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From Pinochet in The House of Lords to the Chevron/Ecuador Lago Agrio Dispute: The Hottest Topics in International Dispute Resolution

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Articles

From Pinochet in The House of Lords to the Chevron/Ecuador Lago Agrio Dispute: The Hottest Topics in International Dispute Resolution

Charles N. Brower* and Diane Brown**

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I. INTRODUCTION

Since the end of the Cold War, fundamental changes in global governance, power dynamics, and economic relations have led to a period of vigorous structural and substantive growth in the arena of international law. Structurally, this period has been marked by a proliferation of international courts and tribunals. Substantively, we have seen the elucidation and development of many areas of international law. These developments have increased the complexity of international law and led to new challenges in various areas, including international dispute resolution.

This Article addresses three of the hottest topics in international dispute resolution. Part II focuses on reconciling international criminal justice with domestic peace by exploring three case studies in Latin America, Africa, and Europe, respectively. Part III discusses the perils of the fragmentation of international law by examining how disparate courts interpret and apply the same legal principles and instruments in competing ways. Part IV examines the growing interface between the jurisprudence of domestic courts and international courts and tribunals. Each of these issues can be attributed, in part, to this structural and substantive growth in the sphere of international law.

II. HOT TOPIC 1: RECONCILING INTERNATIONAL CRIMINAL JUSTICE AND DOMESTIC PEACE

Countries undergoing transition, whether from repressive rule or recovering from war, are often confronted with the need to address legacies fraught with grave violations of international human rights and humanitarian law. It is only by dealing with the past through addressing the root causes of violence in its various forms and specifically addressing grievances that societies can reconcile differences, move forward, and build a sustainable peace. Indeed, international law requires states to investigate and prosecute gross violations of human rights

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and serious violations of international humanitarian law, to provide redress to victims of those violations, and to take measures to prevent further violations.¹

There is no “one size fits all” method, however, for coming to terms with a violent past. Rather, the most appropriate way forward for a particular society will depend on a variety of context-specific, socio-political, economic, and cultural factors. Toward this end, over the years, states have employed a variety of measures, including the establishment of truth commissions; the enactment of amnesty or lustration laws; the provision of reparations to victims; domestic prosecutions of alleged perpetrators; traditional forms of justice, such as the Gacaca courts established in response to the Rwandan genocide;² or any combination thereof. Furthermore, in the early 1990s, another transitional justice tool emerged from the toolbox, after having lain dormant for nearly half a century.

With the establishment of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (“ICTY”) and Rwanda (“ICTR”), the hybrid criminal tribunals, such as the Special Court for Sierra Leone (“SCSL”), the Special Tribunal for Lebanon, and the Extraordinary Chambers of the Courts of Cambodia (“ECCC”), and finally, the International Criminal Court (“ICC”), the legacy of the post-World War II military tribunals at Nuremberg and Tokyo has been revived.³ Criminal justice in the international arena has become a leading means of seeking accountability for gross violations of human rights and serious violations of international humanitarian law. For the past nineteen years, these institutions have proven to be effective means of combating impunity, and, furthermore, have made significant contributions to the elucidation and development of international criminal and humanitarian law. Correspondingly, the prosecution of internationally-condemned crimes in domestic jurisdictions has gained increasing momentum.

1. See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21 2006); see also Office of the U.N. High Comm’r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, at 5-6, U.N. Doc. HR/PUB/08/1 (2008) (listing, *inter alia*, article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, and article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as international human rights instruments forming the legal basis for a right to a remedy and reparation).

2. See *Rwanda Killers Face Local Justice*, BBC NEWS (Mar. 10, 2005, 12:59 PM), <http://news.bbc.co.uk/2/hi/africa/4335405.stm>.

3. *About the ICTY*, UN ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited Dec. 8, 2012); *About ICTR*, UN ICTR, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Dec. 8, 2012); *About the Special Court for Sierra Leone*, UN SCSL, <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx> (last visited Dec. 8, 2012); *About the STL*, STL, <http://www.stl-tsl.org/en/about-the-stl> (last visited Dec. 8, 2012); *About ECCC*, UN ECCC, <http://www.eccc.gov.kh/en/about-eccc> (last visited Dec. 8, 2012); *About the Court*, ICC, http://www.icc-cpi.int/EN_Menus/ICC/About%20the%20Court/Pages/about%20the%20court.aspx (last visited Dec. 8, 2012).

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However, this globalization of criminal justice has generated debate regarding whether the aims of international criminal justice are always reconcilable with, and conducive to, the pursuit of peace. This potential tension between “justice” and “peace” is a paradox, given that a fundamental rationale for holding persons accountable for crimes such as genocide, war crimes, and crimes against humanity is to contribute to stability and peace by deterring future atrocities, bringing justice to victims, and paving the way for the re-establishment of the rule of law and reconciliation.⁴

Yet, it is widely acknowledged that such efforts can also have negative consequences—possibly generating instability and frustrating domestic efforts at peace and reconciliation by, for example, opening old wounds, creating a disincentive to negotiate peace, or interfering with traditional justice processes, which may be considered more appropriate or effective, or both, in certain contexts. This tension between justice and peace can be seen time and again as a byproduct of international efforts to address the aftermath of gross violations of international human rights and humanitarian law, and leads to the difficult question of “if and when justice should take priority over peace.”⁵

A. Pinochet in the House of Lords

Spain’s efforts to prosecute General Augusto Pinochet, the former Chilean Head of State, under the principle of universal jurisdiction, and the divided response to these efforts within Chilean society and among international leaders, graphically raised precisely such questions regarding the compatibility of international justice and domestic peace.

In 1973, General Pinochet seized power after the democratically elected government of President Salvador Allende was overthrown by a military coup.⁶ During General Pinochet’s seventeen-year regime, some 2,603 people are reported to have been executed, tortured, or “disappeared.”⁷ In 1978, the Chilean government passed an Amnesty Law, shielding from prosecution any persons

4. See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 28 (2001); Sara Daeshori, *Pursuing Peace in an Era of International Justice*, 50 POLITORBIS 83 (2010), available at www.dplf.org/uploads/1292518783.pdf.

5. Nick Grono, Deputy President of the Int’l Crisis Group, Speech to the Overseas Development Institute: Peace versus Justice? Understanding Transitional Justice in Fragile States (Oct. 9, 2009) (transcript available at <http://www.crisisgroup.org/en/publication-type/speeches/2009/the-role-of-international-justice-mechanisms-in-fragile-states.aspx>).

6. HUMAN RIGHTS WATCH, DISCREET PATH TO JUSTICE?: CHILE, THIRTY YEARS AFTER THE MILITARY COUP 1 (2003), available at <http://www.hrw.org/legacy/backgrounders/americas/chile/chile0903.pdf>; Amnesty Int’l, *Chile: The Terrible Legacy of Augusto Pinochet*, AI Index AMR 22/010/2004 (Sept. 9, 2004), available at <http://www.amnesty.org/en/library/asset/AMR22/010/2004/en/cf781af9-d58e-11dd-bb24-1fb85fe8fa05/amr220102004en.pdf>; Frances Webber, *The Pinochet Case: The Struggle for the Realization of Human Rights*, 26 J. L. SOC’Y. 523, 524 (1999).

7. HUMAN RIGHTS WATCH, *supra* note 6, at 1; Amnesty Int’l, *supra* note 6; Webber, *supra* note 6, at 524.

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who committed crimes between 1973 and 1978.⁸ It was during that five-year period, when Chile was ruled under a state of siege, that the vast majority of human rights violations are alleged to have been committed.⁹ In 1989, the Chilean people held free, democratic elections, and General Pinochet conceded defeat to opposition leader, Patricio Aylwin.¹⁰ General Pinochet remained a senator for life, however, which office provided him immunity from prosecution, and he retained his position as commander-in-chief of the armed forces.¹¹ President Alwyn's election initiated a period of transition, in which victims of General Pinochet's regime called for justice and demanded accountability.¹² However, elements of the former regime, including General Pinochet himself, called on Chileans to forget the past as a means of moving forward.¹³ Pinochet claimed, "It is best to remain silent and to forget. It is the only thing to do: we must forget. And forgetting does not occur by opening cases, putting people in jail."¹⁴

In 1991, the new government established a truth and reconciliation commission ("TRC") to document the crimes committed during General Pinochet's regime.¹⁵ However, the 1978 Amnesty Law prevented the TRC from naming or prosecuting alleged perpetrators.¹⁶ Nevertheless, in 1998, General Pinochet was arrested in London on the basis of an international arrest warrant and request for extradition issued by an examining magistrate in Spain.¹⁷ Spain sought to prosecute General Pinochet for his role in crimes against humanity committed during his rule under a Spanish law authorizing the exercise of universal jurisdiction.¹⁸

8. The law does not distinguish between common crimes and human rights violations, and the only exception to amnesty is for persons "implicated in the homicide and passport falsification case in relation to the assassination of political activist Orlando Letelier" in Washington, D.C. Law No. 2.191, Abril 19, 1978, DIARIO OFICIAL [D.O.] (Chile). See *Avenues and Obstacles to Justice*, MEMORIA Y JUSTICIA, http://www.memoriayjusticia.cl/english/en_avenues.html (last visited Nov. 25, 2012); Webber, *supra* note 6, at 529.

9. HUMAN RIGHTS WATCH, *supra* note 6, at 1, 4 n.2.

10. *Background on Chile*, CTR. FOR JUSTICE & ACCOUNTABILITY, <http://www.cja.org/article.php?list=type&type=196> (last visited Nov. 25, 2012); Webber, *supra* note 6, at 528, 529; Alfonso Serrano, *Death of a Dictator*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/2100-215_162-2251475.html.

11. *Background on Chile*, *supra* note 10; Webber, *supra* note 6, at 529; Serrano, *supra* note 10.

12. *Background on Chile*, *supra* note 10.

13. *Id.*; Amnesty Int'l., *supra* note 6.

14. *Background on Chile*, *supra* note 10.

15. *Id.*

16. *Id.*; Amnesty Int'l., *supra* note 6.

17. Naomi Roht-Arriaza, *Universal Jurisdiction: Myths, Realities, and Prospects: The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 311 (2001); Frederic L. Kirgis, *The Pinochet Arrest and Possible Extradition to Spain*, AM. SOC'Y OF INT'L LAW (Oct. 1998), <http://www.asil.org/insigh27.cfm>.

