A VIENNA CONVENTION INTERPRETATION OF THE "INTERESTS OF JUSTICE" PROVISION OF THE ROME STATUTE, THE LEGALITY OF DOMESTIC AMNESTY AGREEMENTS, AND THE SITUATION IN NORTHERN UGANDA: A "GREAT QUALITATIVE STEP FORWARD," OR A NORMATIVE RETREAT?

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I. INTRODUCTION

A. *The "Interests of Justice" Provision in Article 53 of the Rome Statute*

During the negotiations over the establishment of the International Criminal Court ("ICC") — held in Rome, Italy, between 1997 and 1998[1] — participating states waged great debate over domestic amnesty agreements and their role in the era of the new International Criminal Court.[2] The treaty that resulted from these negotiations, the Rome Statute of the International Criminal Court ("the Statute"), does not mention amnesty,[3] however, and the state parties have not resolved the issue[4] despite it being one fraught with contention.[5]

Due in large part to the increasing relevancy of the amnesty issue,[6]

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[1] *See* International Criminal Court, Establishment of the Court, http://www.icc-cpi.int/about/ataglance/establishment.html (last visited Jan. 11, 2008).

[2] The word "amnesty" was mentioned only twice during the final tenure of the Preparatory Commission, neither of which is relevant to this Note. *See* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15 – July 17, 1998, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole,* ¶¶ 38, 101, U.N. Doc A/CONF.183/13 (Vol. II) (2002). It appears that the United States first raised the issue when, at the preparatory conference regarding the establishment of an ICC in 1997, the American delegation circulated a "non-paper" suggesting that domestic amnesties ought to be taken into consideration in discussions over the Court's proposed jurisdiction. *See* Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L. J. 507, 508 (1999).

[3] The document creating the ICC is known as the Rome Statute. *See* Rome Statute of the International Criminal Court, U.N. Doc A/CONF.183/9 (July 17, 1998) [hereafter Rome Statute].

[4] *See* Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93, 95 (1999) ("Rome skirted the question of amnesties."). *See also id.* at 95-97 (describing the American position on the importance of amnesties in post-conflict transitions to peace and criticizing the Rome Statute's silence on the issue as ignoring history); Gerhard Hafner et al., *A Response to the American View as Presented by Ruth Wedgwood,* 10 EUR. J. INT'L L. 108, 109-13 (1999) (responding to Wedgwood's criticisms, arguing that amnesties would run counter to the purpose of the ICC and would contradict emerging state practice in international law).

[5] The States Parties' national legislatures often raised the issue during the ratification process. *See*, *e.g*., Beale Rudolf, *Statute of the International Criminal Court, Decision No. 98-408DC, 1999 J.O. 1317*, 94 AM. J. INT'L L. 391, 391 (2000) (describing the role of the amnesty issue in the French Assembly, and the French Constitutional Council's decision on the same issue).

[6] The fast-accumulating scholarship on the matter is one indication of this. *See, e.g.*, Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 407 (2005); Mahnoush H. Arsanjani, *Developments in International Criminal Law: The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22 (1999); Matthew Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 21 J. INT'L CRIM. JUSTICE

speculation has mounted that the role of domestic amnesty was somehow imbedded in a curiously ambiguous provision of Article 53 of the Statute.[7] Article 53, titled "Initiation of an Investigation," states in pertinent part: "If, upon investigation, the Prosecutor concludes that there is not a reasonable basis for a prosecution because... (c) A prosecution is not *in the interests of justice*...." the Prosecutor may effectively cease the investigation.[8] The provision's ambiguity is arguably intentional,[9] and from December 2004 to April 2005, the ICC's Office of the Prosecutor asked a group of leading non-governmental organizations ("NGOs") to submit interpretations of the "interests of justice" provision.[10] The human rights NGOs, including Human Rights Watch and Amnesty International, argued strongly for a narrow interpretation of the provision that would exclude consideration of domestic amnesty agreements that could potentially frustrate the ICC's authority.[11] The question remains: can one interpret Article 53 in good faith

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71 (2004); Richard Goldstone & Nicole Fritz, *"In the Interests of Justice" and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 LEIDEN J. INT. L. 655 (2000); Dira Majzub, *Peace or Justice? Amnesties and the International Criminal Court*, 3 MELB. J. INT. L. 248 (2002); Dwight Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L. L. REV. 293 (2005); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L. L. 481 (2003); Scharf, *supra* note 2 at 32; Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L. J. 205 (2000) (as an illustrative — but by no means exhaustive — list of the recent writing on the subject).

[7] *See* Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 812, 859 (2006); Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MICH. ST. DCL J. INT. L. 595, 641 n.224 (1999); Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 370-71 (2006); Newman, *supra* note 6, at 319; Scharf, *supra* note 2, at 524.

[8] Rome Statute, *supra* note 3, art. 53(2)(c). *See also id.* art. 53(1)(c) ("Taking into account the gravity if the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the *interests of justice*.") (emphasis added). The two provisions of Article 53 essentially announce the same principle.

[9] According to an interview with the Chairman of the Rome Diplomatic Conference, Philippe Kirsch, conducted by Michael P. Scharf, the "provisions" reflect a "creative ambiguity," which could potentially allow the Prosecutor to consider amnesty agreements when determining whether to conduct an investigation. *See* Scharf, *supra* note 2, at 521-22. However, it is not clear from Scharf's article whether or not Kirsch was referring to Article 53 when he made those comments. *Id.*

[10] *See* Coalition for the International Criminal Court, Interest of Justice, http://www.iccnow.org/?mod=interestofjustice (last visited Jan. 11, 2008).

