The Law and Practice of International Courts and Tribunals **4**: 281–328, 2005

THE PRICE OF INTERNATIONAL JUSTICE

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I. INTRODUCTION

Currently, about $420 million a year is spent on international courts and tribunals. About three fourths of this sum is for international criminal bodies alone. Of those $420 million, about $71 million is paid by the U.S. and $185 by the members of the European Union.[1]

In the past fifteen years, the number of international courts and tribunals has grown enormously, up to the point that currently about two dozen international courts and tribunals can be counted, operating either at a global or a regional level. This study focuses on eleven of these. Namely:

- International Court of Justice (ICJ)
- International Tribunal for the Law of the Sea (ITLOS)
- World Trade Organization Dispute Settlement System (WTO)
- European Court of Human Rights (ECHR)
- Inter-American Court of Human Rights (IACHR)
- 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
- Internationalized Panels in the Courts of Kosovo

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[1] On 1 May 2004, the EU welcomed 10 new members, swelling its ranks to 25 members. However, as the ten new States combined increase the EU's GDP only 9.1%, their contribution to the budgets of the courts and tribunals considered in this study is secondary, thus figures pre-enlargement are more significant and will be used.

Of the constantly expanding array of international judicial and quasi-judicial bodies, the selected group includes all major bodies, and in particular those whose public nature is most evident.[2] These are the courts and tribunals whose work often has consequences that extend beyond the narrow confines of the given dispute and the parties to the case, and whose decisions resonate throughout international law and politics. Arbitral tribunals, which administer *à la carte* justice and whose judgments can be kept secret by the parties, will not be examined here. 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, while they carry out important public functions within the confines of the respective political and/or economic

[2] There is a further reason for focusing on this specific group, and this has to do with the different degrees of public/club nature of international judicial bodies.

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 peacekeeping 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 one person/individual 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.

Public goods are said to be *pure* when they are absolutely non-rivalrous and non-excludable. In practice, most public goods are *impure* as to some degree they fall short of being either absolutely non-rivalrous or non-excludable or both. *Club goods* are goods from whose benefits anyone else but the producers can be excluded, while goods that mix both public and club qualities are dubbed *joint products*.

The question 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 warrants a separate study and will therefore only be marginally touched upon here.

This paper focuses only on bodies whose public nature (as contrasted to the club nature of many of the excluded bodies) is most evident.

integration areas, have a lesser impact on the development of international law at large.

International justice is a relatively new international public good and, judging from the growing constellation of bodies that are established to provide it and the increasing use that is being made of them, it is one that is in great demand. Yet, what does a little more than $400 million a year actually buy? The answer is both straightforward and complex.

In short, it buys an array of institutions and procedures that, on the whole, provide unique international public goods such as 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 kinds to get away with war crimes and crimes against humanity.

However, on a deeper level, these bodies might be 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. Thus conceptualized, they might be depicted as a move away from a world where only States count and the mighty rule to an order where certain fundamental common values are shared, protected and enforceable by all members of a wider society consisting of States, International Organizations and individuals in all their legal incarnations.

This study aims to diagnose the financial health of these eleven bodies, focusing on the most urgent and significant difficulties faced by each to determine whether governments are allocating the necessary resources to ensure they are able to do their job properly and to determine where action needs to be taken. A series of more general policy-making considerations and recommendations aimed at helping international judicial bodies carry out their assigned mission will follow.

Three appended charts provide the reader with basic data and figures:

- 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.
- Chart 3: How courts and tribunals are financed.

II. THE INTERNATIONAL COURT OF JUSTICE

Diagnosis: Growing gap between needed resources and allocated resources

The main problem of the ICJ is probably that in the past decade its budget has not grown as much as its caseload, to the point that it can be said that the World Court is currently underfunded.

Since, of the bodies considered in this paper, the ICJ is the one with the longest continuous history, it is interesting to look at its budgets since inception. The first annual budget of the ICJ, in 1946, was $477,724.[3] Adjusted by the purchase power of the US dollar in 2003 this figure corresponds to $4,512,011,[4] 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 caseload. Budget growth has actually lagged behind. The current caseload of the Court, with a dozen cases 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 twice as much.[5]

In the past decade, the ICJ has faced a rising tide in workload, mainly generated by the developing and former communist countries, and the trend is still rising. In the 1990s, 34 cases involving almost 40 different States and three advisory opinions were submitted to the Court.

Since the early nineties, each and every President of the ICJ has opened the annual report to the UN General Assembly with an urgent plea for more funding. In 2000 then President 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 principal judicial organ of the United Nations, is to die a slow death or whether you will give it the wherewithal to live."[6]

The General Assembly heeded the call and the budget was increased from $10,218,000 in 1999 to $12,961,300 in 2003 (in real terms this is an

[3] ICJ, *ICJ Yearbook, 1946–1947*. The ICJ switched to bi-annual budgets in 1976.

[4] Throughout the paper the resources of the Economic History Services website have been used to convert sums into 2003 USD: http://www.eh.net/hmit/.

[5] Throughout the 1960s the ICJ had, at any given time, no more than two contentious cases or requests for advisory opinions pending.

[6] A/55/PV.41.

increase of $1,673,078 or about 16%). Yet this happened only after hard bargaining and the increase was still below the Court's wishes. While the ICJ no longer faces the dramatic situation of 1999 when, due to a cluster of cases brought by Yugoslavia against 10 NATO members caused by the bombing in the Kosovo campaign it was hit (no pun intended) with the highest number of new cases ever, it is still fair to say that it has to fight tooth and nail for every single dollar. In the past few years, it has concentrated its energies in trying to convince the UN to provide the 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 carries out important functions, many of which are unique. First, it provides a forum for the settlement of all kinds of disputes between States. Typically the issues that crowd the Court's docket are the use of force, diplomatic protection and boundary delimitation. In the past decade the ICJ has been asked to render judgments and opinions on aspects of the war in the former Yugoslavia and the Congo, the Lockerbie bombing and the testing, threat or use of nuclear weapons, to name a few.

