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# Latin America: The Next Frontier for the ICC?

*Mikel Delagrangue*

## I. INTRODUCTION

The countries that make up the region known as Latin America draw from a similar, and seemingly mutually exclusive, history of representative democracies with progressive legal traditions - as well as - a history of autocratic dictators sitting atop repressive military juntas. It is the former historical tradition that the International Criminal Court (now in its eighth year of operation) seeks to take full advantage of, not only by cultivating the rule of law and strengthening democracy, but by also pursuing its own self-interested goal of enhancing the Court's international legitimacy through the extension of jurisdiction and influence. The current attitudes toward the ICC in Latin America have in some ways been shaped by the region's recent history of impunity in the face of human rights violations. Over the last twenty years, most Latin American states have been embroiled in armed conflict and/or authoritarian rule - leading to serious deficiencies in the respect for human rights and accountability. Although this moral and legal void led the region to experience extreme political violence involving forced disappearances, torture, and mass summary and extra-judicial executions, most Latin American countries have broken with their autocratic pasts and are now firmly committed to the protection of human rights.

As a testament to this about-face, many countries in the region are embracing the ICC's complementarity scheme (to promote, progress, and buttress existing domestic legal institutions in order to prosecute/prevent international crimes), as well as the pre-existing norms of the Inter-American legal system in-order to realign themselves with the international community. However, there is still much ground to be covered by way of institutional support to ensure that the "culture of impunity," will never again rear its ugly head.<sup>1</sup>

Prior to the creation of the Rome Statute, the Inter-American Court and Commission had categorically rejected, as contrary to the American Convention of Human Rights, the application of amnesty laws in cases that

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<sup>1</sup> See Margaret Popkin, *Latin America: The Court and the Culture of Impunity*, CRIMES OF WAR PROJECT at 1, (Dec. 2003), available at <http://www.crimesofwar.org/print/icc/icc-popkin-print.html>.

involve serious human rights violations.<sup>2</sup> In addition, the Inter-American Commission on Human Rights also held that a government's recognition of responsibility, establishment of a "truth commission," and even reparations, were insufficient to satisfy serious human rights violations.<sup>3</sup> In such cases, only the proper utilization of the domestic judicial system to investigate, prosecute, and (if necessary) punish, will suffice to achieve full and comprehensive justice for the domestic population.<sup>4</sup> It is under this backdrop that countries previously unwilling to address past human rights violations have now committed themselves to the Rome Statute, though certain issues continue to hinder full cooperation with the treaty's obligations.

Some of the major issues inhibiting full adherence to the Rome Statute in Latin America include, whether the possibility of life in prison, envisioned by the Statute, poses a constitutional conflict given that life sentences are proscribed in many of the states' constitutions.<sup>5</sup> Similarly, questions of constitutionality arise when determining whether surrender or transfer provisions to the Court violate prohibitions on extraditing a country's nationals, or whether governmental immunity provisions pose an obstacle to domestic ratification of the Rome Statute. Even those countries in Latin America which have ratified the Statute, have been slow to adopt implementing legislation due to both external pressure from the United States, as well as internal pressure from domestic factions fearing prosecution.

However, important proposals regarding the ICC are currently being discussed and implemented, particularly at the Organization of American States (OAS), where recent resolutions have reflected Latin America's growing commitment to the Court.<sup>6</sup> Domestically, supporters of the ICC

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<sup>2</sup> Douglass Cassel, *La lucha contra la impunidad ante el sistema Interamericano de Derechos Humanos*, in VERDAD Y JUSTICIA. HOMENAJE A EMILIO F. MIGNONE, at 357 (Juan E. Mendez, Martin Abregu, Javier Mariezcurrena, eds) (San Jose, Costa Rica: Inter-American Institute of Human Rights, 2001).

<sup>3</sup> Garay Hermsilla et al., Case 10.843, Inter-Am. C.H.R., Annual Report, ¶ 57 (1997); Irma Reyes et al., Case 11.228, Inter-Am. C.H.R., (insert report number), ¶ 56, 109 (insert year of the case); Ellacuria, Inter-Am. C.H.R., Report No. 136/99, ¶ 229-30 (insert year of the case)(Where the army was charged with the murder of six Jesuit priests and two women, the IACHR determined that a 1993 amnesty law violated El Salvador's obligations under the American Convention of Human Rights and called for El Salvador to prosecute. The IACHR stressed that the Truth Commission, despite its "highly relevant" role "cannot be considered as a suitable substitute for proper judicial procedures . . ."). The Inter-American Commission itself may prepare country reports and conduct on-site visits to individual countries, examining the human rights situation in the particular country and making recommendations to the government. Country reports have been prepared on the Commission's own initiative and at the request of the country concerned. The Commission also may appoint special rapporteurs to prepare studies on hemisphere-wide problems.

<sup>4</sup> *Id.*

<sup>5</sup> Popkin, *supra* note 1, at 5.

<sup>6</sup> Beginning in 1999 with Resolution 1619 and continuing each year consecutively to 2007 with Resolution 2279, the OAS General Assembly has adopted resolutions entitled "Promotion of the Interna-

have put forward proposals that aim to eliminate the statute of limitations for genocide, crimes against humanity, war crimes, as well as other internationally proscribed crimes.<sup>7</sup> Specific provisions have also been proposed to establish that crimes against humanity and war crimes are not subject to amnesties or pardons.<sup>8</sup> These efforts bode well for extending ICC jurisdiction, but actually extending the Court's docket to include Latin American war criminals may be a bit more complicated.

The purpose of this note is to highlight the troubled history of the Latin American region, and illustrate how it is uniquely susceptible to notions of externalized justice, specifically as it relates to democracy and institution building/refining. In addressing the(se) challenges, both internally (political divisions and the implementation process) and externally (American interference along with other geopolitical influences), this note will describe the ICC's role, at least in Latin America, as potentially facilitating a "justice cascade" that should help to revitalize and reinforce domestic impulses towards accountability, democracy, and human rights.<sup>9</sup> Not to be confused with other "trickle down" theories, the ICC, and the Office of the Prosecutor (OTP) in particular, have used the model of influence before intervention to modest success in Kenya, and should consider it as a template for future interaction with the equally sophisticated legal systems of Latin America. The region's current state of turmoil between "leftist" and "right-wing" regimes, juxtaposed with the Court's current position as a nascent (and somewhat controversial) institution, combine to create a unique

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tional Criminal Court," which have called upon the Permanent Council to hold, with the support of the General Secretariat, a working meeting on appropriate measures that states should take to cooperate with the International Court in the investigation, prosecution, and punishment of the perpetrators of war crimes, crimes against humanity, genocide, and crimes against the administration of justice of the International Criminal Court. These Resolutions have always included a reservation by the United States.

<sup>7</sup> Specifically, *see* ICC implementing legislation law 26200 (Art. 11) that clearly establishes the inapplicability of the statute of limitations for international crimes; *see also* Uruguayan Implementing Legislation 18.026, article 21.2 (in regards to "disappeared persons") "El delito de desaparición forzada será considerado como delito permanente, mientras no se establezca el destino o paradero de la víctima." (The crime of forced disappearance will be considered a permanent crime, even while the destiny or whereabouts of the victim is unknown).

<sup>8</sup> *See* Uruguayan Ley 18.026, Art. 8 regarding the inappropriateness of amnesty for ICC Crimes) "(Improcedencia de amnistía y similares). Los crímenes y penas tipificados en los Títulos I a III de la Parte II de la presente ley, no podrán declararse extinguidos por indulto, amnistía, gracia, ni por ningún otro instituto de clemencia, soberana o similar, que en los hechos impida el juzgamiento de los sospechosos o el efectivo cumplimiento de la pena por los condenados." (Inappropriateness of amnesty). The crimes and penalties typified in Titles I to III of Part II of the present law, will not be able to be declared extinguished by pardon, amnesty, grace, nor by any other institute of mercy if the facts prevent the judgment of the suspects or the effective fulfillment of the penalty by the condemned.

<sup>9</sup> Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI J. INT'L L. 1, 1-33 (2001).

and potentially symbiotic relationship, that if utilized, may realize the potentialities of both the region and the institution, and if ignored, may lead to mutual de-legitimacy.

## II. THE ROOTS: A BRIEF LOOK BACK

“No one touches anyone,” remarked General Augusto Pinochet just before the 1989 Chilean elections, “The day they touch one of my men, the rule of law ends. This I say once and will not say again.”<sup>10</sup> This quote from the former Chilean dictator is indicative of the day-to-day threats that Latin American militaries posed to civilians and their elected governments. The dearth in democratic ideals, however, did not begin with the southern cone (Chile, Argentina, Uruguay), antirevolutionary military regimes of the 1970s and 1980s. In-fact, the deficit can be traced back to the three centuries of Spanish and Portuguese colonial rule, and the lack of individual (not to mention indigenous) rights as they relate to the state/Monarch.<sup>11</sup> What became a legacy of unquestioned “white” upper class political control carried on into the colonial independence period (completed by approximately 1825) and characterized much of the nineteenth century in Latin America.<sup>12</sup> Though “Latin America” constitutes many individual states with independent and diverse cultures and traditions, the region also shares a common colonial legacy, a common language (save for Brazil, French Guyana, and a handful of smaller Caribbean states) and a common geopolitical position, falling within the “backyard” of the world’s lone superpower. Again, appreciating the cultural and historical distinctions that have developed between the region’s neighbors over the past 200 years, the common/shared experiences of the states making up “Latin America” do allow for a discussion on the broader, region-wide experiences with the rule of law and, by extension, the ICC.

In Latin America, the onset of social and political conflict began in earnest at the turn of the twentieth century in the form of class warfare.<sup>13</sup> In some countries, including Mexico, Argentina, and Chile, class warfare entailed either the working class striking over low wages and poor working conditions, or simply the time-honored tradition of oppressing the indigen-

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<sup>10</sup> Tina Rosenberg, *Overcoming the Legacies of Dictatorship*, in COUNCIL ON FOREIGN RELATIONS, at 134-35 (1995).

<sup>11</sup> Thomas C. Wright, *Latin America in the Twenty-First Century: Human Rights in Latin America*, 30 CAL. W. INT'L INT'L L.J. 303, 304 (2000) (juxtaposing the lack of emphasis on individual rights in Spanish and Portuguese tradition to that of English law in describing the different philosophical underpinnings of both Latin American countries and the U.S. and Canada).

<sup>12</sup> *Id.*

<sup>13</sup> VICTOR ALBA, *POLITICS AND THE LABOR MOVEMENT IN LATIN AMERICA* 25-34 (Carol de Zapata trans., Stanford University Press, 1968) (1968).

ous peasant class.<sup>14</sup> When the working classes began to organize and collectively demand more power via social and economic benefits, they were brutally repressed by the military or the police.<sup>15</sup> The indigenous and Mestizo under-classes also suffered from similar repression after seeking greater enfranchisement from the state.<sup>16</sup> The frequency of military and police repression in order to preserve elite power, became the hallmark of the pre-revolutionary period, and effectively ushered in the new era of revolution and counter-revolution.

The match that lit the fire of the revolution/counter-revolution era was undoubtedly struck by Fidel Castro's Cuban revolution in 1959.<sup>17</sup> The image of a successful mass mobilization and revolution in the region inspired other politically marginalized classes to attempt to bring about an immediate change to the existing social, economic, and political status quo.<sup>18</sup> This inevitable parroting, from Mexico to Argentina, led to another seemingly foreseeable (albeit antithetical) consequence, the counter-revolution.<sup>19</sup> The unconscionable record of human rights abuses in the region was found to be substantially more likely in the countries where the threat of revolution was most acute.<sup>20</sup> Thus, the military brass became the underwriters of a seemingly ubiquitous campaign of state terror under the guise of rolling back the threat of revolution.<sup>21</sup>

#### A. The Southern Cone

Nowhere was the relationship between revolution and counter-revolution more apparent than in the Southern Cone region of South America. In Uruguay, the socialist leaning Tupamaro faction looked poised to overthrow the government, until the military intervened by staging a coup in 1973 in-order to circumvent the country's bureaucratic institutions and purge Uruguay of its leftist insurgents.<sup>22</sup> Similarly in Argentina, socialist guerilla groups took up arms against the Ongania military dictatorship until

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; see also DONALD C. HODGES, ARGENTINA, 1943-1976: THE NATIONAL REVOLUTION AND RESISTANCE 32-63 (University of New Mexico Press 1976) (1976) (describing the brutal repression of the powerful Argentine labor movement subsequent to the 1955 overthrow of Juan Peron).

<sup>16</sup> See generally THOMAS P. ANDERSON, MATANZA: EL SALVADOR'S COMMUNIST REVOLT OF 1932 (University of Nebraska Press 1971) (1971) ("La Matanza (the slaughter) in El Salvador in 1932 involved the killing of between 10,000 and 30,000 Indian and mestizo peasants by government troops.")

<sup>17</sup> Wright, *supra* note 11, at 307.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 309.

<sup>20</sup> *Id.* at 308.

<sup>21</sup> See generally Rosenberg, *supra* note 10.