18. Roht-Arriaza, *supra* note 17, at 311; Kirgis, *supra*, note 17; see David Sugarman, *The Arrest of Augusto Pinochet: Ten Years On*, OPEN DEMOCRACY (Oct. 29, 2008), <http://www.opendemocracy.net/article/the-arrest-of-augusto-pinochet-ten-years-on> ("[U]niversal jurisdiction permits a national court to try a person suspected of a serious international crime even if neither the suspect nor the victim are nationals of the [forum

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Initially, the High Court of the United Kingdom found that General Pinochet could not be extradited because, as a former Head of State, he was entitled to state immunity in relation to the alleged crimes.¹⁹ However, in an unprecedented decision,²⁰ the House of Lords upheld the extradition, and found that General Pinochet could not claim immunity for acts of torture committed after December 8, 1988, the date that the United Kingdom's ratification of the Torture Convention took effect.²¹ In reaching this decision, Lord Browne-Wilkinson cited the ICTY Trial Judgment in the *Furundžija* case, which found that the prohibition against torture is *jus cogens*, i.e. a peremptory norm.²²

In Chile, news of General Pinochet's arrest and the House of Lords' decision was met with a mixed response, generating both pro-Pinochet demonstrations and anti-Pinochet celebrations.²³ The Chilean government considered the arrest an interference with Chile's judicial sovereignty and asserted that Chileans should decide how to deal with General Pinochet.²⁴ It even threatened to bring a case against Spain before the International Court of Justice ("ICJ").²⁵ However, victims of the Pinochet regime celebrated the arrest as an opportunity to finally hold General Pinochet accountable for his crimes.²⁶

The response from the international community was also mixed. Former British Prime Minister Margaret Thatcher criticized the U.K. government for sanctioning the case and claimed that General Pinochet would not get a fair trial if extradited to Spain.²⁷ The U.S. Department of State further expressed concern that the arrest could upset Chile's fragile democracy.²⁸ However, the U.N. High

state], and the crime took place outside that [forum].").

19. Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237, 239-40 (1999).

20. Regina v. Bartle and the Comm'r of Police for the Metropolis and Others, [1999] 2 All E.R. 97 (H.L.) (appeal taken from Eng.).

21. Bianchi, *supra* note 19, at 239-40.

22. He stated that even though none of the alleged conduct was committed by or against U.K. citizens, the Torture Convention requires that torture is triable in the U.K. regardless of where it is committed. He further stated that "International law provides that offences *jus cogens* may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.'" See *Regina*, [1999] 2 All E.R. 97 (H.L.) [8-9].

23. *Chilean President Calls for Calm*, BBC NEWS (Nov. 28, 1998, 9:04 AM), <http://news.bbc.co.uk/2/hi/americas/222238.stm>; *Joy and Anger at Pinochet Ruling*, BBC NEWS (Nov. 25, 1998, 6:56 PM), <http://news.bbc.co.uk/2/hi/221936.stm>.

24. Roht-Arriaza, *supra* note 17, at 315; *Chilean President Calls for Calm*, *supra* note 23; *Joy and Anger at Pinochet Ruling*, *supra* note 23.

25. *Pinochet Dispute for World Court*, BBC NEWS (Sept. 15, 1999, 9:50 PM), <http://news.bbc.co.uk/2/hi/americas/448607.stm>.

26. *Chilean President Calls for Calm*, *supra* note 23.

27. More specifically, Thatcher added that this was likely, "not least because the key witnesses for his defence run the risk of immediate arrest if they set foot on Spanish soil." See *Thatcher Pleads Pinochet's Case*, BBC NEWS (Oct. 6, 1999, 8:52 PM), http://news.bbc.co.uk/2/hi/uk_news/politics/467114.stm.

28. E. Lawrence Barcella, Jr., *Pursuing Pinochet: The Case We Made 22 Years Ago*, TRANSNATIONAL INST. (Dec. 6, 1998), <http://www.tni.org/article/pursuing-pinochet-case-we-made-22-years-ago>.

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Commissioner for Human Rights hailed the ruling as “a ringing endorsement that torture is an international crime subject to universal jurisdiction.”²⁹ Amnesty International also supported General Pinochet’s extradition, stating that “[i]n the absence of a state putting on trial one of its own people for crimes against humanity, the obligations of the international community come into play.”³⁰

Ultimately, however, in March 2000, General Pinochet was allowed to return to Chile after British authorities found that he was unfit to stand trial due to ill health.³¹ Yet, the endeavor to hold General Pinochet accountable for his crimes did not end there. Spain’s intervention had the unexpected consequence of “opening the floodgates” to national prosecutions.³² When Pinochet returned to Chile, the Supreme Court of Chile removed his immunity from prosecution under Chilean law, and thereafter, over 177 complaints were brought against him for alleged human rights violations committed during his rule.³³ However, these proceedings were also suspended on medical grounds, and to the dismay of many, General Pinochet died in 2006 without having been tried or convicted for any crime.³⁴ Nevertheless, the indefinite suspension of General Pinochet’s case did not prevent significant progress, since the time of his arrest, in holding other persons to account for crimes committed during his regime.³⁵

General Pinochet ultimately evaded international criminal justice. However, international intervention at a time when Chilean courts were either unable or unwilling to act served as a catalyst for national prosecutions. Whether international efforts to hold General Pinochet accountable brought justice to the people of Chile, and in particular, the victims of his crimes and their loved ones, is thus open to question.

B. The ICC Case Against Joseph Kony et al. and Prospects for Peace in Northern Uganda

The situation in Northern Uganda provides another illustration of the potential clash between international criminal justice efforts and the quest for

29. *Straw Considers Pinochet Case*, BBC NEWS (Mar. 25, 1999, 4:22 AM), <http://news.bbc.co.uk/2/hi/302487.stm>.

30. *Judges Re-run Pinochet Hearing*, BBC NEWS (Jan. 18, 1999, 12:02 PM), <http://news.bbc.co.uk/2/hi/257228.stm>.

31. Frederic L. Kirgis, *Pinochet Arrest in Chile*, AM. SOC’Y OF INT’L LAW (Dec. 2000), <http://www.asil.org/insigh58.cfm>; *Pinochet ‘Unfit to Face Trial’*, BBC News (Jan. 12, 2000, 12:04 AM), http://news.bbc.co.uk/2/hi/uk_news/599526.stm.

32. *Background on Chile*, *supra* note 10; HUMAN RIGHTS WATCH, *supra* note 6, at 5.

33. Kirgis, *supra* note 31; *Pinochet Charged with Kidnapping*, BBC NEWS (Dec. 1, 2000, 7:11 PM), <http://news.bbc.co.uk/2/hi/americas/1050374.stm>.

34. *See, e.g.* HUMAN RIGHTS WATCH, *supra* note 6, at 5; *Chile Drops Pinochet Trial*, BBC NEWS (July 1, 2002, 8:21 PM), <http://news.bbc.co.uk/2/hi/americas/2080500.stm>; *Chile’s Gen Pinochet Dies at 91*, BBC NEWS (Dec. 11, 2006, 12:53 AM), <http://news.bbc.co.uk/2/hi/6167237.stm>.

35. *See generally* HUMAN RIGHTS WATCH, *supra* note 6.

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peace. Northern Uganda's twenty-year conflict between rebel leader Joseph Kony's Lord's Resistance Army ("LRA") and the Ugandan government involved a campaign of terror waged against the civilian population.³⁶ Thousands of people were killed, and some two million uprooted.³⁷ The LRA, notorious for its brutality, is alleged to have committed mass rape, murder, and mutilation of civilians, and to have abducted tens of thousands of children to serve as combatants and sex slaves.³⁸ It is alleged that the Ugandan Army, rather than protecting this vulnerable population, committed its own widespread abuses, including forced displacement, killing, torture, rape, and arbitrary arrests and detention.³⁹

The United Nations has described these events in Northern Uganda as "one of the worst humanitarian crises in the world."⁴⁰ The scale of human suffering resulting from the conflict created an equally pressing urgency to resolve it.⁴¹ As a means of encouraging LRA fighters to surrender, the Ugandan government enacted an Amnesty Act in 2000, which guaranteed that LRA fighters who put down their weapons would be immune from prosecution.⁴² In 2003, unable to apprehend LRA leaders, the government referred "*The Situation Concerning the Lord's Resistance Army*" to the Prosecutor of the ICC.⁴³ In response, the Prosecutor opened an investigation into the matter, and in 2005, issued five arrest warrants against senior LRA leaders, including Kony.⁴⁴

The ICC's indictments generated considerable concern within Northern Ugandan society that the threat of ICC prosecution could derail the fragile peace process and prolong the violence.⁴⁵ Rather than resorting to retributive justice, those who opposed ICC involvement generally preferred seeking to resolve the

36. See HUMAN RIGHTS WATCH, UPROOTED AND FORGOTTEN: IMPUNITY AND HUMAN RIGHTS ABUSES IN NORTHERN UGANDA (2005), available at <http://www.hrw.org/reports/2005/09/19/uprooted-and-forgotten>.

37. See *id.*

38. See generally *id.*; Michael Otim & Marieke Wierda, *Uganda: Impact of the Rome Statute and the International Criminal Court*, INT'L CTR. FOR TRANSITIONAL JUSTICE 1-2 (May 2010), <http://www.ictj.org/sites/default/files/ICTJ-Uganda-Impact-ICC-2010-English.pdf>; Amnesty Int'l, *Left to Their Own Devices: The Continued Suffering of Victims of the Conflict in Northern Uganda and the Need for Reparations*, 5, AI Index AFR 59/009/2008 (Nov. 17, 2008), available at <http://www.amnesty.org/en/library/asset/AFR59/009/2008/en/55689934-af47-11dd-a845-0749a6f015c0/afr590092008en.pdf>.

39. See generally HUMAN RIGHTS WATCH, *supra* note 36; Otim & Wierda, *supra* note 38, at 1-2; Amnesty Int'l, *supra* note 38.

40. HUMAN RIGHTS WATCH, *supra* note 36, at 13.

41. Otim & Wierda, *supra* note 38, at 2.

42. See CONCILIATION RES., COMING HOME: UNDERSTANDING WHY COMMANDERS OF THE LORD'S RESISTANCE ARMY CHOOSE TO RETURN TO A CIVILIAN LIFE (2006), available at http://www.c-r.org/sites/c-r.org/files/ComingHome_200605_ENG.pdf; see also Otim & Wierda, *supra* note 38, at 2.

43. Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB; Otim & Wierda, *supra* note 38, at 2.