[11] *See* Human Rights Watch Policy Paper, *The Meaning of "The Interests of Justice" in Article 53 of the Rome Statute*, http://hrw.org/campaigns/icc/docs/ij070505.pdf (last visited Jan. 11, 2008); Amnesty International, *Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the Concept of the Interests of Justice*, http://www.iccnow.org/

to permit amnesty for international human rights violations? This article will examine this question through the lens of the situation in Northern Uganda and the ICC's recent indictments of the Ugandan rebel leaders, the Lord's Resistance Army ("LRA").[12]

Having introduced the issue of amnesty in the Rome Statute and the importance of the "interests of justice" provision to amnesties generally in Part I, Part II provides background on the conflict in Uganda and why the issue of amnesty and the "interests of justice" provision are particularly relevant. Part III of the article provides the Vienna Convention framework for analyzing and interpreting the "interests of justice" provision and goes on to analyze the provision using that framework and the context of the provision in the Statute.

Part IV discusses the relevance of international law to the amnesty issue. The article focuses on the international jurisprudence regarding amnesty from the Inter-American Court of Human Rights ("IACtHR"). In this section the American Convention — which founded the IACtHR — is compared to Africa's analog, the African Charter. The relevant provisions of the two documents are extremely similar and the jurisprudence of the IACtHR is clear: amnesty is inconsistent with international law. The similarity between the two instruments suggests the IACtHR's jurisprudence could be applied in African nations, including Uganda. The final section of the article concludes that, based upon the various interpretive procedures and the jurisprudence of the IACtHR and other international tribunals, we should *not* interpret the "interests of justice" provision to permit amnesty for the LRA, and the Prosecutor should proceed with its case against those already indicted by the Court.

II. SOME BACKGROUND ON THE CONFLICT IN UGANDA

For nearly twenty years the East-African country of Uganda has been tearing itself apart from the inside.[13] When former leader Idi Amin's[14] reign

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documents/AI_LetterOTP_Interests_Aug05.pdf (last visited Jan. 11, 2008).

[12] *See infra* note 42.

[13] For detailed descriptions of the conflict in Uganda, *see* Human Rights Watch Report, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda,* Vol. 17 No. 12(A), September, 2005, *available at* http://www.hrw.org/reports/2005/uganda0905/ [hereafter *Uprooted and Forgotten*]; Amnesty International Report, *Breaking the circle: protecting human rights in the northern war zone*, AI Index: AFR 59/001/1999, March, 1999, *available at* http://www.amnesty.org/en/report/info/AFR59/001/1999; Human Rights Watch Report, *Hostile to Democracy: The Movement System and Political Repression in Uganda*, HRW Index No.: 1-56432-239-4, Oct. 1999, *available at* http://www.hrw.org/reports/1999/uganda/ [hereafter *Hostile to Democracy*].

[14] Idi Amin ruled Uganda in a "reign of terror" that lasted from 1971 to 1979 and resulted in somewhere between 100,000 to 500,000 deaths. *See Hostile to Democracy*, *supra* note 13;

of terror ended with exile in 1979,[15] Uganda's political situation did not improve. In 1986, current President Yoweri Museveni and his National Resistance Army ("NRA") fought for and took control of Uganda, planting the seeds of violence that would claim much of the Northern territory for upwards of twenty years.[16] Museveni and the NRA's campaign encountered its main resistance in the north, where Acholi[17] leader Alice Lakwena, founder and leader of the Holy Spirit Movement ("HSM"), fought against the NRA's abusive tactics.[18]

When the HSM was finally destroyed near Kampala towards the end of 1986, Lakwena's cousin, Joseph Kony, created the Lord's Resistance Army ("LRA") to follow in her footsteps.[19] Kony and the LRA, much like Lakwena's HSM, are highly spiritual, and Kony claims to have "inherited the spirits that possessed [his cousin]" when she went into exile in Kenya.[20] Such tactics have arguably been helpful in turning Kony's forces, made up largely of abducted children, into loyal "zombie fighters."[21] While the LRA

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see also David B. Kopel, Book Review, 15 N.Y.L. SCH. J. INT'L & COMP. L. 355, 370 (1995); Karl Vick, *Former Chad Dictator Faces Pinochet Test*, WASH. POST, Jan. 27, 2000, at A22 (reporting that "Idi Amin, as self-proclaimed emperor of Uganda in the 1970s oversaw an estimated 300,000 political killings before finding refuge in Saudi Arabia"); Naomi Roht-Arriaza, Overview, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 221, 221-22 (Naomi Roht-Arriaza ed., 1995) ("Up to 800,000 people disappeared in Uganda between 1962 and 1986 as a result of civil wars and dictatorships, including the notorious rules of Idi Amin and Milton Obote."); *see also* Farooq Hassan, *Realpolitik in International Law: After Tanzanian-Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859, 909-10 (1981) (noting that "[f]ew national leaders can equal Idi Amin in barbarity" and that "his ultimate overthrow brought cheers of gratitude and relief from millions worldwide").

[15] *See* Press Release, Human Rights Watch, Idi Amin Dies Without Facing Justice (Aug. 18, 2003), http://hrw.org/english/docs/2003/08/18/uganda6312.htm (last visited Jan. 11, 2008).

[16] *See Uprooted and Forgotten*, *supra* note 13, at 8.

[17] The Acholi are the indigenous people who occupy Acholiland in Northern Uganda. Current LRA leader Joseph Kony is — ironically — also an Acholi, though the Acholi have borne the brunt of Kony's LRA attacks. *See* Anna Borzello, *Profile: Ugandan Rebel Joseph Kony*, BBC News, July 5, 2006, http://news.bbc.co.uk/2/hi/africa/5146662.stm (last visited Jan. 11, 2008); Caroline Pare, *Uganda's Rebel War*, BBC News, Nov. 2, 2000, http://news.bbc.co.uk/2/hi/programmes/crossing_continents/1003463.stm (last visited Jan. 11, 2008).

[18] *See Uprooted and Forgotten*, *supra* note 13, at 8.

