International Justice and International Law

Lea Brilmayer
New York University Law School

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INTERNATIONAL JUSTICE AND INTERNATIONAL LAW

LEA BRILMAYER*

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* Benjamin F. Butler Professor of Law, New York University Law School.
I. INTRODUCTION

I wonder how many of the people reading this essay expect to see a satisfactory system of international law in their lifetimes. By satisfactory I don’t mean perfect; domestic law is certainly not perfect in either its content or its methods of enforcement. Satisfactory, in the context of international law, means well articulated and generally accepted norms that are more or less fair, are usually obeyed and are supported by the international community when violated. For a system of international law to be satisfactory it must be substantively acceptable, legitimate in its derivation, and reasonably effective.

There are, notoriously, two points of view on international law. Skeptics claim that the term “international law” is an oxymoron — like military music, legal ethics, British cuisine or (perhaps) academic literature. They claim that without a centralized system of enforcement, nothing approaching law can exist. The international law enthusiasts, in contrast, see a glass half full rather than a glass half empty. The international lawyers claim that actually there is a great deal of international law currently in place and that its norms are generally, if quietly, observed. As Louis Henkin puts it, “The lawyer may see what law there is and what law does; the critic may see only what law there is not and what law has not achieved.” But from neither point of view is international law already as fully developed as domestic law. Even the most optimistic international lawyers would probably not insist that there already exists an optimal — or even a satisfactory — level of norm observance, although most of them are too concerned with showing what international law can do to be interested in making concessions about what it can’t. Whether the glass is half full or half empty,

  Other frequent inclusions on this list of oxymorons are insurance coverage and American culture.
2. For a well-known development of this point, see generally LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed. 1979) (especially chapter 3).
3. Id. at 9.
the point remains that no one claims that it is entirely full, or even as full as we would like it to be.

If the current state of international law is less than satisfactory, what should be said about international justice? Even those who are among the most optimistic about international law would probably not claim that international justice prevails. As with international law, moreover, international justice has those who doubt that it even makes sense as something to aim for. Justice, some think, exists only within societies; it is for a community to aspire to internally. Even some of our most prominent theorists of domestic justice, such as John Rawls, draw the line at applying their arguments to the international situation. If we add the common pessimism about international law to the general gloom about the possibility of international justice we come out with a fairly poor prognosis for the topic of this essay: international justice through international law.

There is, of course, a tradition of aspirational writing about what international law might in theory achieve for international justice. This tradition generates blueprints for world government, world law enforcement, and (eventually) world justice. It is a respectable tradition, although sometimes depressingly millennial, serving more to remind us of how far we would have to go than to inspire us onward. I have no intention of joining these architects of the future. The objective here is diagnosis, not design. The question here is why international law can’t get more done; what is it good at and what is it not. In particular, I am interested in identifying its capabilities at achieving international justice.


Other philosophers who have found Rawls’ logic generally persuasive on domestic matters have argued that if applied consistently it ought to be extended to international affairs. See, e.g., Thomas Pogge, Realizing Rawls (1989); Charles Beitz, Political Theory and International Relations (1979).

The first part of this essay deals with the variety of things that international law might try to do, and, in particular, with the various forms of international justice that it might seek to implement. There are many things that we might want from international law, and some of these have to do with justice, while others do not. Of those that deal with justice, a variety of different justice-based ideals are possible. I start therefore by asking which of these objectives we can expect international law, as it currently stands, to accomplish. International law has certain institutional tools, but not as many as we might like. It is better situated to promote certain aspirations than others. If we want to be able to promote those others, then we must be thinking about how to strengthen its institutional design in particular ways.

The second part of this essay explores the question of what difference it makes that international law has only developed the capacity to do some of the things that we might want it to. Specifically, I want to address the possibility that international law’s inability to achieve certain kinds of justice interferes with its ability to achieve certain other, nonjustice based, objectives. International law takes the status quo for granted as the appropriate point of departure. It asks “Where do we go from here?” and tries to make things better for the future. International justice, in contrast, does not privilege the status quo in this way. Its point of departure is an ideal (although which ideal it chooses will depend on which vision of justice it incorporates, and there is more than one). If people care about justice then they act in ways that undermine the possibility of achieving other international objectives such as peace, cooperation, and mutual security. Or at least, that is the possibility I wish to consider.

The glass, in other words, is both half full and half empty at the same time. The optimists and their critics are both right. International law is indeed unsatisfactory, and far from optimally constructed to achieving international justice. But there are also things that it is, comparatively speaking, fairly good at. To understand the difference between its capabilities and its incapacities is the first step in enlarging the former and eliminating the latter. It is extremely important that we try to identify which things are which, rather than rely on overly broad generalizations about it either being effective or ineffective in its entirety. It is with this identification that we must start, and from there
we can go on to ask what if anything can be done to make international law more effective as a whole.

II. OUR INTERNATIONAL ASPIRATIONS

What do we want out of international law? Some of our goals are a product of our sense of international justice, while others are simply questions of our general level of international well-being. The two basic issues of general well-being concern international peace and the promotion of international prosperity and cooperation through law. The basic conceptions of international justice include retributive justice, corrective justice, and distributive justice.

A. Peace and Prosperity

It hardly needs to be stated that two of our most important international aspirations are peace and prosperity. Peace, indeed, seems the basic precondition for virtually all other international goods. The cost of war must be measured not only in the lives and limbs that are lost directly to armed conflict, but also in the economic devastation caused by war and the psychological trauma suffered by those who witness it. The costs of war last far into the future, as communities clear their farms and fields of land mines, as children grow up without parents who were killed, as disabled veterans slowly rebuild their lives while living with the fear that their sacrifices will be forgotten, and as succeeding generations come to grips with hatreds of those their parents fought against.

Close behind establishment of lasting peace is a second aspiration, prosperity. It is second only in the sense that often it cannot come until peace is achieved; it is not necessarily second in importance. Certainly more people find their lives twisted by the effects of poverty than by the direct effects of war. The effects include the health consequences of malnutrition and preventable diseases, the psychological costs of illiteracy, the physical burden of constant labor just to earn enough to stay alive, and the general emotional sense of fatalism and disempowerment that often accompanies the awareness that, through no fault of one’s own, one’s life is destined to be very hard indeed.
The connection between international law and peace seems more direct than the connection between international law and prosperity. International law is directly concerned with the prevention of international aggression; with the inviolability of existing territorial borders. In addition, many forms of physical violence against individual human beings are prohibited by international human rights law, and some of the cruelest excesses of war are banned by conventions dealing with the proper conduct of armed conflict. The very notion of international law seems to carry with it the idea that disputes can and should be resolved through nonviolent means such as negotiation, diplomacy, mediation, and international litigation.

International law, in contrast, seems less directly aimed at the promotion of international prosperity. If all existing international norms were honored from this day forward, there would be no guarantee that international living standards would rise. But in addition to the practical fact that one cause of economic devastation would have been eliminated — armed conflict — international law contributes to prosperity in another way. International law is as much concerned with promotion of international cooperation as with sanctioning antisocial conduct. Like domestic law, international law facilitates the establishment of mutually productive relations (commercial contracts, trade agreements, scientific exchanges, and the like) as well as imposing penalties for violations of legal prohibitions. These cooperative arrangements are directly conducive to the achievement of greater international prosperity.

While international peace and prosperity are undeniably goods, they are not, for this reason, necessarily tied to international justice. Indeed, they are obviously consistent with very great levels of injustice. Peace might be the peace of colonialism or empire; a world dominated by a single great power. Domestically, as well, this is the case. There is more social unrest in some democracies than in some highly repressive societies. Prosperity, in addition, is unevenly distributed around the world. Increasing the world’s wealth as a whole does not ensure a basic minimum for all and this is true even where overall prosperity is based on cooperation among nations. The terms of trade may be uneven; strong nations may gain more from a cooperative scheme than weaker ones.
There is no reason to deny that, all other things considered, peace and prosperity are proper goals of international law. But to understand the connection between international law and international justice, we must go beyond these undoubted goods. If there is more to international justice than peace and prosperity, what does international justice distinctively involve? There are at least three different answers, one focusing on retributive justice, one focusing on corrective justice, and one focusing on distributive justice.

B. Three Forms of International Justice

Retributive justice, corrective justice, and distributive justice are familiar concepts from domestic jurisprudence; the content of these aspirations is substantially the same when international jurisprudence is at issue. Retributive justice requires that violators of norms receive penalties commensurate with their violations. Its connection with international law is obvious. Retribution is called for when norms are violated, and international law is one source of such norms. In international as in domestic society, punishment does not follow transgression against all social norms (such as requirements of common courtesy, or esthetic norms) but only those norms that have somehow been singled out as having a distinct official character. International law is connected to retributive justice in that international law must specify which behavior is prohibited, and what consequences follow from indulging in it. To be worthy, international law must do both of these things in a way consistent with basic morality.

Retributive justice has some similarities to the essentially instrumental objective of deterrence, but the differences are philosophically significant. If the objective is deterrence, then punishment is merely a means to the end of discouraging undesirable conduct in the future. Deterrence is not a form of justice so much as an ingredient in the promotion of international peace and cooperation. It contributes to international peace because peace involves adherence to norms prohibiting aggression. It contributes to international cooperation because cooperation requires that states comply with community norms even when they impose a cost. Deterrence is important because without means to encourage compliance states may violate norms when convenient, and
so that other states will live in fear of such violations. As an instrumental good, however, it is different from the justice based ideal of retribution, according to which violators are subject to penalties because that is morally appropriate regardless of any desirable consequences that may follow.

