would be within easy reach of the richest States, but it is politically unthinkable.

An endowment might make much sense not only for those bodies with a small budget which are seriously hampered by financial constraints, like the IACHR, but also for the ICJ and ITLOS. Ten million dollars or less would enable the IACHR to offset any OAS budgetary crisis and stalemate for a

long time. That would mean less than six million for the US and the remaining four to be divided amongst the other 34 OAS members.

The most recent addition to the constellation of international judicial bodies, the Caribbean Court of Justice, is to be financed exactly according to this scheme. The Caribbean Development Bank has been mandated by the Heads of Government of member States of the Caribbean Community (CARICOM) to raise on the international market $ 100 million to establish a Trust Fund. The Trust Fund will finance operations of the Court under the scrutiny of a Board of Trustees which, interestingly, is composed mostly of people who are not governmental representatives.[74] The Caribbean Development Bank will lend the money raised to CARICOM member States that are party to the Court's Statute to meet their financial obligations to the Court in a one-time payment. The burden is divided amongst Caribbean States according to an agreed scale of assessment. The largest contributors are Trinidad and Tobago (29.73%), Jamaica (27.09%), and Barbados (12.77%). The other eleven members share the remaining 30%. The smallest share is that of Montserrat (0.42%).

Pay-per-use schemes might be an alternative to obligatory and voluntary contributions, but only for some specific kind of bodies. Indeed, they do not make sense in the case of criminal bodies, nor in those like the ICJ, ITLOS and WTO dispute settlement mechanism for they would deter use and penalize poorer countries.

However, in the case of international judicial bodies whose goal is ensuring the implementation of law rather than settling disputes, like human rights bodies or in certain cases the judicial bodies of regional economic integration organizations, it would make sense to introduce a "defendant pays" system. It would foster fairness and efficiency.

The financial onus of the ECHR budget could be made to weigh more heavily on those States whose practices are most frequently questioned. To illustrate, currently France, Germany, Italy, the UK, and Russia pay 12.39% each of the ECHR budget. Yet, Italy is by far the State which has been ruled against the most in 2003 (106 violations), followed at a distance by Turkey and France (76), Poland (44), Romania (24) and Greece (23). If the scale of assessment of the Court was solely based on violations, in 2004 Italy should pay 20.3% (instead of 12.39%) of the budget, France and Turkey 14.5%

[74] Namely, the CARICOM Secretary-General, the Vice-Chancellor of the University of the West Indies; the President of the Insurance Association of the Caribbean; the Chairman of the Association of Indigenous Banks of the Caribbean; The President of the Caribbean Institute of Chartered Accountants; the President of the Organization of Commonwealth Caribbean Bar Associations; the Chairman of the Conference of Heads of the Judiciary of Member States of the Caribbean Community; the President of the Caribbean Association of Industry and Commerce; and the President of the Caribbean Congress of Labour.

(instead of 12.39% and 2.94% respectively), Poland 8.44% (instead of 2.23%), Romania 4.6% (instead of 0.78%) and Greece 4.4% (instead of 1.26%). Germany, conversely, would pay 1.9% instead of 12.39%. By linking contributions to the number of violations that were subject to a Court's judgment in the previous year, greater efficiency would be achieved as this would internalize negative externalities that more law-abiding States suffer. This would also create an inducement for some repeated violators, like Italy, which get sanctioned repeatedly for violation of the same article (Art. 6 on fair trial and due process), to finally reform their legal system and bring it in line with international standards.

Linking could be total or partial, leaving room for redistributive fairness and practicability considerations. For instance, in the case of the Inter-American Court it would be difficult to rely solely on a similarly modified scale of assessment as, of the top five contributors, only two are subject to the Court's jurisdiction and, for that matter, appear quite infrequently. Still, frequent violators like Peru could and should be assessed more.

The same reasoning is largely valid in the case of courts of regional economic integration agreements. Those States that lag behind in the implementation of laws, regulations or directives of the organization and thus are called to defend their non-compliance before the organization's judicial body more often should bear a greater share of the Court's budget than that of more law-abiding members.

Litigation costs

This study considered only the budgets of the various judicial bodies and their financing. It expressly excluded the question of the cost and financing of litigation. In international criminal bodies, these costs are built into the Court's budget anyway. Almost invariably, defendants are assigned defense counsel by the Court who are paid out of the Court's budget. The budget of the Office of the Prosecutor is part of the budget of the Court by definition.

In the case of non-criminal tribunals, costs are typically borne solely by the parties appearing before the various bodies. In some instances, judges might have the power to allocate litigation costs to the defeated party.

