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Which supranational sovereignty? Criminal and socioeconomic justice compared

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Abstract. The idea that transnational dynamics challenge the regulatory capacity of the state has hardly ever received as much attention as in contemporary debates. Different voices denounce the crisis of the state and advocate the establishment of supranational institutions with legally coercive power. It is tempting to jump to the conclusion that these voices are concerned with the same cluster of problems. We think that one should resist this temptation. Firstly, not all the *problems* pointed out by the advocates of supranational sovereignty are of the same kind and structure. Some concern the need to limit the power of states, whereas others address the almost opposite necessity to support and strengthen their problem-solving capacity through forms of international regulation. Secondly, the corresponding *solutions* are different. In particular, although they may all imply the establishment of *supranational* institutions, not all such institutions need be *global*. The creation of a full-blown global rule of criminal law, for instance, would raise serious concerns of global despotism and cultural imperialism, and we therefore make a case for *regional* and context-sensitive solutions in this case. However, problems of supranational socioeconomic justice can only be addressed through global regulatory institutions, for regional institutions would, in this case, only recreate current problems at the interregional level.

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The quest for supranational institutions: an out of tune choir?

The adequacy of the nation-state as an instrument to face the most pressing problems of our time is increasingly called into question by scholars of different disciplines. The idea that the political, legal, and socioeconomic phenomena often

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grouped under the label of 'globalisation' challenge 'established patterns of territorially-based governance'[1] has hardly received as much attention as in the last twenty years. Global market regulation, international crimes, and climate change, to name but a few, are considered to be too complex challenges to be dealt with by states alone. In order to address such issues, scholars have proposed a wide array of international institutional solutions. It is therefore tempting to jump to the conclusion that the different voices denouncing the crisis of the state are concerned with the same cluster of problems and call for similar solutions. We would like to resist this temptation. We share part of the concerns raised by the inability of the state to face new challenges; however, we also believe that the various problems related to the inadequacy of the state should not be addressed as an undistinguished lump.

Our scepticism is twofold. Firstly, we do not think that all the *problems* on the table are of the same kind. Different arguments are concerned with features of the state that are deemed inadequate for different, and in some cases opposite, reasons. For instance, whereas the case for the internationalisation of criminal law is mostly grounded in the conviction that individuals ought to be protected from the excessive power of national institutions – and thus identifies the state as the *source* of the problem – the argument in favour of a stronger regulation of global markets is based on the idea that international institutions should *support* states in exercising important problem-*solving* capacities – such as the regulation of economic phenomena and the provision of welfare rights to their citizens – which they can no longer successfully exercise under circumstances of globalisation. Secondly, we believe that the corresponding *solutions* to these problems are different, in that they might call for the establishment of institutions with different scope, functions, and powers.

In order to keep the argument sufficiently simple, we are going to focus on two issues: criminal law and socioeconomic justice. The two areas are so central to both current debates on globalisation and, conversely, shared ideas about why states are valuable and necessary, that we believe our argument to be of sufficiently general interest.

The article unfolds as follows. The second section provides an overview of the quest for internationalisation in criminal and socioeconomic justice, and highlights some *prima facie* analogies between the two. The third section examines current forms of international governance in the two areas, and argues that they are unsatisfactory. The fourth and fifth sections assess the idea of a *cosmopolitan* solution to both problems and argue that, whereas the transnational challenges to socioeconomic justice can only be addressed by institutions that are global in scope (though limited in competence, and therefore not cosmopolitan properly speaking), the creation of a global rule of criminal law would generate more problems than it would solve: a *supranational*, but *regional* solution is more appropriate in the criminal case.

The cosmopolitan temptation in criminal and socioeconomic justice

The choice of criminal and socioeconomic justice as objects of our analysis is motivated by two complementary reasons. On the one hand, both areas are central

[1] Barry Holden (ed.), *Global Democracy: Key Debates* (London: Routledge, 2000), p. 202.

to traditional understandings of the *very point* of the state: administering criminal justice to guarantee public order and protect rights, and regulating socioeconomic cooperation to make sure that those participating in it have fair standing and returns, are two of the central justifications of the existence of the coercive apparatus of the state. On the other hand, the connection of these two tasks with the state and the state only is increasingly challenged. Hence, the trajectory of the two areas so far has been significantly *parallel*, and showing where parallelism should end is therefore all the more interesting. This section briefly describes the parallel trajectory.

The case for an international criminal court

Criminal law is a central feature of state sovereignty. Since it received its classical shape during the modern era, the power to punish its own citizens has been one of the most important functions of the state. Criminal law is meant to protect the peaceful living of individuals in a community and, at the same time, it is the most coercive power the state can impose upon its citizens, which could go as far as taking their lives. No wonder, then, that when criminal law is concerned states are extremely reluctant to resign their power in favour of supranational institutions. During the last century, however, scholars have started to challenge the view of criminal law as an exclusive state prerogative and to call for the internationalisation of criminal justice. In particular they have been concerned with 'international crimes', a category whose boundaries are still controversial, but which is universally recognised as including at least aggressive war, genocide, crimes against humanity, and war crimes. International courts, so the argument goes, are the most appropriate fora to deal with these crimes for two reasons.