44. Otim & Wierda, *supra* note 38, at 2.

45. HUMAN RIGHTS WATCH, *supra* note 36, at 3.

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conflict through restorative means including dialogue, amnesties for LRA members, and the reintegration of former combatants.⁴⁶

In June 2006, less than a year after the indictment of Kony and his colleagues, the LRA entered into peace talks with the Ugandan government.⁴⁷ Over the next two years, numerous agreements were signed between the warring parties, including a cessation of hostilities agreement in August 2006, which, although breached on numerous occasions, led to a reduction in violence.⁴⁸

As a price for his purported cooperation, Kony repeatedly demanded that the ICC withdraw the arrest warrants.⁴⁹ Aware that the arrest warrants threatened to derail discussions that could lead to peace, but with no legal avenue available to it to compel withdrawal of the warrants,⁵⁰ the Ugandan government entered into an agreement with the LRA in February 2008 to establish a War Crimes Division in the High Court of Uganda, so that alleged perpetrators could be tried nationally.⁵¹ The agreement also provided for the pursuit of justice through traditional mechanisms.⁵² With the establishment of this War Crimes Division, Uganda could potentially challenge the admissibility of the ICC case against Kony under Article 19 of the Rome Statute.⁵³ The Ugandan government further promised the rebels that once the final peace agreement was signed, it would seek a deferral of the ICC prosecution from the UN Security Council under Article 16

46. *Id.*; Otim & Wierda, *supra* note 38, at 2.

47. Otim & Wierda, *supra* note 38, at 3.

48. See generally INT'L CRISIS GRP., NORTHERN UGANDA: THE ROAD TO PEACE, WITH OR WITHOUT KONY 11 (2008), available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/uganda/Northern%20Uganda%20The%20Road%20to%20Peace%20with%20or%20without%20Kony.pdf>; see also INT'L CRISIS GRP., PEACE IN NORTHERN UGANDA? 1-5 (2006), <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/uganda/B041%20Peace%20in%20Northern%20Uganda.pdf>.

49. INT'L CRISIS GRP., PEACE IN NORTHERN UGANDA?, *supra* note 48, at 15.

50. As party to the Rome Statute establishing the ICC, the Ugandan government is obliged to cooperate with the ICC, including by arresting and surrendering any wanted persons in the Ugandan State. See *id.*

51. Agreement on Accountability and Reconciliation, Uganda-Lord's Resistance Army, Annex, art. 7, Feb. 19, 2008, available at http://northernuganda.usvpp.gov/uploads/images/u_h8S9SwfKutKGw70eM4vw/agendaitem3296.pdf; Otim & Wierda, *supra* note 38, at 3; Manisuli Ssenyonjo, *How Joseph Kony is Keeping His Options Open*, THE GUARDIAN (Mar. 26, 2008, 1:17 PM), <http://www.guardian.co.uk/katine/2008/mar/26/lra.background>.

52. Agreement on Accountability and Reconciliation, *supra* note 51, at art. 19; Otim & Wierda, *supra* note 38, at 3; Ssenyonjo, *supra* note 51.

53. Rome Statute of the International Criminal Court art. 19, July 17, 1988, 2187 U.N.T.S. 3. Article 19, entitled "Challenges to the jurisdiction of the Court or the admissibility of a case," provides, in relevant part:

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
 - ...
 - (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted . . .

Id.; Otim & Wierda, *supra* note 38, at 4.

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of the Rome Statute.⁵⁴ If granted, such deferral would provide the Ugandan government a year, with the possibility of renewal, within which to bring the five wanted LRA leaders to justice domestically.⁵⁵

Ultimately, it appears that these assurances were not enough. In late 2008, the peace process degenerated when Kony refused to sign the final peace deal.⁵⁶ In the meantime, in July 2008, the Ugandan government went ahead with its plans to establish the War Crimes Division of the High Court of Uganda.⁵⁷ The War Crimes Division of that Court recently finished its first trial of an LRA commander, concluding that the accused was entitled to amnesty for any crimes committed during the conflict.⁵⁸ Furthermore, in 2010, the Ugandan government passed the International Criminal Court Act, incorporating the Rome Statute into Ugandan law.⁵⁹

54. Rome Statute of the International Criminal Court, *supra* note 53, at art. 16. Article 16, entitled “Deferral of investigation or prosecution,” provides:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Id.

55. INT’L CRISIS GRP., NORTHERN UGANDA, *supra* note 48, at 9; Otim & Wierda, *supra* note 38, at 5. In February 2008, the ICC Pre-trial Chamber requested the Ugandan government to provide information regarding the status of the arrest warrants, noting the agreement to establish the War Crimes Division. The government responded that that establishment would take place after the final peace agreement with the LRA, that the War Crimes Division “is not meant to supplant the work of the International Criminal Court and accordingly, those individuals who were indicted by the International Criminal Court will have to be brought before the [War Crimes Division] for trial.” See Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Case No. ICC-02/04-01/05, Report by the Registrar on the Execution of the Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, 3 (Mar. 27, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc461285.pdf>.

56. Otim & Wierda, *supra* note 38, at 5; INT’L CRISIS GRP., THE LORD’S RESISTANCE ARMY: END GAME? 1 (2011), available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/uganda/182%20The%20Lords%20Resistance%20Army%20-%20End%20Game.pdf>.

57. Otim & Wierda, *supra* note 38, at 3. In October 2008, the ICC Pre-trial Chamber initiated proceedings under Article 19(1) of the Rome Statute to determine whether it could still investigate and prosecute the case against *Kony et al.* In March 2009, it determined that the case is still admissible, finding:

the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of the issuance of the Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage.

In December 2009, the Appeals Chamber affirmed. See Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Case No. ICC-02/04-01/05 OA 3, Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19(1) of the Statute” of 10 March 2009, ¶¶ 7, 12, 92 (Sep. 16, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc743635.pdf>.

58. *Uganda’s Amnesty for LRA Commander a ‘Setback’ for Justice*, AMNESTY INT’L (Sept. 23, 2011) <http://www.amnesty.org/en/news-and-updates/uganda%E2%80%99s-amnesty-lra-commander-%E2%80%98setback%E2%80%99-justice-2011-09-23>.

59. However, this Act “is prospective from June 25, 2010, and thus cannot be applied to the period of conflict in [N]orthern Uganda.” OPEN SOC’Y FOUND., PUTTING COMPLEMENTARITY INTO PRACTICE: DOMESTIC JUSTICE FOR INTERNATIONAL CRIMES IN DRC, UGANDA, AND KENYA 7 (2011), available at

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While Northern Uganda has experienced relative calm since the initial ceasefire in 2006, the LRA has reemerged, terrorizing communities in the Democratic Republic of Congo, South Sudan, and the Central African Republic.⁶⁰ In response, in October 2011, U.S. President Barack Obama authorized the deployment of some 100 U.S. Special Forces troops to advise the Ugandan government on removing Kony and other senior LRA leaders from the battlefield.⁶¹

In the context of the conflict in Northern Uganda, one can only wonder whether Kony would have signed a peace agreement, thereby ending the LRA's reign of terror in the region, if the ICC arrest warrants had been rescinded. Yet, one could also argue that Kony was only willing to participate in peace talks at all because the ICC had taken action. Furthermore, it is significant that, similar to the Chilean context, the threat of international prosecution motivated the Ugandan government to set up its own system for trying war crimes suspects. Whether this is indeed a positive development will depend on the quality of justice meted out by that court, which remains to be seen. At the same time, it is clear that the ICC indictment of LRA leaders has not prevented continued violence in the region. Additionally, with some of the highest-level alleged perpetrators still evading both international and local accountability, justice to victims in Northern Uganda has yet to be realized.

Ultimately, it is difficult to conclude in this case whether the pursuit of international criminal justice assisted in the facilitation of, or acted as an obstacle to, peace. Paradoxically, the only reasonable conclusion may very well be that it did both.

C. The International Criminal Tribunal for the Former Yugoslavia and Peace in the Balkans

The work of the ICTY arguably presents a more clear-cut case in which it may be concluded that international criminal justice, to some extent, has facilitated the pursuit of peace. The Security Council established the ICTY in 1993 as a means of addressing the protracted conflict in the region of the former Yugoslavia while the war in the Balkans was still raging. It was considered that prosecuting perpetrators of war-time atrocities, when national courts were unwilling or unable to do so, would contribute to the cessation of hostilities, the maintenance of peace, and to reconciliation in the region.⁶²

<http://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>.

60. INT'L CRISIS GRP., NORTHERN UGANDA, *supra* note 48, at 20; INT'L CRISIS GRP., THE LORD'S RESISTANCE ARMY, *supra* note 56, at 1-2.

61. INT'L CRISIS GRP., THE LORD'S RESISTANCE ARMY, *supra* note 56, at 1-2.

62. See S.C. Res. 827, U.N.Doc. S/RES/827 (May 25, 1993).

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The Dayton Peace Accords, which ended the war in Bosnia and Herzegovina (“Bosnia”), were signed in December 1995.⁶³ Slobodan Milošević, then President of Serbia and Montenegro, was a key party to the peace process, along with Croatian President Franjo Tuđman and Bosnian President Alija Izetbegović.⁶⁴ By this time, Bosnian Serb political leader Radovan Karadžić had already been indicted by the ICTY for his alleged role in atrocities committed during the war.⁶⁵

It was not until May 1999 that the ICTY indicted Milošević for alleged war crimes in Kosovo.⁶⁶ Significantly, this marked the first time a sitting Head of State had been indicted for war crimes.⁶⁷ Milošević was indicted amidst the North American Treaty Organization air strikes against the Federal Republic of Yugoslavia, which commenced after international efforts to resolve the Kosovo conflict through peace talks at Rambouillet had failed.⁶⁸

As an *ad hoc*, temporary institution, the ICTY was never meant to substitute for the adjudication of war crimes cases at the national level. Accordingly, ten years after the ICTY’s establishment, in Resolution 1503 (2003), the Security Council endorsed a strategy devised by the ICTY’s Judges for the completion of its work.⁶⁹ Pursuant to this Completion Strategy, the ICTY concentrated on the prosecution of the highest-level accused and transferred the cases of lower and mid-level accused to courts in the region, which were considered at that point, to varying degrees, willing and ready to receive them.⁷⁰ Furthermore, in Resolution 1503, the Security Council called upon the international community to assist national jurisdictions, as part of the Completion Strategy, in improving their capacity to prosecute cases transferred from the ICTY.⁷¹ In this manner, capacity building of courts in the former Yugoslavia handling war crimes cases was integrated into the ICTY’s mandate.

63. General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, 35 I.L.M. 75, available at http://www.ohr.int/dwnld/?content_id=379.