Corrective justice is closely related to retributive justice. Corrective justice requires that the wrongdoer compensate the victim for the wrong that he or she has inflicted. Often, retributive justice and corrective justice can both be served at the same time because if the wrongdoer is required to compensate the victim this requirement of compensation will itself be a penalty upon the wrongdoer. However, the two need not be identical; it is possible to punish the wrongdoer in a way that affords no benefit to anyone or in a way that generates a benefit to someone other than the victim. In domestic law, incarceration is an example of the first and the imposition of fines an example of the second. The purest embodiment of retribution in domestic law is criminal law. Tort law, in contrast, embodies both retribution and corrective justice because a tort award puts the plaintiff in his or her initial position while simultaneously imposing a penalty on the defendant.

The third type of justice that is relevant to international affairs is distributive justice. It offends our sense of fairness to see some countries suffering abject poverty while others consume far more than their share of the world’s resources. Just exactly what is the cause of this unbalanced distribution is open to dispute. Some cite the uneven distribution of the world’s natural resources: mineral wealth, fertile agricultural land, fisheries, timber, and plentiful rainfall. Others point to a history of colonial and neocolonial oppression, including the world market system. Still others cite cultural differences, mismanagement, official corruption, overpopulation, and environmental degradation as presenting another possible set of answers.

Whether international redistribution is feasible and desirable is also open to dispute. The practical difficulties of redistribution are evident, but some would go further and claim that it is not desirable even as an ideal. This position could be based either on a theory that the poor in some sense deserve what they have; on the argument that even if they do not deserve what they get it is better for them to be self-reliant; or
on the premise that redistribution is only appropriate within a single cooperative enterprise such as a particular nation state.\(^6\) Distributive justice is probably more controversial than either retributive or corrective justice. If the domestic model for retribution is criminal law, and the model for corrective justice is tort law, then the best domestic model for distributive justice would be entitlements supported by tax revenues. (Domestic redistribution through taxation, of course, is controversial just as international redistribution is, and for many of the same reasons.)

In a certain sense, distributive justice is the mirror image of retributive justice, with corrective justice having aspects of both. Distributive justice is motivated solely by the intended consequences for the beneficiaries; while obviously the resources distributed to them have to come from somewhere, the fact that they are taken from someone else’s pocket is incidental (indeed, perhaps, regrettable). With retributive justice, in contrast, the motivation is solely the effect on the wrongdoer. What happens with any resources that he or she is deprived of is incidental to the retributive purpose; they might be transferred to the victim, but they might instead be forfeited to the state. Corrective justice has aspects of both because ideally it places both the victim and the wrongdoer back in their initial position; it penalizes the wrongdoer while compensating the injured party.

III. OUR INTERNATIONAL TOOLS

What methods are at international law’s disposal as it sets out to advance these objectives? How does it attempt to provide peace, promote prosperity, and further the various sorts of international justice? Criticisms that international law is ineffective are largely based on the belief that its methods fall far short of those that are available to domestic legal institutions. And it is true that some domestic tools are relatively weak or are absent altogether in international law. The problem lies not with the articulation of norms to promote peace and prosperity, or to define what justice requires. International law has as many

norms as one might need; what is lacking are ways to put them into action. We can start with some of the things that international law is relatively good at, and move progressively to those methods that are relatively absent.\footnote{There are interesting parallels between my breakdown into the different tools of facilitation, pressure, and force, and the breakdown by Kenneth Abbott and Duncan Snidal into facilitative, productive, and enforcement regimes. \textit{See Kenneth Abbott \& Duncan Snidal, Mesoinstitutions in International Politics} (forthcoming 1996). The similarity is mainly limited, however, to the similarities between their first category and my first category. Both their analysis and mine recognize the utility of formal international legal institutions in bringing together states with congruent interests that would otherwise find it difficult to reach agreement.}

\textit{A. Providing a Forum}

International legal institutions are fairly capable when it comes to provision of a forum for discussion. The United Nations comes immediately to mind as a standing opportunity for countries of the world to meet and discuss their differences; the existence of a standing forum for discussion reduces the transaction costs of reaching international consensus. Many of that organization's component bodies also fill this function for specific issues — trade, communications, food and agriculture, and so forth. We should not take this function for granted; free exchange of opinions was not always possible. To cite just one example of how international law has made it easier, safer, and more productive to meet, the rules of diplomatic immunity have made it possible for countries to exchange ambassadors without fear of their being maltreated. Such rules are rarely violated.

Provision of a forum is valuable in many different ways. Countries often have important interests in common that cannot be adequately identified and acknowledged without the opportunity for discussion. Of course, interests are often not entirely congruent; but even where they have a conflictual element, face-to-face meetings may make those interests that they do have in common clear enough that the participants find it worthwhile to set aside their differences. Sometimes the advantage is in large part a psychological one; one’s enemies may seem more hostile and frightening when seen from a distance and meeting
them may create a sense of common bonds of humanity. Negotiations sometimes pick up sufficient inertia that, once started, their inner logic provides its own motivations to settle. The fact that an international institution will be available to monitor both sides' conduct after agreement has been reached also encourages consensus.

Provision of a forum for discussion works largely through carrots, not sticks. The object is to induce the parties to the negotiating table, and from there to agreement, through the prospect of their own advantage. For this reason, it should not be surprising that international law has been most successful with problems that can be solved through arrangement of discussion and negotiation. International law need not be backed by force when the parties' needs are overlapping — when there is some state of affairs that would make them both better off. In such circumstances, international law has only to take advantage of the incentives that already exist in the parties' situations.

For all of these reasons, it is commonplace that the first step in resolving differences is often simply to meet with one's opponents to clarify the common interests that exist and to narrow as much as possible the range of disagreement. There is no doubt that the progress that has been made in many current conflicts (the mideast peace talks come immediately to mind) started with simply bringing the parties to the bargaining table. Whether this is done bilaterally or through multilateral international institutions, this process is facilitated enormously by international legal process and the diplomatic processes that the legal rules make possible. Provision of a forum is an important element of the international legal system's toolkit.

B. Pressure

International legal institutions are at their strongest and most effective where there is room for Pareto improvement; where there is some state of affairs that will make both of the parties better off. As to

8. There are sometimes situations where one of the parties will be made better off but the other will not. In such cases, it may still be possible to "logroll" if the gain to one party more than offsets the loss to the other. This is because the parties may be able to link the issue in question to another one where the other party will be the one receiving the
these, provision of a forum for discussion may be enough. International law, famously, lacks its own “muscle”; its own ability to force the parties to do something that they don’t want to do. But where the possibility of gains from trade provides its own pull, then muscle for pushing may not be necessary. The problem is that not all cases of conflict may fit this mold. This solution only works where it is possible to make both sides better off, and there may be cases in which obeying a legal norm will make one of the parties to a dispute genuinely worse off.

The second most widely available international legal strategy is application of pressure. Pressure also works through incentives, but they are negative ones. By either imposing costs on one of the parties, or by threatening to do so, other countries can create a state of affairs in which, relatively speaking, compliance with international standards will appear attractive. The means for doing this are varied. Sanctions can include trade boycotts; withdrawing ambassadors; banning a violator from participation in international sports, scientific, or cultural activities; refusing to sign an unrelated agreement that the violator wants; and various other signs of international disapproval. Absent such sanctions, the violator would find its contemplated course of action more enticing than adherence to the norm; but when the costs of the sanctions are counted in, its preference ordering changes.

This strategy is generally less feasible for the international legal system than for domestic legal systems because it is costly to member states, and therefore they will not apply these sanctions unless they feel that there is a good reason to. It is often not easy to obtain or coor-

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9. In theory, it is possible for the international community to give nations positive incentives to comply with their international obligations. The main problem with employing this strategy too frequently is that it encourages states to footdrag, and to decline to fulfill obligations unless rewards are offered. This creates perverse incentives, because it rewards expressions of unwillingness to carry out one’s obligations, when the whole point of an obligation is that it should be fulfilled even without any side payments.

10. As Abe and Antonia Handler Chayes put it:

The deficiencies of sanctions for treaty enforcement are related to their costs and legitimacy. The costs of military sanctions are measured in lives, a price contemporary publics seem disinclined to pay except for the most urgent objectives, clearly related to primary national interests. The costs of economic sanctions are also high,
ordinate their cooperation. The activities that must be foregone in order to put pressure on recalcitrant nations are often ones that would have been highly beneficial to the other members of the community. Trade boycotts are an obvious example; since the reason that countries engage in the trade they do is for their mutual benefit, giving up trading opportunities that they would otherwise have taken advantage of is costly. Trade sanctions during both the Persian Gulf War and the Balkan conflict have been very costly for neighboring states. In addition, each state that observes the official boycott must live with the fear that it is accepting these costs while others cheat. Countries worry, then, that they will suffer in adhering to the boycott while the boycott never becomes effective because others break rank.