<sup>22</sup> JAMES KOHL, URBAN\_GUERILLA WARFARE IN LATIN AMERICA 172-309 (James Kohl & John Litt eds., 1974).

they were finally defeated in 1979 by the Proceso de Reorganizacion Nacional, or what is today known as either Operation Condor or the “Dirty War.”<sup>23</sup> The argument for utilizing such repressive measures, much the same as in Uruguay, centered around the fact that achieving both a political and economic house cleaning required a heavy hand, something that could not be carried out by a civilian, democratic government. In Chile, the election of Salvador Allende in 1970, under the auspices of bringing about socialist reforms, put a catalyst for elite disenfranchisement into a position of power.<sup>24</sup> To prevent this perceived evil from materializing, the military staged a coup in 1973 and General Augusto Pinochet implemented his ex post facto persecution of political opponents, which led to the institutionalization of torture throughout the country as well as some 3,000 “disappearances.”<sup>25</sup> Pinochet’s enactment of Decree Law No. 2191 which granted blanket amnesty for acts of “murder, mayhem, batteries, unlawful detention, kidnappings, disappearances, and torture,” set a precedent for military dominance over democratic institutions in the region.<sup>26</sup>

## B. Civil War

In cases where either the rebels were well organized and enjoyed the popular support of the people, or where the central governments were too weak to sufficiently snuff out dissent, civil war was often the result. In Central America, the Sandinistas of Nicaragua followed the Cuban model of socialist-inspired revolution, and succeeded in overthrowing the government.<sup>27</sup> The Sandinista model soon spread to neighboring Guatemala,

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<sup>23</sup> See generally MARIA JOSE MOYANO, ARGENTINA’S LOST PATROL: ARMED STRUGGLE, 1969-1979 (Yale University Press 1995); see also MARGUERITE GUZMAN BOUVARD, REVOLUTIONIZING MOTHERHOOD: THE MOTHERS OF PLAZA DE MAYO 38, 94 (University of California Press 1994) (1999) (explaining that the harvest of the dirty war was nearly 10,000 people disappeared according to the official inquiry conducted after the restoration of civilian government, some human rights groups have put the number as high as 30,000); Judith Laikin Elkin, *Recoleta: Civilization and Barbarism in Argentina*, 27 MICH. Q. REV. 235 (1988) (in describing techniques against guerillas by state, “First, we kill the guerillas. Then, we kill the guerillas’ families. Then we kill the friends of their families, so that there will be no one left to remember who the guerillas were.”); The National Commission on Disappeared Persons, available at <http://www.nuncamas.org/english/library/nevagain/nevagain001.htm>.

<sup>24</sup> SIMON COLLIER & WILLIAM F. SATER, A HISTORY OF CHILE 1808-2002 330-331. (Cambridge University Press 2004).

<sup>25</sup> *Id.* at 359-61 (much of the dirty work was carried out by the DINA (Direccion de Inteligencia Nacional), a secret police that reported directly to Pinochet and which hunted down, arrested, and killed political opponents).

<sup>26</sup> Anita Frohlich, *Reconciling Peace With Justice: A Cooperative Division Of Labor*, 30 SUFFOLK TRANSNAT’L L. REV. 271, 273 (2007) (citing Jorge Mera, CHILE: TRUTH AND JUSTICE UNDER THE DEMOCRATIC GOVERNMENT, IN IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 171, 179 (Naomi Roht-Arriaza ed., 1995)).

<sup>27</sup> See Wright, *supra* note 11, at 316.

where an insurgency began to take root, as well as El Salvador, where the group known as Frente Farabundo Marti de Liberacion Nacional (FMLN) stepped up its actions against the state beginning in 1980.<sup>28</sup>

Though the Central American “civil war” model may evoke notions of state repression against a romanticized rebellion, the human rights violations that occurred, as in the cases of the Southern Cone countries, were not exclusively the work of the state. Both sides of the Central American conflicts found it acceptable to deploy death squads to conduct violence, torture, massacres, and scorched earth policies on indigenous populations.<sup>29</sup> These policies produced a staggering number of civilian casualties. By 1992, El Salvador’s civil war concluded after 75,000 civilians had perished.<sup>30</sup> Similarly, in Guatemala, some 150,000 people, primarily civilian Mayan peasants, were killed by the time the 1996 peace accord was signed.<sup>31</sup>

### C. Aftermath: Democracy and Impunity

In the 1980s a region-wide movement towards democracy began to affect the dictatorships of Latin America as voters in Argentina, Bolivia, Brazil, Chile, Ecuador, Honduras, Nicaragua, Panama, Paraguay, Peru, and Uruguay elected civilian governments.<sup>32</sup> Although the transition was remarkable, given the brief amount of time that elapsed, pessimism continued to run high as Latin America had seen two previous waves of democratization in the nineteenth century. At the height of the second wave in 1960, Paraguay was the only military dictatorship in the region, but by 1976, Colombia, Venezuela, Suriname, and Costa Rica were the only non-dictatorships in Latin America.<sup>33</sup> In most instances, “democracy” meant little in terms of respecting human rights. Some nascent democracies behaved in a manner much the same as before their transition, mostly because they were unable to keep repressive security forces from carrying out human rights abuses on their own populations.<sup>34</sup> With little by way of developed legal infrastructure, police and soldiers remained confident that their crimes would be judged in friendly military courts, if they were judged at

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<sup>28</sup> SUSANNE JONAS, *THE BATTLE OF GUATEMALA: REBELS, DEATH SQUADS, AND U.S. POWER* 131-44 (Westview Press 1991); TOMMIE SUE MONTGOMERY, *REVOLUTION IN EL SALVADOR: ORIGINS AND EVOLUTION* 119-84 (Westview Press 1982).

<sup>29</sup> JONAS, *supra* note 28, at 103-13, 145-59.

<sup>30</sup> Rosenberg, *supra* note 10.

<sup>31</sup> Madeleine Davis, *Externalised Justice and Democratisation: Lessons from the Pinochet Case*, 54 *POLITICAL STUDIES* 245,266 (2006).

<sup>32</sup> Rosenberg, *supra* note 10.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

all.<sup>35</sup> In fact, national reconciliation in the aftermath of the Southern Cone dictatorships and Central American civil wars continues to be an issue for the countries involved.

Chile was the first country in Latin America to enact an amnesty law for its military excesses in 1978, and it soon became the model for similarly situated Latin American post dictatorial regimes.<sup>36</sup> After Pinochet was defeated in a 1988 plebiscite, the newly elected president of Chile, Patricio Aylwin, had a hard time reversing the self-amnesty of the previous regime with former President Pinochet maintaining his position of commander-in-chief of the national army.<sup>37</sup> Similarly in Argentina, three military uprisings were enough to convince the then newly elected president Raul Alfonsin to end the *Nunca Mas* (Never Again) truth and reconciliation campaign (otherwise known as CONADEP) by passing *ley del punto final*, (Full Stop) which set a 60-day prescription period for misdemeanors and crimes against international law.<sup>38</sup> Less than a year later, on June 8, 1987, a second amnesty law was passed in response to military pressure entitled *ley de obediencia debida* (Due Obedience) that exempted from trial all military subordinates who had obeyed orders.<sup>39</sup> Alfonsin's successor, Carlos Menem, regressed even further in 1989 by pardoning the junta leaders that had already been convicted and making new criminal indictments virtually impossible.<sup>40</sup>

In Colombia, one of the oldest and arguably most stable democracies in Latin America, conditional amnesty has been attempted as a means to end civil war.<sup>41</sup> From independence to the beginning of WWII, a series of small-scale civil wars made Colombia a representative example of the Latin American experience with democracy. However, *la violencia*, lasting throughout the 1940s and 50s, left at least 200,000 people dead and elevated Colombia's brutality record above those of its regional neighbors.<sup>42</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> Robert Quinn, Note, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 *FORDHAM L. REV.* 905, 909 (1994).

<sup>37</sup> See Collier & Sater, *supra* note 24, at 393; see also Andreas O'Shea, *AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE* 59 (Springer 2002).

<sup>38</sup> LAURA TEDESCO & JONATHAN BARTON, *THE STATE OF DEMOCRACY IN LATIN AMERICA: POST-TRANSITIONAL CONFLICTS IN ARGENTINA AND CHILE* (Routledge 2005).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (Newly elected president Raul Alfonsin named a panel of distinguished citizens to a National Commission on the Disappeared (*Comisión Nacional sobre Desaparición de Personas*). Their report was entitled "Nunca Mas" ("Never Again")) (The "full stop" law set a deadline of sixty days to bring charges for crimes committed during the "dirty war" as a way of limiting the number of future trials. The law of "due obedience" (*obediencia debida*) was subsequently passed to protect junior officers for "obeying orders").

<sup>41</sup> SUSAN LEE, *COLOMBIA: A CASE STUDY IN IMPUNITY IN LATIN AMERICA*, 25 (Rachel Sieder ed., 1995).

<sup>42</sup> FOREST HYLTON, *EVIL HOUR IN COLOMBIA* 129 (Verso 2006).

Since 1970, the Colombian military has used paramilitary organizations as proxies to avoid accountability for a particularly brutal anti-insurgency campaign against both the Revolutionary Armed Forces (ELN) and the *Fuerzas Armadas Revolucionarias de Colombia* (Armed Revolutionary Forces of Colombia) (FARC).<sup>43</sup> The spread of contract killing, kidnapping, and extortion gave way to a mutually reinforcing political environment involving extreme right-wing repression versus an overgrown leftist armed resistance.<sup>44</sup> Whenever Colombia's political center appeared to entertain "socialist" positions, including more equitable wealth, the redistribution through taxation or negotiation with leftists instead of protracted/indefinite conflict, members of the far right would take action to usurp power.<sup>45</sup> It was precisely one of these rightward gales that ushered President Alvaro Uribe Velez into office in 2002 under the auspices of "democratic security."<sup>46</sup> Considering the methodology of utilizing financial and legal resources as a means of subverting the insurgency to be ineffective, Uribe resolved himself to end the conflict through brute military strength. By passing measures such as Decree No. 2002, which created military zones of "rehabilitation and consolidation," as well as a 2003 Constitutional amendment further increasing the executive's ability to wage war on "terrorism," the Colombians appeared to be harking back to the region's counter-revolutionary period and its employment of "legalized force."<sup>47</sup> However, instead of seizing power by military coup (the Southern Cone technique), the democratically elected Colombian government "strengthened their military forces and their paramilitary proxies by decree."<sup>48</sup> These paramilitary proxies, apart from expropriating nearly five million hectares of land between 1997 and 2003, have killed not only thousands of alleged opposition members in "counter-insurgency" campaigns, but also farmers and other civilians living in regions where guerillas were present.<sup>49</sup> After considera-

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<sup>43</sup> *Id.* at 27.

<sup>44</sup> *Id.* at 133.

<sup>45</sup> *Id.*

<sup>46</sup> Frohlich, *supra* note 26, at 276; *see also* HYLTON, *supra* note 42, at 121 ("Democratic security" policies focus on integrating civilians into the repressive branches of the state in order to defeat the insurgencies and extend central government authority); *see also* Hylton, *supra* note 42, at 104 (the most important lobbies behind this change in course were the Liberal Party, the military high command, multinational banana companies, palm oil processors, flower magnates, narco-barons, and cattle ranchers).

<sup>47</sup> Frohlich, *supra* note 26, at 276; *see also* LEE, *supra* note 41.

<sup>48</sup> *Id.* This decree represents accordance with the American aid package "Plan Colombia" and includes various pieces of legislation legitimizing (legally) a myriad of counter-insurgency groups and techniques. This "plan" was also reinforced by the United States, both financially and militarily. *See* HYLTON, *supra* note 42, at 109-20.

<sup>49</sup> *See* HYLTON, *supra* note 42, at 118 (paramilitaries involved in the largest land grab in Colombian history); *see also* LEE *supra* note 41, at 21, 25. Aerial fumigation under Plan Colombia has also

ble international and domestic pressure had been exerted, Colombia began efforts to demobilize their proxies by adopting Act No. 782, which allowed for various legal remedies, including amnesty, for those who had not participated in *serious* human rights violations.<sup>50</sup> This *realpolitik* attempt to tolerate immunity for past abuses in exchange for immediate peace continued with the 2005 Justice and Peace Law (JPL), which applied to actors who *have* committed serious human rights violations.<sup>51</sup> The law, an attempt at curtailing the activities of the most notorious paramilitary group, AUC (United Self-Defense Forces of Colombia), aims to promote peace and reconciliation by limiting legal retribution.<sup>52</sup> The JPL has offered sentence reductions to more than 3,200 of the demobilized paramilitaries accused of committing crimes against humanity in exchange for both full confessions and the satisfaction of reparations claims from victims of the violence.<sup>53</sup>

The success of the JPL, and Plan Colombia policy overall, is hard to gauge. The Law was originally promoted as a tool for pacification, but in practice, the Uribe Administration's strategy has been focused on security, namely, combating the FARC and demobilizing paramilitaries.<sup>54</sup> One of the main problems with the JPL was that the burden of implementation was placed squarely on the shoulders of the Attorney General's newly created Justice and Peace Unit (JPU). The understaffed/under-resourced JPU received more than 155,000 claims from victims of paramilitary atrocities and other violence since November 2006, leading to a bottleneck in the process of justice, truth, and reparations.<sup>55</sup> The fact that large numbers of victims have yet to file a claim, coupled with the decision to extradite fourteen of

been an enormously costly and destructive endeavor, causing widespread respiratory and skin infections in the civilian population, killing licit and illicit crops, and poisoning rivers and soils. See HUGH O'SHAUGHNESSY & SUE BRANFORD, *CHEMICAL WARFARE IN COLOMBIA: THE COSTS OF COCA FUMIGATION* (Latin American Bureau 2005).

<sup>50</sup> Frohlich, *supra* note 26, at 277.

<sup>51</sup> U.N. Econ. & Soc. Council [ESOSOC], Comm'n. on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia*, ¶ 71, U.N. Doc. E/CN.4/2006/9 (May 16, 2006).

<sup>52</sup> Jose Miguel Vivanco & Maria McFarland Sanchez-Moreno, *A Bad Plan in Colombia*, INTERNATIONAL HERALD TRIBUNE, May 16, 2005, at [insert page number where article can be found here, e.g., A1, BB 16.5] (the director of Human Rights Watch warned that the law would "launder the criminal records of top paramilitary commanders – including some of the country's most powerful drug lords – while allowing them to keep their wealth and maintain their control over much of the country."). See HYLTON, *supra* note 42, at 115 (both the U.N. and E.U. roundly rejected Uribe's Justice and Peace Act as unacceptable according to international law).

<sup>53</sup> Int'l Crisis Group, *Correcting Course: Victims and the Justice and Peace Law in Colombia*, LATIN AMERICA REPORT No. 29 (2008), available at <http://www.crisisgroup.org/home/index.cfm?id=5753>.

<sup>54</sup> Int'l Crisis Group, *Colombia's New Armed Groups*, LATIN AMERICA REPORT No. 20 (2007), available at <http://www.crisisgroup.org/home/index.cfm?id=4824>.