64. *Seven Questions: Richard Holbrooke on Radovan Karadzic*, FOREIGN POLICY (July 24, 2008), http://www.foreignpolicy.com/articles/2008/07/23/seven_questions_richard_holbrooke_on_radovan_karadzic; Jim Hooper, *Trying War Criminals—Dayton’s Mandate for Apprehending War Criminals*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/trial/hooper.html> (last visited Nov. 12, 2012).

65. Karadžić was indicted by the Tribunal in July 1995. See Prosecutor v. Radovan Karadžić, Case No. IT-95-5-I, Indictment (Int’l Crim. Trib. for the Former Yugoslavia July 25, 1995), <http://www.icty.org/x/cases/karadzic/ind/en/kar-ii950724e.pdf>.

66. Following his transfer to the ICTY, in 2001, Milošević was also indicted for crimes in Croatia and Bosnia and Herzegovina. See Leila Sadya Nadat, *The Trial of Slobodan Milosevic*, AM. SOC’Y OF INT’L LAW (Oct. 2002), <http://www.asil.org/insigh90.cfm>.

67. *Milosevic Indictment Makes History*, CNN (May 27, 1999), http://articles.cnn.com/1999-05-27/world/9905_27_kosovo.milosevic.04_1_milosevic-indictment-nikola-sainovic-milosevic-and-four?_s=PM:WORLD.

68. See *The Conflicts*, UN ICTY, <http://www.icty.org/sid/322> (last visited Nov. 12, 2012).

69. S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

70. *Completion Strategy*, UN ICTY, <http://www.icty.org/sid/10016> (last visited Nov. 19, 2012); see S.C. Res. 1503, *supra* note 69.

71. See S.C. Res. 1503, *supra* note 69.

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In line with its Completion Strategy, the ICTY indicted a total of 161 high-level perpetrators, and will not be indicting any more.⁷² The ICTY also transferred eight cases of lower-level accused to courts in Bosnia, Croatia and Serbia.⁷³ However, thousands of crimes committed during the wars in the former Yugoslavia remain to be investigated and/or tried.⁷⁴ To facilitate this effort, the ICTY, often working in tandem with international partners,⁷⁵ has gone to great lengths over the years to assist national legal institutions and professionals in building their capacity to deal with these crimes, including through supporting the establishment of specialized war crimes chambers in Bosnia, Croatia and Serbia.⁷⁶

The degree to which the ICTY, through its efforts, has been successful in fulfilling its mandate of contributing to the restoration and maintenance of peace in the region, and in particular, to reconciliation, has generated much debate. However, it is difficult to dispute that as in the Ugandan and Chilean cases, the efforts of the international community to hold accountable perpetrators of atrocities committed during the wars in the Balkans served as a catalyst for the domestic prosecution of alleged war criminals. Courts in Bosnia, Serbia and Croatia have taken up the mantle and have made significant progress in adjudicating their own cases in accordance with international human rights standards.⁷⁷ Although these jurisdictions still face serious challenges, for example, in dealing with substantial case backlogs, providing witness protection

72. *Development of the Local Judiciaries*, UN ICTY, <http://www.icty.org/sid/10462> (last visited Nov. 19, 2012); see *Key Figures*, UN ICTY, <http://www.icty.org/sections/TheCases/KeyFigures> (last updated Oct. 16, 2012).

73. Additionally, the Tribunal's Office of the Prosecutor transferred files from cases that were investigated, but did not result in the issuance of indictments for follow-up by local prosecutors' offices as appropriate. See *Transfer of Cases*, UN ICTY, <http://www.icty.org/sections/TheCases/TransferofCases> (last visited Nov. 19, 2012).

74. Int'l Justice Desk, *Thousands Still to be Tried in Balkans for War Crimes*, RADIO NETHERLANDS WORLDWIDE (May 14, 2012, 2:18 PM), <http://www.rnw.nl/international-justice/article/thousands-still-be-tried-balkans-war-crimes>.

75. For example, with financial support from the European Union, the Tribunal entered into a partnership with the Organization for Security and Cooperation in Europe's ("OSCE") Office for Democratic Institutions and Human Rights ("ODIHR"), the United Nations Interregional Crime and Justice Research Institute, and OSCE Field Missions in Bosnia and Herzegovina, Croatia, and Serbia, to implement the "War Crimes Justice Project" aimed at supporting the capacity of legal professionals in the region of the former Yugoslavia dealing with war crimes cases. *War Crimes Justice Project*, OSCE OFF. FOR DEMOCRATIC INST. & HUM. RTS., <http://www.osce.org/odihhr/74803> (last visited Nov. 19, 2012); see *Capacity Building*, UN ICTY, <http://www.icty.org/sections/Outreach/CapacityBuilding> (last visited Nov. 19, 2012).

76. See *Development of the Local Judiciaries*, *supra* note 72.

77. See, e.g., OSCE, DELIVERING JUSTICE IN BOSNIA AND HERZEGOVINA: AN OVERVIEW OF WAR CRIMES PROCESSING FROM 2005 TO 2010 7 (2011), available at http://www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf; HUMAN RIGHTS WATCH, UNFINISHED BUSINESS: SERBIA'S WAR CRIMES CHAMBER 2 (2007), available at <http://www.hrw.org/legacy/backgroundunder/eca/serbia0607/serbia0607web.pdf>; INT'L CTR. FOR TRANSITIONAL JUST., CROATIA: SELECTED DEVELOPMENTS IN TRANSITIONAL JUSTICE 5, 14-21 (2006), available at http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Croatia-Developments-2006-English_0.pdf.

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and support, and securing evidence,⁷⁸ it can be concluded that rather than derailing peace efforts, through stimulating and supporting domestic war crimes prosecutions, efforts on the international plane have contributed to strengthening the rule of law, and in this respect, to peace-building in the Balkans.

D. *Conclusion*

A lesson that can be drawn from these case studies is that transitional justice cannot be considered and addressed through a single approach. The pursuit of justice is context-specific, and different mechanisms are appropriate in different situations. The establishment of an international criminal tribunal to try alleged war criminals may have had a positive impact in the former Yugoslavia, due to the socio-political and cultural factors specific to the circumstances of that conflict, as well as the timing of the pursuit of justice. However, the success of tribunals such as the ICTY does not necessarily suggest that an international criminal tribunal is the most appropriate approach in every context, nor that prosecuting alleged perpetrators alone can adequately address all of the problems faced by societies in transition. Ultimately, it is important that whatever method or combination of methods is pursued, due regard is paid to the necessary balance between peace and justice.

The complexities that can arise when attempting to reconcile peace and justice are well portrayed in an op-ed by Ian Paisley that recently appeared in the *New York Times*.⁷⁹ He discusses the fact that the ICC just rendered its first guilty verdict in the case of *Thomas Lubanga* for coercing children to be soldiers in the Democratic Republic of Congo.⁸⁰ He starts, “An African proverb states, ‘Peace is costly but it is worth the expense.’”⁸¹ Here, the expense, perhaps, is justice. He points out that “[t]he Court to date has spent around \$1 billion,” and that although justice “has been done . . . there is no peace in that country.”⁸² And there is not. Finally, he concludes that:

Proponents of the [ICC] say there cannot be peace without justice. Yet experience teaches us that this is not always the case. Reconciliation is not an easy option, but it does allow people to move forward with the hope of unity, and the potential for justice in the future. The experiences of Northern Ireland and South Africa show us that there is nothing more

78. See generally OSCE, *supra* note 77; HUMAN RIGHTS WATCH, *supra* note 77; INT’L CTR. FOR TRANSITIONAL JUST., *supra* note 77.

79. Mr. Paisley is the son of Rev. Ian Paisley, former leader of the Democratic Unionist Party in Northern Ireland. See Ian Paisley, *Peace Must Not Be the Victim of International Justice*, N.Y. TIMES (Mar. 16, 2012), <http://www.nytimes.com/2012/03/17/opinion/peace-must-not-be-the-victim-of-international-justice.html>.

80. *Id.*

81. *Id.*

82. *Id.*

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important than peace. If this means the International Criminal Court does not always intervene or deliver justice, it may be a price that is worth paying.⁸³

III. HOT TOPIC 2: THE PERILS OF THE FRAGMENTATION
OF INTERNATIONAL LAW

In addition to the unprecedented development in the past two decades of international and hybrid criminal courts, there has also been an enormous growth in a variety of other types of international tribunals.⁸⁴ The proliferation of these institutions has led to the phenomenon of disparate courts interpreting and applying the same legal principles and instruments, sometimes in complementary, but often in competing ways. The absence of an international mechanism to resolve inconsistent interpretations has raised concerns regarding the perils of the fragmentation of international law.

A. *ICJ and ICTY Treatment of the Legal Standard for Attribution of State Responsibility for Internationally Wrongful Acts—“Effective Control,” “Overall Control,” or It Depends?*

Recently, the ICJ and the ICTY have been at odds regarding the issue of what degree of control over paramilitaries is required to attribute their acts to a foreign State, therefore rendering them internationally wrongful. The issue first arose in 1984 in the ICJ’s *Nicaragua* case, which concerned the activities of the *contras*, a Nicaraguan rebel group that was operating in Nicaragua against the Sandinista regime.⁸⁵ In that case, the Court considered whether alleged violations of international humanitarian law committed by the *contras* were imputable to the United States, resulting in the international responsibility of the latter for those acts.⁸⁶

83. *Id.*

84. For example, since the 1990s, there has been a tremendous increase in bilateral and multilateral investment promotion and protection treaties, which provide for mandatory arbitration of disputes before an arbitral tribunal. This has generated a proliferation of treaty-based investment dispute arbitral tribunals. *See, e.g.*, Charles N. Brower, *The Evolution of the International Judiciary: Denationalization through Jurisdictional Fragmentation*, in THE AMERICAN SOCIETY OF INTERNATIONAL LAW: PROCEEDINGS OF THE 103RD ANNUAL MEETING 170, 182 (2009).

85. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 392 (June 27).

86. *Id.* ¶¶ 20, 113. The Court also considered whether the acts of “persons of the nationality of unidentified Latin American countries,” known as “UCLAs,” such as blowing up underwater oil pipelines and an attack on an oil and storage facility, were imputable to the United States. With regard to the UCLA’s, the Court found in the affirmative, reasoning that “[a]lthough it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations.” *See id.* ¶¶ 81, 85-86.