First, international crimes are committed by, or at least with the support of, a state or a state-like organisation. For instance, a war of aggression needs an army to be waged, and crimes against humanity are typically committed through 'an abuse of state power involving a systematic inversion of the jurisdictional resources of the state'.[2] Since the state is involved in the perpetration of these crimes, there is no hope that it will punish the perpetrators, at least where no leadership turnover has occurred. Leaving state sovereignty intact means granting impunity to the perpetrators.[3]

Second, advocates of international criminal law contend that increasing global interdependence has brought about the creation of a world-wide international community with shared interests and values. At the core of these values are the 'peace, security and well-being of the world.'[4] Since international crimes threaten these universal basic values, their perpetration is an outrage to the whole international community and they therefore ought to be judged by international courts.[5]

[2] Richard Vernon, 'What Is a Crime against Humanity', *Journal of Political Philosophy*, 10 (2002), pp. 231–49, 242.
[3] See, for instance, Gerhard Werle, *Völkerstrafrecht* (Tübingen: Mohr Siebeck, 2007), pp. 39–40.
[4] *Rome Statute of the International Criminal Court*, UN *Doc*. A/CONF.183/9, 1998, preamble.
[5] See Kai Ambos (with the assistance of Christian Steiner), 'On the Rationale of Punishment at the National and International Level', in Marc Henzelin and Robert Roth (eds), *Le droit pénal à l'épreuve de l'internationalisation* (Paris: Lgdj-Georgéd-Bruylant, 2002), pp. 305–23.

The case for global economic institutions

Socioeconomic justice, understood as the just allocation of the burdens and benefits of socioeconomic cooperation, has also been traditionally understood as a distinctively domestic affair. This has been grounded in two sets of reasons:

1. Socioeconomic justice sets the basic terms of socioeconomic cooperation, and it therefore applies only to those who *already engage* in it, namely people living under the same political, social, and economic institutions;[6]
2. Demands of socioeconomic justice only apply among people who are commonly subject to a *coercive* order which they impose upon each other. The joint imposition of this order requires *justification*, and such justification, as argued by several theorists,[7] can best be given by making sure that the coercive institutions will have a (roughly) equal impact on, or at least greatly benefit, all the authors/subjects of the scheme.

This picture, however, is challenged by two considerations. Firstly, the increasingly international character of the production and distribution of goods renders claim (1) questionable. If goods are produced in a country, assembled in another, and commercialised in a third one, we can no longer maintain that justice-relevant socioeconomic cooperation only takes place between those who share the same nationality or residence.[8]

Secondly, if global forces and phenomena (transnational corporations, tax competition, world trade) have an increasing impact on state policies, it no longer makes sense to say that socioeconomic justice is only required within the state because it and *it only* coerces us, as claim (2) suggests. This calls into question the adequacy of the state as a problem-solver in socioeconomic matters under conditions of strong global interdependence. For example, tax competition is triggered by competition between states in attracting capital, companies, and skilled labour by offering attractive tax options. Once it starts, so the story goes, states are heavily pressurised into lowering their taxes to retain capital and labour, but in so doing they deprive themselves of public revenues, and consequently of the resources that are necessary to realise social justice.[9] Some scholars, moreover, claim that tax competition erodes the problem-solving capacity of states even if it does not generate a race to the bottom, for it nevertheless pushes countries towards a problematic rigidity and uniformity in their tax policies.[10]

[6] See, for instance, John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), pp. 106–20; Samuel Freeman, 'The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice', *Social Philosophy and Policy*, 23 (2006), pp. 29–68.

[7] Michael Blake, 'Distributive Justice, state Coercion, and Autonomy', *Philosophy and Public Affairs*, 30 (2001), pp. 257–96; Thomas Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33 (2005), pp. 113–47. A notable exception is Laura Valentini, 'Coercion and (Global) Justice', *American Political Science Review*, 105 (2011), pp. 205–20.

[8] Iris Marion Young, 'Responsibility and Global Justice: A Social Connection Model', *Social Philosophy and Policy*, 23 (2006), pp. 102–30.

[9] Richard Murphy, John Christensen, et al., *Tax us if you can*, Tax Justice Network (2005), {http://www.taxjustice.net/cms/front_content.php?idcat=30}. For an in-depth discussion of tax competition and sovereignty, see also Peter Dietsch, 'Tax Competition and its Effects on Domestic and Global Justice', in Ayelet Banai, Miriam Ronzoni and Christian Schemmel (eds), *Global and Social Justice: Theoretical and Empirical Perspectives* (London: Routledge, 2011), pp. 95–113, and Peter Dietsch, 'Rethinking sovereignty and international fiscal policy'. This symposium pp. 000–000.

[10] Philipp Genschel, 'Globalization, Tax Competition, and the Welfare State', in *Politics & Society*, 30 (2002), pp. 245–75.

Hence, the deliverance of (some aspects of) both criminal and socioeconomic justice seems to have become too complex an affair to be dealt with by states alone. The next section briefly examines the existing solutions to these two sets of problems.

Current forms of international governance in the criminal and socioeconomic domain

Can international criminal law carry out its purposes?

The claims in favour of the internationalisation of criminal justice have been remarkably successful, and international criminal law is today a reality. At the end of the Second World War, the Nuremberg and Tokyo tribunals were created to punish high-ranking state officials of the European Axis and in the Far East who had planned, ordered, and committed specific international crimes. Half a century later, two further international tribunals were created to deal with the crimes committed in former Yugoslavia from the start of the war in Bosnia in 1991 (the International Criminal Tribunal for former Yugoslavia, ICTY) and in Rwanda during 1994 (the International Criminal Tribunal for Rwanda, ICTR). Finally, in 1998 the International Criminal Court (ICC) – whose scope is not limited to a particular area or conflict, but is in principle universal – was established.

We would like to suggest, however, that the current system of international criminal law is neither truly effective in putting an end to impunity for international crimes, nor an authentic expression of universal values, as the above presented arguments claim. We shall firstly turn our attention to the 'end of impunity argument', which stresses the uselessness of national criminal systems in dealing with international crimes; and then address the 'common-values argument', according to which the current system of international criminal law expresses the common interests and values of the global international society.

I. As to the 'end of impunity argument', one should ask whether the current system of international criminal law is able to punish the perpetrators of international crimes – even the powerful ones – with a sufficient degree of comprehensiveness, certainty, and uniformity.