Whether disputes are actually settled as a result of litigation in court is something that cannot be guaranteed. That depends on many factors that are beyond the Court's control. Even so, the Court has undeniably contributed, and continues to contribute, to the calming of severely compromised situations and avoid the degeneration of specific problems into larger political issues.

Certainly a few States, and influential ones for that matter, have snubbed the ICJ, or refused to cooperate with it, or have taken offence at its judgments. But the great majority of them do respect its authority. Even the U.S., despite all the clamor of the *Nicaragua* case, has appeared before the Court several times since without much fuss, and in disputes with bitter enemies like Iran or Libya or allies like Canada and Italy.

Second, the ICJ 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 for its own personnel, the rights and obligations of member States, the interpretation of agreements between the organization and member States, the legality of the threat or use of nuclear weapons, and the legality of the wall currently being constructed in occupied Palestine. Most of the time the UN and its organs have made good use of the Court's

advice. No other organ or institution could do what the ICJ does in this field.

Finally, since the ICJ is the principal judicial organ of the primary international organization, and the only one with universal membership, the words of the Court's judges 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. Still, judgments of the ICJ are looked at as particularly momentous interpretations and clarifications of international law. In this sense, the ICJ plays a pivotal role (some might even argue an excessive role considering its shortcomings and limitations) in the ascertainment, consolidation and progressive development of international law. While its judges might have been at times either too cautious or too proactive, its contribution to the ascertainment and formation of international law cannot be easily dismissed.

All in all, considering the services it has rendered, and still renders to the UN and international community at large, the price paid for having it does seem very reasonable. Clearly, the financial resources the World Court needs to fully carry out these unique functions are easily within reach of the UN and its member States. Keeping it on a tight budget looks increasingly like a poorly concealed attempt to influence it, rather than justified parsimony.

III. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Diagnosis: It is adequately financed but it is underutilized

For one bench overburdened there is another plainly underemployed. Currently the Tribunal 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.[7] Considering it has a budget that 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 bench of 21 judges to hear an occasional request for the release of a vessel is, admittedly, judicial overkill.

The ITLOS is underutilized more by design than because States snub it. The United Nations Convention on the Law of the Sea (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 it is also acephalous, or perhaps more correctly,

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

multi-cephalous like a hydra. By design it does not have a judicial body at its core that can authoritatively interpret its provisions, but rather an array of bodies, both 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 by default be 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. In the case of disputes, no State wished to be bound to any particular adjudicative body. Those were the years of the Cold War. Moreover, the opprobrium of the *South West Africa* cases was still very much present in the minds of too many States and, in particular, developing countries, and the ICJ was shunned. Few States favoured the idea of giving a permanent international judicial body any role whatsoever in international governance, least of all to an ICJ look-alike.

There are two niches in which ITLOS does not have significant competition. First, where the authorities of one State party to UNCLOS have detained a vessel flying the flag of another State party and it 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 ITLOS.[8] 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 the 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 on the constitution of one of the arbitral tribunals to which a dispute on UNCLOS might be submitted, the ITLOS can order provisional measures to ensure that the situation does not worsen before the case is heard.[9]

[8] Article 292 of UNCLOS.
[9] Article 290.2 of UNCLOS.

Although ITLOS is relatively young, having started operating only in late 1996, and its track record is still scarce, it looks like these ancillary but unique functions will be its main output for the time being.

To release the dispute settlement potential of the Tribunal, the UNCLOS will need to be amended so as to reposition the Tribunal at the center of the dispute settlement system. But this is a lengthy and politically arduous exercise. Yet there is something that can be done immediately and with few political implications. The Tribunal also needs to "market" itself better. To start with it could lend 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 UNCLOS, in which the Tribunal had been asked to order provisional measures, were held in Washington D.C. at the International Center for the Settlement of Investment Disputes and in The Hague at the Permanent Court of Arbitration.

Even though it is underemployed it could be argued that through its mere existence the Tribunal is still having beneficial effects on the overall international judicial system. For instance, in 2001, in the *LaGrand* case, the ICJ 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. Most commentators agree that this step was aimed at warding off the competition from ITLOS, whose interim measures are unambiguously binding. By finally putting an end to a long, but also unnecessary, debate, the ICJ has surely reinforced its authority and strengthened its hand with the parties. Like in every field, competition ultimately improves overall efficiency.

IV. WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT SYSTEM

Diagnosis: It is adequately financed but it requires structural adjustments to make it fairer and easier to use, especially by developing countries

The importance of the dispute settlement system of the WTO 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.

In the words of 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."[10]

Over nine years of existence, more than three hundred 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 Appellate Body reports. They involved goods as diverse as airplanes and brooms, cars and bananas, computers and underwear, footwear and gasoline, macaroni and genetically modified grains. Several of those disputes were worth billions of dollars and involved complex issues eventually affecting internationally tens of thousands of jobs, public health and the environment. The European Community, U.S. and Japan have been the most frequent users by far of the procedure (either as plaintiffs of defendants), but developing countries have also played a significant role, appearing in a number of disputes.

Although States have been, and at times are still, nervous about giving the last word of 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. Considering how little it costs, it is a real bargain.

Although the WTO dispute settlement system may seem to be adequately funded, it can be improved, but results on this front are far from satisfactory. The question of the reform of the system has been on the table for a decade, since 1994, with little result. More can be done, 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 in 2002. Other more structural adjustments to the dispute settlement machinery are needed, though. As long as the result of the procedure remains only an authorization to retaliate by imposing tariffs on the goods of the offender rather than monetary compensation, it is unlikely that developing countries will care to fully take on the trading giants.