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In addressing this question, the Court first considered that it was necessary to determine:

whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.⁸⁷

The Court found that “there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.”⁸⁸ Specifically, it reasoned, *inter alia*, that although the evidence before it indicated that the assistance provided by the United States to the *contras* was crucial to the *contras*’ activities, the evidence did not establish that the *contras* were completely dependent on the United States.⁸⁹ However, the Court further found that this conclusion did not “suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the *contras*.”⁹⁰

According to the Court, in order for the acts to be imputable to the United States, it was sufficient to prove that the United States “had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.”⁹¹ To establish effective control, the Court required a showing “that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by” Nicaragua.⁹² The Court concluded that although the United States provided various crucial forms of assistance to the *contras*, including financial and logistical support, the evidence did not demonstrate that the United States directed or enforced the alleged acts.⁹³

In the case of *Prosecutor v. Tadić*, the ICTY also addressed the legal standard for imputing the acts of individuals to a foreign State, specifically, the acts of the Bosnian Serb Army to the Federal Republic of Yugoslavia (“FRY”).⁹⁴ In this case, however, the purpose of the inquiry was not to determine international responsibility for the Bosnian Serb forces’ acts, but rather to determine whether the Bosnian Serb Army acted as a *de facto* state organ,

87. *See id.* ¶ 109.

88. *See id.*

89. *See id.* ¶ 110.

90. *See id.*

91. *See id.* ¶ 115 (emphasis added).

92. *See id.*

93. *See id.* ¶ 116.

94. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 584 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts/70507JT2-e.pdf>.

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thereby rendering the conflict in Bosnia international.⁹⁵ In answering this question, the ICTY revisited the test for attribution of state responsibility set forth by the ICJ in the *Nicaragua* case (“*Nicaragua* test”).

In interpreting and applying the *Nicaragua* test, the majority of the Trial Chamber considered that it was “neither necessary nor sufficient merely to show that the [Bosnian Serb Army] was dependent, even completely dependent, on the [FRY Army] and the [FRY] for the necessities of war. It must also be shown that the [FRY Army] and the [FRY] exercised the potential for control inherent in that relationship of dependency or that the [Bosnian Serb Army] had otherwise placed itself under the control of the [FRY].”⁹⁶

Presiding Judge Gabrielle Kirk McDonald, however, disagreed with the majority’s interpretation of the *Nicaragua* test.⁹⁷ She considered that *Nicaragua* established two distinct tests for attribution. Specifically, she stated that “the effective control standard was never intended to describe the degree of proof necessary for a determination of agency founded on dependency and control” and that “the majority erroneously imports the requirement of effective control to an agency determination.”⁹⁸

Judge McDonald observed that the effective control requirement was not mentioned until after the ICJ determined that there was no agency relationship between the *contras* and the United States. On this basis, she concluded that “the showing of effective control is a separate and distinct basis for determining State responsibility for the conduct of others.”⁹⁹ She further found that “the appropriate test of agency from *Nicaragua* is one of ‘dependency.’”¹⁰⁰ In sum, while the majority found that the *Nicaragua* test did not necessarily require a showing of dependence on the State, but did require a high degree of control by the State—namely, effective control—Judge McDonald found that with a showing of dependency, a further showing of effective control was not required.

On appeal, the ICTY Appeals Chamber rejected the *Nicaragua* test altogether.¹⁰¹ It determined instead that the requisite degree of control required under international law can vary in the circumstances of each case.¹⁰² It distinguished between two scenarios. First, it considered that for the actions of individuals or groups not organized into military structures, it is necessary to show that “specific instructions concerning the commission of that particular act

95. *Id.* ¶ 585; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 104 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

96. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 588.

97. *Id.* at 288, 292 (McDonald, J., dissenting).

98. *Id.* at 294 (McDonald, J., dissenting).

99. *Id.* at 295 (McDonald, J., dissenting).

100. *Id.* at 288, 299 (McDonald, J., dissenting).

101. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 115.

102. *Id.* ¶ 117.

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had been issued by that State to the individual or group in question” or that “the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue.”¹⁰³ However, when the acts of “*armed forces or militias or paramilitary units*” were at issue, the Court required a less stringent showing that a state wields “overall control” over the group, including through financing, training, and equipping the group, as well as coordinating or assisting in the planning of the military actions of the group.¹⁰⁴ Demonstration that the state issued instructions for the commission of the specific act in question was not required.¹⁰⁵

The ICJ recently revisited this issue in the “Bosnian Genocide” case,¹⁰⁶ and relied on its test set forth in *Nicaragua*.¹⁰⁷ In doing so, the ICJ explained that it was “unable to subscribe” to the ICTY’s contrary interpretation of the issue.¹⁰⁸ The Court reasoned that the ICTY’s jurisdiction is limited to determining the criminal responsibility of individuals and does not extend to questions of state responsibility.¹⁰⁹ It noted that it attached a high degree of importance to the ICTY’s legal and factual findings in relation to issues of criminal liability that fall within its jurisdiction, but surmised that the same was not true for issues of general international law that do not fall within the ICTY’s specific purview.¹¹⁰

The ICJ also clarified the *Nicaragua* test. Referring to the *Nicaragua* Court’s finding that “the evidence available to the Court . . . is insufficient to demonstrate [the *contras*’] complete dependence on United States aid,”¹¹¹ it noted that:

according to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the

103. *Id.* ¶ 137.

104. *Id.* ¶¶ 131, 137.

105. *Id.*

106. Specifically, the Court considered whether the Srebrenica massacres “were committed by persons who, though not having the status of organs of [Serbia and Montenegro], nevertheless acted on its instructions or under its direction or control.” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Reports of Judgments, Advisory Opinions and Orders, 2007 I.C.J. 43 ¶ 396 (Feb. 26).

107. Specifically, the Court stated that:

[g]enocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.

Id. ¶ 401.

108. *Id.* ¶ 403.

109. *Id.*

110. *Id.*

111. *Id.* ¶ 391 (citing Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 110 (June 27)).

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instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent¹¹²

Having answered this question in the negative in terms of the Bosnian Serb Army's relationship to the FRY, the Court then explained that even absent a relationship of "complete dependence," state responsibility could still arise if, as established in the *Nicaragua* case, it was proven that the state had "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State."¹¹³ It further explained that for such conduct to give rise to state responsibility, it would "have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed".¹¹⁴ Thus, the Court in the Bosnian Genocide case clarified that, as Judge McDonald argued in her *Tadić* dissent, the *Nicaragua* case established two distinct tests for the attribution of state responsibility.

It appears that the ICJ attempted to explain and, perhaps, justify the inconsistent interpretations of the ICJ and ICTY as resulting from differences in jurisdiction.¹¹⁵ In doing so, the ICJ dodged the conclusion that its own jurisprudence conflicted with that of a fellow international tribunal. Time will only tell whether in the future, as international questions are increasingly brought to the fore, such implicit cooperation will continue or whether areas of divergence will grow.

B. Inconsistency in Decisions by Investment Dispute Tribunals—Disparate Interpretations of the MFN Clause in the Germany-Argentina Bilateral Investment Treaty

Fragmentation also has arisen in the realm of international investment disputes, with the growth of institutions devoted to the resolution of such disputes. For example, Judge Brower has been involved in a series of international investment arbitrations concerning disputes arising from the

112. *Id.* ¶ 392.

113. *Id.* ¶ 399 (citing *Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 14, ¶ 115).

114. *Id.* (citing *Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 14, ¶ 115).

115. In this regard, the Court posited that "[i]nsofar as the 'overall control' test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable." However, the Court was not persuaded that the "overall control" test was equally applicable under the law of State responsibility for the purpose of determining "when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs." *Id.* ¶ 404.

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Germany-Argentina bilateral investment treaty (“BIT”)¹¹⁶ in which different arbitral tribunals have interpreted identical Germany-Argentina BIT provisions in inconsistent ways. At least four German companies, Siemens,¹¹⁷ Hochtief,¹¹⁸ Wintershall,¹¹⁹ and Daimler,¹²⁰ have brought cases against Argentina under the BIT. The issue in each case has been whether the claimants were required under Article 10 of the BIT to spend eighteen months seeking the resolution of their investment disputes in Argentine courts as a prerequisite to invoking international arbitration, or whether, relying upon the BIT’s Most-Favoured-Nation (“MFN”) provisions, they were entitled first to submit the dispute to international arbitration.

Pursuant to Article 10(1) of the BIT, if a dispute arises between a German investor in Argentina, or vice versa, the parties should seek to settle the dispute.¹²¹ However, Article 10(2) further provides that:

If a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties concerned gave notice of the dispute, it shall, at the request of either party, be submitted to the competent courts of the Contracting Party in whose territory the investment was made.¹²²

Article 10(3) further provides that:

The dispute may be submitted to an international arbitral tribunal in any of the following circumstances: (a) At the request of one of the parties to the dispute where, after a period of 18 months has elapsed from the moment when the judicial process provided for by paragraph 2 of this article was initiated, no final decision has been given or where a decision

116. Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investment, Ger.-Arg., Oct. 8, 1993, 1910 U.N.T.S. 171 [hereinafter Germany-Argentina BIT].

117. Siemens v. Arg., ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC508_En&caseId=C7.

118. Hochtief v. Arg., ICSID Case No. ARB/07/31, Decision on Jurisdiction (Oct. 24, 2011), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2351_En&caseId=C260.

119. Wintershall v. Arg., ICSID Case No. ARB/04/14, Award (Dec. 8, 2008), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1492_En&caseId=C39.

120. Daimler v. Arg., ICSID Case No. ARB/05/1, Award (Aug. 22, 2012), <http://www.italaw.com/sites/default/files/case-documents/ita1082.pdf>.

121. Germany-Argentina BIT, *supra* note 116, art. 10(1).

122. *Id.* at art. 10(2).

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has been made but the parties are still in dispute; (b) Where both parties to the dispute have so agreed.¹²³

Pursuant to the MFN provisions, no contracting party shall provide in its territory to the investments of nationals or companies of the other contracting party less favorable treatment than that provided to its own companies or nationals or those of third-party states.¹²⁴

In two of the cases, *Siemens* and *Hochtief*, the tribunals ruled that the MFN provisions in the BIT permitted the Claimants to arbitrate.¹²⁵ However, in the *Wintershall* and *Daimler* cases, the tribunal ruled to the contrary, finding that the Claimants could not rely on the MFN provisions in order to avoid first submitting their disputes to Argentine courts for eighteen months.¹²⁶

123. *Id.* at art. 10(3).