Thus, if we were to rank international legal methods in terms of how easy they will be to employ, and how likely they are to be available, we would have to put simple facilitation of mutually beneficial exchanges first, and deterrence or sanctioning of antisocial behavior through threats or the imposition of costs second. Both of these methods are more likely to be available, however, than a third method, direct force designed to compel obedience to international law or to seize resources that the violator is not entitled to retain. This method can be illustrated by reference to one of the few recent examples in which it was employed: the Persian Gulf War.11

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11 The international occupations of Haiti and Somalia also had elements of this strategy. However, these cases were different because in the former the occupation was acceded to by the regime in power (albeit under pressure) and in the latter there was no effective government in power. Of course, in Somalia, another difference was that the occupation was not a response to violations of international law but an effort to alleviate a major humanitarian crisis.
C. Direct Use of Force

In the Persian Gulf War, the American led coalition (acting with the authorization of the United Nations) attempted first to use indirect methods to induce Iraq to retreat from Kuwait. These methods included negotiations, diplomacy, and trade boycotts. Once the coalition decided that none of these inducements were likely to prove successful, they faced the issue squarely and decided to invade. What the coalition had been unable to induce the Iraqi government to do through pressure, it was able to force the Iraqi government to do through direct military means.

In domestic law, of course, most governments possess fairly ample (if not perfect) power to directly compel individuals to obey society’s norms. If it wants to prevent an individual from doing something, a government can seize that person and put him or her into jail; and it has the power, as well, to seize property to satisfy a judgment. What passes for pressure in the domestic context, moreover, is often strongly influenced by the fact that direct force is available. When a court enters a judgment against a defendant, its judgment will typically have the effect that the defendant will carry out the judgment rather than risk the consequences. If the defendant does not, then courts have ways of directly exercising control over the assets; these include garnishment and attachment, as well as direct transfer of title to land. The court need not use force because the losing party can see what will happen if he or she does not cooperate. Direct force is involved but it remains in the background; compliance appears voluntary but only because noncompliance is recognized as futile.

When skeptics claim that international legal institutions have little power, what they typically point to is inability to directly enforce international decisions. If a country were to ignore a World Court decision, for example, there would be no international analog to seizure or attachment. What occurred in the Persian Gulf War was quite exceptional, and attributable mainly to the great importance attached to Kuwait’s oil resources. Thus, it is possible to argue that international law has little weight because it is not backed by force. It is almost always possible for a truly uncooperative violator to persist in thumbing its
nose at the world community, so long as it is prepared to pay the price.

Some of the reasons that direct action is rarely employed have to do with the self-interested disinclination of other states to take on a violator directly; and some have to do with the structure of the international legal system itself. Other states' disinclination to employ direct methods have mainly to do with the risks they face if they engage in direct confrontation. The risks are especially high if military methods are considered. Reflect on the international community’s consistent reaction to the current Balkan conflict; until quite recently, military force was almost completely precluded. The preference of other nations to use either mediation or incentives (positive or negative) as opposed to intervening militarily is evident and takes no great sophistication to understand. Military involvement is not only expensive, but also risky to the lives of one’s nationals. In the Balkans, bombing was undertaken only when it became embarrassingly clear that nothing else would work and that the situation had become a general disgrace.

But this is not the only reason for the preference for indirect methods. Direct force is discouraged by the very Charter of the United Nations and by other principles of international law; this is so even when the motivation is retaliation for a clear violation of international law. Physical aggression is ruled out as a response to violations of international law in almost all cases, the main exception having to do with self-defense. It is perhaps ironic that by generally outlawing the use of force, the international community has deprived itself of a very forceful remedy for international wrongs. But this is not surprising, and overall not a cause for great regret, considering that it would be hard to build a system that allowed constituent states to use forceful methods if and only if they were being correctly employed as a remedy of the international system. Opening the door to use of unilateral force, even if in theory the opening is limited to response to violations of international law, is potentially a very risky step.

It is for these reasons that the international legal system typically works indirectly. Even once it is decided that some violation should be met with strong resistance, and even once a political coalition is mobilized to apply pressure, it is still generally politically and legally more
feasible to act through creating incentives for the violator to decide to change course. The status quo must be made sufficiently unpleasant that the violator will decide, on its own, to step in line. Such indirection is clumsy and ineffective in comparison to directly forcing the violator to comply. However, because the international legal system can rarely muster the degree of forcefulness and consensus necessary to intervene directly, indirect pressure is usually the best tool that is available.

IV. PEACE, PROSPERITY, AND JUSTICE: THE NECESSARY TOOLS

My thesis is that, given the relative weaknesses of the remedies available in the international legal system, one should expect that it would be better at maintaining peace and facilitating cooperation than at achieving justice; and that in particular, of the various forms of justice, retribution is the easiest to pursue, with corrective justice and distributive justice (respectively) presenting greater difficulties. The logic behind this claim rests on the simple truisms that the ability to achieve a goal depends on the extent to which that goal is in the mutual interests of the parties, and, when the goal imposes costs on one of the parties, this is more of an impediment when that party is a strong state than a weak state. Because promotion of cooperation and maintenance of peace involve, essentially, the identification of mutual interests and the deterrence of violation of norms, they are easier to achieve with the tools available to international law than the forms of justice which require transferring assets from one state to another. The proposed ranking might be sketched as follows, with difficulties increasing as one moves from the left to the right:

1 facilitation  2 deterrence  3 penalties  4 correction  5 distribution

This claim is meant to be understood in a rather general way. It refers to categories of problems, generally, and not necessarily to each case specifically. There may be some problems of corrective justice that are easier to address than some problems of deterrence. This is likely to be true if one focuses on a minor corrective justice problem and a major problem of deterrence. My argument is just that, all other
things being equal, this general relationship holds between promoting cooperation, maintaining order, and achieving justice. No pretense can be made of mathematical precision at defining what is a major or minor problem, or what exactly it means that "all things are otherwise equal." But if the general thrust of the argument is sound, then one would be led to predict what has, I think, proven to be the case: that international law is better at preserving the status quo or moving the parties to a mutually beneficial situation than at the transfer of resources that is sometimes necessary to further international justice.

A. Facilitation and Distributive Justice

We can start with the easiest part of the argument to make: the two ends of the spectrum. There is likely to be little disagreement over the fact that international law is relatively better at identifying and promoting mutual interests than in redistributing wealth in a more egalitarian way. Simply as an empirical matter, when one looks at what international law has accomplished it has seemed to do very little in terms of wealth redistribution, while most of its activities have been directed at negotiation of agreements that the parties will adopt voluntarily and which, for that reason, can be assumed to be beneficial to all involved. The reason should be obvious: agreements are positive sum, and provide their own inducements to the parties, while transfer payments are zero sum and are likely to be resisted by the state that is supposed to supply the resources to be distributed.

It is clear that if international law is to be able to redistribute wealth systematically, as opposed to simply doing so when rich nations happen to feel like making voluntary contributions, or steering a greater share to poor nations when the pie itself is increasing, then it has to have some kind of sanctioning power at hand. We have already pointed out that the tool typically used for wealth distribution in the domestic context — the taxing authority’s power to seize assets — is virtually completely lacking in the international context. This means that the sole device for ensuring compliance with norms of redistribution is application of pressure. But not only would distributive justice require large amounts of pressure (because massive transfers of resources would be involved) but also the pressure must be directed against pre-
cisely those actors that are best situated to resist that pressure: the wealthy and powerful. Distributive justice requires transfer of resources from those with a great deal to those with very little. The former are the least subject to pressure and the latter are the least able to exert it.

At the two opposite ends of the spectrum, then, we find that international law is fairly good at promoting mutually beneficial goals and not at all capable of providing any substantial amount of distributive justice. My claim for the center of the spectrum is that deterrence is easier to provide than retributive justice, and that retributive justice is easier to provide than corrective justice. The reasons why are easy enough to see when one keeps in mind what deterrence, retribution, and correction consist of.

B. Deterrence, Retribution, and Correction

Deterrence involves application of pressure to discourage violation of international norms. Retribution involves imposition of appropriate penalties for violation of international law. And corrective justice involves requiring the violator to compensate the victim. The reason that deterrence is easier than retribution, which is in turn easier than correction, is simply that any system that is capable of mobilizing the pressure to require the violator to compensate the victim has thereby imposed a penalty on him or her; and any system that is capable of mobilizing the pressure to inflict a penalty upon the violator has thereby imposed a deterrent. The capacity to effect corrective justice implies the capacity to effect retributive justice, which in turn implies the capacity to deter. The reason is that deterrence is included within retribution, and retribution within correction. But the converse is not necessarily the case. We might label these claim one and claim two, respectively:

1. retribution implies deterrence (but not the converse)
2. correction implies retribution (but not the converse)

Consider first claim two, namely that the capacity to effect corrective justice implies the capacity to effect retributive justice (but that the converse is not true). Corrective justice means that the violator has
been required to pay the victim enough to compensate him or her. The very fact that the violator has been required to pay compensation is in itself a penalty, even if the reason for the requirement is a compensatory rather than a punitive one. Corrective justice requires two things — compensation for the victim, and compensation from the violator — and the latter of these essentially amounts to the imposition of a penalty. The converse of this proposition is not, however, true. It is entirely possible for a system to be capable of effecting retribution without being capable of effecting compensation.

To see this, one need only look at domestic law. One of the reasons that compensation is more difficult than retribution is that the violator may not have sufficient assets to make amends for the consequences of his or her activities. Yet the fact that it is impossible to force compensation does not mean that retribution is impossible; for the remedy imposed may not be a financial one (incarceration). All corrective remedies are also retributive, but the opposite is not the case. The same is as true in international as in domestic affairs. The violator may not have the resources to make the victim whole; but other measures may exist to penalize the violator, such as trade sanctions, withdrawal of membership in international organizations, and the like.