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

V. EUROPEAN COURT OF HUMAN RIGHTS

Diagnosis: It is adequately financed and is properly maintained. But, to keep pace with the growing number of cases its budget will have to grow considerably, well beyond even the currently high levels

In many regards, the ECHR is a case apart from all other international judicial bodies. Its docket resembles more that of a domestic court 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 by a member State. Hence, the ECHR has about 800 million potential applicants (three times as much as the whole U.S. population).

In 2003, the Court received a deluge of applications (35,613). Of these, 27,281 were allocated to a decision-making body leading to 18,034 decisions and 703 judgments. This has not always been so. The floodgates were opened in 1998 when Protocol 11 to the European Convention gave individuals direct access to the Court, bypassing and eliminating the European Commission of Human Rights. In 1998, the number of cases filed was 5,981 (i.e. an increase of 456% in five years). In that same year the Court delivered 105 judgments. Five years later its output had grown by 669%.

European governments have shored up the resources needed to save the system from collapse. Compare the ECHR 1998 and 2004 budgets: Six years ago the budget was FRF 152,000,000 ($25,297,147). Today it is almost double at €39,190,600 ($50,063,647). Even when this figure is adjusted by the current high value of the Euro and inflation, it is still a remarkable increase.

ECHR's achievements have provided the best justification for making considerable sums available to it. The Court's case law has been exerting 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 ranking, and binding interpretations of it made by the ECHR have therefore huge and immediate impact. The jurisprudence of the ECHR has significantly influenced that of the UN human rights bodies as well as other regional systems. On issues like extradition, the death penalty and the definition of cruel and inhuman punishment even the U.S. Supreme Court has felt compelled to take note of the jurisprudence of the ECHR (if only to distance itself from it). The

ECHR may even have an as yet unacknowledged and perhaps unrecognized influence greater than that described here.

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 cases being filed and the judgments delivered, since 2001 the number of judgments from the Court 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. 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.

VI. INTER-AMERICAN COURT OF HUMAN RIGHTS

Diagnosis: It is asphyxiating and urgent measures are required to save it from collapse

While the ECHR is thriving, its American counterpart is on the brink of asphyxiation. The difference between the resources spent on the European and Inter-American systems for the enforcement of human rights is striking. Granted, the Council of Europe is a larger and richer regional international organization than the Organization of American States: The Council of Europe's 2004 budget is €180,500,000 ($230,155,550) while that of the OAS is $87,304,346. 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 Inter-American Court and Commission's budgets are combined).

Like the ECHR, in recent years the IACHR has seen its caseload increase significantly. Since 1998 the IACHR has delivered three 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 (average of 3.3 per year). This is 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, week-ends included). Part-time judges are usually resorted to in international courts that are either seldom used (like the ITLOS), or that are at the beginning of their life (like the ICC), but rarely in courts with a caseload comparable to that of the IACHR.

To deal with the surge in submissions and hearings the IA Court amended its rules of procedure in November 2003 to increase the length of sessions from two to four weeks each making it possible, in theory, for judges to spend twice as much time deciding cases than before. This has obvious repercussions on the budget.

If, since 1998, the IACHR has more than doubled its caseload, during the same period the budget of the Court has grown by only 26%, from $1,095,800 to $1,391,300, which, in real terms, means a meager increase of just $154,020 (14%).

The gap between needed resources and allocated resources has worryingly increased to the point of financial crisis. Since 2000 the Court has regularly been given less than it requested to carry out its mission (about 25% less). 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 it from financial breakdown.

Yet, the straw that broke the camel's back was the reform of the Court's rules of procedure to double the length of the sessions. The reform was done at the request of the OAS General Assembly. Recognizing the extra costs that this would have created, at the beginning of 2003 the Permanent Council of the OAS adopted a resolution (Res. 835) presented by 18 States, including all 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.

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

For 2004, to implement the new rules and allow for 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 on 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 [...]."[11]

In this situation, it is clear that the Court will not be able to implement the amendments to its rules of procedure and increase the length of the sessions. Even the current calendar is at risk, as the Court might simply have to cancel one of the four scheduled two-week sessions to remain 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."[12]

Admittedly the financial troubles of the Inter-American system of protection of human rights are 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 shrinkage when adjusted for inflation. The 2004 proposed budget requests an increase of 3%. Provided it is approved, it will barely offset inflation, rising health care costs, and other statutory requirements.

The problem is that the budget has become hostage to politics. Before 2002, the main blockage was believed to be the fact that arrears due to the OAS were so high that many countries that were up to date in their payments refused to consider an increase in the budget until the other members paid their arrears. With the United States repaying its arrears of approximately $20 million, this contention lost some force. Currently the total owed to the OAS by its members is $14,550,310 (about 18% of the OAS Regular Fund execution).[13] Some States, like Bolivia, Colombia, the

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

[12] Idem, para. 6.

[13] Argentina: $10,874,000, Barbados: $33,700, Bolivia: $218,947, Colombia: $291,556, Dominica: $4,700, Dom. Rep.: $1,293,233, Haiti: $124,975, Jamaica: $67,200, Nicaragua: $623,378, Paraguay: $369,261, Suriname: $260,800, Uruguay: $388,200.

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, at least in the immediate future.

Arrears aside, the main obstacle has become the incapacity of the OAS member States to reach an agreement on a new scale of assessment. The onus of the OAS budget is borne disproportionately by a few States. By far the greatest single contributor is the U.S., bearing alone more than half of the budget of the organization (59.47%). The next greatest contributors are Canada (12.36%), Brazil (8.55%), Mexico (6.08%) and Argentina (4.90%). Together, the top five contributors of the OAS bear 91.36% of the organization's budget. Considering the modest sums necessary to give the OAS and thus, the IACHR, some oxygen, the U.S. has offered to pick up the extra burden but many governments who think that Washington plays a too weighty role in the organization's finance and politics have refused this.