[19] *See* James A. Goldston et al., *A Crucial Case for the International Criminal Court: Justice for Uganda*, INT. HERALD TRIB., Feb. 27, 2004.

[20] Lakwena has since passed away. *See* Omar Kalinge Nnyago, *Lakwena's Death Opens New Wounds in the North*, THE MONITOR (Uganda), Jan. 30, 2007.

[21] *See* Matthew Green, *Demystifying Kony,* ALLAFRICA.COM, Aug. 26, 2007; *see also* Abraham McLaughlin, *The end of Uganda's mystic rebel?*, CHRIST. SCI. MONITOR, Dec. 31, 2006 ("Mr. Kony was believed to have a powerful spirit that helped him defy bullets, foretell attacks, and know when people criticized him.").

originally enjoyed some local support for its fight against Museveni's government, sentiment soon turned as Kony's tactics became more and more brutal.[22]

As Kony's campaign of terror continued, Museveni and the Ugandan government looked to amnesty as a carrot to lure the LRA into a discussion aimed at ending the violence, which eventually led to the passage of the Amnesty Act of 2000.[23] Broad grants of amnesty to the LRA rebels evoke traditional Ugandan processes of reconciliation and reintegration, the most prominent of which is known as "mato oput."[24] Mato oput, practiced within the local Acholi tribe, is a traditional reconciliation ceremony.[25] Following the ceremony, the village welcomes back the repentant.[26] Such rituals have been "used to reintegrate former LRA soldiers, despite their awful acts,"[27] since the beginning of the civil war.

In fact, in a reflection of their dedication to reconciliation, Acholi religious leaders were instrumental in the drafting of the Amnesty Act of 2000.[28] Under the Amnesty Act "approximately 14,000 soldiers had fled the LRA and several other rebel groups to seek amnesty."[29] However, despite the large number of surrenders, the fighting has continued and the LRA

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[22] *See, e.g.*, Green, *supra* note 21("It was only later, when his fighters began cutting the lips and ears off villagers suspected of collaborating with the army and resorted to mass abductions of children for use as fighters and 'wives', that Kony earned the contempt of his own people.").

[23] *See Uprooted and Forgotten*, *supra* note 13, at 8; Government of Uganda, The Amnesty Act, 2000, *available at* http://search.freefind.com/find.html?id=23423574&pid=r&mode=all&query=amnesty+act&submit=+Go+ (last visited Jan. 11, 2008).

[24] *See* Barney Afako, *Reconciliation and Justice: 'Mato Oput' and the Amnesty Act,* Conciliation Resources, http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php (last visited Jan. 11, 2008) ("[W]hen in January 2000 the government introduced a new Amnesty Act, it was building on tradition and responding to the expressed wishes of the people of Uganda – particularly those of the people of Acholi whose specific concerns were incorporated into the law."). Mato oput ceremonies appeal to the Acholi because "the Acholi method of peace, conflict resolution and reconciliation are co-operative and can be indirect and circumstantial which does effectively encourage the accused to admit responsibility." *See* Birgit Brock-Utne, *Indigenous conflict resolution in Africa: A draft presented to the week-end seminar on indigenous solutions to conflicts held at the University of Oslo, Institute for Educational Research 23-24 of February 2001*, http://www.africavenir.org/publications/occasional-papers/BrockUtneTradConflictResolution.pdf (last visited Jan. 11, 2008).

[25] *See* McLaughlin, *supra* note 21.

[26] *Id.*

[27] *Id*.

[28] *See* Afako, *supra* note 24. Unquestionably, this complicates the discussion of appropriate remedies for international human rights abuses. However, that is a policy discussion beyond the scope of this article.

[29] Blumenson, *supra* note 7, at 808.

leadership remains at large.[30]

In 2002, Uganda and Sudan signed an agreement aimed at containing the LRA,[31] and peace talks between the Ugandan government and the rebels began in earnest in 2004.[32] These talks, however, never produced a peace deal and the fighting that had abated in November 2004 began anew in January 2005.[33]

Most recently, in the summer of 2006, the situation saw increased efforts at obtaining a lasting peace. On May 17, 2006, President Museveni gave the LRA leadership a two-month ultimatum to end the conflict peacefully.[34] Then, in late May, rebel-leader Joseph Kony announced that "[t]he LRA is ready to talk peace and end the war in a good way, not by force."[35] Sudanese Vice President and Chief Mediator Riek Machar then began organizing peace talks between the LRA and the Ugandan government, which officially began in the Sudanese town of Juba (the "Juba talks") on July 14, 2006.[36] The Juba talks led to a historic cease-fire between the rebels and the government, which the parties signed on August 28, 2006.[37] After numerous hitches in the process and a period of renewed fighting, the parties agreed to and signed a revised peace deal on November 1, 2006.[38]

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30 *See id*.

31 *See* BBC News: Africa, Timeline: Uganda, A chronology of key events, *available at* http://news.bbc.co.uk/2/hi/africa/country_profiles/1069181.stm (last visited Jan. 11, 2008). *See also* Akhavan, *supra* note 6 (arguing Sudan has provided crucial support to the LRA since the "war" began in 1986. In an "unlikely, Faustian alliance" the Islamist Sudanese government aligned itself with a "nominally Christian insurgency (the LRA) against the Museveni's government). *See also* U.N. Office for the Coordination of Humanitarian Affairs ("UNOCHA"), *Sudan-Uganda: Anti-LRA pact extended* (Dec. 3, 2002), http://www.irinnews.org/report.asp?ReportID=31218&SelectRegion=East_Africa&SelectCountry=SUDAN-UGANDA (last visited Jan. 11, 2008); Gerard Prunier, *Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986-99)*, 103 AFR. AFF. 359-83 (2004).

32 *See Uprooted and Forgotten*, *supra* note 13, at 15.