In the international situation, moreover, there is an additional difficulty that stems from the fact that the amount of pressure that can be marshalled is limited. It may be difficult to apply enough pressure to force the violator to compensate the victim, because the amount of pressure sufficient to deprive the violator of the net benefit of its violation may still not be sufficient to force it to return the benefits it has received. If the net benefit of the violation is x, so that imposition of a penalty of that size is adequate to deprive it of any gains from its violation, a penalty of x may nonetheless not be sufficient to force it to return its unjust gains. It may simply prefer to suffer the penalty in silence. One important reason is that the violator would probably lose face if it admitted that it violated international law; giving in signals weakness to one's opponents both at home and abroad. 12 Because in-

12. Consider, for example, the unwillingness of Saddam Hussein to give in to international sanctions. Inability to deal with pressure from the outside would send a message to
ternational law must rely on indirect pressure rather than directly forcing violators to comply, the violator that cares deeply about not compensating the victim is in a strong position to resist.

If the amount of pressure that is applied is not effective to cause the violator to give compensation, in addition, then all of the international legal system's efforts are wasted from a corrective justice point of view. The pain imposed on the violator is only a means to an end, and if the end of corrective justice to the victim is not achieved, the effort was all for naught. The same cannot be said of retribution; even if the amount of pressure imposed is insufficient to bring about compensation, it will still function as a penalty. In particular, from a retributive standpoint, the international legal system need not apply the extra increment of pressure that would be required to motivate a state to loose face. Corrective justice is an all or nothing matter while, retribution is not. Either enough pressure is applied to force the violator to give compensation, or the opposite is true.

Turning now to the first claim — that the ability to punish entails an ability to deter, but not the converse — similar reasoning applies. The first part of the first claim is true because punishment in itself acts as a deterrent; where a legal system is known to have the ability to effect retribution, violations are less likely to occur. Just as corrective justice contains within it the kernel of a retributive remedy, so retribution contains nested within it a kernel of deterrence. This does not mean that retribution and deterrence are philosophically equivalent. Retribution views punishment as morally desirable in its own right, while deterrence sees it as a means to an end. However, imposing a penalty for retributive purposes also has the effect of deterring similar conduct in the future.

The converse is not, however, the case. It is not the case that a system that has the capacity to deter has the capacity to effect punishment. It is virtually a truism that it takes less to deter a violation than to punish it once it has occurred. The main reason is that deterrence requires only maintaining the status quo, and usually the status quo has practical advantages on its side. For example, in deciding whether to

internal enemies of the regime that it was losing its grip on the political situation.
commit a violation a state will both consider the expense involved in engaging in the violation (e.g., military costs in the case of the invasion of Kuwait) as well as discount the benefit by the less than total probability of success.\textsuperscript{13}

This reasoning suggests why it is that those who tout the advantages of international law see the glass as half full while those who dismiss international law see the glass as half empty. Some illegal actions are deterred while others are not. The fact that some are deterred shows that international law has some teeth. The fact that some are not shows that it is not perfect. Of course, in domestic law as well, some violations are not deterred. But at least with regard to those violations where the perpetrator is known, domestic law is able to apply a remedy while international law is not. If one focuses on the violations that are deterred, then, international law seems relatively effective; but one might instead choose to focus on the fact that when the decision is made to violate the law, it can be done without fear of reversal by the international community.

Of the three — deterrence, retribution, and correction — deterrence, then, is the most feasible in a system characterized by scarce institutional resources. But deterrence is valuable because it makes possible the orderly pursuit of international peace and cooperation. Combined with the fact that peace and cooperation are typically mutually beneficial, the fact that deterrence is more generally available than the

\textsuperscript{13} The main exception to this truism is where the violator hopes to escape detection. In such cases, a greater penalty may be required to deter violations than would ideally be called for as a retributive matter, because the violator will discount the penalty by the likelihood of being caught. However, with regard to the question at hand, the possibility of evading detection is essentially a “wash” in the comparison between retribution and deterrence. If the question is how much institutional strength is needed to achieve deterrence as opposed to effecting retribution, the problem of undetected violations weighs in equally as against both. One cannot deter violations that are an absolute secret, but one also cannot effect retribution.

The international context is different from the domestic context because the key issue is the ability to marshall pressure against a known violator. For one thing, most violations of international law are much more public than violations of domestic law. In domestic law, it is virtually always the case that either the occurrence of the violation or the identity of the violator (or both) is designed to be kept secret. In addition, international law is much more sensitive than domestic law to problems of organizing sanctions against violations, for all of the reasons discussed in the text.
various forms of justice supports my claim that international well-being is easier to pursue than international justice.

V. JUSTICE AND THE STATUS QUO

The basic difficulty with the pursuit of international justice is that it does not privilege the status quo the way that international law does. We have already argued that international law is at its best when the object is either to maintain the status quo or to move the status quo in some direction that is preferable from the point of view of all parties. This makes a certain amount of sense; for when there are limited tools available, it is easiest to start at the point where one currently finds oneself rather than insisting first on a radical rearrangement. But international justice searches for ideals, not practical solutions. It asks what is the normatively most defensible state of affairs, and there is no particular reason to think that that is the current state of affairs (unless one believes that by some invisible hand, the current distribution came to mimic what justice would require anyway — a hard proposition to defend).

International justice is redistributive in a way that other international aspirations are not. This is most obviously true in the case of distributive justice — indeed, the names suggest as much — but it is also the case with corrective and retributive justice. With corrective justice, the object is to take illgotten gains away from violators of norms and use them to make the victims whole. With retributive justice, the object is to penalize the violator to the appropriate degree (although what to do with any resources that are seized is left open). All three forms of justice require us to compare the current state of affairs to the proper state of affairs, and to take from some and give to others so as to bring things as close as possible to the ideal.

Just as there is no reason to think that the ideal state of affairs is identical to the status quo, there is no particular reason to think that the ideal state of affairs (from the point of view of justice) is Pareto superior to the status quo — that, in other words, it will make all states better off. There are likely to be losers. Indeed, it is virtually built in with at least two of the forms of justice that there be losers. The whole point of retributive justice is that something be taken away
from the state that violated international norms. And part of the point of corrective justice is that the compensation given to the victim comes from the violator. International justice, therefore, is swimming against the tide. It requires international legal mechanisms that are not generally available. It requires the ability to redistribute when what we primarily have is the ability either to maintain the status quo or to move it in a Pareto superior direction.

In domestic legal arrangements, we do not face such problems to nearly as great a degree. The reason is that the potential use of force makes it unnecessary to proceed by indirection, by creating incentives for actors to themselves prefer the outcome that is right. This is particularly true for distributive justice, for our tax system is backed by the threat that if you do not pay your taxes and this is discovered, your assets will be seized. In the analogous international setting, in contrast, the wealthy country that chooses not to contribute to international assistance schemes — or, for that matter, chooses not to pay its United Nations dues — can do so if it is willing to put up with the pressure that its defiance generates.  

So long as international law must try whenever possible to work through the promotion of mutually beneficial solutions, it will be relegated to protection of the status quo and facilitation of Pareto superior improvements. Justice will be beyond its grasp. So long as its only alternative is to apply pressure, thus inducing compliance, the international legal system will find corrective and distributive justice singularly difficult to achieve. It will find itself limited to incremental improvements to the well-being of all, with occasional forays into the punishment of international criminals. We certainly should not, for this reason, despise our international institutions. Promotion of peace and cooperation is certainly an attractive objective, tethered to the status quo though it may be. Yet, we must also ask ourselves whether these limitations on the international legal system might have a corrosive effect even on the functions at which it is relatively capable. There are reasons to be concerned that the inability to achieve justice (especially

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corrective and distributive justice) might undermine promotion of stability, order, and mutually beneficial agreements. “No justice, no peace,” as they say. We turn to these questions in part two.
PART TWO:
INTERNATIONAL LAW — ITS PAST AND ITS FUTURE

I. INTRODUCTION

There is a tension, in international law, between the past and the future. It is exemplified by recent media coverage of the ongoing investigations of war crimes committed during the conflict in the former Yugoslavia.\(^1\) At the same time that a tribunal constituted by the United Nations was investigating and indicting several Serbian leaders for the crime of inciting and committing outrageous human rights abuses, other international leaders were conducting serious negotiations with many of those same individuals over the fate of Bosnia Herzegovina. Obviously, it is hard to reach a settlement with individuals who know that they are likely to be convicted of human rights violations and punished if they ever fall into the hands of the international community. Should one, then, offer amnesty or pardon as a part of the settlement? Moving ahead to peace seems to require one to turn a blind eye to justice for past wrongs. But how can one bargain in good faith with people who are likely guilty of the sorts of things with which these individuals are charged? And how can one consider pardoning them?

If we were to phrase the problem in terms proposed in the first part of this essay, we might say that international law is better situated institutionally to move forward towards solutions that improve the position of all of the participants than it is to correct the inequities or injustices that exist. Its institutional mechanisms are pointed towards the future while its equities are rooted in the past. International leaders, \(^1\) Stephen Engelberg, *Panel Seeks U.S. Pledge on Bosnia War Criminals*, N.Y. Times, Nov. 3, 1995, at A1. See also Roger Cohen, *When the Price of Peace is Injustice*, N.Y. Times, Nov. 12, 1995, at D3 ("The position of a United Nations tribunal investigating war crimes was clear: without justice, any peace will be tenuous and bound for collapse. But American negotiators were more nuanced, for diplomacy by its nature is the enemy of absolute judgments. The peace accord they seek would naturally be a forward-looking thing. Judicial investigations look backward.").