<sup>55</sup> See Int'l Crisis Group, *supra* note 53.

the most senior former AUC leaders to the U.S. on drug-trafficking charges (instead of Crimes against Humanity, for instance), suggests that the government has lost faith in its own transitional justice framework and has resorted to other modes of pacification.<sup>56</sup>

In light of recent events (AUC leaders stepping up drug trafficking, the FARC's return to political assassinations, and the Colombian government's resorting to illegal cross-border raids),<sup>57</sup> ICC Prosecutor Luis Moreno-Ocampo visited Colombia, a state party to the Rome Statute, on August 25, 2008, to review the implementation of the JPL.<sup>58</sup> While tempering expectations of an immediate intervention by the Court, Ocampo did stress the need to hold elected officials and members of the armed forces accountable for human rights violations, and also ominously suggested that he may open up his own investigation if evidence of human rights violations surfaced in the future.<sup>59</sup> In fairness, Uribe's military strategies have led to successes against the FARC, which is now reeling from an organizational and identity crisis following the deaths of key leaders like Manuel *tirofijo* (sure shot) Marulanda and Raul Reyes. However, the one-dimensional military approach has allowed paramilitaries to fill the void left by the retreating and embattled FARC. As a result, Plan Colombia, and thus Uribe's "democratic security," have produced neither peace nor justice (which may have been the plan all along). Considering his work unfinished, and in keeping with regional precedent, President Uribe staged a referendum to amend the constitution so that he may stay in office.<sup>60</sup>

Considering the former examples as representative to a greater or lesser degree, Latin America can be appropriately described as a region of struggling democracies. With guerilla warfare, and its destabilizing effects, alive and well in Mexico, Peru, and Colombia, and the question of indigen-

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<sup>56</sup> *Id.*

<sup>57</sup> See Declaration on the Assassination of the Colombian Deputies Kidnapped by the FARC, O.A.S. Permanent Council Resolution 4235/07 (condemning the FARC for the murder of 11 Colombian politicians); see also HYLTON, *supra* note 42, at 116 (Plan Patriot helped turn the Colombian conflict into a source of regional diplomatic tension by attempting to drive the FARC out of its established areas [Caqueta, Meta, Guaviare and Vaupes] and extradite its leaders to the United States. The plan caused heightened tension in Ecuador and Venezuela with Ecuador amassing twenty thousand troops on its Colombian border); see also Peter Walker, *Venezuelan Troops Mobilize as Farc Dispute Nears Boiling Point*, THE GUARDIAN, Mar. 4, 2008, available at <http://www.guardian.co.uk/world/2008/mar/04/Colombia.venezuela> (stating that Colombia's military launched an air raid on a camp belonging to the Revolutionary Armed Forces of Colombia (Farc) a mile inside Ecuador, killing 17 rebels, including Raúl Reyes, a senior Farc commander).

<sup>58</sup> *La CPI podría intervenir en choque entre ramas del poder público*, EL ESPECTADOR, Sept. 2, 2008; *Si aplican la ley, habrá paz*, SEMANA, Aug. 30, 2008.

<sup>59</sup> See Int'l Crisis Group, *supra* note 53.

<sup>60</sup> *Colombian lawmakers OK referendum on Uribe third term*, CNN WORLD, Sept. 2, 2009, <http://www.cnn.com/2009/WORLD/americas/09/02/colombia.referendum/index.html>.

ous rights becoming an increasing starter for instability from Guatemala to Chile, Latin America as a whole could certainly benefit from a democratic coagulant, an institution that, in theory, can turn democratic ideals (namely the rule of law) into entrenched norms.

### III. ENTER THE I.C.C.

The International Criminal Court (ICC) was conceived, not as a supra-national legal apparatus, but as “a treaty-based inter-national legal institution of last resort.”<sup>61</sup> Put simply, the ICC is not just another bureaucratic cog in the UN wheel: instead it is an organization created by treaty, and beholden to its statute’s signatories. Under this charge, the Court aims at preserving the primacy of domestic legal systems through the principle of complementarity, while also providing a jurisdictional resort for the Security Council (Art. 12.3) and for States not party to the treaty who wish to utilize the competence of the Court (Art. 13, b).<sup>62</sup> The ICC also functions as an effective reminder for national jurisdictions to adhere to their international obligations. Theoretically, the Court’s role should also include “providing technical assistance and capacity-building support for the individual national criminal justice systems of States parties as they attempt to investigate and prosecute international crimes within the ICC’s jurisdiction.”<sup>63</sup> In its charge as a capacity builder, the ICC has been described as an external pressure for national democratization, strengthening the protection of human rights through “cultivation, consolidation, and improvement of democratic institutions.”<sup>64</sup>

To live up to this billing, membership in the ICC imposes obligations that can require both legislative creation and/or reform on the part of signatory states.<sup>65</sup> Some states-parties, through their implementing legislation, have given their own courts universal jurisdiction for crimes under the ambit of ICC jurisdiction to ensure that their domestic courts will act as an

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<sup>61</sup> M. Cherif Bassiouni, *The ICC – Quo Vadis?*, 4 J. INT’L CRIM. JUST. 421, 422 (July 2006).

<sup>62</sup> The Rome Statute of the International Criminal Court art. 12(3), 13(b), July 17, 1998, 2187 U.N.T.S. 90. For a comprehensive account of the basic features of the principle of complementarity, see J.T. Holmes, *Complementarity: National Courts Versus the ICC*, in, *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 667, 667-86 (A. Cassese, P. Gaeta & John, R.W.D. Jones eds., Oxford University Press 2002).

<sup>63</sup> Bassiouni, *supra* note 61.

<sup>64</sup> J. Mayerfeld, *The Democratic Legacy of the International Criminal Court*, 28:2 THE FLETCHER FORUM OF WORLD AFFAIRS 147, 147 (2004).

<sup>65</sup> The Rome Statute envisages domestic implementation of jurisdiction over the crimes within its scope (genocide, crimes against humanity, war crimes) in Articles 86-88, requiring domestic cooperation with the Court. Requiring the surrender of accused persons to the court would be an example of legislation reform.

effective complement to the ICC.<sup>66</sup> It is important to note that the ICC does not replace the role of national courts in universal jurisdiction cases and in fact, the theory of universal jurisdiction exists separately from that of ICC jurisdiction.<sup>67</sup>

To be clear, the role of the Court is, “as a backstop, an external mechanism for justice in relation to certain crimes, where national courts fail to act.”<sup>68</sup>

The ICC, still well within its infancy, is not without its limitations and weaknesses. Some of the key challenges facing the Court in 2009 (most of which are beyond the scope of this article) are: getting states to live up to their statutory commitments (i.e., Bashir visiting member states in Africa); limited resources (especially when considering intervention in countries with sophisticated legal systems like Colombia or Kenya); case/investigation selection and the debate of qualitative intervention (based on setting precedent) verses quantitative intervention (based on number of victims); and operating around and collaborating with peace negotiations and alternative modes of justice.

In light of the situational history in countries like Uganda and Sudan, there are some concerns about the ICC’s ability to navigate effectively around international *realpolitik* concerns of maintaining peace.<sup>69</sup> In both cases, the ICC has been vilified by domestic and international pundits for issuing indictments against the military leaders of the LRA in Uganda and for issuing indictments against those bearing the most responsibility in the government of Sudan (including its President Omar Bashir). The ICC’s indictments were criticized for having been either “poorly timed,” or seen to stand in the way of on-going peace negotiations.<sup>70</sup> In both cases, the Court’s jurisdiction to investigate (and ostensibly prosecute) was triggered by referral (self referral in the Case of Uganda, Security Council referral in the case of Sudan).<sup>71</sup>

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<sup>66</sup> See Davis, *supra* note 31 (“For Belgium, and to a lesser degree Spain, universal jurisdiction represents the notion that some crimes are so deplorable that a state is legally obligated to undertake proceedings irrespective of the location of the crimes or the nationality of perpetrators and victims.”).

<sup>67</sup> M. Cherif Bassiouni, *The History of Universal Jurisdiction and its Place in International Law*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 39, 46 (S. Macedo ed., University of Pennsylvania Press 2004),

<sup>68</sup> Davis, *supra* note 31, at 266.

<sup>69</sup> See Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14(3) *EUR. J. INT’L L.* 481 (2003).

<sup>70</sup> PETER EICHSTAEDT, *FIRST KILL YOUR FAMILY: CHILD SOLDIERS OF UGANDA AND THE LORD’S RESISTANCE ARMY 169-70* (Lawrence Hill Books 2009).

<sup>71</sup> S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); 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> (follow English hyperlink; then search “ICC-20040129-44”; then

As to the notion that externalized justice is inherently destabilizing, ICC advocates have pointed to the Court's key role in promoting domestic reform.<sup>72</sup> The logic goes, that the greater the interaction between domestic and international law, and between national and transnational actors, the greater the possibility for incremental development in the realm of domestic accountability (the end goal).<sup>73</sup> Needless to say, many (including victims, fatigued by decades of war) remain unconvinced.<sup>74</sup>

Critics have also cited the possibility that ICC membership might give governments, who themselves may have been involved in human rights violations, an extra weapon against internal resistance or rebel movements that lack the legal protection ascribed to states and their representatives.<sup>75</sup> Again looking to Uganda, the ICC's reluctance to look into President Museveni's Bantu policies towards the Acholi in Northern Uganda seems to corroborate the claim that the Prosecutor is reluctant to look into his host's violations.<sup>76</sup> However, administratively, the Prosecutor has taken useful precautions within his office by separating the Jurisdiction, Complementarity, and Co-operation Division from the Investigation Division. This has had the effect of dividing, within the OTP, the role of initial discretionary decision making (i.e., whether or not to open an investigation) from the actual act of collecting evidence.<sup>77</sup> Similarly, the Prosecutor has refrained from actively seeking self-referrals so not to give rise to state expectations of a quid pro quo. The Prosecutor (according to the Rome Statute) can do no more than promise to conduct his investigations objectively.<sup>78</sup>

Finally, the principle of complementarity, at once the Court's most seductive promise as well as its most opaque function, has also been a source of controversy. In Latin America, the implications of complementarity, in terms of legal and governmental practice, are considerable. Especially in situations where countries are facing political transition, the Court may provide some external guarantee of democratic reform. Such was the case in Kenya, where, after disputed elections led to considerable violence, the government faced significant pressure from the Prosecutor of the ICC to

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follow English hyperlink); Press Release, United Nations, Sec'y-Gen. Welcomes Adoption of Sec. Council Resolution Referring Situation in Darfur, Sudan, to Int'l Criminal Court Prosecutor (Mar. 31, 2005), <http://www.un.org/News/Press/docs/2005/sgsm9797.doc.htm>.

<sup>72</sup> Mayerfeld, *supra* note 64.

<sup>73</sup> *Id.*

<sup>74</sup> EICHSTAEDT, *supra* note 70, at 170.

<sup>75</sup> Davis, *supra* note 31.

<sup>76</sup> EICHSTAEDT, *supra* note 70, at 150-55.

<sup>77</sup> Claus Kress, 'Self-Referrals' and 'Waivers of Complementarity' Some Considerations in Law and Policy, 2(4) J. INT'L CRIM. JUST. 944 (2004).

<sup>78</sup> *Id.*

initiate an investigation.<sup>79</sup> As one example of complementarity in action, the Prosecutor used the threat of ICC intervention to spur on the domestic formation of a truth commission (Waki Commission) to investigate the violence.<sup>80</sup> Were it not for Kenya's signing of the Rome Statute, the post election violence would almost certainly have been swept under the rug of impunity leaving victims without recourse and leaving Kenyans generally feeling disaffected by their own government's institutional failings. Instead, the Kenyan government faces a stark choice: impartially investigate and prosecute those responsible for the violence, or handover those most responsible for trial in the Hague. In the future, the Kenya intervention *may* prove instructive for the ICC in terms of interacting and engaging with state parties who boast similarly sophisticated legal infrastructures and institutions. With limited resources, the Court's greatest strength, and consequently its path to lasting legitimacy, may lie in its ability to promote domestic investigations and prosecutions while resisting the temptation to get involved directly. This focus, if maintained, would broaden the scope of ICC intervention, leading to more investigations (outside of Africa) and thereby increasing the Court's legitimacy as a *truly* global institution.

#### IV. STEPS TOWARDS JUSTICE

"Reform is not neutral--it will produce conflicts between 'winners' and 'losers.'"<sup>81</sup>

As has been described, the individual governments in Latin America have struggled in their history to speak "law to power," especially given the aforementioned culture of impunity, paternalism, and non-participation in politics and law that have reigned since the colonial period. Through the early foundational work of academics like Andres Bello, Carlos Calvo, and Alejandro Alvarez, and through participation in the Organization of American States (OAS) and the Inter-American Court/Commission on Human

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<sup>79</sup> Press Release, Int'l Criminal Court, ICC Prosecutor Receives Materials on Post-Election Violence in Kenya (July 16, 2009), <http://www.icc-cpi.int> (follow English hyperlink; then search "ICC-OTP-20090716-PR438"; then follow English hyperlink).

<sup>80</sup> *Id.* ("We will consider in particular the existence of national proceedings. The Kenyan authorities are discussing options to establish a national court to prosecute these cases. In accordance with the Rome Statute, the primary responsibility for investigating and prosecuting these crimes rests with Kenya."); see also Press Release, Int'l Criminal Court, Waki Comm'n List of Names in the Hands of ICC Prosecutor (July 16, 2009), <http://www.icc-cpi.int> (follow English hyperlink; then search "ICC-OTP-20090716-PR439"; then follow English hyperlink).

<sup>81</sup> Joseph R. Thome, *Heading South But Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691, 711 (2000).

Rights (IACHR),<sup>82</sup> Latin American nations have, at the very least, paid lip service to their common desire for a liberal constitutional order that espouses political pluralism, fair elections, a strong, independent judiciary, and responsible administration.<sup>83</sup> Concern with fundamental fairness not only inspired the OAS to refer to human rights in its Charter, but also led the regional organization to adopt the Inter-American Declaration on the Rights and Duties of Man in May 1948, half a year before the United Nations completed the Universal Declaration of Human Rights.<sup>84</sup> As recent developments have shown, these long held aspirations are beginning to gain traction through real political and legal reform.