33 *Id.* In fact, the act that most undermined the peace talks was the defection of the LRA's lead negotiator, Sam Kolo, to the government in return for amnesty under the 2000 Act. *See id.* *Compare Ugandan Minister Says Talks With Rebels Still On*, BBC Monitoring International Reports, March 8, 2005 (criticizing the ICC's investigation).

34 *See* UNOCHA, *Uganda: Key events in the Northern conflict since May* (Aug. 30, 2006), http://www.globalsecurity.org/military/library/news/2006/08/mil-060830-irin02.htm (last visited Jan. 11, 2008).

35 *Id.*

36 *Id.*

37 *See* UNOCHA, *Uganda: Army halts operations as ceasefire goes into effect* (Aug. 29, 2006), http://www.globalsecurity.org/military/library/news/2006/08/mil-060829-irin02.htm (last visited Jan. 11, 2008).

38 *See* UNOCHA, *Uganda: Revised gov't-LRA ceasefire deal signed* (Nov. 1, 2006), http://www.globalsecurity.org/military/library/news/2006/11/mil-061101-irin01.htm (last

A. The Role of the ICC

One must consider all post-2004 steps towards peace within the context of President Museveni's referral of the LRA to the ICC that year.[39] Following Museveni's referral, Luis Moreno-Ocampo, the lead Prosecutor for the ICC, determined there was a reasonable basis to open an investigation into the accusations against the LRA.[40] Prosecutor Ocampo's investigation led to the issuance of arrest warrants for five senior LRA leaders.[41]

The warrants charge the LRA leaders[42] with a litany of war crimes and crimes against humanity, focusing on the years between 2002[43] and 2005, the year of the issuance of the arrest warrants.[44] Reaction to the warrants has been mixed — the United Nations and prominent human rights groups have praised the ICC's efforts,[45] while many Ugandan officials and local Acholi

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visited Nov. 11, 2007). As of November 28, 2007, the parties had signed an agreement on accountability and reconciliation and were in "consultations" regarding the same. *See* James Butty, *Uganda's LRA Rebels Begin Consultations Round Two*, VOICE OF AMERICA, Nov. 12, 2007.

[39] *See* Press Release, International Criminal Court, President of Uganda refers situation concerning Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html (last visited Jan. 11, 2008); *Uprooted and Forgotten*, *supra* note 13, at 3.

[40] *See* Press Release, International Criminal Court, Prosecutor of the International Criminal Court opens an investigation into Northern Uganda (July 29, 2004), http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html (last visited Jan. 11, 2008).

[41] *See* H. Abigail Moy, *Recent Developments: The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate Over Amnesty and Complementarity,* 19 HARV. HUM. RTS. J. 267, 267 (2006).

[42] The ICC has charged Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen. *See* Press Release, International Criminal Court, Warrant of Arrest unsealed against five LRA Commanders (Oct. 14, 2005), http://www.icc-cpi.int/press/pressreleases/114.html (last visited Jan. 11, 2008). However, this number dropped to four when the death of Raska Lukwiya was confirmed this past August. *See* Press Release, International Criminal Court, Statement by the Chief Prosecutor Luis Moreno-Ocampo on the reported death of Raska Lukwiya (Aug. 14, 2006), http://www.icc-cpi.int/pressrelease_details&id=169&l=en.html (last visited Jan. 11, 2008).

[43] The ICC's jurisdiction is limited to events taking place after the ratification of the Rome Statute. *See* Coalition for the International Criminal Court, Frequently Asked Questions, http://www.iccnow.org/?mod=faq (last visited Jan. 11, 2008) (which clarifies that, "[s]ince the entry into force of the Rome Statute on 1 July 2002, the ICC has jurisdiction over crimes committed by nationals of States that have ratified the ICC statute, as well as over crimes committed on the territory of States that have ratified the treaty.").

[44] *See* Situation in Uganda, Case No. ICC-02/04-01/05, Warrant for Arrest of Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ¶ 42 (Sept. 27, 2005). The arrest warrant for Kony is most relevant, as he has led the LRA for the majority of the "war." *See* Moy, *supra* note 41, at 268-69.

[45] *See Annan Hails International Criminal Courts' Arrest Warrants for Five Ugandan*

leaders have criticized the ICC's continued involvement in the conflict.[46] Rwot David Onen Acana II, the chief of the Acholi, has expressed concern that the ICC's investigation will stall, and potentially derail, the peace talks.[47]

Acana and the Acholi leaders prioritize the reconciliation and reintegration of the LRA into the community over investigation and accountability for those most responsible for wreaking havoc on their own people.[48] This sentiment appears to be reflected throughout Northern Uganda.[49]

Equally important is the attitude of the LRA toward the ICC's involvement. The Amnesty Act has encouraged many LRA members to forsake the LRA leadership and surrender to the government.[50] However, Kony and the rest of the LRA leadership remain consistent — there will be no surrender until the ICC drops the case.[51] The LRA's peace negotiating

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Rebels, U.N. NEWS SERVICE, Oct. 14, 2005, *available at* http://www.un.org/apps/news/printnewsAr.asp?nid=16243 (last visited Jan. 11, 2008); Press Release, Human Rights Watch, ICC Takes Decisive Step for Justice in Uganda (Oct. 14, 2005), http://hrw.org/english/docs/2005/10/14/uganda11880.htm (last visited Jan. 11, 2008); Press Release, Amnesty International, Government must back first ever arrest warrants by International Criminal Court (Oct. 14, 2005), http://web.amnesty.org/library/Index/ENGAFR590102005?open&of=ENG-UGA (last visited Jan. 11, 2008).