The history of international criminal law seems, so far, to contradict this assumption. International criminal law has been characterised by a marked *selectivity*, which is evident at three levels. Firstly, there is a form of explicit constitutional selectivity, declared in the statutes of international tribunals, whose jurisdiction is not universal as to the territorial and personal domains involved. This is manifest in the case of the Nuremberg and Tokyo Tribunals, the ICTY and the ICTR. The case of the ICC is different, but its jurisdiction is still not universal, for it only applies to the territory and citizens of the states that ratified its statute.[11]

Secondly, there is a form of 'operational' selectivity, which is not always declared in the statutes of the tribunals, but which has consistently inspired their

[11] The ICC is not bound by this limitation if it opens a case referred by the Security Council. In this case, however, the ICC works as an *ad hoc* tribunal, and its jurisdiction is therefore nevertheless limited.

practice.[12] International tribunals only focus on individuals who were at the top of their countries' political and military hierarchies at the time when the crimes were committed. In this case, as in the first kind of selectivity, the tribunals do not hide their selectivity. Indeed, the choice is justified as a strategic option motivated by the impossibility to prosecute all perpetrators of international crimes.

Finally, there is a third kind of selectivity, which differs from the first two because it contrasts with the official content of the statutes. This selectivity is nevertheless apparent in the practice of international criminal courts, which, so far, have systematically excluded from their activity every case that could prove the responsibility of powerful countries in committing international crimes. The ICTY, for instance, chose not to investigate on the NATO bombing campaign over Yugoslavia in 1999, although it received several referrals on killing of civilians and bombing of civilian targets, like the Chinese Embassy and the TV headquarters in Belgrade.[13] The ICC has so far focused only on cases involving African states: Central African Republic, the Democratic Republic of the Congo, Uganda – who voluntarily referred their cases to the ICC – and Sudan under the initiative of the UN Security Council. On the other hand the ICC refused to open investigations on the war waged by the International Coalition composed of Australia, Poland, the UK, and the USA against Iraq in 2003, notwithstanding several referrals received.[14] The representatives and citizens of the most influential states are not prosecuted by international courts, even if no formal impediment applies.

These three kinds of selectivity show that the end of impunity is neither consistently pursued, nor practically realised, by international tribunals. Instead, international courts are interested in, and suitable for, prosecuting only a small amount of those who are responsible for international crimes, who are selected on the basis of the position they occupied in the hierarchies of their states, their nationality, and the place where the alleged crimes were committed. As the third kind of selectivity particularly shows, the need to punish 'the powerful', which mainly motivated the creation of international criminal law, is not fulfilled, either. International criminal law simply transfers the problem from the national to the international level. Those who enjoy impunity in this case are not the powerful *within* the state, but *some powerful states*. Hence, turning the 'end of impunity argument' upside down, one could suggest with Gary Bass that: 'a few war criminals stand for a much larger group of guilty individuals. Thus, what is billed as individual justice actually becomes a *de facto* way of exonerating many of the guilty.'[15]

[12] The exclusive referral to 'major war criminals' was explicitly stated in the Charter of the Tokyo and Nuremberg Tribunals (see the *Charter of the Nuremberg International Military Tribunal*, art. 1). The ICTY and the ICTR stuck to this limitation since the beginning of their activity; their practice was later explicitly set forth in their Annual Reports and ratified by Security Council Resolutions. See for instance *Annual Report of ICTY*, 2001, para. 286 and *Annual Report of ICTY*, 2002, para. 326, and UN Doc S/Res/1503 (2003).

[13] *Annual Report of ICTY* (2000), summary. See also Michael Mandel, *How America gets Away with Murder. Illegal Wars, Collateral Damage and crimes Against Humanity* (London: Pluto Press, 2004); and Danilo Zolo, *Invoking Humanity: War, Law and Global Order* (London: Continuum, 2002).

[14] *Report of the International Criminal Court*, A/61/217 (3 August 2006), para. 31 and the letter from the Prosecutor of the 9 February 2006, p. 7, both available at the ICC website: {http://www.icc-cpi.int/} last accessed on 20 September 2011).

[15] Gary Jonathan Bass, *Stay the Hand of Vengeance. The Politics of World Crime Tribunals* (Princeton-Oxford: Princeton University Press, 2000), p. 300.

II. As to the 'common values argument', in the next section we shall touch on whether an 'international community' actually exists. Here we shall only ask whether international criminal law is currently perceived as embodying universally shared values, on the basis of the actual level of adhesion to it.

The ICC is the most interesting case in this respect, because its statute is at least theoretically open to universal ratification. However, among the roughly 200 existing states, only 117 ratified it.[16] If the consensus *per se* could be considered sufficiently widespread, although far from being universal, the geographical distribution of states is telling. So, for instance, Europe is the most represented region, with more than 40 states being members of the ICC, while only two states from the Middle East and North African Region (Jordan and Tunisia) ratified it. China, the most populous country in the world, has not ratified the ICC Statute, nor have India, Russia and the US.

Some of the states that have not ratified the ICC Statute expressed their motivation in official declarations. So, for instance, China and India expressed their doubts as to the effective universality, impartiality, and independence of the ICC. China emphasised the need for an election policy of ICC judges so as to be representative of the various regions of the world.[17] Among the reasons that brought India to the decision not to ratify the ICC statute are concerns as to how Indian criminal proceedings would be judged by the ICC. The Indian criminal system departs from the Western criminal model adopted by the ICC in many respects.[18] Algeria and Syria, finally, expressed their scepticism as to the decision of the ICC to open a case regarding the situation in Darfur, and proposed alternative solutions involving diplomatic initiatives instead of a judicial approach. Algeria, in particular, proposed an intra-African diplomatic process conducted by the African Union, involving both the Sudanese government and the armed group in Darfur, and stressed the importance of a direct involvement of the Sudanese people, as an alternative to the external judicial initiative of the ICC.[19]

We might conclude, then, that the current international criminal law regime seems not to have delivered its promises so far.