With the signing of the Inter-American Democratic Charter on September 11, 2001, the member states of the OAS (including all of Latin America except for Cuba) committed not only to maintaining and strengthening democracy, but also to enshrining the essential elements of a democracy. Examples of which include the respect for human rights and fundamental freedoms, the exercise of power on the basis of the rule of law and popular will, and the transparency of government activities.<sup>85</sup> Similar-

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<sup>82</sup> The major additional instruments are the following: Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, June 7, 1999, AG/RES. 1608 (XXIX-0/99), *reprinted in* ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 107 (2007); Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, O.A.S.T.S. No. 68, 33 I.L.M. 1529; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73, 29 I.L.M. 1447; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, 25 I.L.M. 519; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; all documents herein *available at* <http://www.cidh.oas.org/Basicos/English/Basic.TOC.htm> (click on title of instrument).

<sup>83</sup> See generally Liliana Obregon, *The Colluding Worlds of the Lawyer, the Scholar and the Policymaker: A View of International Law from Latin America*, 23 WIS. INT'L L.J. 145 (2005).

<sup>84</sup> American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, *reprinted in* ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 4, 15 (2007), *available at* <http://www.cidh.oas.org/Basicos/English/Basic.TOC.htm> (click on "American Declaration of the Rights and Duties of Man").

<sup>85</sup> See Inter-American Democratic Charter, Sept. 11, 2001, 40 I.L.M. 1289, 1291-92, *reprinted in* ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 149, 152 (2007), *available at* <http://www.cidh.oas.org/Basicos/English/Basic.TOC.htm> (click on "Inter-American Democratic Charter").

Article 1: The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it.

Article 3: Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free and fair elections based on secret balloting and universal suf-

ly, the IACHR, an autonomous organ of the OAS (which represents all of the member states of the OAS), has been increasingly active in the support for human rights in the region, and has even held that impunity for serious human rights violations *is* a violation of the American Convention on Human Rights.<sup>86</sup>

For the individual states themselves, reform has come by way of judicial rulings and progressive legislation. The most influential and precedent-setting proceeding to date has been the Pinochet trial. General Augusto Pinochet's case may become a harbinger for the future of externalized justice in the region due to the fact that, for Chile at least, destabilization concerns proved unwarranted.<sup>87</sup> The attempt to extradite Pinochet from the U.K. and try him in Spain, far from threatening Chilean democracy, incited the domestic legal community to challenge the existing state of the law and rid it of its immunity provisions.<sup>88</sup> In 1999 the Chilean Supreme Court held that Pinochet's 1978 amnesty law did not apply to disappearances, a ruling which eventually led to Pinochet's indictment for kidnappings carried out during his time in power.<sup>89</sup> Grassroots campaigns against Chile's amnesty law have also been constant and forthcoming with charges that Chile's *monist* Constitution provides for international law to supersede existing domestic law and that amnesty for serious human rights violations is prohibited by customary international law.<sup>90</sup> Unfortunately, Pinochet died before he could be formally convicted. However, signs that the veil of impunity has now lifted in Chile are abundant. With Chile finally ratifying the Rome Statute on June 29, 2009, (ten years after signing) and becoming the 109th state party, many domestic judges have begun to step up investigations re-

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frage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.

<sup>86</sup> Douglass Cassel, *La Lucha Contra la Impunidad Ante el Sistema Interamericano de Derechos Humanos*, in VERDAD Y JUSTICIA: HOMENAJE A EMILIO F. MIGNONE 360 (Juan E. Mendez et al. eds., 2001).

<sup>87</sup> Davis, *supra* note 31 ("In the case of Chile at least, it seems that concerns over the possible destabilizing effect of externalized justice proved unwarranted."); see also Diane Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1059-60, 1133-34 (2004) (highlighting the democracy-enhancing potential of universal jurisdiction cases, and the Pinochet case in particular).

<sup>88</sup> *High Court Upholds Stripping Pinochet of Legal Immunity*, CHI. TRIB., Apr. 23, 2006, at 14.

<sup>89</sup> PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS CONFRONTING STATE TERROR AND ATROCITY 98 (2001).

<sup>90</sup> See Walsh, *supra* note 88; see also JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 267-68 (2d ed. 2006). For monists, international law is automatically part of a state's domestic legal system and is just as much domestic law as is contract or tax law. In addition, international law is superior to domestic law . . . in the case of a conflict. Under the monist view, the national legislature . . . the executive . . . and the judiciary is bound to give effect to international law.

lating to Chile's involvement in the "dirty war."<sup>91</sup> In fact, on September 1, 2009, (over thirty years after the war began) Chilean Judge Victor Montiglio issued an arrest warrant for 129 former security officials (Army, Air Force, and uniformed police that worked for the Dina Agency) in connection with their involvement in the perpetration of gross human rights violations from 1973-1990.<sup>92</sup>

In Argentina, Spanish judges targeted human rights violators in much the same way as Pinochet, with similar effects in terms of strengthening domestic infrastructure against the legacies of impunity.<sup>93</sup> The initial volley against the vestiges of impunity came when Argentine legislators, supported by the leadership of President Nestor Kirchner, voted to give constitutional status to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.<sup>94</sup> Following a Senate vote in 2003 to nullify the amnesty laws, the Argentine Supreme Court held in 2005 that both "ley punto final" (1986) and "ley de obediencia debida" (1987) were unconstitutional.<sup>95</sup> The Supreme Court reasoned that although the Congress was competent to grant amnesties under the Constitution, amnesty for serious human rights violations infringed upon the American Convention on Human Rights and the International Covenant on Civil and Political Rights.<sup>96</sup> Once again, a *monist* constitutional structure enabled article 75(22) to grant international conventions constitutional weight and thereby place a premium on international law.<sup>97</sup> This decision emboldened the Argentine courts to begin prosecuting members of the former junta, some of

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<sup>91</sup> Chile, Coalition for the International Criminal Court, *available at* <http://www.iccnw.org/?mod=country&iiduct=35>.

<sup>92</sup> *Chile: 129 to be arrested on 'dirty war' charges*, ASSOC'D PRESS (Sept. 1, 2009), *available at* [http://www.msnbc.msn.com/id/32648672/ns/world\\_news-america](http://www.msnbc.msn.com/id/32648672/ns/world_news-america).

<sup>93</sup> *Scilingo's Sentence Breaks New Ground in the Fight Against Torture*, International Rehabilitation Council for Torture Victims (Apr. 20, 2005), *available at* <http://www.ircrt.org/Default.aspx?ID=3558&M=News&NewsID=212> ("On 19 April 2005, a Spanish Court convicted the Argentinean Ex-Naval Captain Adolfo Scilingo to serve 640 years of imprisonment for crimes against humanity and torture carried out during the 'dirty war' of the military Junta in Argentina between 1976 and 1983.").

<sup>94</sup> RICHARD B. LILICH & HURST HANNUM, *Human Rights Prosecutions in Argentina*, in INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 966-67 (Richard B. Lillich ed., 2006).

<sup>95</sup> *Id.*

<sup>96</sup> Corte Suprema de Justicia [CSJN], 14/06/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc./recurso de hecho," Fallos (2005-328-2056) (Arg.), *available at* <http://www.csjn.gov.ar> (follow "Secretaría de Jurisprudencia" hyperlink; then follow "Consulta de fallos completos" hyperlink; then type "14/06/2005" in the "Fecha de resolución" window; then click "Buscar"; then click "VER" on the second result listed) ("Expte. 'S 1767. XXXVIII'; Fecha '14-06-2005'; Tipo 'FAL' at 108) (hereinafter, CSJN Decision).

<sup>97</sup> *Id.*

who were still serving in the military.<sup>98</sup> If nothing else, the developments in both Argentina and Chile have shown that the process of democratization can rarely (if ever) be deemed to be complete.

Other examples of reform via judicial proceedings have been documented throughout Latin America. In March 2001 the Inter-American Court of Human Rights held that an extensive Peruvian amnesty law from 1995 could not bar the investigation and prosecution of the military involved in the *Barrios Altos Case* due to the fact that the law was deemed to violate the American Convention on Human Rights.<sup>99</sup> Similarly in Honduras, the Supreme Court has issued important rulings aimed at limiting the scope of amnesty, particularly as it relates to the military.<sup>100</sup> In Costa Rica deferential weight was also given to human rights norms when their Supreme Court commented, “with respect to human rights, international instruments are given not just a value similar to the constitution, but to the extent that they provide greater rights or guarantees to people, take priority over the Constitution.”<sup>101</sup> And finally, in Guatemala, on September 1, 2009, former paramilitary commander Felipe Cusanero was sentenced to 150 years in prison (twenty-five years for each of his victims) for his role in the perpetration of forced disappearances between 1982 and 1984. Former Guatemalan Foreign Relations Minister Edgar Gutierrez expressed his hopes that the case would mark an end to impunity for soldiers and paramilitaries accused of being behind the disappearance of over forty-thousand people during the 1960-1996 civil war, a war in which nearly two-hundred-thousand were killed (90 percent by soldiers and paramilitaries).<sup>102</sup>

As these examples illustrate, Latin American nations are attempting to buck off the yoke of impunity by using international norms in order to establish the rule of law and to build solid democracies. The soil for externa-

<sup>98</sup> Larry Rother, *After 30 Years, Argentina's Dictatorship Stands Trial*, N.Y. TIMES, Aug. 20, 2006, at A3.

<sup>99</sup> See *Barrios Altos Case (Aguirre v. Peru)*, 83 Series C 15, Inter-Am. Ct. H.R. (2001), available at <http://www1.umn.edu/humanrts/iachr/C/83-ing.html> (unofficial) (seen as a hallmark of the Fujimori regime, case involves Peruvian Army murdering fifteen people).

<sup>100</sup> Corte Suprema de Justicia [CSJ], 18/01/1996, “\_\_\_\_\_/amparo en revisión,” Caso 58-96 (Hond.), available at [www.uc3m.es/uc3m/inst/MGP/JCI/04-noticias-ho-amnist\\_a.htm](http://www.uc3m.es/uc3m/inst/MGP/JCI/04-noticias-ho-amnist_a.htm) (partial unofficial copy).

<sup>101</sup> Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice], 01/11/2000, Res. 2000-9685 (Costa Rica), <http://200.91.68.20/scij/> (follow “Jurisprudencial Judicial” hyperlink; then follow “Búsqueda Selectiva” hyperlink; then type “00-008325-0007-CO” into the “Expediente” field; click “Continuar”; at section V, ¶ 2, of “CONSIDERANDO”) (citing sentencia 2313-95, follow same procedure as above-except type “90-000421-0007-CO” into the “Expediente” field; at section VI of “RESULTANDO”).

<sup>102</sup> Juan Carlos Llorca, *Guatemala Convicts Paramilitary in Disappearances*, ASSOC'D PRESS (Sept. 1, 2009), <http://www.google.com/hostednews/ap/article/ALeqM5gaXMClxsu5LTriZY8DBYds6N50CAD9AE00E00>.

lized justice, and more specifically the ICC, could not be more fertile. The movement towards a more globalized world should be made to include the rule of law. The symbiotic potential could be couched in terms of both “globalized localism” and “localized globalism.” “Globalized localism” is where international human rights norms are extended locally thus providing an avenue of protection (domestically) against the most heinous international crimes. “Localized globalism” is where the impact of the received institution (ICC), in the local context, builds on the institution’s foundations, jurisdiction and legitimacy.<sup>103</sup> However, as the history of the region has shown, there are almost always competing interests vying for influence in Latin America. Externally, the United States had formerly made it its policy in the region to thwart the ICC wherever it attempted to grow roots, and internally, the dying remnants of the military elite still cling to certain legal and political maneuverings in-order to prevent the *legitimate* rule of law from diluting their power and influence.

#### V. THE EVER-PRESENT ELEPHANT IN THE ROOM

“Nonintervention in all its forms is now an established norm of international conduct and is vigorously supported by the United States in every part of the globe—except in its own back yard.”<sup>104</sup>

#### A. Brief Overview of U.S. Intervention in Latin America

The United States has a history of political and military intervention in Latin America that can be traced back all the way to James Monroe and the “Monroe Doctrine.”<sup>105</sup> Just as the countries of Latin America were emerging from the grips of colonialism, President Monroe enshrined the notion that the United States would use any means necessary to protect the interests in the Western Hemisphere from foreign influence.<sup>106</sup> However, far from developing into an altruistic doctrine of sovereign protection and nonintervention, the United States used the Monroe Doctrine, and its “corollaries,” as paternalistic excuses to stage major military interventions to ensure its regional domination.<sup>107</sup> In the early twentieth century, the United States had

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<sup>103</sup> Thome, *supra* note 81, at 695-96.

<sup>104</sup> Charles Maechling, Jr., *Washington's Illegal Invasion*, FOREIGN POL'Y, Summer 1990, at 113-131 (concluding that nonintervention by one state in the internal affairs of another is not an established norm of international conduct by citing Article 2(1), 2(4) and 33 of the UN Charter; Article 19 and 20 of the OAS Charter; and the Helsinki Accord of 1975, all of which the United States is a party to).

<sup>105</sup> The Monroe Doctrine of 1823, available at <http://usinfo.state.gov/usa/infousa/facts/democrac/50.htm>.

<sup>106</sup> *Id.*

<sup>107</sup> Maechling, *supra* note 104, at 116.

staged no less than a dozen unilateral military interventions in Central America, Mexico, and the Caribbean.<sup>108</sup> These interventions came under the “Roosevelt Corollary,” which gave the United States the right to intervene unilaterally to prevent “chronic wrongdoing” in neighboring republics.<sup>109</sup> The policy was formally initiated in 1904 when American President Theodore Roosevelt forcibly separated Panama from Colombia.<sup>110</sup> This period of “big stick” diplomacy was put on hiatus with President Franklin Roosevelt’s Good Neighbor policy, which sought to enshrine the United States’ commitment to non-intervention.<sup>111</sup>

For most of the twentieth century, it is safe to say that Latin America’s international relations were inhibited by America and its fear of outside intervention, particularly during the Cold War.<sup>112</sup> The Good Neighbor policy was quickly jettisoned as the United States focused on combating communism, which in some cases led to the support of regimes that were “violating human rights but deemed anti-communist.”<sup>113</sup> This return to the Roosevelt Corollary, especially evident during the Reagan Administration and its dealings with Panama, has evolved from one American foreign policy initiative to another.<sup>114</sup> From the “War on Drugs,” to the “War on Terrorism,” the United States has used its singular policy initiatives to justify short-sighted and often illegal incursions into the sovereign domain of states, including the various Latin American republics.<sup>115</sup> The Bush Admin-

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<sup>108</sup> *Id.* at 113; see also Makram Haluani, *Benign Neglect: Cooperation in the Western Hemisphere*, 24 HARV. INT’L L. REV. 4, 50 (2003) (offering a brief (non-comprehensive) List of Incursions: (1903) Approval of the Platt Amendment, which granted the US the right to intervene in Cuban Affairs. Also, US sends 10 warships to support rebellion in Panama in order to acquire the land for the Panama Canal; (1908) US troops intervene in Panama for the first of four times in the next decade; (1917) US Marines intervene again in Cuba to guarantee sugar exports during WWI; (1925) US military occupies Panama City to break a rent strike and to keep order).