[46] *See* Jim Lobe, *Historic ICC Arrest Warrants Evoke Praise, Concern*, INTER PRESS SERVICE NEWS AGENCY, Oct. 14, 2005, *available at* http://www.ipsnews.net/print.asp?idnews=30640 (last visited Jan. 11, 2008) (quoting Betty Bigombe, who has led the most recent peace talks between the government, the LRA, and Sudan, as stating that "[t]here is now no hope of getting (the LRA commanders) to surrender."); Josefine Volqvartz, *ICC under fire over Uganda probe*, CNN, Feb. 23, 2005, *available at* http://www.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz/index.html (last visited Jan. 11, 2008) (quoting, *inter alia*, Byrn Higgs, Uganda Program Development Officer for Conciliation Resources, as saying the "ICC has committed a terrible blunder."); Cathy Majtenyi, *Stopping Rebel Attacks in Northern Uganda No Easy Task*, Voice of America News, Mar. 29, 2005, *available at* http://www.globalsecurity.org/military/library/news/2005/03/mil-050331-317d2285.htm (last visited Jan. 11, 2008) (noting that certain LRA leaders had conveyed to the Ugandan government that the LRA would not proceed with peace talks if the ICC continued to investigate).

[47] *See* Majtenyi, *supra* note 46.

[48] *See id.* Acana has indicated, however, that prosecutions and peace are not, *ipso facto*, mutually exclusive. *See id.*; *see also* Blumenson, *supra* note 7, at 811 ("It appears that a substantial majority of the Acholi people, who comprise both the victims and the perpetrators of the war with the LRA, want reconciliation and favor extending amnesty for all rebels.").

[49] *See* Abraham McLaughlin, *Ugandans welcome 'terrorists' back*, CHRIST. SCI. MONITOR., Oct. 23, 2006 ("As many here see it, when Western lawyers duel before a judge or jury, they're simply trying to outsmart each other — and avoid having the truth about their client come out.").

[50] *See* McLaughlin, *supra* note 21 ("[T]he news of the amnesty being broadcast via radio into the bush has spurred increasing numbers of rebels to desert Kony.").

[51] *See* The Associated Press, *Ugandan rebels refuse to sign peace deal while facing arrest*

spokesman, Godfrey Ayo, has poignantly acknowledged the contradiction inherent in President Museveni's position:[52] "They should not expect us to sign an agreement and later cage our leaders in The Hague... Our leaders are not fools. We want a guarantee that nobody is going to pounce on them immediately after we have signed a treaty, when they no longer have arms."[53]

President Museveni's current position is two-fold: the arrest warrants should stay, but amnesty is still on the table.[54] Museveni, as the one who referred the LRA case to the ICC in the first place,[55] cannot genuinely advocate for the removal of the ICC's arrest warrants. Moreover, Museveni's logic for refusing to call for the cancellation of the arrest warrants at the current time is sound: "Why should we reward you before you give us peace?... If the ICC indictments are removed, it will make the terrorists untouchable. The removal of the indictments will be a reward for their signing of the agreement."[56]

Objectively, the ICC's involvement deserves some credit for the recent moves towards peace, if for no other reason than that it has forced Sudan to take a lead role in the negotiations and to cease aiding the rebels.[57] The newfound acquiescence of Sudan, almost contemporaneous with the referral of the case to the ICC, has dealt a debilitating blow to the LRA and its

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warrants, INT. HERALD. TRIB., Oct. 11, 2006, *available at* http://www.iht.com/articles/ap/2006/10/11/africa/AF_GEN_Uganda_Rebels.php (last visited Jan. 11, 2009) (quoting, *inter alia*, LRA peace negotiating spokesman, Ayo: "If ICC drops the case, then we will sign the peace agreement and peace will return to northern Uganda.").

[52] Discussed *infra*. Museveni's position is arguably untenable, and he risks losing credibility if he does not alter it as the ICC's investigation progresses.

[53] Simon Kasyate, Rodney Muhumuza & Frank Nyakairu, *Kony Rebels Refuse to Sign Peace Deal*, THE MONITOR, Oct. 10, 2006.

[54] *See* UNOCHA, *ICC indictments against rebels should stay, says President* (Sept. 21, 2006), *available at* http://www.globalsecurity.org/military/library/news/2006/09/mil-060921-irin03.htm (last visited Jan. 11, 2008) (noting that Museveni has insisted that the ICC arrest warrants must stay until the LRA rebels surrender).

[55] *See* Press Release, *supra* note 40.

[56] *See* UNCHOA, *supra* note 54. One must assume that the only reason that amnesty remains on the table is because it has the proven potential to bring the LRA to surrender. *See* McLaughlin, *supra* note 21. In this way Museveni's current position is clever, but risky. *See, e.g.*, Mark Doyle, *Africa's Mixed Amnesty Precedents*, BBC News, July 4, 2006, *available at* http://news.bbc.co.uk/2/hi/africa/5148226.stm (last visited Nov. 8, 2006) (noting that, "[t]he Ugandan president's offer of a complete amnesty to rebel leader Joseph Kony if peace talks are successful — despite his indictment on war crimes charges — has some precedents in other conflicts in Africa. But not all came to a successful conclusion.").

[57] *See* Akhavan, *supra* note 6, at 416 ("The reality is that the ICC referral has significantly weakened the LRA by pressuring Sudan to stop harboring rebel camps. The new-found LRA willingness to negotiate with the government is a mark of desperation resulting from this new reality.").

capability to continue to draw out the war.[58]

For the most part, the positions of all interested parties — Museveni's government, the LRA, and the government of Sudan — have not changed since peace talks resumed most recently. Only time will tell how the situation will progress, and whether the latest ceasefire[59] will hold.[60] Regardless of what happens, the progression of the ICC's investigation only increases the importance of resolving the amnesty issue.[61]

In order to resolve the amnesty question, the first step is to perform an interpretation of the relevant text of the Rome Statute: Article 53's "interests of justice" provision. The Vienna Convention on the Law of Treaties guides this analysis.