Two caveats are in order at this point. Our critique of the ICC does not intend to suggest that international criminal law is *always* used against weaker states and to the advantage of powerful ones, nor that the states' reservations towards it are always based on genuine questions of values and legitimacy.[20]

[16] Updated to the 20 September 2011, {http://www.iccnow.org/}.

[17] See the Statement of the Representative of China at the Sixth Committee of the 57th Session of the General Assembly (15 October 2002), {http://www.iccnow.org/documents/China6thComm15Oct02.pdf}; the Statement of the Representative of China at the Sixth Committee of the 58th Session of the General Assembly (20 October 2003), {http://www.iccnow.org/documents/China6thComm20Oct03.pdf}; and the *Position Paper of the People's Republic of China on the UN Reforms* (7 June 2005), {http://www.iccnow.org/documents/China_PositionPaperUNReforms_7Jun05.pdf}, all last accessed on 20 September 2011.

[18] Usha Ramanathan, 'India and the ICC', *Journal of International Criminal Justice*, 3 (2005), pp. 627–34.

[19] See the explanation of Algeria's vote on Security Council Resolution 1593, {http://www.iccnow.org/documents/Algeria.Statement.SCreferralDarfurICC_31March05.pdf} and the statement of Syria's representative at the 63rd Session of the UN General Assembly (27 September 2008), {http://www.iccnow.org/documents/syria_en.pdf}, both last accessed on 20 September 2011.

[20] We would like to thank an anonymous reviewer for drawing our attention to these two points.

As to the first point, three African states, as we have seen above, referred voluntary their situations to the ICC, thus suggesting that they might have found the institution legitimate or at least useful. Conversely, it is undeniable that powerful states such as the US, China, and Russia have not joined the ICC to date also because of fears that their sovereignty be constrained, so they see the ICC as a potential threat to their power. However, these fears appear to be exaggerated, for – as the UK case shows – powerful member states can enjoy a large degree of impunity. Furthermore, the fact that some powerful states see the ICC as a threat to their sovereignty does not cancel the fact that international criminal law has only been applied to weaker states so far, nor it defeats our argument that international criminal law can be influenced by powerful states and therefore applied in an uneven way.

As to the refusal of some states to join the ICC, of course power-politics considerations also play a role, as we have just seen. But we consider it to be sufficient for our argument that the non adhesion to the ICC by some states, and in particular by non-Western ones, is *also* determined by the fact that current international criminal law is the expression of a particularistic conception of (criminal) justice.

Global economic governance in a world of sovereign states

Cosmopolitan arguments in socioeconomic matters have not been as successful as in criminal law. With the partial exception of the EU, virtually all attempts at establishing forms of international socioeconomic regulation have been *horizontal* and *intergovernmental* in nature. Current solutions to global socioeconomic problems do not challenge the idea of states being the ultimate loci of sovereign power, and regard global governance as a matter to be tackled through agreements and negotiations between fully sovereign states, rather than through, at least partly, supranational institutions with *autonomous* regulatory power.[21]

Consider, for instance, the case of trade governance, and particularly of trade negotiations within the framework of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). The Uruguay round (1986–94) was, as is nowadays almost uncontroversially recognised, biased against developing countries and dominated by a homogeneous discourse that trade liberalisation is the best recipe for development, irrespectively of a country's geography, human capital, institutional and economic structure. Moreover, the round was characterised by a significant knowledge gap between developing and developed countries, Trade Related Technical assistance (TRTA) not being fully on the table yet. Finally, power relationships were heavily unbalanced, since no emerging economies had significant bargaining power to counteract mainstream positions. The outcome mirrored these problems, by penalising developing countries in those areas where they were most competitive (especially agriculture), whilst giving developed countries a high level of flexibility in areas that mattered

[21] We regard this to be the case even for institutions like the WTO, which, unlike some institutions of the EU, do not give rise to an independent source of decision-making power.

to them – most notably with the Multi Fibre Arrangement (MFA), which imposed limits on the amount of textiles that developing countries could export to developed ones.

The current trade-negotiation round, the Doha round, which started at the end of 2001, has the lowering of trade barriers around the world as its main objective, an explicit emphasis on development, and is characterised by a more balanced bargaining situation, given the increasing global competitiveness of Brazil, Russia, India, and China (BRICs). The Doha round, however, has been extremely difficult and already collapsed twice (in 2003 after the Cancún talks, and in July 2008 after the Geneva talks); negotiations have yet to be resumed fully after the second collapse. Throughout the negotiations, the most significant differences emerged around the area of agricultural subsidies and anti-dumping measures. Agricultural subsidies are mainly paid by governments of wealthy nations (most notably, the US, the EU member states, and Switzerland) to local agribusinesses to support their activities, with the consequence of increasing the supply of agricultural commodities and simultaneously reducing their market prices. Developing countries argue that agricultural subsidies are trade barriers in disguise, in that they artificially drive down crop prices around the world and annihilate the comparative advantage of developing countries in the production of cheap crops. Moreover, affluent countries have been accused of *dumping*, namely of adopting policies of predatory pricing whereby commodities are sold at a very low price – in some cases, even below the cost of production – in order to drive competitors out of the market. Developing countries challenge the current trade system for failing to recognise agricultural subsidies as an instance of dumping or at least as a genuine trade barrier, whilst not allowing for relevantly similar flexibility to the economies of developing countries in areas where *they* are most vulnerable, such as technology-intensive sectors.