<sup>109</sup> Maechling, *supra* note 104, at 112.

<sup>110</sup> *Id.* at 113.

<sup>111</sup> *Id.* at 114.

<sup>112</sup> See generally, Jean B. Grugel, *New Regionalism and Modes of Governance – Comparing US and EU Strategies in Latin America*, 10 EUR. J. INT’L REL. 603 (2004).

<sup>113</sup> Kati Suominen, *U.S. Human Rights Policy Toward Latin America*, 2001 U.S. INST. PEACE 2, available at <http://www.usip.org/files/resources/sr65.pdf>.

<sup>114</sup> See Maechling, *supra* note 104, at 114 (“During the Reagan administration, the Roosevelt Corollary returned in full force in the form of a bloody and destructive covert war against Nicaragua, an airborne invasion of Granada, and the invasion of Panama, which was preceded by a campaign of economic warfare that brought Panama’s economy to a standstill”).

<sup>115</sup> Note that the “War on Drugs” was used to justify military intervention in Panama including the deposing of the head of state Noriega (a violation of Article 2.4 of the UN Charter and Article 19 and 21 of the OAS Charter); note also that the “War on Terror” was used to invade Iraq (again, a violation of Article 2.4 of the UN Charter).

istration's campaign against the ICC can be viewed in much the same light.<sup>116</sup>

## B. U.S. Opposition to the ICC

The Bush Administration's campaign against the ICC has come in a variety of forms, policies and procedures. The tactics have varied from launching national legislation against the Court, to the obstruction of important decisions by the Security Council, to finally pressuring individual states to contract out of the ICC treaty that they had just joined.<sup>117</sup> Initially, during the Clinton years, the United States sought to achieve its policy initiatives from within by actively participating and contributing in the formulation process in Rome.<sup>118</sup> To keep the United States in the debate, President Clinton signed the Rome Statute on the last possible date (for signature established at Rome)—though he accompanied his signature with a declaration that the United States would not attempt to ratify the treaty any time soon.<sup>119</sup> This R.U.D. proved to be prescient, as President Bush's subsequent "unsigning" inaugurated the Administration's campaign to frustrate the purpose of the ICC.<sup>120</sup> The official position of the U.S. government, in pursuance of its policy stance against the ICC, consistently shows an attitude of "active opposition" aimed at undermining the efficacy of the institution.<sup>121</sup> The Bush Administration pursued this goal not only by criticizing the perceived weaknesses of the Rome Statute itself, but also through such measures as the American Servicemembers' Protection Act (ASPA) and the pursuit of bilateral immunity agreements (BIAs), designed to immunize U.S. military personnel from ICC prosecution.<sup>122</sup> The ASPA, passed in 2002, constituted the initial shot over the bow. This legislation gave the

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<sup>116</sup> The "War on the ICC," used to justify cutting military and economic aid to countries who have signed the Rome Statute but failed to sign a bilateral immunity agreement with the U.S. is a violation of Article 20 of the OAS Charter which states, "[n]o State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." Charter of the Organization of American States, Apr. 30, 1948, 33 I.L.M. 981 (1994), available at <http://www.oas.org/juridico/English/charter.html#ch20>.

<sup>117</sup> Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 INT'L AFF. 693, 694 (2002).

<sup>118</sup> *Id.* at 705. "The U.S. itself was in fact one of the most effective and technically competent delegations in this process, both before the Rome conference, at Rome and even afterwards, when the elements of crimes were being defined." *Id.* at 701.

<sup>119</sup> *Id.*

<sup>120</sup> Press Release, US Department of State, (May 6, 2002); note also R.U.D. stands for Reservation, Understanding, or Declaration.

<sup>121</sup> Gerhard Hafner, *An Attempt to Explain the Position of the USA towards the ICC*, 3 J. INT'L CRIM. JUST. 323, 324 (2005).

<sup>122</sup> R.T. Alter, *International Criminal Law: A Bittersweet Year for Supporters and Critics of the International Criminal Court*, 37 INT'L LAW. 551 (2003).

United States the option to preclude its participation in UN peacekeeping or enforcement missions, unless a permanent *ad hoc* exemption was made for U.S. forces or the host state itself was not a party to the statute.<sup>123</sup> The ASPA also authorized the United States to halt military assistance to any state party unless an agreement was made not to hand over any U.S. citizen to the ICC.<sup>124</sup> The language of the statute famously authorized the President “to use all means necessary and appropriate to bring about the release from captivity” of U.S. servicemen taken into custody by the Court.<sup>125</sup> In pursuing its ASPA mandate, the United States threatened to veto future UN peacekeeping operations in East Timor and Bosnia and Herzegovina until specific exemptions were made for U.S. military personnel involved in the missions.<sup>126</sup> This tactic eventually resulted in the unanimous passage of Resolution 1422 which granted U.S. personnel one year’s immunity.<sup>127</sup> This annual struggle was abandoned in 2004 when it became clear that the United States lacked the requisite Security Council votes, resulting in the Bush Administration’s pursuance of BIAs through the use of both political and economic pressure.<sup>128</sup> The BIAs sought to exploit a perceived loophole in the Rome Statute found in Article 98, which states that the ICC cannot request a state to “act inconsistently with its obligations under international law... or international agreements.”<sup>129</sup> The argument goes that the ICC must respect the treaty obligations of the state party and thus may not violate the individual arrangements. The pursuance of the BIAs by the United States is a representative example of the Bush Administration’s effort to frustrate the purpose of the ICC. These individual agreements have been criticized as unlawful for two reasons: First, Article 98 was meant to cover only existing agreements that were in force at the time the statute was adopted. Second, customary international law precludes the ability to make RUDs that would frustrate the intent and purpose of the signed treaty (which the BIAs—seeking to immunize U.S. personnel from genocide,

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<sup>123</sup> American Servicemembers’ Protection Act, S. 2726, 106th Cong. (2000); American Servicemembers’ Protection Act, H.R. 4654, 106th Cong. (2000).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (note in this instance that “all means necessary,” a term that connotes the authorization of military force, has been proclaimed as the “invade the Hague” provision, as the seat of the ICC is most likely to be where any service member would be held).

<sup>126</sup> Weller, *supra* note 117, at 706.

<sup>127</sup> S.C. Res. 1422, UN Doc. S/RES/ 1422 (Jul. 12, 2002) (the U.S. utilized provisions from both the Rome Statute (Art. 16) and the UN Charter (Chapter VII) to secure the resolution).

<sup>128</sup> Lana Wylie, *Prestige versus Pressure over the International Criminal Court: Response of the Caribbean States*, presented at Canadian Political Science Association, (June 2-5, 2004) (both FMF (Foreign Military Financing) and IMET (International Military Education and Training) funds have been tied to the bilateral immunity agreements).

<sup>129</sup> See The Rome Statute of the International Criminal Court, Art. 98.

crimes against humanity and war crimes—would certainly do). As can be imagined, the Bush Administration's official position has been heavily criticized not only by NGOs in support of the institution but also by EU Member States, the Council of Europe, many Latin American States, and other members of the international community.<sup>130</sup>

The Bush Administration's objections to the ICC could be characterized as both real and imagined. The U.S. government sees its role in the modern, uni-polar world of today to include worldwide military commitments that aim to promote both national and international interests.<sup>131</sup> In objecting to the ICC, the Bush Administration claimed that its service members, whom are engaged in international humanitarian peacekeeping operations as well as conventional warfare, could be subjected to international prosecutions by an un-checked, and potentially politically motivated, prosecutor.<sup>132</sup> This contention would almost certainly fall under the "imagined" column, as one of the most fundamental limitations on the scope of the ICC's power lies in the principle of complementarity and the discretion it prescribes to the domestic judicial system. Only if the state in question is "unwilling or unable" to prosecute does the ICC proceed in asserting its jurisdiction.<sup>133</sup> Similarly, the fears of an overzealous prosecutor are misguided due to the existence of institutional provisions designed to prevent such abuses of power.<sup>134</sup> Basically, the only "real" fear the United States has, in terms of the ICC, is the possibility that high-ranking active and former military and political personnel (possibly even the President) could be subjected to investigations in connection with gross human rights abuses. The trials of low-ranking U.S. military personnel for crimes of torture and murder committed in Iraq have demonstrated that the principle of comple-

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<sup>130</sup> See Hafner, *supra* note 121; see also Council Conclusions on the International Criminal Court (30/09/02), <http://ue.eu.int/uedocs/cmsUpload/ICC34EN.pdf>; see also Argentina Complaints at Center of the Americas.org, available at <http://www.americas.org/item21778>.

<sup>131</sup> Hafner, *supra* note 121.

<sup>132</sup> *Alaine Gherardi, The International Criminal Court: Out of the Blocks or on the Block?*, 2003 THE CENT. FOR PUB. JUST., available at [http://www.cpjustice.org/stories/storyReader\\$935](http://www.cpjustice.org/stories/storyReader$935).

<sup>133</sup> Rome Statute, Art. 17 (1)(a), available at <http://untreaty.un.org/cod/icc/statute/rome.htm>:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

<sup>134</sup> See *id.*, Art. 15 (even if Prosecutor would wish to initiate proceedings in the pursuit of unjustified political objectives, a case can only progress once a pre-trial chamber of ICC judges has approved it), available at [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf); see also *id.*, Art. 16 (an additional safeguard is through the Security Council, which can request a deferral for up to 12 months), available at [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf)

mentarity would likely not relieve the ICC of its duty to investigate, considering the United States' reluctance to investigate up to the highest in the chain of command.<sup>135</sup> Thus, America and Americans theoretically could be subject to the Court's jurisdiction for gross human rights violations if the American legal system failed to investigate on its own; a fact that should speak to the Court's legitimacy – not its illegitimacy.

### C. U.S. vs. Latin America over the ICC:

In December 2006, the U.S. State Department reported that the United States had reached an agreement with 102 countries, including fourteen from the Americas, to exempt American nationals from the jurisdiction of the Court.<sup>136</sup> In the Americas, the United States has obtained an agreement from twelve state parties: Antigua and Barbuda, Belize, Bolivia, Colombia, Dominica, Dominican Republic, El Salvador, Guyana, Honduras, Nicaragua, Panama, St. Kitts & Nevis and four non-state parties: El Salvador, Granada, Haiti, and Nicaragua.<sup>137</sup> However, not all of these countries initially agreed to sign the bilateral immunity agreements. It took the stepped-up program of economic threats embodied in the 2004 "Nethercutt Amendment," which included anti-terrorism and anti-drug funds, to get some Latin American countries to acquiesce.<sup>138</sup> Colombia, for example, often thought of as ground zero in terms of the war on drugs, stood to lose the most aid for its reluctance to sign a BIA with the United States.<sup>139</sup> A growing number of Latin American countries had reacted angrily to the ASPA provisions and the BIAs, which had effectively cut military and development aid to the region for its steadfast support for the ICC. Indeed, ten Latin American countries, including Uruguay, Bolivia, and Mexico decided to maintain their support for the ICC even in the face of significant cuts in aid.<sup>140</sup> In response, many U.S. military and State Department offi-

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<sup>135</sup> Brian Knowlton, *Will Abu Ghraib prosecution go higher?*, N.Y. TIMES, Jan. 20, 2005, <http://www.nytimes.com/2005/01/19/world/africa/19iht-graner.html> (though, it is important to note that Moreno Ocampo, prosecutor for the ICC, has publicly stated that he will not pursue allegations against the United States and the United Kingdom in Iraq, <http://www.globalpolicy.org/intljustice/icc/2006/02ocAmpo.htm>).

<sup>136</sup> ICCNOW.org, *Summary of Information on Bilateral Immunity Agreements (BIAs) or so-Called 'Article 98' Agreements*, available at [http://www.iccnw.org/documents/CICCFCS\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFCS_BIAstatus_current.pdf).

<sup>137</sup> *Id.*

<sup>138</sup> Human Rights Watch, *U.S.: Congress Tries to Undermine War Crimes Court*, <http://www.hrw.org/en/news/2004/12/07/us-congress-tries-undermine-war-crimes-court> (last visited Dec. 1, 2009).

<sup>139</sup> Wylie, *supra* note 128 (facing the threat of losing \$130 Million in 2004, President Alvaro Uribe signed a BIA with the US on September 16, 2003).

<sup>140</sup> See Coalition for the Int'l Criminal Court, *Countries opposed to signing a US bilateral immunity agreement (BIA): US Aid Lost in FY04 & FY05 and Threatened in FY06*, <http://www.iccnw.org/docu>

cials began recognizing that cuts in aid to Latin America not only weakened America's ability to prosecute the "wars" on terrorism and drugs, but also risked leaving a void of influence that could be filled by other states (like China) whose interest in resources far surpass any interest in democracy and/or the rule of law.<sup>141</sup>

Nowhere is the lopsided nature of the debate over the ICC more apparent than at the OAS. Every year since 2003, the member states of the OAS have passed resolutions re-affirming the organization's commitment to the promotion of the ICC, and every year the United States (during the Bush Administration) was the only country to make a reservation to the resolution disavowing its support for the Court.<sup>142</sup> The row over the proper place of the ICC in the Americas has gone beyond the mere utilization of RUDs, as the U.S. Ambassador to the OAS proved in June of 2007, when he adamantly refused to allow the legally charged term "crime against humanity," to be used to describe the kidnapping and summary execution of eleven Colombian legislators by the FARC.<sup>143</sup> The Ambassador argued that "kidnapping" under U.S. interpretation, could not be considered a crime against humanity—a legal assertion that was blatantly contrary to customa-

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ments/CountriesOpposedBIA\_final\_11Dec06\_final.pdf (last visited Dec. 1, 2009).