The identical issue has arisen in many other contexts. See, e.g., John Ryle, *An African Nuremberg*, The New Yorker, Oct. 2, 1995, at 50 ("Their former rulers are on trial for the torture and murder of thousands but many Ethiopians are more concerned about the present.").
intent on bringing about a compromise that will improve upon the status quo for everyone, express frustration with national leaders who (from the world community's point of view) selfishly and irrationally refuse the bargains that the international community urges upon them. Conversely, national leaders express anger at a world community that sets up compromises on their behalf and then insists that these are mutually beneficial. For national leaders compare proposed solutions to what they feel that they deserve — to their ideal of justice — rather than to the status quo, and in comparison to what they see as their entitlement, the compromises offer far too little. And their ideal of justice is often grounded in their understanding of the past.

The inability to reconcile oneself with the status quo, coupled with the knowledge that international institutions are simply not designed to help obtain what one is entitled to, is a major source of international violence today. International violence is seriously different from domestic political violence. For domestic political violence is largely oriented toward capturing existing mechanisms of the state and is therefore largely forward-looking. The civil wars that we have seen in Liberia, Somalia, and Afghanistan, and the violent repression of countries such as Argentina and Haiti, have more to do with taking and holding political power than with righting real or imagined past wrongs. Struggles for control of an existing political institution typically are grounded in beliefs about how politics should be organized in the future, with past wrongs being offered solely as evidence to show that the government currently in power is unlikely to be fair or competent.

2. For these purposes, I am lumping secessionist movements with the category of international violence. The reason that international disputes typically depend on claims of historical justice is that they involve demands against third parties, either citizens of foreign nations (in the case of the usual international dispute) or fellow citizens who are members of a different national group. There must be a justification for depriving these individuals of the resource in question, and typically such justifications are grounded in arguments of historical entitlement. In contrast, in civil wars it is thought to be an adequate justification for throwing one government out simply that it is not wanted by some large percentage of the population. Thus, intrastate challengers to existing governments do not feel a need to justify their movements in quite the same way.

On the importance of historical claims to nationalist movements, see generally Lea Brilmayer, The Moral Significance of Nationalism, 71 NOTRE DAME L. REV. 7 (1996).
There are exceptions; Rwanda is a mixed case, including both a fight to control the country and revenge. It seems likely that the intensity of the savagery is connected to the fact that both impulses are implicated, rather than merely the former, for either one can generate bloodshed enough. And there are occasions when international violence is not genuinely motivated by a claim of corrective justice, although as in the Iraqi invasion of Kuwait it may be useful to invent one.  

What differentiates international from domestic violence is that there is no institutional mechanism to seize. Whatever institutions of political governance and law enforcement exist, they are decentralized and therefore virtually impossible to gain control of. In the eyes of the participants, international violence is not typically a fight for general political control, but rather an effort to get what one is entitled to and what one is unable to get because inadequate international justice mechanisms exist to recognize one’s claims. The fact that international law is obviously not equipped to promote international justice is therefore, itself, an incitement to international violence.

II. WHY PEOPLE FIGHT

One of the main reasons that people fight is that they believe that they have been treated unjustly. Of course, this is not the only reason people fight. They sometimes fight because they are paid to fight — contract killers in the domestic setting and mercenaries in the international setting are clear examples — and sometimes there are

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3. There are, of course, some who are completely cynical about justice, such as the leaders of the Serbs and the Bosnian Serbs who deliberately stirred up ethnic hatred in order to preserve their own prerogatives which were in danger of being lost after the fall of communism in the former Yugoslavia. However, one of the things that this example shows is precisely that in order to get people to fight you must provide them with a rationale for fighting. Although the leaders of the Serbs and Bosnian Serbs were themselves quite cynical, they operated by reawakening in the public at large a sense of corrective justice. Rarely do the ordinary people who do most of the fighting have as cynical an attitude as the leaders did in this case. Typically, a grievance or sense of historical mission is necessary in order to mobilize the people who will bear the brunt of the war.

4. This is true both domestically and internationally, although as I have just suggested the sense of justice is largely forward-looking in the domestic case and largely backward-looking in the international case.
mixed motives as when an individual fights for his or her own country because the military is the best career available. Sometimes people fight because they have been forced to, as where they are drafted. And sometimes they fight because they see in it some naked self-advantage, such as the opportunity to loot, or to rape, or to kill those against whom one has a personal grudge. There are, clearly, many reasons to fight.

But people who fight for gain (either a paycheck, a profession, or a criminal opportunity) are, relatively speaking, easier to deal with than people who fight for what they think is just. People who fight for gain can be bought off. All you need to do is to provide them with resources to compensate their lost opportunities; and the size of the bribe can be reduced to reflect the fact that if they will settle for that bribe, they will not run the risk of being killed. The key question is whether they have done the best for themselves under the present situation; in this sense they are pragmatic. They are not inclined to fight as underdogs in situations where victory is quite unlikely.

People who fight for what they believe in are notoriously more successful fighters than those who fight for gain. They are more willing to take risks, more willing to invest their own talents and abilities, and more willing to suffer hardship. Their loyalty is more unshakable. People who fight for justice care less about being killed, because they recognize a value in sacrifice. They do not care about public opinion, except the public opinion of the group that shares their cause. And it is not usually possible to buy off people who fight for justice without providing them with at least a good portion of what it is that they feel entitled to. Group leaders who show willingness to settle for less than what the group sees as its entitlement risk being written off as “sell outs.”

In the international context, it is usually a particular view of corrective justice that supplies the sense of grievance necessary to motivate people to fight with passion. The inability to provide international distributive justice is not as much of a threat to stability as the inability to provide international corrective justice. The reason is that it is far more difficult to fight for international distributive justice than international corrective justice. Even if the participants are convinced
that justice entitles them to a larger portion of the world’s resources (and as we have already noted, this sort of claim is highly controversial in both the world at large and the philosophical community), organizing to obtain those resources is difficult and, in particular, it is difficult to use violence to further those goals.

This is because even if there is a good claim to a greater share of resources, that fact alone does not provide a strong claim against any one particular resource. The poor are entitled to something; but exactly what it might be is fungible, assuming only that it must be sufficiently substantial to satisfy their claims. It is harder to rally people around the claim to “something” than to a particular thing that they feel they have an historical right to (and quite possibly already a psychological attachment, as well). In addition, by definition, those who are fighting for distributive justice are the poor and weak; their opponents are the rich and strong. This fact in and of itself makes it harder to fight for distributive than corrective justice, as to which the competing claimants may be evenly matched.

In addition, distributive justice requires institutional mechanisms for it to be optimally successful. In the domestic context, distribution is carried out through a complicated system of taxation. Effective distribution must be ongoing, as opposed to corrective justice, which can be a one-shot deal. When one fights for distributive justice in domestic society — as many revolutions have done — there is an institutional mechanism to capture. Once one takes control of the state, one has the leeway to build a system of distribution of property that nationalizes industry and imposes land reform. There is no comparable institution of government to seize in the international setting. There is no mechanism that, once captured, can carry on redistributive activities as a day-to-day matter.

There is an interesting analogy between this point and the argument made in part one of this essay about the international system’s reliance on pressure as a method of control. In a perfect legal system, with good enforcement mechanisms, it is possible to carry out a legal decision directly. If it is decided that some resource ought to be transferred from one claimant to another, the means exist to simply take control of the resource and hand it to its rightful owner. Where control
is incomplete, however, the ability to do this directly may not exist. In such cases, the only way to influence the conduct of others is through infliction of costs. The goal is to make things sufficiently costly that the target of one’s activity decides to comply. And so, I noted, the international legal system (with its incomplete enforcement mechanisms) works through the imposition of penalties. By making it more costly to violate international law, the international legal system seeks to induce the target to obey.

The same is true when an individual or group, as opposed to the international legal system as a whole, seeks to get its way internationally. Typically, the individual or group will not have the physical means simply to seize what it wants; only a few powerful states have the capacity to work their will directly, and they will only be willing to exercise this power in exceptional cases. Thus, aggrieved groups must attempt indirectly to influence their target’s conduct. They must make it sufficiently unpleasant that the target decides to relinquish what it is that the complaining party wants. While the international legal system tends to do this through unpleasant but legally acceptable methods — condemnation, trade sanctions, and the like — individual states and other groups and individuals fall back on the only means available to them. Often, this means violence.

Whether it is the international community as a whole that is trying to change the status quo or whether it is simply one of the participants to the controversy with a particular self-interested point of view, it is extremely difficult to bring about significant redistribution. The only means available is pressure, and distributive justice requires that pressure be brought to bear against the wealthy by the poor. There is no international institution that can compare to domestic institutions in their ability to transfer resources from one place to another and, in particular, from the strong to the weak. Thus, international distributive justice at the instance of the parties is as unlikely a proposition as international distributive justice undertaken by the community as a whole.

Corrective justice, then, is not only a threat to international peace and order; it is likely to be the primary threat. Of course, to say that people often fight, and fight most intractably, for what they think is just is not to say that they are necessarily right, either about the justice
of their cause or that the cause in question is worth fighting for. Neither does it mean that the methods that are employed are acceptable. Those who fight are often wrong about matters of historical fact or the moral reasoning that is founded on it. Sincerity is different from moral rightness. But sincerity itself can matter even when the holders of a belief are wrong about either the facts of the matter or the moral conclusions that they draw.