Thus, one of the most important current attempts to address issues of transnational socioeconomic regulation through traditional horizontal practices of voluntary agreements between sovereign states has so far failed to a large extent. At a more general level, multilateral negotiations seem incapable to cater for the fact that some countries are affected more than others by trade agreements. Trade barriers and dumping might constitute, for some states, not only the grounds for some loss in absolute or comparative disadvantage, but the loss of the very capacity to tackle issues of domestic prosperity and justice with an acceptable degree of discretion. For some developing countries, not being able to diversify one's economy, access foreign markets in the only areas where one is reasonably competitive, or defend one's own productive sector against artificially competitive foreign imports, might entail not being able to develop in a sufficiently robust and equitable manner. Given what is at stake, and the challenge to an effective exercise of sovereignty that these issues constitute, it seems problematic that such decisions be taken in a forum where the bargaining power of the negotiating actors does not mirror in any satisfactory way (and is indeed in some cases reversely proportionate to) the degree to which these are affected by the decisions.[22]

[22] On this specific issue, see Clara Brandi, 'The World Trade Organization as Subject of Socioeconomic Justice', in Ayelet Banai, Miriam Ronzoni and Christian Schemmel (eds), *Global and Social Justice*, pp. 186–99.

A clarification is in order at this point. The considerations addressed so far may give the impression that developing countries are, after all, those which are most pressing in favour of a more strongly *liberalised* global market and therefore less regulation. The issue is, however, more complex. The case of dumping, for instance, is not a classical case of protectionist behaviour: here the idea is precisely that developing countries cannot develop strong productive sectors – especially in complex and technologically intensive areas – if too many cheap products are available from abroad. Developing countries often claim to need stronger protection for their domestic market precisely on the ground that they need to 'catch up' in order to be then able to act in the global economy on an equal and fair footage. Moreover, trade is only an example here. As the case of tax competition in the previous section has showed, at least some problems of global socioeconomic governance require more, rather than less, intervention and regulation, and they also threaten the problem-solving capacities of *affluent* countries. But since tax competition has its short-term winners (most notably, tax havens) no *binding* regulation policy has been adopted so far, as in the case of trade.

The lesson to learn from attempts to find intergovernmental solutions to global socioeconomic problems, and to trade in particular, seems therefore to be that some form of independent supranational regulation is needed.

A global institutional order? Where the analogy ends

The twin spectres of global despotism and cultural imperialism

The failure of international criminal law to attain its ends described in the first part of the third section could be partly attributed to the fact that international criminal law has not gained universal scope and efficacy. However, as we shall argue in this section, a centralised and universal criminal law system would not solve these issues and would raise further, possibly even graver, ones.

As to the problems related to the 'end of impunity argument', the first two types of selectivity – the 'constitutional' and the 'operational' – could be theoretically minimised by universalising the jurisdiction of the court and by providing it with resources and power substantial enough to deal with all those who are responsible for international crimes. The third kind of selectivity, which grants impunity to most powerful states, seems to be avoidable by establishing a global rule of law regime, which would grant the independence of international tribunals through a complex system of checks and balances. The antidote to selectivity seems therefore to be a centralised power with *its own* global constituency, a trumping and coercive power over the actions of states, and effective instruments to exercise these powers, such as its own public officials, revenues, fiscal powers, and police, organised and coordinated according to the rule of law model. Although this would fall short of being a world state proper, it would certainly entail the transferral of some relevant sovereign powers from the national to the global level, thus going far beyond the current structure of the ICC.

Similar solutions are in fact proposed by the most enthusiastic advocates of legal globalism, represented by authors such as Hans Kelsen, Jürgen Habermas, Richard Falk and David Held.[23]

We would like, however, to resist this proposal, by drawing attention to the fact that a global institution with coercive power in the criminal sphere, whilst potentially suitable to overcome the three kinds of selectivity, would incur the serious risk of reproducing at a global level *those very dangers (in terms of abuse of power) that the systems of international humanitarian, criminal and human rights law were created to counteract*. These were set up to protect citizens against the excessive power of states by creating international guarantees and protections. But transferring the most dangerous features of state power to the global level would only export the problem to a wider, more dangerous, and hardly controllable level. Most legal globalists claim to be inspired by Kant's cosmopolitanism; however, as several scholars have noted extensively,[24] Kant's cosmopolitan sympathies fall short of leading him to advocate global coercive institutions. Indeed, Kant himself warns against the risk of incurring into a form of *global despotism* which would constitute the 'most horrible'[25] form of tyranny. It could be objected that we now have a more sophisticated model to export at the global level than the one Kant knew – the contemporary system of the rule of law, based on a complex system of checks and balances, which could better deal with the risk of despotism. However, the history of the last two centuries shows that every system of rule of law is a fragile construction, which is not able to grant against any risk of perverse use of its powers. The advocates of legal globalism seem indeed to take seriously only one of the basic assumption of the rule of law, namely that the law can effectively limit power, and to forget the other, namely that every power has an ineluctable tendency to expand and abuse its prerogatives.[26] Moreover, the pervading capacity of contemporary state power expanded significantly, due both to its centralised bureaucracy and to the increased possibilities of control over population and territory made available by modern technology.

Under these circumstances, global coercive institutions like the ones which would be necessary fully to implement and enforce global criminal law would generate a high despotic potential. Moreover, they would bring about a concentration of power infinitely superior to that of any individual state subject to them, with the consequence that, if this power were to become despotic, there would be

[23] Hans Kelsen, *Peace through Law* (Chapel Hill: University of North Carolina Press, 1944); Richard A. Falk, *The Status of Law in International Society* (Princeton: Princeton University Press, 1970); David Held, *Democracy and the Global Order* (Cambridge: Polity Press, 1995); and Jürgen Habermas, 'Kants Idee des Ewigen Friedens – aus dem historischen Abstand von 200 Jahren', in *Kritische Justiz*, 28 (1995), pp. 293–319.