<sup>141</sup> General Bantz J. Craddock, Commander of the U.S. Southern Command, testified before the House Armed Services Committee, March 2005, which cuts in aid result in a lack of training and equipment for forces in Latin American countries, weakening their ability to address policy concerns. Craddock stated, "in Latin America where contact is the coin of the realm, where engagement is really where we make the progress in reinforcing these democratic institutions and ensuring that militaries understand the democratic process and the subordination to civilian leadership, it's critical we have contact across the board." Similarly, alluding to China, the General stated, "Decreasing engagement opens the door for competing nations and outside political actors who may not share our democratic principles."

<sup>142</sup> See generally O.A.S. Resolutions: AG/RES. 1929 (XXXIII-O/03), AG/RES. 2039 (XXXIV-O/04), AG/RES. 2072 (XXXV-O/05), AG/RES. 2176 (XXXVI-O/06), and AG/RES. 2279 (XXXVII O/07), available at <http://www.oas.org/consejo/GENERAL%20ASSEMBLY/Resoluciones-Declaraciones.asp> (Reservation by the United States: The United States has long been concerned about the persistent violations of international humanitarian law and international human rights law throughout the world. The United States will continue to be a forceful advocate for the principle of accountability for war crimes, genocide and crimes against humanity, but cannot support the flawed International Criminal Court (ICC). Thus, the United States has not ratified the Rome Statute and has no intention of doing so. In light of this position, the United States cannot join in the consensus on an OAS resolution that promotes the Court, nor support the use of the OAS regular budget to fund cooperation and any other support rendered to the ICC, including under any OAS-ICC cooperation agreement. The United States understands that any such support will result only from specific fund contributions.) (last visited Dec. 1, 2009).

<sup>143</sup> Toby Muse, *Colombia Accuses FARC in Hostage Deaths*, WASH. POST, June 28, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/28/AR2007062800363.html> (directly after the incident, Colombian President Alvaro Uribe stated on June 28: "The FARC wants to hide this crime against humanity that it committed."). The subsequent American reaction against the use of the legally charged terminology was witnessed by the author (who was interning at the OAS Office of International Law) at an emergency Permanent Council meeting on June 29, 2007.

ry international law. Confronted with the law, the American Ambassador made it clear that he simply opposed the usage of legal terms of art that may evoke ICC jurisdiction.<sup>144</sup>

Indicative of the U.S. government's long-standing policies towards Latin America, the Bush Administration's pyrrhic victories over the ICC hindered collaborative efforts in the wars on terror and drugs as well as diminished the United States' ability to compete in the region's marketplace of goods and ideas. Now, many of the republics of Latin America are beginning to develop strong and diverse economies that no longer exclusively depend on the United States, since both the EU and countries like China have been more than willing to fill the void voluntarily left by America's recalcitrant policies.<sup>145</sup>

During the US Presidential primaries of 2008, then candidate Barack Obama promised to convene his top military commanders to have a serious conversation about re-joining the ICC.<sup>146</sup> Since his election to office, President Obama, mired in a myriad of domestic political battles, has done little to realize this campaign promise. In the interim, liberal human rights policy groups have been created—most notably the Genocide Prevention Task Force (consisting of former Secretary of State Madeline Albright and Secretary of Defense William Cohen)—whose commitment to mainstreaming atrocity crime awareness and prevention within the halls of Congress seems to have gained some traction.<sup>147</sup> However, even this group seems to embrace

<sup>144</sup> The Ambassador for the Dominican Republic read from the Rome Statute, Article 7 (1) (i) that lists that “crimes against humanity” includes “enforced disappearance of persons” which is described in Art. 7 (2) (i) as: “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

<sup>145</sup> See Jean B. Grugel, *New Regionalism and Modes of Governance – Comparing US and EU Strategies in Latin America*, 10 (4) EUR. J. OF INT’L. REL. 603, 612 (2004) (“The EU now lays claim to a set of interests in the region that go beyond questions of economic governance to embrace a range of social and development issues.”); see also R. Evans Ellis, *U.S. National Security Implications of Chinese Involvement in Latin America*, U.S. ARMY WAR C. STRATEGIC STUD. INST., (2005), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub606.pdf> (explaining that Chinese investment and trade with Latin American countries has spurred a rapid growth in China/Latin America relations. This growth is evidenced by the fact that in 2003, 77% of Chinese foreign investment outside of Asia went to Latin America).

<sup>146</sup> Citizens for Global Solutions, 2008 Presidential Candidate Questionnaire: Response from Barack Obama (2008), <http://www.globalsolutions.org/08orbust/pcq/obama> (last visited Dec. 1, 2009).

<sup>147</sup> Madeline K. Albright & William S. Cohen, *Preventing Genocide: A Blueprint for U.S. Policymakers*, U.S. HOLOCAUST MEMORIAL MUSEUM (Genocide Prevention Task Force) 2008, available at <http://www.ushmm.org/genocide/taskforce/pdf/report.pdf>.

an American “exceptionalist” stance with recommendations that the U.S. remain outside of the ICC framework.<sup>148</sup>

## VI. INTERNAL CHALLENGES

### A. Alternative Modes of Justice

One of the most pressing issues facing the Court, and subsequently the region’s relationship to it, is whether the ICC’s “complementarity principle” can supplement alternative programs of national reconciliation, such as “truth commissions,” that involve amnesties. Pardons and amnesties have been important carrots in promoting national reconciliation and contributing to restorative justice by establishing an historical record of guilt.<sup>149</sup> Apart from the flawed but celebrated South African Truth and Reconciliation Commission (TRC), certain truth commissions in Latin America have been deemed successful examples of restorative justice. Moreover, their ubiquitous presence in the post-militaristic democracies of Latin America make truth commissions hard for the retributive ICC to ignore.<sup>150</sup>

The existence and possible nexus between truth commissions and the Court was the subject of substantial debate at the drafting conference in Rome.<sup>151</sup> As an aspect of national truth and reconciliation efforts, the issue of amnesties was specifically debated, but never articulated fully in the Rome Statute itself.<sup>152</sup> The negotiations centered on general misgivings about handcuffing the Court to notions of retributive justice as the only acceptable response in all situations.<sup>153</sup> Conversely, setting a precedent envisioning amnesties for certain scenarios was also rejected.

In adhering to its mandate to combat impunity, the purposely vague Rome Statute could be understood to generally insist on prosecution, while envisioning circumstances where interfering with the reconciliation mechanism would not be in the best interest of justice.<sup>154</sup> The point has been

<sup>148</sup> *Id.*

<sup>149</sup> STEPHEN C. ROACH, *POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW* 43 (Rowman & Littlefield 2006).

<sup>150</sup> See generally Sam Logan, *Truth Commissions in Latin America: An Analysis of Truth Commissions in Argentina, Brazil, and Chile*, PROGRAM ON SECURITY AND DEVELOPMENT (Monterey Institute of International Studies) 2001, available at [http://sand.miiis.edu/research/documents/logan\\_truth.pdf](http://sand.miiis.edu/research/documents/logan_truth.pdf).

<sup>151</sup> Robinson, *supra* note 69.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> The actionable language in the Rome Statute can be found in Art. 53 (The Prosecutor may in some circumstances decline to prosecute on the grounds that it would not serve the interests of justice); Art. 17 (Where the alternative mechanisms being employed so closely meet the goals of accountability that they can be considered “genuine” proceedings, deference is possible under the “complementarity” regime); Art. 16 (Where the Security Council determines that investigation or prosecution would inter-

made that there is nothing inherently contradictory between the objectives of the ICC and the truth commissions. In fact, truth commissions may offer benefits not available with prosecution alone, such as the creation of a more comprehensive historical record, etc.<sup>155</sup> However, as we have seen with *Pinochet*, as well as the international criminal tribunals for Rwanda and the former Yugoslavia, prosecution itself can also aid in reconciling the past and nation-building for the future. As Darryl Robinson persuasively contends, criminal prosecutions help stigmatize violent extremists, which simultaneously diminishes their influence and limits their power by ending cycles of violence and providing survivors with a sense of justice.<sup>156</sup>

During the period of democratic transition, countries like Argentina, Bolivia, Chile, Ecuador, Guatemala, El Salvador, and Uruguay sought to pass various “amnesty laws” for the purposes of bringing about national reconciliation—sometimes via “truth commissions,” as was done in South Africa after apartheid. The chief rationale behind this process being that fragile democracies may not be able to survive the destabilizing effects of politically charged trials.<sup>157</sup> In some cases, the motivation was clearly self-amnesty (Chile and Peru), and for others (Argentina, El Salvador, and Guatemala), the laws were justified as necessary to avoid military unrest and ensure a stable and lasting peace.<sup>158</sup> Though the region itself has had first-hand experience with extreme political violence involving forced disappearances, tortures, and mass executions, most Latin American countries (as has been discussed) are now firmly committed to the protection of human rights. Unfortunately, this nouveau internationalist motivation has occasionally been accompanied with the caveat that the past be hidden behind a veil of immunity.

It is under this backdrop that countries that had previously been unwilling to address past human rights violations have now committed themselves to the ICC statute, though certain issues have continued to hinder full cooperation with international treaty obligations.

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fere with efforts to maintain or restore international peace and security, the Security Council may require the Court to suspend action). Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, 37 I.L.M. 999, available at <http://untreaty.un.org/cod/icc/index.html> [hereinafter Rome Statute].

<sup>155</sup> Robinson, *supra* note 69.

<sup>156</sup> *Id.*

<sup>157</sup> Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2541-42 (1991).

<sup>158</sup> See Track Impunity Always, Truth Commission Reports for Argentina, El Salvador, Guatemala, Chile, and Peru, <http://www.trial-ch.org/en/truth-commissions.html> (last visited Sept. 22, 2009).

## B. The Implementation Process

Passing legislation that will effectively implement both the crimes under ICC jurisdiction and the agreement on privileges and immunities has been a difficult process for many Latin American countries. Some of the concerns have been universal among state parties, e.g., questions about state sovereignty and questions of constitutionality. While others, like the possibility of life sentences, are uniquely problematic for the region. Out of the seventeen states in the region, fourteen have ratified or acceded to the Rome Statute.<sup>159</sup> Several countries, including Brazil and Bolivia, have begun to advance their implementation initiatives, while others, such as Peru, have had to undergo extensive reforms to their entire criminal code, including an entire chapter on cooperation with the ICC.<sup>160</sup> Other countries, like Ecuador, Mexico, and Paraguay, have initiated the process but have since met domestic roadblocks, which have impeded full cooperation with the Court.<sup>161</sup>

While working at the Office of International Law at the OAS, we found the Uruguayan experience at implementing ICC legislation to be one of the best examples of not only the domestic tribulations involved in the process, but also the potential for international and domestic collusion producing an increasingly broad consensus on what appropriate cooperation entails. Similarly, the Argentinean struggle to pass implementing legislation is worth analyzing because it adds a new wrinkle in terms of jurisdiction granted to the Court, as well as allowing for the citation of ICC provisions in Argentine domestic proceedings.

## C. Uruguay

The Eastern Republic of Uruguay is touted as the first Latin American country to fully implement the Rome Statute into domestic law. Diego Camano, from IELSUR (Social and Legal Studies Institute from Uruguay), said, "Uruguay should feel truly proud in becoming the first state in Latin America to now have laws that fully respect the ICC treaty...Uruguay's steps forward point to a real change to respect for international law and justice in the 21<sup>st</sup> century."<sup>162</sup> The country signed the Rome Statute on De-

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<sup>159</sup> See Coalition for the Int'l Criminal Court, Latin America, <http://www.iccnw.org/?mod=subregion&idusubreg=23> (last visited Sept. 23, 2009) (indicating that only El Salvador, Guatemala and Nicaragua have failed to finalize the ratification process).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See Coalition for the Int'l Criminal Court, Uruguay is the First Latin American Country to Fully Implement ICC Treaty into Domestic Law, <http://www.iccnw.org/?mod=country&idudctp=13&iduct=186&order=authordesc> (last visited October 31, 2006).

cember 19, 2000 and ratified it on June 28, 2002, becoming the seventy-second State party to the treaty.<sup>163</sup> Uruguay's implementation process dates back to 2004, when the Vazquez government hired an independent consultant from the Ministry of Education and Culture, Dr. Oscar Lopez, to draft a new implementation bill.<sup>164</sup> This bill was presented to civil society for comment in May 2005 and then sent to the Senate in November of that same year. The Lower Chamber (Camara de Representantes) of the National Assembly approved the final implementation bill, Ley No. 18.026, on September 13, 2006, and the new legislation came into force on October 11, 2006.<sup>165</sup>

Uruguay has signed the Agreement on the Privileges and Immunities Clause (APIC) on June 30, 2004 and ratified it on September 6, 2006. The APIC law was published in the official gazette on September 19, 2006, and the government deposited the instrument of ratification at the UN on November 3, 2006. By doing so, Uruguay became the first country in the region to fulfill *all* of its obligations under the Rome Statute in terms of implementation.<sup>166</sup>

Though Uruguay has formally met its implementation requirements, it has had to endure a significant amount of criticism for its previous attempt at constructing acceptable legislation. When the President of Uruguay originally submitted the Rome Statute for adoption to the National Assembly in 2002, the Statute included six interpretive declarations.<sup>167</sup> The Uruguayan National Assembly rejected all of the proposed declarations, and only after serious debate was a decision reached allowing only one declaration to be

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<sup>163</sup> *Id.*

<sup>164</sup> Dr. López Goldaracena, *Coalition for the Int'l Criminal Court, Anteproyecto de Ley - Genocidio, Crímenes de Lesa Humanidad, Crímenes de Guerra y Cooperación con la Corte Penal Internacional (Estatuto de Roma)* (2005), available at [http://www.iccnw.org/documents/Uruguay\\_LopezGoldaracena\\_Aug2005.pdf](http://www.iccnw.org/documents/Uruguay_LopezGoldaracena_Aug2005.pdf).