124. The following BIT provisions refer to MFN treatment and were considered by the tribunals, to varying degrees:

Article 3(1), which provides:

Neither Contracting Party shall subject investments in its territory by or with the participation of nationals or companies of the other Contracting party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.

Article 3(2), which provides:

Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.

Article 4, which provides, in relevant part:

(1) Investments by nationals or companies of either Contracting Party shall enjoy full protection as well as juridical security in the territory of the other Contracting Party.

. . .

(3) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency or insurrection shall be accorded by the latter Contracting Party treatment which is no less favourable than that accorded to its own nationals or companies, as regards restitution, compensation, indemnification or other valuable consideration. Such payments shall be freely transferable.

(4) Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this article.

Article 7(1), which provides:

If the legislation of either Contracting Party or obligations under international law existing at present or established hereinafter between the Contracting parties in addition to this Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by this Treaty, such regulation shall, to the extent that it is more favourable, take precedence over this Treaty.

See Siemens, ICSID Case No. ARB/02/8, ¶¶ 82, 88; *Hochtief*, ICSID Case No. ARB/07/31, ¶ 15; *Wintershall*, ICSID Case No. ARB/04/14, ¶¶ 10-11, 160-97.

125. *Siemens*, ICSID Case No. ARB/02/8, ¶ 184; *Hochtief*, ICSID Case No. ARB/07/31, ¶¶ 75, 124-25.

126. *Wintershall*, ICSID Case No. ARB/04/14, ¶ 197; *Daimler*, ICSID Case No. ARB/05/1, ¶ 281.

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More specifically, in the *Siemens* case, Siemens invoked the Germany-Argentina BIT's MFN provisions to support its contention that it was entitled to submit its dispute directly to international arbitration, as permitted under the BIT between Argentina and Chile.¹²⁷ Argentina claimed that the scope of the MFN provisions in the Germany-Argentina BIT did not include the BIT's dispute settlement system.¹²⁸ In 2004, the Tribunal unanimously ruled in favor of Siemens, finding that the MFN provisions permitted the claimants to arbitrate.¹²⁹

The Tribunal in the *Hochtief* case considered the same issue, whether Hochtief could rely on the MFN provisions in the Germany-Argentina BIT to seek direct access to international arbitration, without prior referral to the domestic court of Argentina.¹³⁰ Like Siemens, Hochtief claimed that the MFN provisions "entitle[d] it to rely upon the more liberal provisions on dispute settlement in the Argentina-Chile BIT."¹³¹ Argentina argued that the MFN provisions "applie[d] only to substantive protections under the BIT, which do not include the clauses on dispute resolution in Article 10."¹³² Last year, the Tribunal, by majority, ruled that the MFN provisions applied to dispute settlement under Article 10 of the BIT and that the arbitration could proceed.¹³³ In reaching this conclusion, the Tribunal noted that it:

is conscious of the advantages of consistency in the approaches of different tribunals to similar questions. It is also aware of the significance that other tribunals have attached to differences between the formulations of MFN provisions in various treaties. That said, it is the responsibility of this Tribunal to interpret to the best of its ability the specific provisions of the particular treaties that are applicable in this case, and not to choose between broad doctrines or schools of thought, or to conduct a head-count of arbitral awards taking various positions and to fall in behind the numerical majority.¹³⁴

In the *Wintershall* and *Daimler* cases, however, the tribunals reasoned, in part, that recourse to arbitration is conditioned strictly upon compliance with the provision of Article 10 of the Germany-Argentina BIT requiring that a dispute first be submitted to Argentine courts for eighteen months, and furthermore, that

127. *Siemens*, ICSID Case No. ARB/02/8, ¶ 32.

128. *Id.* ¶¶ 35-40.

129. *Id.* ¶ 184.

130. *Hochtief*, ICSID Case No. ARB/07/31, ¶¶ 15-19.

131. *Id.* ¶ 56.

132. *Id.* ¶ 20.

133. *Id.* ¶¶ 75, 124-25.

134. *Id.* ¶ 58.

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Article 10 can only be circumvented when it is clear from the text of the MFN provisions that it was the intent of the contracting parties to permit this option.¹³⁵

These cases underscore one of the greatest fears arising from the proliferation of international courts and tribunals—the potential that disparate decisions might lead to unfair or prejudicial outcomes. Unlike in the ICJ and ICTY cases discussed previously, the contradictory outcomes of these Germany-Argentina BIT arbitrations cannot be defended on the grounds of differences in jurisdiction—nor can they be justified on factual grounds. Ultimately, the different rulings can be explained purely by the fact that different panels of arbitrators construed the same law differently. Reasonable minds can and will differ on the same set of facts and when confronted with the same laws—this is an indisputable and unavoidable feature of our domestic and international justice systems. However, such uncertainty is magnified in the international arena when one accounts for the multitude of international tribunals, which exercise separate mandates and are not legally accountable to one another, but can be governed by overlapping bodies of law, and the lack of an international appellate body to resolve inconsistencies. While this may indeed be unavoidable, this feature of international law raises concerns for its participants, who often rely on consistency and predictability in making decisions to participate in the first instance. It remains to be seen whether a mechanism can be devised and accepted by states that would better ensure consistency of rulings.

IV. HOT TOPIC 3: THE RELATIONSHIP BETWEEN DOMESTIC COURTS AND INTERNATIONAL COURTS AND TRIBUNALS

Contemporary structural and substantive developments in the arena of international law have also led to a growing interface, or what some would characterize as a “clash,” between the jurisprudence of international institutions and domestic courts. In an increasingly interdependent world, domestic courts are now frequently called upon to interpret and apply the decisions of international legal institutions, and international legal institutions are required to apply and analyze the legality of national decisions. The question remains whether these institutions, both international and domestic, can coexist harmoniously and ensure that justice is served.

A. *Avco Corp. v. Iran Aircraft Industries*

Avco Corp. v. Iran Aircraft Industries, a case in which Judge Brower was involved as a Member of the Iran-United States Claims Tribunal, exemplifies this

135. *Wintershall*, ICSID Case No. ARB/04/14, ¶¶ 114-57, 167-72; *Daimler*, ICSID Case No. ARB/05/1, ¶¶ 200, 281.

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trend.¹³⁶ The dispute, first submitted to the Tribunal in 1982, concerned Avco's performance and Iran Aircraft Industries' payment under certain contracts. Avco relied on voluminous invoices to prove its claim.¹³⁷ At a pre-hearing conference before the Tribunal's three-judge Chamber to which the case was assigned, Avco requested guidance regarding whether the invoices should be submitted into evidence or whether the Tribunal would prefer to receive independently audited and authenticated accounts receivable ledgers listing the invoices.¹³⁸ The Chamber informed Avco that such ledgers would suffice.¹³⁹ However, in its 1988 decision, the Tribunal ultimately found 2-1 that it "[could] not grant Avco's claim solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit,"¹⁴⁰ and Iran Aircraft Industries received a significant net award on its counterclaim.¹⁴¹ Judge Brower issued an Opinion in which he strongly dissented to this outcome on the basis that "the Tribunal . . . misled [Avco], however unwittingly, regarding the evidence it was required to submit, thereby depriving [Avco], to that extent, of the ability to present its case"¹⁴²

When Iran sought to enforce its award in a U.S. District Court under the New York Convention,¹⁴³ which provides for the enforcement of foreign arbitral awards, the Court granted Avco's motion for summary judgment, refusing enforcement.¹⁴⁴ The Second Circuit affirmed, reasoning that Avco indeed had been "unable to present its case" in contravention of Article V(1)(b) of the New York Convention.¹⁴⁵ In reaching this decision, the Second Circuit not only evaluated the validity of the Tribunal's award under the New York Convention, but also interpreted Article IV(1) of the Tribunal's constitutive document, the Algiers Accords,¹⁴⁶ which provides that the Tribunal's awards are "final and binding."¹⁴⁷

136. *Avco Corp. v. Iran Aircraft Indus.*, 19 Iran-U.S. Cl. Trib. Rep. 200 (1988).

137. *See Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 143 (2d Cir. 1992).

138. *See id.*

139. *See id.* at 143-44.

140. *Id.* at 144.

141. *Id.* at 142.

142. *Id.* at 144.

143. *See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

144. *Iran Aircraft Indus.*, 980 F.2d at 142.

145. *See id.* at 146.

146. The Algiers Accords are comprised of two Declarations, including: the Declaration of the Government of the Democratic and Popular Republic of Algeria, U.S.-Iran, Jan. 19, 1981, 20 I.L.M. 224, *reprinted in* 1 C.T.R. 3; and the Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, U.S.-Iran, Jan. 19, 1981, 20 I.L.M. 230, *reprinted in* 1 C.T.R. 9 [hereinafter Claims Settlement Declaration].

147. Claims Settlement Declaration, *supra* note 146, at art. IV(1); *see Iran Aircraft Indus.*, 980 F.2d at 144-45 (The Second Circuit looked to the Tribunal's interpretation of the provision and determined that the

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The Second Circuit's decision, however, did not resolve the dispute. Rather, Iran brought the matter back before the Iran-United States Claims Tribunal, filing a claim against the United States for failing to enforce the award against Avco.¹⁴⁸ In 1998, the Tribunal ruled in favor of Iran, finding that the United States had breached its obligation to ensure that the Tribunal's awards are final and binding, valid, and enforceable in the United States, and ordered the U.S. government to pay the award.¹⁴⁹

In summary, while the U.S. District Court was given the task of interpreting the powers of an international tribunal, that same tribunal was asked to decide upon the legitimacy of the decision of a domestic court. These cases exemplify the discrepancies and contradictions that can arise when today's transnational disputes force domestic and international courts reciprocally to recognize and interpret the legitimacy of their decisions and their governing laws.

B. The ICJ and United States Death Penalty Cases

The next set of cases provides another stark illustration of the complexities that can arise when domestic courts are required to apply the jurisprudence of international courts and tribunals. To date, three countries—Paraguay,¹⁵⁰ Germany,¹⁵¹ and Mexico¹⁵²—have initiated proceedings against the United States before the ICJ for breach of Article 36 of the Vienna Convention on Consular Relations, a multilateral treaty to which the United States is a party.¹⁵³ Article 36 requires authorities of states parties to inform arrested foreign nationals of their right to contact their consular authorities “without delay.”¹⁵⁴

United States had no obligation to directly enforce the award, but only to provide a mechanism for enforcement that is at least as favorable as that provided to parties seeking enforcement of other foreign arbitral awards. The Second Circuit also dismissed Iran's argument that the “final and binding” language of the Algiers Accords requires that the award be treated as *res judicata*, and held that this language only means that the issues resolved in the arbitration cannot be tried in court *de novo*).