[24] Amanda Perreau-Saussine, 'Immanuel Kant on International Law', in Samantha Besson and John Tasioulas (eds), *Philosophy of International Law* (Oxford: Oxford University Press, 2009), pp. 53–78; and Katrin Flikschuh, 'Kant's Sovereignty Dilemma: A Contemporary Analysis', *The Journal of Political Philosophy*, 18 (2010), pp. 469–93. Other scholars, however, such as Hedley Bull and Martin Wright, stress the cosmopolitan component of Kant's writings. For an overview of the debate see Andrew Hurrel, 'Kant and the Kantian Paradigm in International Relations', *Review of International Studies*, 16 (1990), pp. 183–205.

[25] Immanuel Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (Frankfurt am Main: Klostermann, 1968), Hrsg. von Joachim Hebbinghaus, pp. 60–8 and *Zum ewigen Frieden* (Leipzig: Reclam, 1984), pp. 19–23 and 34–6.

[26] See D. Zolo, 'Theory and Critique of the Rule of Law', in Pietro Costa, D. Zolo (eds), *The Rule of Law. History, Theory, Criticism* (Dordrecht: Springer, 2007), pp. 3–72.

no other comparable organised power to appeal to. The very motivation behind the idea of internationalising criminal law is to protect actors against the excessive power of the state apparatus. However, a global rule of criminal law would only export the problem from the state to the world level – and worse still, create a power infinitely superior to that of the nation-state, with *nowhere else to go*.

As to the 'common-values argument', the preliminary question to ask is whether the world-wide international community of shared interests and values described by the advocates of international criminal law really exists. In the absence of such a community, we would like to argue, it is not possible to find a consensus about Western-style criminal law as the most appropriate tool to redress international crimes. We do not challenge the idea that extreme acts such as those which are labelled as international crimes are universally recognised as extremely evil actions that need to be redressed. But we shall contend that it does not follow that *criminal* law, and a system based on the Western legal model, is the *only* valuable system to deal with them.

At closer inspection, and beyond the rhetorical statements of the advocates of ICC, the existence of a homogeneous ethical global community appears to be more a chimera than a matter of fact.[27] Deep tensions, cultural heterogeneity, and only a limited area of consensus characterise contemporary international society. Even without relying on Huntington's theory of the 'clash of civilizations',[28] the increasing tensions between, for instance, the 'Western' and the 'Muslim world' is the most evident example against the idea of an increasing culturally and ethically homogeneous international society. In such a context, the use of terms like 'global community' and 'international society' has a strong symbolic power in strengthening the values assumed as being central and in excluding dissenting views. These expressions present some values as the only values that matter, and suggest an image of the 'global community' as an ethically and culturally homogeneous society. This creates a language of inclusion and exclusion: for communities with different ethical and legal systems, the choice is to be either excluded from the club of the global community, or to conform to its moral system in order to obtain the approval of the dominant political culture and be accepted by it.[29] This constitutes a problem even if no disagreement can be said to exist regarding the moral condemnation of, say, genocide; for it is by no means clear that a *penal* response to genocide along the lines of a Western style criminal law trial would be the most widely shared or most adequate response in all cases, irrespectively of the relevant context. Different ethical and legal traditions are currently not considered as valuable alternatives to the Western criminal model. Alternative models, however, do exist: procedures inspired by the restorative justice model, for instance, have been applied in response to international crimes in several countries.[30] The South African *Truth and Reconciliation Commission* is a particularly successful example.

[27] For a historical overview see Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Oxford: Clarendon, 1984); and Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

[28] Samuel Huntington, 'The Clash of Civilizations?', *Foreign Affairs*, 72 (1993), pp. 22–49.

[29] See Mark Findlay, Ralph Henham, *Transforming International Criminal Justice. Retributive and Restorative Justice in the Trial Process* (Collumpton: Willan, 2005), pp. 301–2.

[30] Restorative justice is a response to crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused, and building peace within communities, without necessarily holding the perpetrator criminally responsible.

South Africa's proposal to recognise this option as an alternative to criminal procedures was however rejected during the negotiations which led to the creation of the ICC. Other options, like the *gacaca* courts employed in Rwanda in response to the genocide occurred in 1994, which combine penal and restorative elements were not even taken into account. Under these circumstances, a full-blown global system of criminal law would accentuate the anti-pluralistic and hegemonic character of current international criminal law. 'Equalizing the cultural differences between the nations of the world'[31] would be its prerequisite, and would thus raise the spectre of cultural imperialism, parallel to that of a global despotism.

Thus, as far as criminal justice is concerned, although we agree that supranational solutions of some kind are necessary, we believe that, on closer inspection, a global rule of criminal law would not be desirable. This does not mean, however, that all supranational solutions must thereby be ruled out, as we shall see in the last section.

Transnational socioeconomic justice as a case of background injustice

Our discussion in the second part of the third section regarding difficulties in the regulation of global markets points at a more general problem: the *insufficiency of self-regulation* as a tool to tackle concerns of global socioeconomic justice. The intergovernmental – rather than supranational – nature of institutions such as the WTO is essentially at odds with the very nature of transnational socioeconomic justice. Intergovernmental negotiations, however multilateral they may be, are bound to mirror power relations between countries and short-term interests. This section explores the general theoretical structure of this problem and claims that certain problems raised by socioeconomic phenomena cannot be solved but through *institutional regulation of a supranational kind*.[32]

Rawls argues that one of the main reasons why institutions are of special importance to socioeconomic justice lies in their role in securing 'background justice'.[33] In a context of intense socioeconomic interaction, actors lose the power to control the consequences of their actions:

> The accumulated results of many separate and ostensibly fair agreements, together with social trends and historical contingencies, are likely in the course of time to alter citizens' relationships and opportunities so that the conditions for free and fair agreements no longer hold. The role of institutions . . . is to secure just background conditions against which the actions of individuals and associations take place.[34]

If this is true, then there is no feasible set of rules that can be applied to socioeconomic actors *directly* and succeed in preventing the erosion of background justice. There are tasks that actors involved in socioeconomic interaction cannot simply fulfil through self-regulation. A contract signed without any coercion, for