<sup>165</sup> See Coalition for the Int'l Criminal Court, Uruguay, <http://www.iccnw.org/?mod=country&iduct=186> (last visited Sept. 22, 2009); see also, Poder Legislativo (Republica Oriental del Uruguay), *Ley 18.026*, (Coalition for the International Criminal Court) 2006, available at [http://www.iccnw.org/documents/newLey\\_18026\\_Implementacion.pdf](http://www.iccnw.org/documents/newLey_18026_Implementacion.pdf).

<sup>166</sup> See Coalition for the Int'l Criminal Court, Uruguay, <http://www.iccnw.org/?mod=country&iduct=186> (last visited Sept. 22, 2009); see also, Poder Legislativo (República Oriental del Uruguay), *Ley 18.013*, (Coalition for the International Criminal Court) 2006, available at [http://www.iccnw.org/documents/APIC\\_Uruguaybill2006.pdf](http://www.iccnw.org/documents/APIC_Uruguaybill2006.pdf).

<sup>167</sup> See Amnesty Int'l, International Criminal Court: Declarations amounting to prohibited reservations to the Rome Statute, <http://www.amnesty.org/en/library/asset/IOR40/032/2005/en/1b2c6038-d483-11dd-8743-d305bea2b2c7/ior400322005en.pdf> (citing [untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/partI/chapterXVIII/treaty10.asp](http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/partI/chapterXVIII/treaty10.asp)) (last visited Dec. 4, 2009). Also, the six interpretive declarations stated, among other things, that amnesties and pardons should not be interpreted as unwillingness or inability of the state to investigate or prosecute genuinely; Uruguay could decline to investigate and prosecute crimes under international law in the "interest of justice" and immunities protected certain officials from prosecution for crimes under international law.

included in the instrument for ratification. The controversial declaration reads as follows: “As a State party to the Rome Statute, the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic.”<sup>168</sup> This “declaration” elicited criticism from a number of European states parties including Finland and Germany. Finland stated:

A statement, without further specification, has to be considered in substance as a reservation which raises doubts as to the commitment of Uruguay to the object and purpose of the Statute. The Government of Finland would like to recall Article 120 of the Rome Statute and the general principle relating to internal law and observance of treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The Government of Finland therefore objects to the above mentioned reservation made by the Eastern Republic of Uruguay to the Rome Statute of the International Criminal Court article 120 of the Statute that no reservation may be made to the Statute, this reservation should not be made.<sup>169</sup>

Germany stated:

The Government of the Federal Republic of Germany considers that the Interpretive Declaration with regard to the compatibility of the rules of the Statute with the provisions of the Constitution of Uruguay is in fact a reservation that seeks to limit the scope of the statute on a unilateral basis. As it is provided in article 120 of the Statute that no reservation may be made to the Statute, this reservation should not be made.<sup>170</sup>

In responding to the criticisms, Uruguay initially made the point that the ICC’s jurisdiction may only be exerted in the absence of the exercise of national jurisdiction, and therefore, the “declaration” imposed no limits or conditions on the Statute. In response to Uruguay’s response, European state parties such as Ireland, Norway, Denmark, U.K., the Netherlands, and Germany, pointed out that an impermissible unilateral declaration should be considered as not having been made, and therefore, does not affect a state’s consent to be bound by the treaty.<sup>171</sup> An example of this principle was arti-

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 12; William Schabas, *Reservation to Human Rights Treaties: Time for Innovation and Reform*, 32 CAN. Y.B. INT’L L. 71 (1994).

culated by Ireland, who stated: “[the] objection does not preclude the entry into force of the Statute between Ireland and the Eastern Republic of Uruguay. The Statute will therefore be effective between the two states, without Uruguay benefiting from its reservation.”<sup>172</sup>

Another important criticism of the original Uruguayan statute was that it allowed for State officials (the Executive) to have discretion over whether or not a suspect or an accused was immune. As stated in Articles 27 and 98 of the Rome Statute, the Court itself should take decisions to determine whether any immunity for genocide, crimes against humanity, or war crimes may exist.<sup>173</sup> In this instance, Uruguay, in Article (1) (1), stated: “Executive Power is competent to decide questions of immunities arising when a request is being executed.” This provision was most likely derived (mistakenly) from Article 98 (1), which applies only to the Court itself and not to States (as Uruguay and others have tried to interpret here). This can easily be determined via the status of customary International Humanitarian Law, which has expressly rejected immunities in all cases pertaining to Genocide, Crimes against Humanity, and War Crimes for over half a century.<sup>174</sup>

Due to some of the aforementioned problems and the criticisms levied against the government, the Ministry of Education and Culture took the initiative to hire an independent consultant to draft a new ICC implementation bill that would address some of the inconsistencies present in the original government legislation.<sup>175</sup> The new legislation has mostly corrected the deficiencies that Uruguay was previously criticized for and in some instances gone above and beyond Rome Statute requirements, making Uruguay a leader in the promulgation of ICC jurisdiction and authority.

Specifically, in Article 4.2 of Uruguay’s implementation legislation 18.026, the law honors the principle of universal jurisdiction for anyone suspected of committing any of the crimes listed in the Rome Statute.<sup>176</sup> The

<sup>172</sup> *Id.*; declaration dated July 28, 2003.

<sup>173</sup> Rome Statute Art. 27, 98.

<sup>174</sup> See Amnesty International, *International Criminal Court: The Failure of States to Enact Effective Implementing Legislation*, <http://web.amnesty.org/library/print/ENGIOR400192004> (last visited Sept. 22, 2009); Rome Statute Art. 98 (1) (“The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”).

<sup>175</sup> Coalition for the International Criminal Court, Updates on Uruguay, <http://www.iccnw.org/?mod=newsdetail&news=373> (last visited Sept. 22, 2009).

<sup>176</sup> Art. 4.2 states:

Quando se encontrare en territorio de la República o en lugares sometidos a su jurisdicción, una persona sospechada de haber cometido un crimen de los tipificados en los Títulos I a IV de la Parte II de la presente ley, el Estado uruguayo está obligado a tomar las medidas necesarias para ejercer su jurisdicción respecto de dicho crimen o delito, si no recibiera solicitud de entrega a la Corte Pe-

Uruguayan law also articulates when State sovereignty will defer to ICC jurisdiction<sup>177</sup>, as well as clearly and succinctly rejecting amnesty for all State representatives in regards to crimes listed in the Rome Statute.<sup>178</sup>

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nal Internacional o pedidos de extradición, debiendo proceder a su enjuiciamiento como si el crimen o delito se hubiese cometido en territorio de la República, independientemente del lugar de su comisión, la nacionalidad del sospechado o de las víctimas. La sospecha referida en la primera parte de este párrafo debe estar basada en la existencia de la semiplena prueba.

(When it finds it in the territory of the Republic or in places under its jurisdiction, a person suspected of having committed a crime of those established in Parts I to IV of Part II of this Law, the Uruguayan State is obliged to take necessary measures to exercise its jurisdiction over that crime or offense, unless it has received requests for delivery to the International Criminal Court or requests for extradition and must proceed to trial as if the crime or offense had been committed in the territory of the Republic, regardless the place of its commission, the nationality of the suspect or victims. The suspicion referred to in the first part of this paragraph must be based on the existence of sufficient proof.)

Ley N° 18.026: Cooperación Con La Corte Penal Internacional en Materia de Lucha contra El Genocidio, Los Crímenes de Guerra y de Lesa Humanidad (2006) (Uru.), available at <http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=18026&Anchor>.

<sup>177</sup> Art. 4.4 states:

“La jurisdicción nacional no se ejercerá cuando:

A) Tratándose de crímenes o delitos cuyo juzgamiento sea jurisdicción de la Corte Penal Internacional:

1) Se solicite la entrega por la Corte Penal Internacional. 2) Se solicite la extradición por parte del Estado competente al amparo de tratados o convenciones internacionales vigentes para la República. 3) Se solicite la extradición por parte del Estado competente no existiendo tratados o convenciones vigentes con la República, en cuyo caso y sin perjuicio de los demás requerimientos legales, para conceder la extradición, el Estado requirente debió haber ratificado el Estatuto de Roma de la Corte Penal Internacional, se procederá de acuerdo con lo dispuesto en el artículo 5°.

B) Si se reciben en forma concurrente solicitudes de entrega a la Corte Penal Internacional y de extradición por terceros Estados, se procederá de acuerdo con lo previsto en el artículo 60.

C) Se trate de crímenes o delitos que no se encuentran bajo la jurisdicción de la Corte Penal Internacional, cuando se conceda la extradición por parte del Estado competente.” *Id.*

(“The national courts shall not be exercised if:

A) In the case of crimes within the jurisdiction of the International Criminal Court:

1) Request delivery by the ICC. 2) The extradition request by the competent State under international treaties or conventions in force for the Republic. 3) The extradition request by the competent state without existing treaties or conventions in force with the Republic, in which case, without prejudice to other legal requirements for extradition, the requesting State should have ratified the Rome Statute of the International Criminal Court, shall be in accordance with the provisions of article 5.

B) If concurrently received requests for surrender to the International Criminal Court and extradition to third States, shall be in accordance with the provisions of Article 60.

C) In the case of crimes which are not under the jurisdiction of the International Criminal Court, when granting extradition by the competent State. ”)

<sup>178</sup> Art. 8 states:

“(Improcedencia de amnistía y similares).- Los crímenes y penas tipificados en los Títulos I a III de la Parte II de la presente ley, no podrán declararse extinguidos por indulto, amnistía, gracia, ni por ningún otro instituto de clemencia, soberana o similar, que en los hechos impida el juzgamiento de los sospechosos o el efectivo cumplimiento de la pena por los condenados.” *Id.*

Beyond providing a “reparation clause,”<sup>179</sup> doing away with the Statute of Limitations in “Disappearance” cases<sup>180</sup>, and curbing the Executive office’s ability to claim “national security” as a defense to ICC jurisdiction<sup>181</sup>, the most significant aspect of the Uruguayan implementation legislation lies in its expansive definitions of Crimes against Humanity and War Crimes (which are almost mirror images of the Rome Statute), particularly regarding issues pertinent to Latin America (like disappearances).<sup>182</sup> These definitions, along with the other notable inclusions previously mentioned, are

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(“Ineligible for amnesty and the like).- The crimes and punishments set forth in Parts I to III of Part II of this Act, shall not be declared extinct by a pardon, amnesty, grace, or any other institution of clemency, sovereign or similar, which in fact prevents the prosecution of suspects or the effective enforcement of the sentence for those convicted. ”)

<sup>179</sup> Art. 14 states:

“(Reparación de las víctimas).- 14.1. El Estado será responsable de la reparación de las víctimas de los crímenes tipificados en los Títulos I a III de la Parte II de la presente ley que se cometan en territorio de la República o que se cometan en el extranjero por agentes del Estado o por quienes sin serlo hubiesen contado con la autorización, apoyo o aquiescencia de agentes del Estado. 14.2. La reparación de la víctima deberá ser integral comprensiva de indemnización, restitución y rehabilitación y se extenderá también a sus familiares, grupo o comunidad a la cual pertenezca. Se entenderá por “familiares”, el conjunto de personas unidas por un lazo de matrimonio o parentesco, así como por el hecho de cohabitar o mantener una forma de vida en común.” *Id.*

(“Victim reparations) .- 14.1. The state is responsible for the reparation of victims of crimes under Parts I to III of Part II of this Act committed in the territory of the Republic or abroad committed by state agents or those who without being told they had the authorization, support or acquiescence of state agents. 14.2. Repair of the victim must be comprehensive understanding of compensation, restitution and rehabilitation, and shall also extend to family, group or community to which he belongs. The term “family”, the set of people united by a bond of marriage or kinship, as well as the fact of living together and maintain a way of life together. ”)

<sup>180</sup> Art. 21.2 states:

“El delito de desaparición forzada será considerado como delito permanente, mientras no se establezca el destino o paradero de la víctima.” *Id.*

(“The crime of enforced disappearance shall be considered a continuing offense, while not establishing the fate or whereabouts of the victim.”)

<sup>181</sup> Art. 45.5 states:

“Si la resolución de la Suprema Corte de Justicia entiende que de ningún modo se afecta la seguridad nacional, el Poder Ejecutivo no estará habilitado para oponerse a la divulgación de información o documentos invocando intereses de seguridad nacional y, si correspondiere por tratarse del supuesto previsto en el artículo 73 del Estatuto de Roma, recabará el consentimiento del autor del documento o de la información.” *Id.*

(If the decision of the Supreme Court avoids issues of national security, the Executive shall not be entitled to oppose disclosure of information or documents on national security interests and, if applicable to be the case provided for in Article 73 of the Rome Statute, shall obtain the consent of the author of the document or information.)

<sup>182</sup> For Uruguayan law regarding Crimes against Humanity (Crímenes de lesa humanidad); see Ley N° 18.026, Art. 18-25, available at <http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=18026&Anchor;for> War Crimes (Crímenes de guerra); see Ley N° 18.026, Art. 26, available at <http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=18026&Anchor>.

evidence of Uruguay's strong commitment to the promulgation of international criminal law and place it amongst the region's foremost progressive States in terms of implementation language.

Though Uruguay's legislation 18.026 represents a good model for other countries in the region to follow, there are still some deficiencies that may preclude it from becoming an "ideal" implementation model. The main deficiency exists in the inclusion of prison terms in the definition section of Statute 18.026,<sup>183</sup> which does not allow for the possible "life imprisonment" sentence that is found in the Rome Statute.<sup>184</sup> As was stated in the introduction, this is an issue common to the Latin American region due to respective constitutional provisions disallowing life imprisonment sentences. Though common to the region, organizations like the OAS and Latin American states parties themselves should continue to push for States to enact the necessary reforms to allow for the possibility of life sentences so as to fully conform to the Rome Statute requirements and show solidarity against the world's most heinous acts.