III. AN INTERPRETATION GUIDED BY THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Rome Statute of the International Criminal Court is a treaty,[62] and as such, the definitive text on treaty interpretation — Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT") [63] — guides interpretation of the Statute's terms. Article 31 of the VCLT is the "general rule of treaty interpretation." Section one of Article 31, the so-called "golden rule,"[64] states that "[a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty [...] and in light of their *object and purpose*."[65] Thus, the interpretive process involves three steps. First, one must define the "ordinary meaning"

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58 *See id.*

59 *See supra* note 38 and accompanying text.

60 The LRA has since walked out of Juba, and, as of this writing, both sides are still attempting to forge a resolution. *See, e.g.*, Grace Matsiko, *Ugandan Rebels Demand Removal of Sudan's Machar as Mediator*, THE MONITOR, Jan. 17, 2007 (noting the LRA's move to vacate Juba and their demand that Machar be replaced as mediator); Samuel Egadu, *Kony Sets New Terms for Talks*, THE MONITOR, Mar. 12, 2007 (providing recent developments in the effort to restart the Juba talks).

61 Especially given the LRA's refusal to renew the CHA agreement. *See* Paul Harera Sebikali, *LRA Refuse to Renew Cease-Fire Agreement*, THE MONITOR, Feb. 23, 2007.

62 "The Rome Statute is an international treaty, binding only on those states which formally express their consent to be bound by its provisions." International Criminal Court, Establishment of the Court, http://www.icc-cpi.int/about/ataglance/establishment.html (last visited Jan. 11, 2008).

63 *See* Vienna Convention on the Law of Treaties, arts. 31-32, 1155 U.N.T.S. 331 (setting forth the "general rule of interpretation") [hereafter Vienna Convention]; Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 78 REC. DES COURS 1, 43 (1978) ("Article 31, paragraph 1, of the Convention establishes what may be described as the 'golden rule' of treaty interpretation. . . .").

64 *See* Jiménez de Aréchaga, *supra* note 63.

65 Vienna Convention, *supra* note 63, art. 31 (emphasis added).

of Article 53's terms. Second, one must analyze the "object and purpose" of the Rome Statute.[66] Third, one must analyze the context of Article 53 in relation to other provisions of the Statute.[67]

A. *"Ordinary Meaning"*

As a typical statutory construction exercise, an analysis of the term's "ordinary meaning" proceeds by locating the term "justice" in the dictionary[68] and then considering the term's usage elsewhere in the Statute.[69] "Justice" is defined in Black's Law Dictionary as "[t]he fair and proper administration of laws."[70] In the Merriam-Webster Dictionary, "justice" is given, *inter alia*,[71] the following definition: "the administration of law; *especially*: the establishment or determination of rights according to the rules of law or equity."[72]

The next step is to consider the use of the word "justice" elsewhere in the Rome Statute, where it appears fifteen times.[73] In some instances, "justice" is used in the Statute to connote some type of punishment.[74] In other instances, "justice" is used in a due process-like context, generally relating to the rights of the accused.[75] A few examples might prove illustrative.

First, in the punitive category: Article 17(2)(b) of the Statute states that "the Court shall determine that a case is inadmissible where... there has been an unjustified delay in proceedings, which... is inconsistent with an intent to *bring* the person concerned *to justice*."[76] Articles 17(2)(c) and 20(3)(b)'s

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66 *Id.*

67 *See* Vienna Convention, *supra* note 63, arts. 31(1), (2) (indicating that context shall mean, *inter alia*, the "text").

68 *See, e.g.*, Arthur Anderson L.L.P. v. U.S., 544 U.S. 696, 705 (2005) (stating that the "natural meaning" of terms could be found by consulting, *inter alia*, Black's Law Dictionary, and Webster's Third New International Dictionary).

69 *See, e.g.*, Dep't. of Energy v. Ohio, 503 U.S. 607, 630 (1992) ("It is axiomatic that a statute should be read as a whole.").

70 BLACK'S LAW DICTIONARY 390 (2d. pocket ed., 2001).

71 The other definitions of the word are irrelevant to our inquiry. *See infra* note 74.

72 Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/justice (last visited Jan. 11, 2008). For the purposes of this analysis, these definitions fit within the "due process" category of potential meanings of "justice. *See infra* notes 76 and 77 and accompanying text.

73 The word "justice" actually appears seventeen times, but it appears twice as part of the "International Court of Justice." *See* Rome Statute, *supra* note 3, arts. 36(4)(a)(ii), 119(2) (used in the "Court of" context); *Id.* pmbl. arts. 17(2)(b), 17(2)(c), 20(3)(b), 53(1)(c), 53(2)(c), 55(2)(c), 61(2)(b), 65(4), 67(1)(d), 70, 70(1), 70(4)(a), 85(2), 85(3).

74 *See id.* arts. 17(2)(b), 17(2)(c), 20(3)(b).

75 *See id.* arts. 55(2)(c), 61(2)(b), 65(4), 67(1)(d), 70, 70(1), 70(4)(a), 85(2), 85(3).

76 *Id.* art. 17(2)(b) (emphasis added).

usages of the term mirror that of 17(2)(b).[77]

In contrast to the above, the drafters also employed the term "justice" to articulate certain protections of an accused's rights to due process.[78] Article 65(4), for example, allows for a "more complete presentation of the facts" in cases where it is "in the interest of the accused."[79]

To determine whether amnesty grants can be read into Article 53's "interests of justice" provision, thereby potentially preventing prosecution by the ICC, the analysis of the meaning of the word "justice" in the Statute is useful. Certainly, amnesty has nothing whatsoever to do with due process rights of the accused; therefore, the due process usages of "justice" are irrelevant. Amnesty does implicate punishment, however, as amnesty is essentially an alternative to punishment. In stark opposition to amnesty as an *alternative* for punishment, the term "justice," as used in the Preamble[80] and Articles 17(2)(b), 17(2)(c), 20(3)(b) of the Statute, functions to imply the *necessity of* punishment — with particular force in the Preamble. A construction of Article 53 that embraces amnesty would therefore be misguided.