As long as the OAS is in a dire financial situation like this one 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 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.

Each and every one of the few dollars (and compared to the other judicial bodies it is only a few dollars) that are spent on the Inter-American Court is worth it. Until recently, most cases heard by the Court 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 on the question of forced disappearances in Honduras has proven to be one of the most cited and influential decisions both domestically and in other international systems, universal and regional, of any human rights tribunal. Although such extreme cases still find their way onto the Court's docket, it has recently 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.

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.

Considering the downright hostility towards the Court of certain governments subject to the judicial scrutiny of the Court, the record of compliance seems 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 fairly good considering the national standards of many of the countries in the region. In sum, the contribution of the Court to the advancement of human rights and democracy in the Americas cannot be easily dismissed.

The IACHR 2004 budget is $1,391,300. It is, by far, the cheapest international judicial body currently in operation. It would take only twice as much to enable the Court to fulfill the crucial functions assigned to it by the American Convention on Human Rights. That is less than one million dollars extra for the United States, and not even one thousand dollars more for countries like Guyana. These are amounts that can be easily reached in a single fundraising event by some wealthy individual. Or one should consider that the Court's budget is just 1.59% of the whole OAS budget and giving it what it needs would not require a massive reallocation of resources within the organization. Perhaps the fact that in far too many countries of the Americas, after years of progress, democracy and human rights are on the retreat is the real reason why the Court has so few friends who it can count on to put their money where their mouth is.

VII. THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA (ICTY AND ICTR)

Diagnosis: They cost much, probably more than what States are willing to pay for them, and this impacts negatively on other international judicial bodies

The ICTY and ICTR have been operating for a decade now and are expected to continue running until 2010–2011. The single most persistent criticism that has been leveled against the "twin criminal tribunals" throughout their life is that they are far too expensive, and that it is debatable whether their cost is justified by the benefits.

By any standard the price paid for the ICTY and ICTR is considerable. Currently, they run on a yearly budget of, on average, about $100 million. Since inception 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, their total cost over 17–18 years of life will probably top at least $2.5 billion ($1.5 billion for the ICTY and $1 billion for the ICTR).

Critics are quick at matching these figures with the number of cases tried by these tribunals. In the case of the ICTY, in 12 years of existence, as of April 2004 102 accused have appeared before the tribunal: 33 are at a pre-trial stage, seven are at a trial stage and 50 have been tried (16 are still at an appeal stage, eight have already served their sentence, 13 are serving sentence, seven are waiting transfer to serve sentence, and five have been acquitted). Twenty-one indictees remain at large. In the case of the ICTR, as of April 2004, the bench has handed down 15 judgments involving 21 accused. Another 21 are currently on trial in seven cases. Twenty-one are in detention waiting for the commencement of their trial while fifteen indictees are at large.

Yet, what is often forgotten is that criminal justice is always expensive, whether it is international or domestic, and is always much more expensive than non-criminal justice. Unlike non-criminal international courts and tribunals where the budget is divided between the two fundamental components, judges and Registry, criminal tribunals also have a third component, namely the office of the Prosecutor. The budget of criminal tribunals therefore includes items that are not present in those of the other bodies, 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. Again, evidence gathering is very expensive while in the case of non-criminal tribunals evidence is collected and presented solely by the parties.

Second, these tribunals do not replace national courts but exist alongside domestic prosecution. The national courts of various States have tried hundreds of cases of war crimes and crimes against humanity committed in the former Yugoslavia and Rwanda. The jurisdiction of the ICTY and ICTR is concurrent to domestic criminal jurisdiction. At any time they can claim primacy over national courts and take over investigations and proceedings, but if the domestic prosecution is genuine, the ICTY and ICTR have shown a willingness to defer to the national courts. Moreover, the rationale of these bodies is not to prosecute each and every instance of international crimes committed in those States. 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 top brass, as several high profile indictees have been secured including the former Yugoslavian President Slobodan Milosevic, the focus of the action has shifted. Because of these considerations, it is

only logical that the caseload of these tribunals does not consist of hundreds or thousands of cases, but only a few dozen.

Be that as it may, once the ICTY and ICTR finish their work, what will $2.5 billion over 17–18 years have bought? Only one item would justify that expense: an end to impunity for war crimes and gross violations of human rights. The establishment of the ICTY, in political circumstances that are probably impossible to replicate, not only reawakened international criminal law from the long sleep into which it had fallen after the Nuremberg and Tokyo trials, 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 the creation of the ICTY and ICTR, 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 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 the criticisms leveled at the ad hoc nature and limited geographical and temporal scope of those endeavors, nor the internationalized criminal courts in Kosovo, East Timor, Sierra Leone and possibly Cambodia.

The resurgence of international criminal law brought about by the ICTY and ICTR 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. For instance, the ICTY and ICTR have issued several indictments relating to sexual violence, whose status had hitherto been uncertain under international criminal law. Landmark cases have been the September 1998 conviction by the ICTR of the Mayor of Taba, Jean-Paul Akayesu, of crimes against humanity and genocide including crimes of sexual violence, and the conviction by the ICTY of Radomar Kovac of violations of the laws or customs of war and crimes against humanity arising from rape, outrages on personal dignity and enslavement. Without those judgments we would probably still be wondering whether those heinous practices are indeed international crimes.

VIII. THE SPECIAL COURT FOR SIERRA LEONE

Diagnosis: The Special Court was supposed to rely solely on voluntary contributions, but very few States pledged money and even fewer stood up to their pledges. As a result, the UN had to step in, approving an extraordinary subsidy. Voluntary contributions are not feasible, nor sustainable

During discussions at the UN about the creation of a judicial body to punish those most responsible for the atrocities committed during the ten year long war in Sierra Leone one thing was absolutely clear: the precedent of the ICTY and ICTR, with their ballooning budgets, was not going to be replicated. Amongst key States the keep-it-cheap and make-it-possible-for-an-easy-bail-out was the mantra.