[31] H. Kelsen, *Peace though Law*, p. 12.
[32] For an in-depth version of this argument, see Miriam Ronzoni, 'The Global Order: A case of Background Injustice? A Practice-Dependent Approach', *Philosophy and Public Affairs*, 37 (2009), pp. 229–56.
[33] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 257–88.
[34] Ibid., p. 266.

instance, may be seen as a legitimate and fair transaction according to the normative criteria that apply to individual conduct in the market place. However, from a wider perspective, the conditions of the contract may put one of the two contractors in a problematic or disproportionately unequal bargaining position in the long run, or have unacceptable consequences on third parties, in ways which cannot be appreciated by the two contractors. For background justice to obtain, the conditions under which contracts can be made in a genuinely free and voluntary basis have to be maintained over time. This, however, requires institutions to do more than just enforcing 'free' and 'voluntary' agreements. For their accumulated effects can lead to scenarios where some actors can no longer enter free and voluntary agreements – say, because they are in extreme need, liable to exploitation and with virtually inexistent bargaining power. Institutions, therefore, have to preserve certain socioeconomic relationships among actors so as to allow them to be in suitable positions to interact with each other fairly.

The problem of background justice has often been understood as something that arises within an *already existing* institutional order.[35] However, the argument of background justice can also ground a case for the *establishment* of new regulatory institutions. Thus, for instance, current global socioeconomic trends may well generate problems of background justice *between states*, by depriving them (especially, but not exclusively, the institutionally and economically weaker ones) of the necessary problem-solving capacities to regulate internal socio-economic dynamics. The current rules on trade, as argued by many, deprive developing countries with vulnerable economies and weak institutions of the necessary means to grow out of poverty or to strengthen their internal economy through diversification, whilst the pressure to liberalise makes them open to cheap foreign goods and further weakens their chances to develop a strong national productive or service sector. Tax competition, on the other hand, weakens the internal capacities of developing *and* developed countries, erodes welfare states or, in the best case scenario, makes welfare and fiscal policies unnecessarily rigid and homogeneous. These are problems of background justice proper, for sovereign states under conditions of strong power and bargaining inequality, and significant interdependence, cannot interact as such, namely as fully sovereign entities.

If the problems raised by trade rules and other transnational socioeconomic dynamics tackle issues of just background conditions, then only the *establishment of supranational institutions with effective regulatory power* has any hope of solving them. Like in the standard domestic case, self-regulation and *rules of conduct* are not going to deliver in this respect; the brief analysis of WTO negotiations seems to back up this point for the case of trade, and similar difficulties have been encountered in several attempts to make agreements in terms of tax coordination and elimination of tax havens.

This, however, does not entail that we ought to construct a world welfare state. On the contrary, the appropriate supranational regulatory institutions are those which, by putting constraints on all countries, give effective problem solving

[35] See, for instance, Saladin Meckled-Garcia, 'On the Very Idea of Cosmopolitan Justice: Constructivism and International Agency', *The Journal of Political Philosophy*, 16 (2008), pp. 245–71.

capacities *back* to them. If, for instance, binding rules against harmful tax competition were to be applied by supranational institutional authorities, then countries would lose the freedom to deviate from such rules, but would gain back the power to design and implement fiscal policies at their discretion within the constraints of those rules.

Criminal and socioeconomic justice: different problems with different solutions

As we have seen, the problems posed by international criminal justice do not justify the establishment of a global rule of criminal law. The challenges of transnational socioeconomic justice, instead, seem to require the transferral of at least some sovereignty from the national to the global level, but with an eye at supporting states in their problem-solving capacities, rather than with the aim of adopting a full-blown cosmopolitan route. By way of conclusion, we would like to sketch a few guidelines for a more promising path in the area of criminal justice, and highlight the differences between the criminal and the socioeconomic case more explicitly.

As argued above, the centralised system of international criminal law, which is the end-goal that inspired the creation of existing international tribunals, would only become fully effective if some additional forms of power were exported from the national to the global level; and such transferral, as we argued, would be extremely problematic, dangerous, and possibly counterproductive. However, international crimes are a problem and cosmopolitans do have a point in being suspicious about the state's willingness and capacity to address them. What would a more promising approach look like? The in-depth elaboration of such an approach is a task for another day, but we shall try and sketch a few promising guidelines here. First and foremost an alternative model would have to be both *pluralistic* and *regionally based*. It would support the establishment of a *plurality* of decentralised and independent regional schemes, each of them establishing the most suitable means to responding to international crimes in full autonomy from the others, and in the way that is most compatible with the cultural and political character of its members. Each regional institution would have competence over a number of political units or states which are relevantly similar with respect to their cultural, legal or political tradition, although also sufficiently diverse among each other to create sufficient neutrality and arbitration at the supranational level. The regional aspect of this solution would create a significant degree of pluralism among the mechanisms adopted by the different regional entities. This means that the solutions adopted should not necessarily involve *criminal* procedures, but could also rely on other models, such as, for instance, processes of restorative justice.[36]

[36] Still penal in character, but different from the international criminal law model, is the idea of universal jurisdiction, according to which domestic courts can punish international crimes, no link being necessary between the place where the crimes are committed, the perpetrators or the victims of the crimes and the state the courts punishing the crimes belong to. However, the universal jurisdiction principle is also committed to penal universalism and to the related indifference towards context-specific considerations, and is not consequently, in our opinion, an attractive alternative to international criminal law. Moreover, the universal jurisdiction principle, where adopted, has proven to be rather ineffective, and counterproductive for the judicial system of the states that adopted it.