International peace is very fragile. Peace is fragile, in part, because people and their property are fragile. It is far easier to build a bomb that will maim and kill than to put together the bodies, lives, and families of the injured. Building dams and bridges, planting crops, and constructing schools and homes is far more difficult and expensive than blowing them up or laying mines. Thwarting international terrorism is an expensive and iffy proposition. It only takes a few airline hijackings to create the need for metal detectors and luggage searches; and these must be put in place in every airport in the world to be effective. The point is not that such precautions are not cost effective; in terms of the lives they save, it is hard to doubt that they are. But while the costs are commensurate with their benefits, they are nonetheless far greater than the costs to those who make them necessary.

The fact that international law is relatively incapable of supplying corrective justice, in this way, puts its efforts to further international peace in jeopardy as well. Its ability to maintain order and channel complaints through legal processes — to maintain a monopoly of power, in other words — are threatened by the incompleteness of what it has to offer. One might think that if the international legal system is incomplete, that it will simply supply what it can and leave any objectives that it cannot provide to whatever means private parties find available. But it is not possible to maintain order without a greater ability to provide a comprehensive set of legal remedies, and in particular the remedy of corrective justice. For so long as peace is fragile, and the only methods of achieving what one thinks is just is to fight, international violence will be unavoidable.

In a sense, this appears to be nothing more than a restatement of the familiar claim that self-help is to be expected, given that international relations is a state of anarchy. It is a lack of effective
legal and remedial institutions that accounts for international violence. From this, it is typically argued that morality is absent from international affairs. Yet my claim is different from that one in important ways, in particular in the conclusions that it draws about international morality. Because this is an important element of the analysis about how international law must balance the claims of the future against the demands of the past, it is where we should turn next.

III. The International State of Anarchy

The familiar self-help argument about international relations being a state of anarchy runs roughly as follows. International law is not backed by force, because there are no centralized institutions or international governance. Because of the absence of centralized enforcement mechanisms, each nation must fend for itself. It is mistaken to expect or insist that nations adhere to some sense of international morality, for if they do they will have no assurance that other nations will reciprocate. Because each nation must be constantly on its guard to protect against risks posed by its competitors, it cannot afford to attend to such moral niceties as international law.

When one examines carefully the situations in which this sort of argument is most persuasive, however, one finds that what they have in common suggests a rather different line of analysis. For example, consider the case of nuclear weapons. Many consider them to be categorically immoral. A skeptic might deny that it is morally impermissible to develop (or, perhaps, to use) nuclear weapons because there is no guarantee that if we abandon our nuclear weapons program that other countries will do so as well. If our enemies have nuclear weapons, they may be able to attack us successfully. Therefore (so the argument goes) we should retain our nuclear weapons because they are necessary for self-protection.

But this argument gains its appeal from the fact that our enemies are not entitled to attack us, or in other words, that we are entitled to

5. See generally Lea Brilmayer, American Hegemony: Political Morality in a One Superpower World (1994) (discussing the anarchy line of argument in chapter 2).
territorial integrity and self-protection. Because they are not entitled to
attack us, and because there is no centralized enforcement mechanism
to prevent such an attack, we should retain all means of self-defense
against such a wrongful attack. The claim that we should not be criti-
cized for retaining nuclear weapons because we need them for self-
defense does not lead to the conclusion that we are entitled to use
them to grab territory from other states, or commit genocide against
ethnic groups that we are prejudiced against. At most it means that we
are entitled to use nuclear weapons for those legitimate interests that
the international system ought to be protecting but that it cannot pro-
tect because it lacks centralized enforcement mechanisms.

So the real claim must be that because one's rights under some
particular norm are not adequately protected, one is entitled to use self-
help to protect those legitimate rights. Already, one can see that there
are important normative aspects to this claim both in theory and in
application. In theory, this claim raises normative issues because it is
in essence an argument to the effect that where legitimate interests are
at stake, otherwise impermissible methods may be used to protect those
legitimate interests. To some people, no doubt, this premise is entirely
clear. To persons who believe this, it is ridiculous to prohibit nuclear
weapons regardless of the consequences, even though the heavens may
fall. They may or may not be correct about this. But what matters now
is that this is, itself, a moral argument. When people say that the ends
justify the means they are making a moral claim about the possibility
that the consequences might be more important than the morality of
the methods that are employed. Thus, even under the anarchy argu-
ment, moral argumentation remains important.

In practice, the anarchy claim also relies in important ways upon
normative thought. The reason is that it is at most convincing when
the ends are in fact legitimate. The argument about nuclear weapons is
only persuasive (if, indeed, it is persuasive at all) if they are employed
to morally acceptable use. It does not follow from the anarchy argu-
ment that we should retain our nuclear weapons because otherwise we
will not be able to achieve world dominance, or commit genocide on
populations that we dislike for reasons of racial prejudice. The argu-
ment that ends justify means is in theory a moral argument; and the
application of it also requires moral analysis, because it does not claim
that all ends justify means. It only claims that legitimate ends justify otherwise repugnant means.

The third way in which the anarchy argument relies on moral premises is that it requires some examination of proportionality. The ends must be legitimate, and one must morally accept the idea that legitimate ends sometimes justify dubious means; but in addition, the morally suspect aspects of the means must in some way be outweighed by the desirability of the ends. It is desirable to put an end to human rights abuses in China, but it is doubtful that we are entitled to do so by incinerating the population of Syria in order to tangibly demonstrate that we will take serious action to penalize human rights abusers. To show that the ends justify the means in a particular case one must show not only that ends sometimes justify means, and that the ends in the particular case are legitimate, but also that in the particular case the ends are important enough that we should set aside our moral qualms about the means we must employ.

The anarchy argument, then, turns out not to be a morally skeptical argument at all. What it really is, when understood in its most plausible light, is a claim about the relationship between means and ends. It is a claim that in those “anarchical” situations where one cannot depend on official governmental protection for one’s legitimate interests, one is entitled to take things into one’s own hands, and to employ means that would (in other circumstances) be morally impermissible. This is a moral claim, because it requires first, a general moral commitment to the principle that ends can sometimes justify means; second, an assertion that the end in question is morally worthy; and third, a specific belief that the end at issue in the particular case justifies the particular means chosen to pursue it.

We can now restate the problem that concerns us here about the inability of international legal institutions to achieve corrective justice. It is apparent to all, including the holders of corrective justice claims and their supporters, that international institutions have no great capacity in this regard. It is not as though international law was generally well-designed to achieve these goals, but simply failed to recognize some particular claim as worthy of recompense. With holders of corrective justice claims well aware that they can expect virtually nothing
from international law, they are faced with an unpleasant choice. Either they can pursue the very limited avenues for redress that are legally open to them (petitioning the General Assembly to take a position, trying to file an action in the World Court, lobbying world opinion) or they can take matters into their own hands (take to the streets, take to the bush, or learn everything possible about plastic explosives).

It is easy to condemn such lawlessness when legal alternatives exist; when there are centralized enforcement mechanisms that one has an obligation to try to work through. Even where such mechanisms exist, we are aware that they are not perfect; but in the better functioning domestic societies, most people gain enough from the fact that these institutions possess a monopoly of force that it does not seem unreasonable to condemn those who refuse to take society’s word as final. It is harder to condemn such “lawlessness” in a situation where the existing legal institutions — whatever their virtues at other sorts of functions — are generally acknowledged to be unable to provide effective redress for wrongs of this sort. It is not appropriate here to take a position on the large issue of whether means in fact can be justified by ends. I am deliberately limiting myself to the rather modest claim that it is easy to see why those who feel they have a right to corrective justice, that international institutions are endemic incapacity of recognizing, find otherwise unpalatable methods within the bounds of the acceptable. It is not possible to dismiss their arguments summarily. The question of whether ends can ever justify means is a hard one that I am unwilling here to address, whatever my own personal beliefs.

But what it should be easy to agree on is that these are moral questions, even though the logic depends in important ways on the fact that international relations is, in this respect, a state of partial anarchy. Whether or not one agrees with the course of action that the rightsholder undertakes, it is important in understanding the situation to

6. I limit my generalization to “better functioning societies” because in some societies there are some groups that cannot be expected to work through legal channels, which have been effectively foreclosed to them. Thus, for example, the situation of Jews in Nazi Germany or blacks in apartheid South Africa is different from the usual case of a group that simply has not been able to obtain what it wants through usual democratic channels or through the processes of litigation.
appreciate that from his or her own point of view, the person who undertakes illegal violence is taking up a function that international law has not fulfilled: provision of corrective justice.

IV. THEY’RE BOTH RIGHT . . . AND BOTH WRONG . . .

If inability to supply corrective justice is the source of much of today’s international violence, and if those who feel they have justice on their side are more successful for this reason, then one might expect the world’s conflicts to be more one-sided than they are. Why is it not the case that those who have justice on their side fight harder and therefore win? Some conflicts are indeed one-sided in this respect; some pit individuals who fight for justice against those who fight for pay or simply because they are told to and they must obey. Some classic recent examples of this sort of one-sided conflict are the Vietnam War and the Soviet occupation of Afghanistan. These conflicts were not one-sided overall, after one takes into account the superior material resources of the United States and the Soviet Union, respectively. It was precisely because of material superiority that the two conflicts lasted as long as they did, for in both cases as soon as the outside support disappeared, the game was over. But in terms of corrective justice, the conflicts were distinctly asymmetrical. There seemed to be an identifiable right and wrong side to the conflict, and the material superiority of the wrong side eventually succumbed to the other side’s sense of commitment and belief in the justice of its cause.