The result is a "court with a tin cup". The Special Court, unlike any other international judicial body, is totally reliant on the goodwill of some States, rather than on assessed and legally binding contributions by UN members. The parties to its founding treaty, that is to say the UN and Sierra Leone, do not shoulder any financial responsibility.

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 the continuous availability of funds, risks in terms of moral responsibility, loss of credibility of the UN and exposure to legal liability, are very high.

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

Funds for the first and second year were slow coming in, and then 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, less than two million dollars had been pledged for the Special Court's third year of operations (1 July 2004 – 30 June 2005). It is clear that without some urgent action the Special Court would have been insolvent in a few months.

In March 2004, after having consulted with the Security Council, the Secretary-General asked the General Assembly to approve a subsidy of up to $40 million ($16.7 million for the period July – December 2004 and $23.3 million for the period January – December 2005). In particular, the Special Court estimated that it needed $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, 13 individuals have been indicted to date and considering the time and financial constraints placed on the Court, it is unlikely that any other persons will be charged.

It is already clear that the Special Court will not be able to complete all the trials and possible appeals before the end of 2005 as requested by the Security Council and General Assembly and that funds will have to be raised beyond the current budget. Since raising funds 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 people at the United Nations and amongst donor governments thrilled.

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. Evidence of this failure is the fact that 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 surviving members of the Khmer Rouge. While initially discussions at the UN indicated that the Khmer Rouge court was going to be financed by voluntary contributions, after the ordeal of the Special Court funding options 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 United Nations 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.

IX. INTERNATIONALIZED COURTS IN KOSOVO AND EAST TIMOR

Diagnosis: They are very cheap but savings are made at the expense of due process and the rights of defense and victims

As in the case of Sierra Leone, costs-related considerations greatly influenced discussions about what mechanisms or institutions should be created to bring international criminal justice to East Timor and Kosovo. However, unlike the case of Sierra Leone, voluntary contributions have never been an option. Internationalized courts in Kosovo and East Timor are part of larger UN peacekeeping missions. This means that their expenses are incorporated into the UN peacekeeping budget and borne by all UN members according to a scale of assessment. Still, while not marred by pledges that fail to materialize, internationalized courts in Kosovo and East Timor are surely not thriving.

In 2002, prosecuting serious crimes such as war crimes and crimes against humanity in East Timor and Kosovo cost, respectively, about $15,200,000 and $6,300,000. As compared to the case of the ICTY and ICTR, but also to that of the Special Court for Sierra Leone, these prosecution efforts are a bargain. Also, considering they have been operating only since 2001, output figures compare well with those of the ICTY and ICTR. In East Timor, as of February 2003, the Special Crimes Unit 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 war crimes and genocide had been charged and prosecuted. Local prosecutors filed 13 of the 17 indictments and international trial panels have issued 10 judgments.

Judging from their low operational costs, which is a fraction of that of their predecessors, and a largely comparable number of indictments and judgments, one could assume internationalized panels in Kosovo and East Timor are extremely efficient. Unfortunately, they are only cheap. Savings are made at the expense of the most vulnerable: the defendants and the victims of the 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, and access to the internet or books, not to speak of a library, clerks and administrative support. The building hosting the Serious Crimes Panel in Dili got a new power generator only in the spring of 2004. Before, judges and prosecutors had to stop working at several hours in the day because of the intermittent power supply situation in the new republic. 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. It is probably because of the outcry that this has caused that the UN has decided to cover the costs related to the remuneration of defense counsel in the Extraordinary Chambers in Cambodia (if and when they become a 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 make the recruitment even more difficult. This has resulted in a lack of judges and a 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 foreign counterparts. For instance, the cost of a national judge on the Serious Crimes Panel in East Timor was $4,332 in 2001, while the cost of the two international judges was $213,000. The same policy was adopted in Kosovo.

Victims are also rendered a paltry service. While fully international criminal bodies like the ICTY, ICTR and ICC have taken bold steps forward by acknowledging victims' rights to reparation, including compensation, internationalized bodies have made a leap back. In hybrid courts victims do not enjoy compensation or reparations. In theory, the Serious Crimes Panels in East Timor should have a trust fund for victims, funded by forfeiture collected from the convicted persons, but that fund has never been established.

Cost-efficiency is something that should always be sought, but criminal justice has never been done on a shoestring. In East Timor and Kosovo the logic seems to be "a little prosecution is better than nothing" but this is a very shortsighted logic, and a frail one on which to rebuild the judiciary of those war-torn regions.

X. THE INTERNATIONAL CRIMINAL COURT (ICC)

Diagnosis: It is likely to become a very expensive body and it has a very narrow financial basis

The International Criminal Court started functioning only recently, since its Statute entered into force on 1 July 2002. The first two years have been spent setting up the Court, electing judges and prosecutors, recruiting staff and creating the necessary organizational infrastructure. It is only in the past few months that the Office of the Prosecutor started looking into some situations where war crimes and crimes against humanity have allegedly been committed. Hence, little can be said about its state of financial health and the adequacy of resources to the tasks ahead.

Two things, however, are already clear. First, the ICC is a costly institution and it will be even more so once it starts operating fully. The 2004 budget of the Court is €53,071,846 (about $66 million). No investigations have been started, no indictments have been issued, no trials are underway and no one is in detention, and already the ICC costs half of what the ICTY costs. Once the ICC starts operating it will likely do so at the beat of at least $150 million a year and probably significantly more than that. In comparison the ICC is going to be three times as costly as the ECHR.