Finally, each political community would have the chance to deal directly with the violations occurred, the supranational institution being only a last resort, in case the local authority is not able or willing to address the violations.[37]

We believe that institutional solutions designed according to these guidelines present advantages over the ICC and over a global rule of criminal law. Regional institutions would have the usual advantages of being supranational, namely that of not leaving the power to decide whether to act or not to states alone, whilst however avoiding the risk of global despotism. They would not, of course, solve every problem related to efficacy. The disproportion of power which constitutes a problem for international criminal law, for instance, would not disappear at the regional level. A regional system, even if carefully designed, would not be able to redress *every* serious international crime. But, as we have seen, nor does international criminal law. On the other hand, as an advantage in comparison to the current solution, a regional system would enable different regional blocks to counterbalance and exercise soft control on each other, thereby diminishing the risks of global despotism and creating a possibility for them to exercise external pressure on each other to punish or redress the violations committed in the respective territorial spheres competence. Moreover, the preservation of pluralism, and the construction of supranational legal systems according to the values and practices of those who are or have been affected by international crimes, would be effective anti-imperialistic measures in themselves. Two concluding remarks should be made at this point with respect to our proposal. First of all, the assessment of the comparative advantages of regional and global systems of international law is not made under idealising circumstances and assuming perfect institutional functioning. Under such circumstances, both systems would probably be sound, albeit still more or less desirable depending on the value one accords to pluralism. Under most common empirical constraints, however, whilst both solutions would have shortcomings (such as, in the regional case, a certain risk of disregard for minority views and a vacuum of competence for interregional crimes), we hold that the regional case is, on balance, to be preferred for the reasons suggested above. Second of all, a regional, smaller and possibly more flexible institution would have the further advantage of being able to accommodate (thanks precisely to its flexibility) context-sensitive concerns that are motivated by reasons other than cultural diversity. *Gacaca* trials, for instance, can be preferred to criminal trials not only because of reasons of affinity to the local public political culture, but also because they are the best way to achieve rough justice when the number of perpetrators is very large. Similarly, Truth and Reconciliation Commissions can also be preferred for political and not only for cultural reasons – such as when social peace will be hard to achieve in case of harsh retribution, and when victims and perpetrators have to carry on living side by side. Regional institutions have a better chance of being able to achieve this fine-tuning.[38]

Among the few states which adopted the universal jurisdiction, the two pioneers (Belgium and Spain) have either abolished it or expressed their intention to do so in the near future.

[37] In this it would thus be similar to the functioning of the ICC, which only intervenes in case states are unwilling or unable to proceed. However, it would differentiate itself from the latter, in that it would also contemplate non-criminal procedures as valid measures.

[38] We are grateful to an anonymous reviewer for urging us to think on both these matters.

The conclusion we have reached with respect to criminal justice does not entail, however, a comprehensive rejection of global institutional solutions of *any* kind. Indeed, the main point of this article is that not all international problems are of the same kind. In particular, the endorsement of a regional supranational solution to international problems of criminal justice does not mean that a structurally similar option would also be appropriate for transnational socioeconomic justice. The different problems of socioeconomic justice addressed in this article are of an *interregional* character: most of the issues they arise tackle problems that happen *across* different regions. By this we do not mean that genocides, crimes against humanity or war crimes never happen at an interregional level. What we mean is that regional solutions in socioeconomic governance might reproduce problems of background justice between regions, rather than between countries – thus not even reducing the extent of the problem. For instance, the presence of Regional Trade Agreements (RTAs) constitutes an additional problem, rather than a solution, to the issues discussed in 3.2. Such agreements protect some clusters of countries against others, often making already powerful actors even stronger, and excluding weaker actors from an even wider slice of the global market. The example of EU agricultural subsidies is the most well-known, but by far not the only, example in this respect. RTAs *penalise* those who are *excluded* in a way that criminal regional solutions do not. The same applies to the case of tax competition: there is not much use in agreeing on regional institutions tackling tax competition within a region in a world where capital (and increasingly, some forms of labour) can move cross-regionally with great ease. Rules that limit tax competitions within a region would only attract capital and some labour away from that region, thus moving tax competition itself from the interstate to the interregional level, without solving it.[39]

If, however, the conclusion of this article is that global solutions are too dangerous for criminal justice, but only global solutions can solve problems of transnational justice, a final question naturally arises: why should we not be equally concerned about cultural imperialism and global despotism in the socioeconomic case? It is not our intention to deny that such problems might arise. However, we believe that there is an important feature that makes the socioeconomic case different from the criminal one. In the case of socioeconomic justice, what we want to do through international institutions is to *support* states that are weakened by globalisation in their threatened *problem-solving* capacities, rather than counteract or limit their power. Thus, global institutions would limit state sovereignty for state sovereignty's sake: if the institutional design were to succeed, the relevant global institutions would, to some extent, give some socioeconomic power *back* to states. States should give up power to take unilateral decisions in some areas in order to gain more room for manoeuvring in terms of domestic public policy. Once this power is given back to them, different countries can and

[39] Indeed, the most cited case as one the first examples of tax competition is interregional. In 1984, the US unilaterally decided to abolish their withholding tax on foreign residents holding bank accounts in the US, causing Europe to follow suit shortly after. See Reuven S. Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State', *Harvard Law Review*, 113 (2000), pp. 1573–676. The idea that tax competition cannot be tackled at a regional level is also the point often raised by the UK in response to the proposals of other EU member states (most notably, Germany and France).

will take different decisions in economic policy. This remark also responds to the charge of cultural heterogeneity and imperialism: if (some) power is given back to states, and to the weak ones in particular, there is much less reason to fear that the imposition of culturally biased norms will be a by-product of global institution-building. However, whereas global despotism in global socioeconomic governance can be avoided more easily than in the criminal case, this need not entail that the danger does not exist. Of course, this means that the *competence* of global socioeconomic institutions should be importantly limited in scope.

Finally, if supranational criminal institutions are regional and socioeconomic ones are global, this is a good anti-despotic measure as such. Different supranational institutions (some regional, some global) create in itself a plurality of voices that could be beneficial to counteract the threats of excessive global power.