It is interesting, though, how many conflicts do not fit this pattern of a committed group fighting for what it sees as justice against a group that is motivated by sheer realpolitik. Many conflicts around the world are characterized by a strong sense of commitment and justice on both sides. In part, of course, this reflects nothing more than the simple fact that human beings often make mistakes of moral judgment, especially when there is self-interest at stake. Both sides may think that they are in the right, but one of them is likely to be wrong. But surely there is something more than this at stake. If the moral issue is a close one, then one might think that the individuals involved would be aware of the issue’s difficulty. They would not believe that their side was clearly right, that if any reasonable person looked at the situation from
an unbiased point of view, he or she would surely agree that their cause was just. While it is possible that the explanation for both sides simultaneously believing in the evident justice of their cause is nothing more than self-delusion, an extra factor may be at work. That extra factor has to do with international law’s inability to provide corrective justice.

The inability to provide corrective justice is not just a “one-time” problem. It plagues the entire history of any given conflict as it unfolds over time. Because at any given point in time the losing party knows that it cannot turn to international law for help, that party turns to extralegal methods instead. It feels entitled to do this, as a moral matter, because it believes that its end is a legitimate and compelling one and there is no other avenue of recourse. Whether or not it is successful, its employment of extralegal methods now creates a grievance on the part of the other side of the dispute. That side now feels entitled to treat its opponents as lawbreakers, invaders or terrorists. In its reprisals it believes that it is justified in using whatever means it has at its disposal. The grievances accumulate over time, as one violation of moral and legal norms piles on top of another from both sides of the dispute.

If one looks at only a short-term slice of the dispute, there does seem to be a clear right and wrong. After the first wrong, it may be relatively easy to pinpoint the violator. If one focuses on the point just after a wrongful retaliation, taken out of context, the other side seems clearly wrong. But it is a mistake to take things out of context this way. The error that the participants make is typically more complicated than simply overestimating the strength of their own claims of justice (although often that is done as well). It is to focus on only those points in history where they were the victims of extralegal or illegal actions. In any protracted dispute, there is a substantial likelihood that both sides will have grievances to point to that are genuine moral wrongs. Each tends to overlook the grievances of the other side, and to argue that the wrongs that they committed were nothing more than reasonable reactions to their own suffering.

All too often, the problem develops in something similar to the way that the problems have unfolded in the Balkans and the Middle
East. Group A starts out in possession of a particular piece of territory, and is then invaded by Group B which takes possession of a part or all of the territory. Some time later, the A’s manage to be successful in regaining what they considered to be their historic homeland. A and B, at this point, both believe themselves to have claims to corrective justice; their territory was invaded and wrongfully taken from them. The B’s, at this point, are unable to retake “their” land militarily, so they start a terror campaign in which they seek to frighten the A’s into relinquishing control. The A’s respond with repression; it becomes impossible for a citizen of Group B extraction to move freely or to obtain a good job, and B’s are subjected to humiliating searches and questioning on the least provocation. Sometimes the B’s are arbitrarily jailed and beaten, or subjected to other forms of political discrimination (such as being driven from their land). From the point of view of the A’s, they are responding to a terrorist movement mounted by a group of people who never should have been living in their territory in the first place. From the B’s point of view, innocent people are now being subjected to human rights abuses and are therefore victims of guilt by association. Furthermore, those “freedom fighters” with whom the innocent victims are being grouped are themselves behaving morally in using whatever methods they can to right an historic injustice.

The reason that the two groups can both believe so sincerely (and, in their own terms, so plausibly) in the justice of their cause and in the right to take the measures that they do is that they are working from two completely different baselines. In the Balkans, for example, the Serbs measure everything from a status quo ante of the early 1300s, before the Turks invaded what is now Yugoslavia and converted many of the inhabitants to Islam. But since then portions of the territory have changed hands many times, and every group that wants to claim an “historic homeland” for its own need only find some time period during which it occupied and governed that homeland, and then insist that this is the appropriate place from which to mark departures. Furthermore, the Serbs can and do focus on the period of

7. For an illuminating and engaging account of the history of the Balkans, as seen through the eyes of the participants in current struggles, see ROBERT KAPLAN, BALKAN GHOSTS: A JOURNEY THROUGH HISTORY (1993).
Croatian domination during the Second World War, when many Serbians were massacred. The Bosnian Muslims in contrast focus on the atrocities committed in the last few years.

In domestic law this problem also exists — we all know about the Montagues and the Capulets, or the Hatfields and the McCoys — but there are at least minimally acceptable devices for settling accounts, for clearing the decks. These mechanisms are, essentially, the mechanisms of corrective justice. It is the fact that international law is so self-evidently incapable of imposing any corrective justice solutions that allows grievances on both sides to accumulate. The fact that there are grievances on both sides is what allows both sides to claim, plausibly, that they are in the right and are entitled to do whatever they need to in their efforts to prevail.

Ideally, moral theory would give us some guidance about how to sort out this tangled pile of claims and counterclaims. If one side violates the other’s rights, does this give the other the right to respond in kind? There is far less that has usefully been said on this topic than on many other moral problems, including topics of modern interest such as wealth redistribution, promise keeping, human autonomy, and a long list of others. But even less has been said about what to do about what happens next. If the other does respond in kind, and if this was wrongful, then what are we to do in a situation where apparently both parties are in the wrong? If the other does respond, and this was permissible, then is it permissible for the first to counterrespond? And what statute of limitations (if any) applies? We simply do not have a moral theory offering even tentative answers on most of these subjects.

The reason that both sides can believe strongly that they are in the right is that we lack any well-developed and convincing theoretical analyses — or even intuitions — about how such wrongs and rights balance each other. Each side focuses simply on its “rights,” and if it is pointed out that the other side also has “rights” then it is a close question which set of “rights” prevails. What is in fact a close moral question appears so much more morally one-sided to the participants because they are focusing on only a part of the problem, a single slice of time. It is entirely possible that they might be clearly in the right
with regard to the part of the problem that they are looking at, but that there is no clear answer to the problem as a whole.

The inability of international institutions to provide corrective justice, in sum, explains not only the existence of conflict but the intensity of conflict. It explains the existence of conflict for the reason that the aggrieved party fights because it believes that it has a good claim and it knows that it has no international recourse. It explains the intensity of conflict for the reason that as actions, reprisals and counterreprisals accumulate, both sides come to have strongly held beliefs that justice entitles them to what they want. And these beliefs are sufficiently plausible that group leaders are able to recruit and hold the allegiance of their followers, in spite of the all too obvious fact that conflict is likely to end in destruction, suffering, and death.

V. THE ATTITUDE OF THE INTERNATIONAL COMMUNITY

One of the many disadvantages of the fact that the American public tends to get its sense of what is going on in the world from sources such as CNN is the inability of the popular media to present more than a time slice of any particular problem. Perhaps this is because television images are so static, so vivid when it comes to presenting the “now,” that the “now” swamps all awareness of what happened “then.” We have all heard criticisms of the way that the public did not know or care about the suffering in Somalia until the television photojournalists put that country on the evening news. Famine coverage generally arrives only when large numbers of people are already beyond the reach of help. But what is also true is that the thing that the journalist in Somalia put on the evening news was, inevitably, the news. It was pictures of what was going on at that exact time, albeit in a place many thousands of miles away. It gained its emotional force from the very fact that it was happening at that very moment.

When we react to tragic events like these based on acquaintance-ship of the moment, it is perhaps not surprising that we adopt the perspective of the future. “Something bad is happening now; what can be done to stop it?” we ask ourselves. We look for ways to get from the status quo we find so terrible to something better for tomorrow. The urgency of the desire, fueled by the images we see in photographs
or on TV, makes measured academic consideration of how things came
to be this way seem laughably out of place, almost morally inappropri-
ate. The need to fix the problem is more morally compelling than the
need to analyze its roots.

This sense of urgent need to change things is coupled with implic-
it awareness of the fact that there are limited things that international
institutions can do to make the problem go away. For reasons I set out
in part one of this essay, the only tools that are ever-ready are those
of negotiation and diplomacy, with placing pressure on wrongdoers a
distinct second best and achievement of justice a distant third. When
we want to make things better, quickly, it is understandable that we
will turn to the tools we have at hand. In the case of famine relief, we
respond by sending food, often neglecting the underlying causes of
famine, such as civil war, maldistribution of income within a country,
or desertification. These would be hard to attack, and the strategy of
sending food (in contrast) is likely to offend no one.

As inadequate as this may be in the case of famine relief, it is far
more pathetic as a response to human conflict itself. When we see
to pictures of civilian bomb victims in Sarajevo, or of a demolished bus
with its dismembered passengers in the West Bank, or scores of vic-
tims of a automatic rifle attack in a mosque in Hebron, a natural reac-
tion is “What can be done to stop the carnage?” The only readily
available answer is talking and compromise, but often the parties them-
seles show no interest in talking and compromise. Whether the eve-
nening news is about Belfast, Tuzla, or the Gaza strip, it seems natural
to shake one’s head and wonder why those involved in such atrocities
are unable to see that everyone would be better off if the killing
stopped. Are they crazy?

If all one considers is improving one’s lot in life, then they are.
By “improving one’s lot in life” I do not mean only getting a better
income, or a bigger house, or being able to send one’s children to
school, although these things are certainly included. I also mean the
nonmaterial advantages that follow from peace. These include the se-
cure companionship of loved ones who will not be dragged away to
fight; the ability to sleep at night without worry that a bomb will fall
nearby; and the knowledge that the house or farm one works each day
to build for one's children will be enjoyed by them and not destroyed by civil war or terrorism. In the majority of serious conflicts around the world, the situation (both material and psychological) of all the parties could be improved if they would only stop fighting. The international legal system strains mightily to arrange this for them. But in many cases, they aren't interested.