B. "Object & Purpose"

In addition to the ordinary meaning of "justice," this analysis must consider the "object and purpose" of the Rome Statute.[81] The Preamble of the Statute states the object and purpose quite clearly. State Parties to the Statute, being:

> Mindful that during this century millions of children, women and men have been *victims of unimaginable atrocities* that deeply shock the conscience of humanity,
>
> Recognizing that such grave crimes *threaten the peace, security* and well-being of the world,
>
> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

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[77] *See id.* arts. 17(2)(c), 20(3)(b).

[78] *See supra* note 76.

[79] Rome Statute, *supra* note 3, art. 65(4). Article 65 is titled "Proceedings on an admission of guilt." *Id.*

[80] More on this *infra*.

[81] Vienna Convention, *supra* note 63, art. 31(1).

> Determined to put an *end to impunity* for the perpetrators of these crimes and *thus to contribute to the prevention* of such crimes,
>
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes... [are]
>
> Resolved to guarantee lasting respect for and the *enforcement of international justice*....[82]

The Preamble articulates the primary purpose of the ICC: to end impunity and to bring those responsible for atrocities "to justice."[83] It would be difficult to construe it any other way. Moreover, the Preamble carries

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[82] Rome Statute, *supra* note 3, pmbl. (emphasis added).

[83] *See* OTTO TRIFFTERER, *The Preventive and the Repressive Function of the International Criminal Court*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 143 (Mario Politi & Giuseppe Nesi eds., 2001) ("to prevent crimes under international criminal law is the main purpose and the mission of the Court. . . ."). Further, "conviction and determination of sentences shall demonstrate that it is worthwhile to obey the law and, at the end of the day, it does not 'pay' . . . to commit crimes." *Id.* at 145. Building upon the previous statements, Triffterer concludes that "all Articles of the Statute and the Court, exercising its jurisdiction on the basis of the Statute, serve the purpose 'to prevent and repress' crimes under international law." *Id.* at 164. Thus, one can conclude, at least from Triffterer's interpretation of the Preamble, and the Rome Statute writ large, that domestic amnesty would *undermine* the jurisdiction of the Court, if in fact the Prosecutor decided to defer to national amnesty laws and refuse prosecution of those responsible for international crimes. *See also* LUIGI CONDORELLI & SANTIAGO VALLAPANDO, *Deferral & Referral by the Security Council, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY 631 n.15 (Antonio Cassese et al. eds., 2002) ("From the clear words of the Preamble of the Statute, it seems that the goal of putting an end to the impunity of the perpetrators of [international] crimes is the main reason for the creation of the ICC."); Panel Discussion, *Association of American Law Schools Panel on the International Criminal Court*, 33 AM. CRIM. L. REV. 223, 241 (1999) ("I think that the Preamble reflects what this Rome Statute is all about."). *See also* ACP-EU Joint Parliamentary Assembly, Resolution on the International Criminal Court (ICC), ACP-EU Res. 3560/03/fin (2003), http://www.amicc.org/docs/ACP-EUres.pdf (last visited Jan. 11, 2008) (noting that each state:

> "[f]irmly believes that the ICC States Parties and Signatory States are obliged under international law not to defeat the *object and purpose of the Rome Statute*, under which, according to its Preamble, 'the most serious crimes of concern to the international community as a whole must not go unpunished' and that States Parties are obliged to cooperate fully with the Court, in accordance with Article 86 of the Rome Statute thus *preventing them from entering into immunity agreements* which remove certain citizens from the States' or the ICC jurisdictions, undermining the full effectiveness of the ICC and jeopardizing [sic] its role as a complementary jurisdiction to State jurisdictions and a building block in collective global security. . . .").

more weight than other provisions of the same statute or treaty, and is where one typically finds the "object" and "purpose" of a statute or treaty.[84]

Not only is the purpose of the Rome Statute clearly evinced[85] in the Preamble, but under the VCLT, State Parties "have an obligation to each other not to act in such a way as to 'deprive' a treaty of its object and purpose, or to undermine its spirit."[86] There is a general consensus[87] surrounding the interpretation of the Rome Statute's "object and purpose"[88] indicating the "object and purpose" is to put an end to impunity.[89] Given this consensus and the prosecution-heavy nature of the language in the Preamble,[90] an interpretation of one of the Statute's articles as precluding prosecution of an indicted international criminal[91] would appear erroneous.

Nevertheless, some have argued that, the clarity of the object and purpose notwithstanding, Article 53 and the "interests of justice" provision

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[84] *See* Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 16-17 (1975) (looking to the Preamble for the "object" and "purpose" of the European Convention); Vienna Convention, *supra* note 63, art. 31(2) (indicating that States should turn to, *inter alia*, the preamble of a treaty to divine the treaty's purpose).

[85] *See supra* note 83.

[86] Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT'L L. REV. 1115, 1129 (2004) (quoting James Crawford, et al., *In the Matter of the Statute of the International Criminal Court and In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute: Joint Opinion* (June 5, 2003), at 11, *available at* http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf (last visited Jan. 11, 2008)). *See also* Vienna Convention, *supra* note 63, art. 18.

[87] *See supra* note 83. *See also* Tan, *supra* note 86, at 1130 ("It is widely accepted that the Rome Statute's object and purpose is to put an end to the regime of impunity that protects the perpetrators of all the most serious crimes of concern to the international community within the jurisdiction of the ICC.").

[88] Vienna Convention, *supra* note 63, art. 31(1).

[89] *Supra* note 83.

[90] *See supra* note 82 and accompanying text. Particularly, note the use of the phrases "unimaginable atrocities," "grave crimes," "serious crimes," "[d]etermined to put an *end to impunity*," and "*enforcement of international justice*." *Id*.