148. See *Iran v. United States*, Award No. 586-A27-FT (Iran-U.S. Cl. Trib. June 5, 1998), reprinted in 34 Iran-U.S. Cl. Trib. Rep. 39 (1998); see also CHRISTOPHER S. GIBSON & CHRISTOPHER R. DRAHOZAL, *THE IRAN-U.S. CLAIMS TRIBUNAL AT 25: THE CASES EVERYONE NEEDS TO KNOW FOR INVESTOR-STATE & INTERNATIONAL ARBITRATION* 167 n.5 (2007).

149. GIBSON & DRAHOZAL, *supra* note 148, at 167 n.5.

150. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 266 (Apr. 9).

151. LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 104 (June 27).

152. *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

153. Vienna Convention on Consular Relations art. 36(1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention]. The ICJ has jurisdiction over disputes arising out of the interpretation and application of the Convention, pursuant to the Optional Protocol Concerning the Compulsory Settlement of Disputes, to which the United States was also a party. In March 2005, however, the United States withdrew from the Convention's Optional Protocol. See Frederic L. Kirgis, *President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights*, AM. SOC'Y OF INT'L LAW (Mar. 2005), <http://www.asil.org/insights050309a.cfm>.

154. Vienna Convention, *supra* note 153, at art. 36.

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Each case involved foreign nationals who had been sentenced to death by U.S. courts. In what is perhaps the most well-known of these cases, the “*Avena Case*,” Mexico claimed that U.S. authorities arrested, tried and sentenced to death fifty-four of its nationals without advising them of their right to consular assistance.¹⁵⁵ In 2004, the ICJ issued its judgment on the merits in the case, finding that the United States had violated Article 36(1) of the Vienna Convention by failing to inform the fifty-four Mexican nationals of their Convention rights (“*Avena Judgement*”).¹⁵⁶ As a remedy, the Court required the United States to provide the individuals with review and reconsideration of their convictions.¹⁵⁷

In response to the *Avena Judgement*, President George W. Bush issued a memorandum to the U.S. Attorney General stating that “the United States will discharge its international obligations under [the *Avena Judgement*] by . . . having State courts give effect to the decision.”¹⁵⁸ In 2008, however, the U.S. Supreme Court considered the President’s memorandum and the *Avena Judgement* in the case of *Medellín v. Texas*, which involved one of the Mexican nationals covered by the *Avena Judgement*.¹⁵⁹ The Supreme Court held that “neither *Avena* nor the President’s Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.”¹⁶⁰ The Court reasoned that although the United States is bound by the ICJ’s decisions, the treaties could not be given effect as federal law absent implementing legislation because the treaties at issue in the *Avena* case were not self-executing.¹⁶¹

Just five months after the Supreme Court’s decision, on August 5, 2008, and despite provisional measures ordered by the ICJ to stay his death sentence, Medellín was executed.¹⁶² The *Medellín* decision and its aftermath raise important

155. *Avena and Other Mexican Nationals*, Application Instituting Proceedings, ¶ 1 (Jan. 9, 2003), available at <http://www.icj-cij.org/docket/files/128/1913.pdf>.

156. *Avena and Other Mexican Nationals*, Judgment, ¶ 153(4) (Mar. 2004), available at <http://www.icj-cij.org/docket/files/128/8188.pdf>. With respect to three of the individuals who faced imminent execution, the ICJ first issued a provisional measures order, calling upon the United States to “take all measures necessary to ensure that [the individuals] are not executed pending final judgment in these proceedings.” *Avena and Other Mexican Nationals*, Order of Provisional Measures, ¶ 59 (Mar. 2004), available at <http://www.icj-cij.org/docket/files/128/8180.pdf>.

157. *Avena and Other Mexican Nationals*, Judgment, ¶ 153(9) (Mar. 2004) available at <http://www.icj-cij.org/docket/files/128/8188.pdf>.

158. Margaret E. McGuiness, *Medellín v. Texas: Supreme Court Holds ICJ Decisions under the Consular Convention Not Binding Federal Law, Rejects Presidential Enforcement of ICJ Judgments over State Proceedings*, 12 AM. SOC’Y INT’L L. INSIGHTS 6 (2008).

159. *Medellín v. Texas*, 128 S. Ct. 1346, 1353 (2008).

160. *Id.*

161. *Id.* at 1348.

162. *Texas Executes Mexican Murderer*, BBC NEWS (Aug. 6, 2008, 9:17 AM), <http://news.bbc.co.uk/2/hi/7542794.stm>. In June 2008, Mexico filed a request for interpretation of the *Avena* Judgment, as well as for provisional measures. On July 16, 2008, the ICJ issued an order requiring the United States to “take all

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questions regarding both the willingness and the ability of the United States to comply with its international obligations, and highlight the ramifications of non-compliance. The decision generated considerable concern, among other things, that other countries would similarly breach their obligations under the Vienna Convention, putting Americans at risk abroad.¹⁶³

Yet, despite the negative ramifications that arose from *Medellín*, positive indicators can be found. First, it is noteworthy that the Executive Branch did attempt to compel state courts to comply with a decision of the ICJ. Furthermore, prior to *Medellín*'s execution, the "Avena Case Implementation Act of 2008" was introduced in the U.S. House of Representatives, a bill that, if passed, would have empowered U.S. federal courts to hear the claim of a foreign national whose right to consular notification was violated.¹⁶⁴ These steps taken by the Executive and Legislative branches in response to international demands suggest a willingness on the part of the United States to honor international legal commitments. One hopes that further lessons can be learned from the *Medellín* case, and that the political will has grown for the United States to ensure its compliance with the international rule of law.

C. The Chevron-Ecuador Lago Agrio Dispute

The storied dispute between Chevron and the government of Ecuador, which has played out in numerous fora, both domestic and international, is perhaps the most apt illustration of the growing interface, and often clash, between the jurisprudence of international and domestic courts.

The dispute arose from the activities of an oil exploration and production concession operated by the Texaco Petroleum Company ("TexPet"), later acquired by Chevron, in the Ecuadorian Amazon, as part of a consortium.¹⁶⁵ TexPet's partners in this endeavor included the government of Ecuador and its state-owned oil company.¹⁶⁶ In 1992, TexPet relinquished its interest in the

measures necessary to ensure" that *Medellín* would not be executed pending judgment on the request for interpretation. See Request for the Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Order of Provisional Measures, ¶ 80 (July 16, 2008), available at <http://www.icj-cij.org/docket/files/139/14639.pdf>.

163. Sarah H. Lee, *Strangers in a Strange Land: The Threat to Consular Rights of Americans Abroad After Medellín v. Texas*, 70 OHIO ST. L.J. 1519, 1544 (2009).

164. The bill was introduced into the House of Representatives by Rep. Howard Berman (D-CA). It was referred to the House Committee on the Judiciary but was never enacted. See Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2008), available at <http://www.gpo.gov/fdsys/pkg/BILLS-110hr6481ih/pdf/BILLS-110hr6481ih.pdf>; *H.R. 6481 (110th) Avena Case Implementation Act of 2008*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/110/hr6481> (last visited Nov. 25, 2012).

165. TexPet was a subsidiary of Texaco. In 2001, Chevron acquired Texaco and its subsidiaries. See *Chevron Corp. v. Ecuador*, UNCITRAL, PCA Case No. 34877, Final Award 9 (Aug. 31, 2011); see also *Chevron Corp. v. Naranjo*, 667 F.3d 232, 235 (2d Cir. 2012).

166. Ecuador's State-owned oil company, the Corporación Estatal Petrolera Ecuatoriana ("CEPE"), was replaced by the State-owned company PetroEcuador in 1989. See *Ecuador*, UNCITRAL, PCA Case No. 34877,

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consortium,¹⁶⁷ and by 1998, pursuant to a settlement agreement, was released from all liability for any environmental harm caused by the consortium's activities after completing designated remediation projects.¹⁶⁸

1. TexPet's Breach of Contract Lawsuits and Related Arbitration Under the United States-Ecuador BIT

Between 1991 and 1993, TexPet filed a number of lawsuits in Ecuadorian courts, alleging breach of contract in relation to the consortium's activities.¹⁶⁹ The lawsuits lingered without resolution in the Ecuadorian court system for some fifteen years. Consequently, in 2006, Chevron, having acquired TexPet's interest, sought resolution of its cases in an international forum, commencing arbitration proceedings against Ecuador in The Hague under the United States-Ecuador BIT.¹⁷⁰

The international arbitral tribunal was confronted, *inter alia*, with the question of whether Ecuador violated both domestic and international law as a result of undue delay in deciding the lawsuits.¹⁷¹ Ultimately, the tribunal found that Ecuador had breached Article II(7) of the BIT, which provides that states parties must "provide effective means of asserting claims and enforcing rights with respect to investment," and awarded Chevron roughly \$100 million in damages.¹⁷² In the wake of that award Ecuador has commenced proceedings under the same BIT against the United States, alleging a dispute between the two over the correct "interpretation and application" of the very same Article of their BIT.¹⁷³

2. Aguinda Class Action in United States District Court

Meanwhile in 1993, indigenous residents of the Ecuadorian Amazon commenced a class action lawsuit against Texaco in the U.S. District Court for

¶¶ 208-209.

167. See *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

168. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 598 (S.D.N.Y. 2011).

169. *Ecuador*, UNCITRAL, PCA Case No. 34877, ¶ 217.

170. See *id.* ¶ 228; see generally Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. No. 103-15 (entered into force May 11, 1997) [hereinafter U.S.-Ecuador BIT].

171. *Ecuador*, UNCITRAL, PCA Case No. 34877, ¶ 35.

172. *Id.* ¶¶ 141-42; see U.S.-Ecuador BIT, *supra* note 170, at art. II, ¶ 7.

173. *The Republic of Ecuador v. The United States of America*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1455 (last visited Nov. 25, 2012). However, the tribunal in this case notified the parties that it would be dismissing the case for lack of jurisdiction, with reasons to follow. See Luke Eric Peterson, *United States Defeats Ecuador's State-to-State Arbitration; Will Outcome Dissuade Argentine Copycat Case?*, INV. ARBITRATION REPORTER (Oct. 3, 2012), http://www.iareporter.com/articles/20120903_3/print.