Another instance where the Uruguayan statute departs from the wording of the Rome Statute lies in the definition of the crime of genocide. Though the OAS and the ICC have both referred to the Rome Statute as a "minimum requirement" and urged States to go above and beyond the crimes listed in the Statute so as to reign in impunity for international crimes, the wording used in the definition of genocide may only serve to confuse.<sup>185</sup> In fairness, however, there is a bit of a controversy. In both the

<sup>183</sup> See Ley N° 18.026, art. 16 (declaring that genocide "will be punished with fifteen to thirty years of penitentiary."); see also *id.* at art. 18-20 (declaring that Crimes Against Humanity "will be punished with fifteen to thirty years of penitentiary."); *id.* at art. 26 (declaring that War Crimes "will be punished with two to thirty years of penitentiary."); *id.* at art. 71(B), "(Ejecución de penas de prisión adoptadas por la Corte Penal Internacional).- 71.1. El Estado uruguayo acepta, de conformidad con lo dispuesto por el artículo 103 párrafo 1 literal a) del Estatuto de Roma, tomar a su cargo la ejecución de una pena definitiva de privación de libertad de una persona condenada por la Corte Penal Internacional, siempre y cuando: A) Se trate de un ciudadano uruguayo. B) El tiempo de condena no exceda el máximo previsto de tiempo de condena por el orden jurídico nacional.")

(Execution of sentences of imprisonment taken by the International Criminal Court) .- 71.1. The Uruguayan State accepts, in accordance with the provisions of Article 103 paragraph 1 letter a) of the Rome Statute, taking over the enforcement of a final sentence of deprivation of liberty of a person convicted by the International Criminal Court, provided when: A) Whether a Uruguayan citizen. B) The time of conviction does not exceed the specified maximum time of conviction by the national legal order.)

<sup>184</sup> See Rome Statute, Article 77 (1) (b) ("a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person"). <http://www.un.org/law/icc/statute/rome.htm>.

<sup>185</sup> For the OAS reference, see the Committee on Juridical and Political Affairs report *Working Meeting on the International Criminal Court*, February 2, 2007 ("The legal definitions established in the Rome Statute constitute a minimum benchmark for states. However, each country is free to implement policies and sets of laws that surpass those standards.").

Genocide Convention and the Rome Statute, the plural language “members” is used, whereas the ICC Elements of Crimes mentions “one or more persons.”<sup>186</sup> In including intentional homicide of “one or more people of the group”<sup>187</sup> into the definition of what constitutes genocide, the Uruguayan statute’s terminology, though broader, may unwittingly create unnecessary confusion domestically as to which homicides equal genocides, when “genocidal intent” needs to be considered, and when international law is to be evoked.<sup>188</sup> This confusion could be avoided by simply adopting the definitions as presented in the Rome Statute.

A final critique of the Uruguayan model lies in the fact that the office of the Executive, according to implementing statute 18.026, is the official conduit of ICC-Uruguayan relations.<sup>189</sup> In a perfect world, leaving discre-

<sup>186</sup> Rome Statute of the International Criminal Court art. 6, July 17, 1998, *available at* [http://www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf); *see also* Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, *available at* <http://www.un.org/millennium/law/iv-1.htm>; *see* ICC Elements of Crimes art. 6, *available at* [http://www.icc-cpi.int/library/about/officialjournal/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf).

<sup>187</sup> *See* Uruguayan Statute 18.026. art. 16 (A).

<sup>188</sup> *See* Rome Statute art. 22, para. 2 (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.”).

<sup>189</sup> *See* Uruguayan Statute 18.026 art. 32.1 (“El Poder Ejecutivo tendrá a su cargo la representación ante la Corte Penal Internacional, actuando a través del Ministerio de Relaciones Exteriores, y será competente para entender en todos los asuntos que determina la presente ley.”); art. 42.2 (“El control de los requisitos formales de una solicitud de cooperación o asistencia corresponderá al Poder Ejecutivo y a la Suprema Corte de Justicia. La resolución definitiva sobre los mismos será privativa de la Suprema Corte de Justicia.”); art. 42.10 (“El Poder Ejecutivo, sin perjuicio de la facultad de comparecer de acuerdo con lo previsto en el artículo 43.1, podrá en cualquier estado del trámite formular las observaciones o recomendaciones convenientes a su interés.”); art. 44.2 (“El Poder Ejecutivo suministrará a la Corte Penal Internacional o a sus órganos, toda la información relativa al estado de las actuaciones que se llevan a cabo en la República.”); art. 45.5 (“Si la resolución de la Suprema Corte de Justicia entiende que de ningún modo se afecta la seguridad nacional, el Poder Ejecutivo no estará habilitado para oponerse a la divulgación de información o documentos invocando intereses de seguridad nacional y, si correspondiere por tratarse del supuesto previsto en el artículo 73 del Estatuto de Roma, recabará el consentimiento del autor del documento o de la información.”).

(“The Executive will be responsible for representation before the International Criminal Court, acting through the Ministry of Foreign Affairs, and shall have jurisdiction to try all the issues determined by this law.”), Art. 42.2 (“The control of the formal requirements of a request for cooperation or assistance shall be the executive and the Supreme Court. The final decision on them will be exclusive to the Supreme Court.”), Art. 42.10 (“The executive branch, without prejudice to the right to appear in accordance with the provisions of Article 43.1, may at any stage of the proceedings make any comments or recommendations suitable to your interest.”), Art. 44.2 (“The executive branch shall provide to the ICC or its organs, all information concerning the status of actions being carried out in the Republic.”), Art. 45.5 (“If the decision of the Supreme Court understands that in no way affects national security, the Executive shall not be entitled to oppose disclosure of information or documents on national security interests and, if applicable to be the case referred to in Article 73 of the Rome Statute, shall obtain the consent of the author of the document or information.”).

tionary power in the hands of the Executive of the State would not be an issue but, as history has shown, the Executive is often the only state agent with sufficient power to conduct the very atrocities proscribed by the Rome Statute. It is for these reasons that the Uruguayan model should be respected as the first foray into full ICC implementation, but should also be improved upon as the rest of the Latin America begins to follow in its footsteps.

#### D. Argentina

Argentina belonged to the “like-minded” states that pressed for the creation of the ICC and was one of the most active countries during the drafting and negotiation phase in Rome. Argentina signed the Rome Statute on January 8, 1999, and ratified on February 8, 2001, becoming the twenty-eighth state party.<sup>190</sup> Argentina further met her international obligations by signing the Agreement on Privileges and Immunities on October 7, 2002, and deposited the instrument of ratification at the UN on February 1, 2007.<sup>191</sup> However, implementing ICC legislation domestically proved to be a bit more difficult. Though the Argentine government appointed a special inter-ministerial Commission to draft an implementation bill, intense debate crushed the first two attempts. Finally, Argentina’s National Congress approved a third bill, submitted by Senator Christina Fernandez (Law #26200), in December of 2006 (taking effect in January of 2007), which included both complementarity and cooperation norms.<sup>192</sup> The Implementation Law (hereinafter Law) also regulates cooperation between national authorities and ICC organs.<sup>193</sup> Such cooperation is needed particularly in the submission of information and evidence and in the surrender and arrest of persons. Above all, the Law recognizes and establishes the principle by which Argentina is obliged to comply rapidly and fully with the requests emanating from the ICC (Art. 40 of Law).<sup>194</sup> It also allows the ICC Prosecutor to operate directly within Argentine territory (Art. 44) when the activity does not require the compulsory measures envisaged in Article 99(4) of the Rome Statute.<sup>195</sup>

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<sup>190</sup> Coalition for the International Criminal Court, <http://www.iccnw.org/?mod=country&iduct=7>.

<sup>191</sup> *Id.*

<sup>192</sup> Aljandro E. Alvarez, *The Implementation of the ICC Statute in Argentina*, 5 OXFORD J. INT’L. CRIM. JUST. 480, 480 (2007).

<sup>193</sup> Ley de implementación del Estatuto de Roma de la Corte Penal Internacional, (The ICC Implementation Law)

[http://web.amnesty.org/web/web.nsf/32875f903347b75280257171005b696c/87edcb3c8f98a13f8025728900811c2f/\\$FILE/ATTEKYFB/int\\_jus-legislation\\_argentina-esl.pdf](http://web.amnesty.org/web/web.nsf/32875f903347b75280257171005b696c/87edcb3c8f98a13f8025728900811c2f/$FILE/ATTEKYFB/int_jus-legislation_argentina-esl.pdf).

<sup>194</sup> *Id.* at art. 40.

<sup>195</sup> *Id.* at art. 44.

In regards to the issue of universal jurisdiction, Argentina has historically applied the territoriality principle of jurisdiction, despite the fact that it is party to treaties that include extra-territorial provisions.<sup>196</sup> The Law represents a change in policy as Argentina now entertains active personality jurisdiction (Art. 3(c)) for ICC crimes which allows domestic courts to try crimes committed outside of the country by Argentine nationals or residents.<sup>197</sup> Additionally, the Law does not prohibit extradition, distinguishing Argentina (and all other MERCOSUR extradition treaty parties) from most other judicial systems that entertain the active personality principle.<sup>198</sup> Perhaps the most admirable aspect of the Law is contained in Article 11, which clearly establishes the inapplicability of statutes of limitations for international crimes.<sup>199</sup> This empowering principle was evoked by the Argentine Federal Court of Appeals, which confirmed its jurisdiction over ex-Chilean dictator Augusto Pinochet, by reasoning that the murder of Carlos Prats, the chief of the Chilean Army under Salvador Allende, in Buenos Aires in 1974, was not just an isolated event but was in fact part of a widespread and systematic policy of exterminating political dissidents.<sup>200</sup> The Court used Art. 6 (c) of the ICC statute to ground its opinion, claiming that the crime against humanity performed by Pinochet precluded the possibility of invoking the statute of limitation defense.<sup>201</sup>

The implementation law represents a clear break from the country's troubled past and has firmly established Argentina as a leader in promulgating the rule of law throughout the region. Evidence of this can best be displayed in terms of inter-state cooperation. On 20 June 2005, President Kirchner, together with the Presidents from all MERCOSUR Member States, adopted a Declaration entitled "Commitment of the MERCOSUR to the Rome Statute of the International Criminal Court," in which they highlighted the importance and scope of the Rome Statute.<sup>202</sup> They also

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<sup>196</sup> See Alvarez, *supra* note 192 at section 2 (Argentina belongs to the International Convention Against Torture (Art. 5(1) (b), the Inter American Convention to Prevent and Punish Torture (Art. 12b), and the Inter-American Convention on Forced Disappearance of Persons (Art IVb)).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> See Argentinian Law Number 26200, Article 11 ("La acción y la pena de los delitos previstos en los artículos 8º, 9º y 10 de la presente ley y aquellos que en el futuro sean de competencia de la Corte Penal Internacional, son imprescriptibles.").

(The action and the punishment of the crimes envisaged in Articles 8, 9 and 10 of this Act and those in the future within the competence of the International Criminal Court, are inalienable.)

<sup>200</sup> See Cámara Nacional en lo Criminal y Correccional Federal, 15/5/2001. (National Chamber of Criminal and Federal Corrections).

<sup>201</sup> *Id.*

<sup>202</sup> Coalition for the International Criminal Court, <http://www.iccnw.org/?mod=newsdetail&news=13>.

adopted a common position regarding the provision of Article 98 of the Rome Statute by committing themselves "not to undertake multilateral or bilateral agreements with Third States that could affect the basis of the jurisdiction of the International Criminal Court or other provisions of the Rome Statute."<sup>203</sup>

## VII. THE FUTURE: THE COURT AND THE REGION

Though the region has shown itself to be willing and able to stand up for the principles of human decency by outwardly supporting the ICC and its *modus operandi*, both the Court and the developing Latin American democracies would be better sustained by a regular flow of investigations and *domestic* prosecutions. Aspirations of de-centralized, non-authoritarian democracies in the region comes with the attendant weakness of executives lacking complete control of the military, the judicial system, and the political make-up of the legislatures.<sup>204</sup> It is in this context that developing (or struggling) democracies resort to amnesty "in order to propitiate still powerful supporters of the former regime (Chile), to resolve a judicial crisis (Argentina), or to simply end a long-lasting conflict (Columbia)."<sup>205</sup> As has been shown, Colombia, the only country in the region with an on-going internal armed conflict, presents a complicated case for potential ICC intervention. Since many of the atrocities (committed by both sides) are considered to be widespread or systematic and targeted at civilians, they would almost certainly fit within the definition of crimes against humanity and legitimize the Court's intervention.<sup>206</sup> Whether intervention takes the form of (complete jurisdiction) Hague-based prosecutions or (threat-of-prosecution) political pressure is up to the Prosecutor to decide. However, as has been suggested, the Court's limited resources and inherent lack of institutional capacity to substantively engage sophisticated legal systems may tip the scales in favor of applied pressure. As the Prosecutor has stated on a number of occasions, the ICC will be considered a success when the Court's docket is empty. By continuing to pressure domestic systems to live up their international obligations, the Prosecutor gets one step closer to realizing the Court's goals.

As M. Cherif Bassiouni explains, "the principal obstacles to the effectiveness of the ICC will always be Real politik and states' interests."<sup>207</sup> This statement certainly proves true in Latin America, as the Bush Administra-

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<sup>203</sup> *Id.*

<sup>204</sup> Frohlich, *supra* note 26.

<sup>205</sup> *Id.*

<sup>206</sup> Popkin, *supra* note 1.

<sup>207</sup> Bassiouni, *supra* note 67.

tion's interventionist policies have created a rift in the region's long-standing internationalist desires and their own individual states' interests. The statement also proves true in relation to each individual state's battle with the culture of impunity and its last remaining vestiges. Luckily, real politik and states' interests are not always contradictory to the goals of the ICC. Indeed, as Bassiouni further elaborates, "at times, the interests of peace and security will trump the pursuit of justice, but justice delayed is not necessarily justice denied."<sup>208</sup> This advice serves a region well, which has suffered through long periods of human rights violations, as it envisages a future of strong and independent democracies dedicated to protecting its citizens from the excesses of governmental control by re-dedicating itself to the rule of law and the fundamental value of human rights. This re-dedication is indeed one of the core missions of the International Criminal Court and, by working together; both the institution and the region's goals may be symbiotically realized.

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<sup>208</sup> *Id.*