Second, the ICC draws its resources by and large from the same pool of States that finance the ECHR, that is to say Western European countries. The ICC, which, because of U.S. opposition, is not a UN body but rather a self-standing international organization, has its expenses assessed to those States that have ratified its statute (currently 94 States). The ICC scale of assessment is based on the scale of assessment of the UN regular budget. However, the first and second largest contributors to the UN budget, that is to say the U.S. and Japan, are not party to the Statute of the Court nor seem to be likely to become so in the near future. As a consequence, the single greatest contributor to the ICC budget is Germany with 19.3%, or $11,013,850 in 2004, while the 15 EU member States combined bear no less than three-fourths of the Court's costs (72.78%, or $41,535,880 in 2004). By comparison, this is significantly higher than the share paid by the EU member States for the ECHR (59.51%) or that paid by the U.S. for the IACHR (59.47%).

As long as the ICC scale of assessment is based on that of the UN and as long as the ICC fails to attract ratification by other large economies (namely Japan, as no one expects the U.S. to change its mind anytime soon), the ICC is going to be virtually solely dependent on the Western European States. The future will test how much they are willing to dip into

their pockets to ensure that the ICC remains a viable and sustainable endeavour.

XI. SOME POLICY-MAKING CONSIDERATIONS

A. International Justice: Expensive Or Cheap?

These days, the figure of $420 million spent yearly on international justice makes more than one government balk at the prospect of a further proliferation of international judicial bodies. However, costs are likely to increase significantly, at least in the short – medium term, both because existing judicial bodies need more resources to remain viable and operational and because new bodies are already in the making.

Yet, financial commitment to the cause of international justice seems to wither. While the costs of the ICTY and ICTR are incorporated into the budget of the UN and are therefore supported by the whole international community the more recent criminal tribunals have increasingly become reliant, in part or in whole, on the goodwill of a few States (and then the usual few, one might add).

At the end of the day, is international justice expensive or cheap? While these words are not found anywhere in the dictionary of economics, they surely have a 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?

Let's compare this figure 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 U.S. 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 be $50 million. The figure of the trial costs will likely be much higher.

Again, let's consider the wider context in which some of these international courts and tribunals operate. For instance, the UN regular budget for 2002–2003 was $2.63 billion while that for peacekeeping 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

peacekeeping budget, or even just 5.6% of the two budgets combined. Similarly, it should be kept in mind that from 1992 to 1998 the international community spent between 49 to 70 billion dollars 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. The ICJ budget is only half a percentage point of the regular budget of the UN. The whole human rights guarantee system of the OAS (i.e. Inter-American Court of Human Rights and the Commission) weights for just 5.5% of the OAS budget. Considering the key functions these bodies carry out within their respective organizations they take a remarkably low percentage of the organization's budget.

B. The Impact of Scarce or Unreliable Financing

Regarding the level of financing, in the long run and in the aggregate, international judicial bodies seem to be given what they need 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 has also been 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 eventually be allocated resources, albeit often strictly the minimum, to handle all the cases submitted to them. If resources were 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, very often there is 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 (e.g. persecuting 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 instead directed at deciding upon each and every case submitted to them. If the case or the request for an opinion is admissible they have no leeway to refuse 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 who and how many people to indict and bring to trial), while the source of cases of non-criminal bodies, including human rights courts, 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. Logic dictates that as there are only so many cases a court can handle with the resources it is given, if the number of cases submitted increases and funding does not the result is backlog. However, judges might be under the combined pressure of fiscally overburdened governments and the need to justify the meager resources they are given by handling more cases thrown at them. Does this lead to flawed outcomes? 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 the first to pay the price are usually those who cannot complain: 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 any assistance of compensation for the abuses suffered.

Both in the case of criminal and non-criminal judicial bodies, when there are budgetary squeezes other activities to be reduced are information to the public, and their promotion and cooperation with other bodies. Having a public awareness of the existence of reliable avenues beyond domestic courts and their functions 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 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."[14] 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 the judiciary: "It

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

is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions."[15]

C. How Judicial Bodies are Currently Financed: Pros and Cons

1. Obligatory Contributions

Courts of law, as a matter of constitutional principle, are financed by taxation. Justice and economics dictate this. They are public goods and produce a public good. If only market forces were left to determine whether these goods are produced or not the result would be that they are not. The free-rider problem and the prisoners dilemma makes 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 obviate 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 in their up-keep.

At the international level, the same principle is largely applied. Judicial bodies are financed by obligatory contributions of those States that either have 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 ensures the independence of the court.

Making financing of international judicial bodies part of the financing of a larger international organization, as is the case with the ICJ with the UN, the ECHR with the Council of Europe, and the IACHR with the OAS, 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 if only those States that have accepted the body's jurisdiction contributed to its expenses (as is the case of the ICC). 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.

[15] 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.

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 U.S. to the UN in the late 1990s was blocked by squabbling in Capitol Hill between pro-life and pro-choice lobbyists and 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 a doubly asphyxiating effect. 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 OAS budget itself. The ITLOS and the ICC are not financed through the UN budget precisely because of U.S. opposition to those bodies, and it could not be otherwise.

As a matter of fact, funding by taxation of the membership (i.e. obligatory contributions) is no guarantee of a steady and reliable income. While, under international law, payment of assessed contributions is mandatory,[16] 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 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 the arrears of the organization have run as high as 25%. A more aggressive 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 arrears, and restricted procurement opportunities.

[16] 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, I.C.J. Reports 1962*, 151.

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 shared 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.

2. Pros and Cons of Scales of Assessment

Directly or indirectly, all expenses of the bodies considered in this study are allocated on the basis of scales of assessment. These are either designed to reflect a capacity to pay principle or are based on the special interests and duties of certain States. Each has different floors and ceilings.