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the Southern District of New York, seeking compensation for alleged environmental contamination to the rivers and rain forests of the region caused by TexPet's oil operations between 1964 and 1992.¹⁷⁴ Texaco sought dismissal of the case on *forum non conveniens* grounds, arguing that Ecuador was an adequate and appropriate alternative forum.¹⁷⁵ The District Court ultimately ruled in Texaco's favor,¹⁷⁶ and the Second Circuit affirmed the decision, but not before securing Texaco's consent to the jurisdiction of Ecuadorian courts.¹⁷⁷

3. *Lago Agrio Action in Ecuadorian Court*

Having lost their battle in U.S. District Court, residents of Ecuador's Amazon rainforest filed a new lawsuit against Chevron and Texaco in 2003—this time before a court closer to home, in Lago Agrio, Ecuador.¹⁷⁸ After an eight-year legal battle, on February 14, 2011, the Ecuadorian court found that Texaco had “caused extensive damage to the environment, peoples, and indigenous cultures in Ecuador in violation of Ecuadorian law,” and awarded the Lago Agrio plaintiffs over \$18 billion in damages (“Lago Agrio Judgment”).¹⁷⁹

In the meantime, while the Lago Agrio proceeding was still pending, Chevron took preemptive action in two fora outside of Ecuador to counter a potential judgment against it.

4. *Second Arbitration Under United States-Ecuador BIT and RICO Suit*

First, in 2009, Chevron initiated a second BIT arbitration against Ecuador in The Hague. In this proceeding, the international arbitral tribunal was asked to adjudge Chevron's claim that “Ecuador's judicial branch has conducted the Lago Agrio Litigation in total disregard” of domestic and international law.¹⁸⁰ Chevron requested money damages and equitable relief, including an award requiring

174. *See Aguinda*, 303 F.3d at 473.

175. *Chevron Corp.*, 768 F. Supp. 2d at 598. Note that Texaco also argued for the dismissal of the case on the grounds of “failure to join the Republic of Ecuador and Petroecuador, which . . . were indispensable because (1) the requested equitable relief within Ecuador could not otherwise be ordered, and (2) Petroecuador's own actions would be at issue in the case.” *Id.*

176. *See Aguinda*, 303 F.3d at 476.

177. *See id.* at 480; *see also Naranjo*, 667 F.3d at 235.

178. *Chevron Corp.*, 768 F. Supp. 2d at 600.

179. *See id.* at 620-21. The decision was affirmed by the Ecuadorian Court of Appeals, and Chevron subsequently sought further review before Ecuador's National Court of Justice. *See Chevron Corp. v. Texaco*, UNCITRAL, PCA Case No. 2009-23, First Interim Award on Interim Measures, 13 (Jan. 25, 2012); Press Release, Chevron, Chevron Appeals Illegitimate Ruling in Ecuador (Jan. 20, 2012), http://www.chevron.com/chevron/pressreleases/article/01202012_chevronappealsillegitimaterulinginecuador.news.

180. *Texaco*, UNCITRAL, PCA Case No. 2009-23, Claimant's Notice of Arbitration, ¶ 4 (Sept. 23, 2009).

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Ecuador to indemnify Chevron for any potential damages against it awarded by the Ecuadorian court.¹⁸¹

Secondly, on February 1, 2011, just prior to the Lago Agrio Judgment, Chevron commenced proceedings in the U.S. District Court for the Southern District of New York against, among others, the Lago Agrio plaintiffs and their lawyers.¹⁸² Chevron's complaint included allegations that the plaintiffs' lawyers engaged in a criminal enterprise to obtain a judgment against Chevron in the Ecuadorian court or a settlement through unlawful means, including fraud and extortion, in violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO").¹⁸³ Chevron sought, among other things, a preliminary injunction barring enforcement of a potential judgment in the Ecuadorian courts against Chevron anywhere in the world outside of Ecuador.¹⁸⁴

On February 8, 2011, the District Court issued a temporary restraining order against enforcement outside Ecuador of any adverse Ecuadorian judgment.¹⁸⁵ The following day, the international arbitral tribunal, noting the District Court's temporary restraining order, issued its own order directing Ecuador "to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgement against [Chevron] in the Lago Agrio Case . . . pending further order or award in these arbitration proceedings . . ." ("February 9, 2011 Order").¹⁸⁶

In March 2011, noting the Lago Agrio Judgment, as well as the international arbitral tribunal's February 9, 2011 Order, the District Court for the Southern District of New York granted Chevron's request for a preliminary injunction.¹⁸⁷ The Court concluded, among other things, that the Ecuadorian judicial system lacks impartiality and integrity and that there was "ample evidence of fraud in the Ecuadorian proceedings."¹⁸⁸ Shortly thereafter, the Court of Appeals for the

181. *Id.* ¶ 76.

182. *Chevron Corp.*, 768 F. Supp. 2d at 625.

183. *Id.*

184. *Id.* at 625-26; *see also Naranjo*, 667 F.3d at 238. The District Court severed the claim for a declaratory judgment from the other claims on April 15, 2011. *See Chevron Corp. v. Donziger*, 800 F. Supp. 2d 484 (S.D.N.Y. 2011).

185. *Chevron Corp.*, 768 F. Supp. 2d at 626.

186. *See Texaco*, UNCITRAL, PCA Case No. 2009-23, Order for Interim Measures, 11 (Feb. 9, 2011). Most recently, on January 25, 2012, after the Ecuadorian court of appeal dismissed Chevron's appeal against the Lago Agrio Judgment, the international arbitral panel reissued the order against enforcement that it had granted as an interim award. *See Texaco*, UNCITRAL, PCA Case No. 2009-23, First Interim Award on Interim Measures, 16 (Jan. 25, 2012). On February 16, 2012, the Tribunal issued a Second Interim Award on Interim Measures, and on February 27, 2012, the Tribunal issued a Third Interim Award on Jurisdiction and Admissibility. *See Texaco*, UNCITRAL, PCA Case No. 2009-23, Second Interim Award on Interim Measures (Feb. 16, 2012); *see also Texaco*, UNCITRAL, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (Feb. 27, 2012).

187. *Chevron Corp.*, 768 F. Supp. 2d at 660.

188. *Id.* at 633-34, 636.

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Second Circuit vacated the injunction,¹⁸⁹ finding that challenges to the validity of a foreign judgment can occur only after enforcement of the judgment is sought.¹⁹⁰ The Court cited considerations of international comity, stating that “[t]he court presuming to issue such an injunction sets itself up as the definitive international arbiter of the fairness and integrity of the world’s legal systems” and that such a court “risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which it emanates.”¹⁹¹

5. *Petition Before the Inter-American Commission for Human Rights*

To complicate matters further, on February 9, 2012, the Lago Agrio plaintiffs filed a petition before the Inter-American Commission on Human Rights for precautionary measures under Article 25 of its Rules of Procedure.¹⁹² The plaintiffs claimed that the relief sought by Chevron before the arbitral tribunal threatened the plaintiffs’ rights under the American Convention for Human Rights, and in particular, the rights to life, physical integrity, health, a fair trial, judicial protection, and equal treatment under the law.¹⁹³ They asked the Commission to “call for precautionary measures from [Ecuador] sufficient to assure that [it] will refrain from taking any action that would contravene, undermine, or threaten” their rights.¹⁹⁴ Shortly thereafter, on March 2, 2012, the Lago Agrio plaintiffs withdrew the petition, stating that precautionary measures were no longer warranted in light of a judgment of the Ecuadorian court of appeal, which found that Ecuadorian courts could not give effect to the arbitral tribunal’s order.¹⁹⁵ The court reasoned that no legal mechanism existed which would allow it to suspend the recognition or enforcement of the Lago Agrio judgment.¹⁹⁶ Although the court “affirm[ed] Ecuador’s commitment to its

189. *Naranjo*, 667 F.3d at 234, 247.

190. *Id.* at 241, 247.

191. *Id.* at 243-44. Since that decision, however, the Lago Agrio plaintiffs reportedly have commenced proceedings to enforce their judgment in Canada and Brazil. Fred W., *Ecuador Commences Actions in Canada and Brazil to Enforce 18 Billion Judgment Against Chevron*, CATHARSIS OURS BLOG (June 30, 2012), <http://fredw-catharsisours.blogspot.com/2012/06/ecuador-commences-actions-in-canada-and.html>.

192. Letter from Pablo Fajardo et al., Plaintiffs’ Legal Representatives, Calle Eloy Alfaro y Progreso Nueva Loja—Sucumbíos, and Aaron Marr Page, Counsel, Forum Nobis PLLC, to Dr. Santiago Canton, Executive Secretary, Inter-American Commission on Human Rights (Feb. 9, 2012), *available at* <http://www.nd.edu/~ndlaw/faculty/cassel/IACHR-PM-request.pdf>.

193. *Id.*

194. *Id.*

195. Letter from Pablo Fajardo et al., Plaintiffs’ Legal Representatives, Calle Eloy Alfaro y Progreso Nueva Loja—Sucumbíos, and Aaron Marr Page, Counsel, Forum Nobis PLLC, to Dr. Santiago Canton, Executive Secretary, Inter-American Commission on Human Rights (Mar. 2, 2012), *available at* <http://lettersblogatory.com/wp-content/uploads/2012/03/OAS-response.pdf>.

196. *Id.*

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international obligations both in investment matters and in human rights matters,” it held that when a conflict arises between the two obligations, human rights obligations take precedence.¹⁹⁷

In summary, we have on the playing field: (i) a judgment from an international arbitral tribunal against Ecuador awarding Chevron \$100 million; (ii) an award in Ecuadorian courts against Chevron awarding the Lago Agrio plaintiffs over \$18 billion; (iii) two pending matters—one before an international arbitral tribunal and another before the U.S. courts—in which Chevron has alleged that the Lago Agrio litigation was conducted in violation of both domestic and international law; and (iv) a petition filed by the Lago Agrio plaintiffs against Ecuador before a human rights commission, which was subsequently withdrawn. Evidence has shown that with regard to the two pending proceedings, both U.S. domestic courts and the international arbitral tribunals are willing to recognize the acts of the other. Only time will tell whether this trend will continue, or whether we will be forced to deal with conflicting decisions and next determine how they can be resolved, if ever.

V. CONCLUSION

Ultimately, taking into consideration the underlying tension and the explicit conflicts that arise between international and domestic institutions and within international law, it may be concluded that when international institutions and practitioners are working at their highest caliber, and when domestic societies and governments are receptive to, or at the very least, recognize the force of international law, justice, both domestic and international, may be achieved. As can be seen from the foregoing, however, such a result cannot be guaranteed in any specific case, and in any event there will be problems to overcome.

197. *Id.* The appellate court reconfirmed its ruling in a subsequent decision. *See id.*