When deciding whether to submit a case to an international jurisdiction, litigation costs are, undoubtedly, one of the elements to be considered. Yet it is not the only one, nor necessarily the most important. Other factors might be the stakes (the higher the political stakes the less likely litigation is); the chances of success based on the assessment of the law (which in turn depends on the relative clarity/obscurity of the norms); how long the judicial body will take to decide the case (and this in turn depends on the number of cases pending at any given time before the body and the body's procedures and resources, both material and financial); and availability of remedies and enforcement procedures.

How much it costs in the end to litigate a case is usually not made public. The final figure might be hidden in the folds of the budget of a country's ministry of justice or foreign affairs and, if private lawyers are retained, will remain hearsay. It seems that litigating an average international case that makes it to a final judgment might cost millions of US dollars. But even if the real figure were a multiple of that, that would not help answer the question of how much litigation costs count in the decision whether to go to court. There is no way of knowing in the abstract at which point the value the litigating State attributes to the issues at stake in the case is greater or less than the resources that the litigating State will have to field. Nor is there any evidence that any case has not been litigated before an international judicial body only because of cost-related considerations.

Be that as it may, trying to determine how much it costs to litigate a case internationally might not be an idle exercise. Indeed, effective participation in international proceedings and the ability to take advantage of the possibilities presented by an increasing number of fora is generally in the interests of the international community as a whole. If the resources available to any given State were to be insufficient to utilize the available judicial bodies efficiently, then there would be a case for a public subsidy. Of course, litigation *per se* should not be encouraged. But if there is to be more international litigation (which does not imply more litigiousness), then it is in everyone's interest that it be conducted properly and that those disadvantaged be presented with every opportunity to participate fully and effectively.

There are several instances of subsidized litigation in international judicial bodies. This study has illustrated some, like the trust funds created for the ICJ and ITLOS. The ECHR 2004 budget has an appropriation of € 200 000 (about $ 256 000) for "legal aid". The issue of legal aid in an international context, however, has not yet been fully explored and some additional study should be dedicated to it. The optimal quantum of the international community's intervention inevitably depends on the capacity of calculating the gap to be filled, and in this domain how much "public subsidy" is made available and for which States is determined more on the basis of petitions of principle rather than accurate study.

At least as far as the ICJ and ITLOS is concerned, subsidizing litigation costs is not ideal and has proven to have little or no effect on the decision of States to submit cases, nor on the modality to do so, not even in the cases of the poorest countries. Funds could be used much more efficiently by helping to fill the human resources gap that often prevents many actors from taking full advantage of the opportunities that the expanding international judiciary offers.[75]

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[75] Romano, C., "International Justice and Developing Countries (cont.): A Qualitative Analysis", *Law and Practice of International Courts and Tribunals*, Vol. 1, No. 3, 2002, pp. 539–611.

A lack of substantive legal expertise, and in particular on litigation before international fora, can have multiple negative consequences both for the actors concerned and for the international judiciary as a whole. For instance, a government is unlikely to commence legal proceedings or respond to proceedings initiated by others if it is unaware of its rights or does not appreciate that its rights or interests are being threatened in some way. Moreover, lack of adequate expertise might cause cluttering of the international judicial system in two ways. First, without adequate capacity to judge the relative strength or weakness of a case, cases that could be handled by plain alternative dispute resolution might end up locked in lengthy judicial proceedings. Second, cases might be filed even when the judicial body manifestly lacks jurisdiction thus unnecessarily taking up the limited time of the bench. All these problems are compounded, as is occurring increasingly, by the choice of possible fora where cases can be brought. Selecting the right forum can have large implications both for the particular dispute at hand and for the development of international law as a whole.

Finally, for developing countries which do not have many staff in the national administration to litigate cases, greater training could help them reduce their dependency on ad hoc foreign lawyers retained from the biggest law firms, a financially and politically taxing exercise.

State and non-governmental donors should consider joining forces to create mixed (governmental-private) institutions to provide pro bono legal services and training to those who would most benefit from it. To be members, developing countries should pay a fee, minimal enough to not be an obstacle, but substantial enough to show genuine commitment, while philanthropies could contribute, indicating to whom they desire to give access. Preferential access should be given to entities (States or individuals, according to the forum in question) that have never before (or only exceptionally) engaged in litigation, possibly in the form of priority and the waiver of fees.

Although it is still too early to judge its success, the WTO system is headed in the right direction. The accent is put on training and on *pro bono* lawyering, not on subsidizing litigation.

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