The 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 only a couple of thousands of dollars per year at most. Courts and tribunals are a highly subsidized good to them, 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 to do so above and beyond their contributions. This effectively means that judicial bodies can be made the hostage of a few States that are particularly ill-disposed towards them and their functions. Voluntary and supplementary funds are usually a way to funnel extra-budgetary fund incomes, 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 U.S., France, the U.K., 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.

This is, admittedly, a problematic way to apportion the expenses of an international organization. States can chose a low class to save money and it 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.

3. 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.

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 bodies hostage. However, voluntary funding has a disunifying effect. 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 (e.g. trust funds to subsidize litigation costs, or assistance to victims), if at all.

D. Alternatives to Assessed Contributions and Voluntary Funding

As far as the bulk of expenses of the judicial body are concerned, there is no real and desirable alternative to State contributions. From time to time alternative schemes that would give international organizations their own financial resources (e.g., 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 sources other than States' contributions (e.g., the EU or WIPO) and even in those cases they are independently financed only in part. States are loath to lose ultimate control of organizations to which they might have given significant powers or surrendered aspects of their sovereignty.

Similar schemes basically stem from two concerns: first the idea that international judicial bodies cannot be really independent as long as they are sustained by State contributions, and second the fact that governments, in general, maintain judicial bodies on a tight budget for which the body has 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.

The fact that governments finance human rights judicial bodies 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 in any significant way. International courts and tribunals do, from time to time, take decisions that greatly displease governments, and sometimes very influential governments. There is no evidence that budgetary concerns 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 mitigating these problems.

4. Endowment or Working Capital Fund

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 their 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. Although that would be within easy reach of the richest States 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 U.S. and the remaining four would 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 States Member of the Caribbean Community (CARICOM) to raise $100 million on the international market 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.[17] 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%.

5. Pay-Per-Use Schemes

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, neither in those like the ICJ, ITLOS and the WTO dispute settlement mechanism, for they would deter use and penalize poorer countries.

However, in the case of international judicial bodies whose goal is more that of ensuring implementation of law rather than settling disputes, like human rights bodies, but also, in certain cases, 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 that has been ruled against the most in 2003 (106 violations), followed at a distance by Turkey and France (76). If the scale of the assessment of the Court was solely based on violations, in 2004 Italy should pay 20.3% of the budget, while France and Turkey would pay 14.5%, instead of 12.39% and 2.94%, which they are respectively currently paying. Conversely Germany, a rich country with a good compliance record, would pay only 1.9%. By linking contributions to the number of violations that were subject to a Court's

[17] 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.

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 gets sanctioned repeatedly for violation of the same article (Article 6 on fair trial and due process) to finally reform their legal system and bring it into line with international standards, and free the overcrowded docket of the court.

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 on more often to defend their non-compliance before the organization's judicial body should bear a share of the court's budget larger than that of more law-abiding members.

Chart 1: International Courts and Tribunals Budgets Contributions by the U.S. and the 15 EU Members

	Fiscal year	Budget	Adjusted and Converted #
International Court of Justice (ICJ)	2002–2003	$25,922,600 (bi-annual)	$12,961,300
International Tribunal for the Law of the Sea (ITLOS)	2004	$8,039,000	$8,039,000 ‡
World Trade Organization Dispute Settlement System (WTO)	2004	CHF 5,932,800 *	$4,573,543 **
European Court of Human Rights (ECHR)	2004	EUR 39,200,000	$50,063,647 ***
Inter-American Court of Human Rights (IACHR)	2004	$1,391,300	$1,391,300
Inter-American Commission of Human Rights	2004	$3,429,900	$3,429,900
International Criminal Court (ICC)	2004	EUR 53,071,846	$66,562,709
International Criminal Tribunal for the Former Yugoslavia (ICTY)	2002–2003	$254,603,800	$127,301,900
International Criminal Tribunal for Rwanda (ICTR)	2002–2003	$187,262,900	$93,631,450
Special Court for Sierra Leone (SCSL)	2004–2005	$29,963,685	$29,963,685 ****
Serious Crimes Panels in the Courts of East Timor	2002	$6,300,000	$6,300,000
Internationalized Panels in the Courts of Kosovo	2002	$15,200,000	$15,200,000
Total			$381,415,749

** This is the sum of CHF 4,715,800, which is the budget of the WTO Appellate Body and its Secretariat and CHF 1,217,000 which are the expenditures for Dispute Settlement Panels.*

*** 1 CHF = 0.77 USD*

**** 1 EUR = 1.25 USD*

***** Total amount of voluntary contributions to date: $54,889,725*

‡ = Actual costs to members in 2004 were significantly lower. In 2001, ITLOS made savings of $833,269, plus it had credits for $2,356,865 from the Staff Assessment Account. Hence, the actual total costs to members in 2004 was only $4,848,866.

The U.S. pays (per year)	**Percentage of the total**	**The 15 EU members pay (per year)**	**Percentage of the total**
$2,851,486	22%	$4,774,942	36.84%
$0	0%	$3,985,736 †	49.58%
$720,325	15.74%	$1,796,283	39.27%
$0	0%	$29,792,848	59.51%
$827,406	59.47%	$0	0%
$2,039,761	59.47%	$0	0%
$0	0%	$41,535,880	72.78%
$31,188,966	24.5% (22% regular UN budget and 27% peacekeeping budget)	$48,928,804	38.43%
$22,939,705	24.5% (22% regular UN budget and 27% peacekeeping budget)	$35,987,248	38.43%
The U.S. has contributed $20,000,000 over the past three years. Average = $6,666,000 per year.	36.40%	EU members contributed $31,500,000 over the past three years. Average = $10,500,000 per year. *****	57.38%
$1,701,000	27%	$2,501,730	39.70%
$4,104,000	27%	$6,035,920	39.70%
$71,372,649		$185,839,391	

***** *Belgium, Denmark, Finland, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Sweden, Spain, U.K., and the European Commission (Portugal, Austria and France did not contribute).*

† *Excluding Denmark. Denmark, however, ratified the UN Convention on the Law of the Sea in November 2004.*

Economic History resources website: http://www.eh.net/ehresources/.