This typically is because the people who actually fight the wars and suffer their consequences compare proposed solutions to what they feel entitled to, rather than to what they currently have. Their leaders may be cynics, grasping for every advantage without regard to any sentiment of justice, but those who fight and suffer typically believe, at least they must if they hold out any hope of winning. When we watch them suffering on CNN, we see their present but not the past that they see. We see a future in which the suffering has stopped, but this is not necessarily the future that they want to hold out for. Their unwillingness to settle for a rational solution strikes us as crazy, and it drives us crazy.

We fail, in short, to understand what the conflict means to the people who participate in it. While we are all aware that the most lasting peace is likely to be a just peace, this argument seems to us to be too speculative and focused too far in the future to have much importance when weighed against the devastation we see today and hope to end tomorrow. There is also a more sinister side to our failure of understanding. Continued fighting puts us at risk. The violence in the Middle East has spillover effects in America. These have included terrorist attacks on Americans abroad, hijacking of airliners on which Americans were passengers, the bombing of the World Trade Center, and other acts of violence and murder. It would be better for us if the fighting stopped. This is not only because of our moral indignation when we see its results in other countries on the television, but also because of our fear of car bombers and airline hijackers in our midst.

Our desire to see the conflict over is typically manifested by our expression of hope that the parties have sufficiently "exhausted themselves" by the fighting that they will be willing to talk seriously of peace.8 It is clear that the parties' perceptions are largely subjective as

8. On the subject of "exhaustion" in one particular context, see William Zartman,
to whether the conflict is a zero sum problem of corrective justice or a potentially positive sum problem in which settlement might make them all better off. It all depends on how much positive value parties attach to what they see as "justice" and how much negative value they attach to the idea of compromise. Conflict is most intractable where one or both of the parties affirmatively prefers to inflict pain on the other, thereby guaranteeing that no solution will be mutually beneficial. At the point where the parties decide that they will never achieve their preferred goal of corrective justice, and decide that they can live with that fact, the compromises that the international community offer may start to seem attractive. Sometimes they even come to see the positive value of their opponents' positions, although that is often too much to hope for.

With regard to the fighting in the former Yugoslavia, we have been waiting optimistically for several years now for the warring sides to "exhaust themselves" and set to serious negotiations. Americans generally are becoming familiar with a cliche well known to diplomats, that you can't force peace on people who prefer to fight. As I write this, another peace plan is in the works, and it is indeed possible that the Bosnian Serbs, the Croats, and the Bosnian Muslims are exhausted enough to stop. Of course one must always be concerned that the leaders who decide to step in line with international pressure to opt for the Pareto optimal solution — the mutual improvement over the status quo — will be cut off from popular support, outflanked by a more radical leader who insists on holding out for justice. That of course has been the position taken by Hamas, which filled the radical role vacated by the P.L.O. But the international community is always waiting expectantly for "nationalists," "terrorists," and "guerrilla fighters" to finally decide to see things its way.

Many of my arguments are designed simply to suggest that such nationalists, terrorists, and guerrilla fighters are behaving perfectly logically and consistently from their own point of view. They are responding to the inadequacies of the international legal system. One does not have to be a wholehearted moral skeptic, or a proponent of

realpolitik, to recognize that there are some things at which the international legal system is not very good. One can believe in morality in international relations, and precisely because of that belief, understand their actions in terms of something like anarchy. I believe that when we try to step inside their point of view, we will have a better view of what is going on. But there are also some more concrete suggestions that I am prompted to make by this analysis.

The first is to be willing to abandon, at least provisionally, the false promise of neutrality. I don’t mean to say that one should bring one’s own biases and interests to international conflicts. The problem, instead, is with a peculiar way of being nonjudgmental. Although it might seem neutral and open-minded, it is not necessarily an advantage to approach problems with the attitude that both sides are equally right and equally wrong; that each has its own subjective position but that neither is better than the other.

I say that one must abandon neutrality provisionally because at the same time that one recognizes that there are rights and wrongs in most cases, one must recognize that in any given case it is an open question whether these rights and wrongs are more important than advancing the competing goals of peace and prosperity. There may be circumstances when it is necessary to adopt such a posture of neutrality, for instance where some particular status quo is so urgently bad that there is no point asking who is to blame but only in trying to save human lives. Relief groups are sometimes in this position, as when they have to decide whether to cooperate with morally repulsive governments to get relief through, or whether to provide medical aid to all the wounded (regardless of which side they fought on and whether they themselves may have been guilty of human rights abuses).

But we should resist the temptation to adopt this posture out of moral laziness, out of an unwillingness to make hard decisions about who is right and who is wrong, or out of some displaced sense of moral relativism that one has confused with impartiality. We should avoid becoming so enmeshed in a technocratic “conflict management” mentality that we find ourselves unable to understand that corrective justice also means something, and that those who hold out for justice are not necessarily acting out of emotion or self-interest. Conflict man-
agement is an important objective — peace and prosperity are important goals — but we must decide on a case-by-case basis how to balance it against the other aspirations international law must also have.

Second, we must be willing not only to make those decisions but also to make them in an informed way. This means learning something about the history of a conflict beyond what can be heard and seen on CNN. It is all too easy to look at the results of conflict on the evening news and blame it on terrorists or nationalist groups. This is just name calling if it is not backed up by historically informed and well-reasoned moral judgment that takes into account what the group in question had in mind when it did what it did. This recommendation is addressed to the morally sensitive public rather than to international affairs professionals, who certainly do not need to be told that conflict can be neither understood nor managed without awareness of its historical foundation.

Finally, and most importantly (and, not coincidentally, of greatest difficulty) we must pursue the development of institutions of corrective justice at the international level.9 This is not a luxury that can be safely relegated by realists to fuzzy-minded moralists. I have tried to show that the absence of corrective justice has a corrosive effect on the other functions that international law is trying to fulfill. It interferes with the ability to promote cooperation and peace, for the simple reason that people care about justice and what it promises them as much as they care about comparing where they stand now to where they might like to stand tomorrow.

The international community has definitely made serious efforts in this direction. One might think first of the World Court, but a more interesting recent example might be the war crimes tribunals getting underway in the former Yugoslavia and in Rwanda. The Nuremberg Trials were, obviously, another example. Various nations that have now

9. Note the role of domestic courts in adjudicating some of these problems, such as the damage remedies for human rights violations provided by the federal Alien Tort Claims Statute. On the role of American courts in the enforcement of international law, see generally Lea Brilmayer, International Law in American Courts: A Modest Proposal, 100 YALE L.J. 2277 (1991); Harold Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347 (1991).
Trials were, obviously, another example. Various nations that have now thrown off military dictatorships\textsuperscript{10} have considered trying past leaders for human rights abuses. One must keep in mind the costs associated with such endeavors, for there is no reason to assume that such investigations can be undertaken without jeopardizing other goals. Sometimes it may be better to "let bygones be bygones" . . . but not always.\textsuperscript{11}

VI. CONCLUSION

We sometimes look at foreign conflicts as though the men and women who fight in them are from another planet. What can one possibly think of the Bosnian Serbs, the militant Islamic extremists, or the I.R.A., if one has no acquaintance with their view of history? They seem so irrational, so atavistic, so mindless and peculiar. Any stranger who did not understand the conflicts in which we of the "advanced Western nations" have fought, however, would take the same position on viewing some of the devastation wrought by our "advanced" societies. What could have looked like a bigger waste of time (and human life and resources) than the American Civil War . . . from the point of view of someone who did not understand what motivated it. We understand the two World Wars in which our country figured from their inner point of view. We should try to do the same for others' conflicts. The goal is not to adopt their point of view, but to understand it the better to be able to judge it.

To say that international law is stuck between its past and its future is not to say that the past is necessarily more important than the future or vice versa. That, probably, is a decision that will have to be

\textsuperscript{10} See Ryle, supra note 1, for a description of the ongoing trial in Ethiopia. For a general discussion of the problem, see Diane Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regime, 100 YALE L.J. 2537 (1991).

\textsuperscript{11} It has of course been argued, historically speaking, that the agreement for reparations after Versailles had the terribly negative effect of encouraging the development of Nazism in Germany during the interwar period. Similarly, it is possible that prosecution of war criminals may have the undesired effect of making them less willing to stop fighting, thus prolonging the conflict. For a discussion of the difficulties attendant to such prosecutions, see Carlos Nino, The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina, 100 YALE L.J. 2619 (1991); Diane Orentlicher, A Reply to Professor Nino, 100 YALE L.J. 2641 (1991) (responding).
made on a case-by-case basis. What seems deeply troubling, however, is that, as things currently stand, the deck is systematically stacked. Because of its paucity of institutional mechanisms, international law is incapable of recognizing claims of justice and incapable of responding to the needs of history. Given the great importance history has in shaping the identities of individuals and of peoples, the systematic inability to recognize its importance should be cause for concern even if that inability did not upset attempts to structure the events of the future. Such incapacity presupposes a rootlessness, an ability to always think in terms of where one is going from here, that is out of touch with the way most people live their lives and want to live their lives. When one adds the practical consequences of the inability to respond to claims of justice — the instability and violence that can result — then the costs are clearly higher.

History, and corrective justice, deserve a higher priority on the international agenda. As our international legal system matures over time, we have to hope that in this (as in other ways) it will come to be increasingly satisfactory.