Chart 2: Number of States Contributing to the Budget and what Percentage any given Court's Budget is of the Budget of the Organization to which it is attached

Name	Number of States that finance it	Budget of the organization to which the judicial body is attached	Percentage
International Court of Justice	All UN members (193)	UN regular budget $2.63 billion (2002–2003) *	0.49%
International Tribunal for the Law of the Sea	145 States (Notable absences: United States, Denmark, Turkey and Israel)	N/A	N/A
World Trade Organization Dispute Settlement System	146 States (Notable absences: Russia)	Total WTO budget CHF 161,776,500 ** = $124,567,905 (2004)	3.70%
European Court of Human Rights	45 States	Council of Europe budget EUR 180,500,000 *** = $230,155,550 (2004)	21.70%
Inter-American Court of Human Rights and Inter-American Commission of Human Rights	35 States	OAS budget $87,304,346 (2004)	5.5% (1.59% Court and 3.91% Commission)
International Criminal Court	94 States (Notable absences: U.S., Russia, Japan and China)	The ICC is a self-standing international organization.	N/A
International Criminal Tribunal for the former Yugoslavia	All UN members (193)	UN regular budget $2.63 billion (2002–2003). Peacekeeping budget $2.6 billion (2002).	The ICTY and ICTR combined weight for about 16.8% of the regular budget, or 8.4% of the peacekeeping budget, or even just 5.6% of the two budgets combined.

International Criminal Tribunal for Rwanda	All UN members (193)	UN regular budget $2.63 billion (2002–2003). Peacekeeping budget $2.6 billion (2002).	The ICTY and ICTR combined weight for about 16.8% of the regular budget, or 8.4% of the peace-keeping budget, or even just 5.6% of the two budgets combined.
Special Court for Sierra Leone	33 States, 1 international organization (EC Commission) and 1 NGO (Open Society Institute) have contributed through June 2004	UN regular budget $2.63 billion (2002–2003). Peacekeeping budget $2.6 billion (2002). The total cost of the UN Mission in Sierra Leone hovers around $2 billion. Total amount of voluntary contributions to date: $ 54,889,725.	N/A
Serious Crimes Panels in the Courts of East Timor	All UN members (193)	UN regular budget $2.63 billion (2002–2003). Peacekeeping budget $2.6 billion (2002). The total cost of United Nations Transitional Administration for East Timor reached $1.6 billion mid-year 2003.	N/A
Internationalized Panels in the Courts of Kosovo	All UN members (193)	UN regular budget $2.63 billion (2002–2003). Peacekeeping budget $2.6 billion (2002). The cost of the United Nations Mission in Kosovo for its first four years of operation was $1.5 billion.	N/A

* *This is the UN regular budget.*
Peacekeeping expenses are funded through another budget and a different scale of assessment.
** *1 CHF = 0.77 USD*
*** *1 EUR = 1.25 USD*

Chart 3: How Courts and Tribunals are Financed

Name	How is it financed
International Court of Justice	ICJ expenditures are part of the UN regular budget and are borne by all UN members, according to a scale of assessment. The UN scale of assessment is based on the "capacity to pay" principle. Richest States pay more and the poorest less. As of 2001, no State bears more than 22 percent or less than 0.001 percent of the budget.
International Tribunal for the Law of the Sea	The ITLOS is not an organ of the United Nations. Its budget is financed by contributions of those States that have ratified the UNCLOS. Expenses are shared on the basis of a scale of assessment, which is the same used for the UN regular budget, adjusted for the different membership. The richest member pays 24% and the poorest 0.01%. Since the U.S. is not party to the UNCLOS, the single greatest contributor to the ITLOS is the second greatest contributor to the UN.
World Trade Organization Dispute Settlement System	The WTO derives the quasi-totality of the income for its annual budget from contributions by its members. These are established according to a formula based on their share of international trade.
European Court of Human Rights	Scale of assessment based on the "capacity-to-pay" principle. The five largest economies pay 12.39% each (France, Germany, Italy, the U.K., and Russia). The poorest European countries pay 0.12%.
Inter-American Court of Human Rights and Inter-American Commission of Human Rights	Scale of assessment based on the "capacity-to-pay" principle. The greatest single contributor is the U.S. (59.47%). The next greatest contributors are Canada (12.36%), Brazil (8.55%), Mexico (6.08%) and Argentina (4.90%). Together, the top five contributors of 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.
International Criminal Court	The ICC scale of assessment is based on the scale of assessment of the UN regular budget, taking into account the fact that the first and second contributors to the UN budget (the U.S. and Japan) are not parties to the Statute of the Court.
International Criminal Tribunal for the former Yugoslavia	Half of the tribunal's expenses are assessed to the member States on the basis of the UN regular budget scale, and the other half on the basis of the peacekeeping budget scale.

International Criminal Tribunal for Rwanda	Half of the tribunal's expenses are assessed to the member States on the basis of the UN regular budget scale, and the other half on the basis of the peacekeeping budget scale.
Special Court for Sierra Leone	Voluntary contributions. In April 2004, the General Assembly approved a subsidy of $16.7 million for the Special Court and another one of $23.3 million is foreseen for 2005.
Serious Crimes Panels in the Courts of East Timor	The majority of the costs are written under the budget of the relevant UN peacekeeping missions (UNMISET). UN members are assessed these costs in accordance with the peacekeeping scale.
Internationalized Panels in the Courts of Kosovo	The majority of the costs are written under the budget of the relevant UN peacekeeping missions (UNMIK). UN members are assessed these costs in accordance with the peacekeeping scale.

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