[91] Those suggesting that Article 53 may be interpreted as such argue that customary international law permits amnesties in such cases or that prosecution is *not always* the best way to deal with human rights atrocities. *See* Blumenson, *supra* note 7; Brubacher, *supra* note 6; Goldstone & Fritz, *supra* note 6; Stephen Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecutions and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81, 89-90 (1996); William Schabas, *Amnesty The Sierra Leone Truth and Reconciliation Commission and the Special Court of Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145 (2004); Scharf, *supra* note 7; Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions, Lessons from Sierra Leone*, U.S. INST. FOR PEACE, Special Report 130 (Feb., 2005), *available at* http://www.usip.org/pubs/specialreports/sr130.pdf (last visited Jan. 11, 2008); Villa-Vicencio, *supra* note 6.

ought to be construed to include amnesty.[92] As Justice Richard Goldstone and Nicole Fritz note in their article regarding the "interests of justice": "[c]ertainly, the word 'justice' is demanding. It conveys a concept which is tremendously contested — meaning different things to different people. Yet few would aver that it is 'demanding' in the sense that it is always retributive."[93] That may be true, but the foregoing analysis of the term's meaning suggests that in the Rome Statute "justice" is retributive. In any case, the Vienna Convention itself demands that our analysis proceed to consider the context of Article 53 within the rest of the Statute.

C. Contextual Arguments

In addition to the "ordinary meaning" of the words and the "object and purpose" of the Statute, the Vienna Convention states that one must also look to the context of the statutory provision in relation to the other articles in the text.[94] The contextual inquiry will proceed from the notion that Article 53 could potentially allow a domestic amnesty law to remove a case from the ICC's jurisdiction. The issue is, therefore, are there any other articles within the Rome Statute that could potentially be interpreted so as to remove jurisdiction from the Court?[95] The most relevant provision in this respect — and to which we will now turn our attention — is Article 17, governing complementarity.[96] Article 17 states that the Court shall determine a case "inadmissible" — i.e. the Court will not investigate — if, *inter alia*, "[t]he 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....*[97] Article 17 represents a compromise between the state parties to the statute and the ICC itself,

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[92] Rome Statute, *supra* note 3, art. 53(1), (2). *See also supra* note 7 (citing proponents of prosecutorial deference to national amnesty laws, within the ICC regime).

[93] Goldstone & Fritz, *supra* note 6, at 662.

[94] *See* Vienna Convention, *supra* note 63, arts. 31(1), (2) (indicating that context shall mean, *inter alia*, the "text"). For the purposes of this section, this is different than interpreting a *term* in its context. For this analysis, we look to other *provisions* in the statute in order to interpret the provision at issue.

[95] The importance of this procedure is similar to that discussed previously with respect to the term "justice." If another provision in the Rome Statute exists that could be interpreted as having the potential to remove certain cases from the ICC's jurisdiction, that would lend credibility to the presumption — which is only made for the sake of argument — that Article 53 could be interpreted in such a way as well, as applied to a domestic amnesty law. Thus, if such a provision *does* in fact exist in the Statute, then eventually the inquiry will become whether such a provision includes domestic amnesties within the ambit of circumstances in which jurisdiction will be removed from the ICC.

[96] Rome Statute, *supra* note 3, art. 17.

[97] *Id.* art. (1)(b) (emphasis added).

leaving jurisdiction implicitly in the hands of the States unless they are unwilling or unable to prosecute.[98] Thus, the first question is: what comprises unwillingness or an inability to prosecute? Article 17(2), which sets out various criteria as to what constitutes "unwillingness,"[99] answers this inquiry, in part.

Presuming that amnesty is granted in good faith,[100] domestic amnesty laws might fall within the exceptions to Article 17(2) and deprive the ICC of jurisdiction. However, because Article 17(2) does not presume to be exhaustive, such a presumption would certainly be questionable.[101]

Moreover, Articles 17(1)(a) and (b) appear to place an additional requirement on states' actions, indicating that only a "genuine" investigation or prosecution would be sufficient to bar ICC jurisdiction.[102] Under such requirements, amnesty without any genuine investigative component would not trigger Articles 17(1)(a) or (b). Additionally, the scope of Article 17 has been interpreted broadly to allow for wide discretion on the part of the Prosecutor regarding whether or not a State has discharged its Article 17 duties.[103] It would be premature to declare that, because Article 17(2) does not include domestic amnesty laws as constitutive of unwillingness or inability to prosecute, one should read Article 17 to imply that amnesty

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[98] *See id.*; Adriaan Bos, *The Experience of the Preparatory Committee, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 26 (Mario Politi & Giuseppe Nesi eds., 2001) ("According to this principle the use of the Court for preventing serious crimes from going unpunished lies in the hands of the State. This made it easier for States to accept the concept of the Court.").

[99] Rome Statute, *supra* note 3, arts. 17(2)(a)-(c) includes the following as bases for determining unwillingness: the state fails to investigate and/or prosecute "for the purpose of shielding the person concerned from criminal responsibility. . . "; there has been an "unjustified delay in the proceedings which . . . is inconsistent with an intent to bring the person concerned to justice"; or, the proceedings were not being conducted "independently or impartially. . . ." *Id.*

[100] Uganda clearly enacted its amnesty law in good faith, as it seems clear that the goal was to end the violence in the region. *See supra* Part II.

[101] *See* Kyle Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L. REV. 167, 212 n.333 (2005) (noting that "the complete manner in which the unwillingness exception [of Article 17] will be applied is unclear. . . ."); Michael Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 66 n.183 (2001) (indicating that the Prosecutor appears to have a "wide margin of error" in determining whether domestic actions satisfy Article 17).

[102] *See* Rome Statute, *supra* note 3, art. 17(1)(a), (b).

[103] *See* Newton, *supra* note 101; *see also* Akhavan, *supra* note 6, at 415 (noting that the application of Article 17's complementarity principle to the conflict in Uganda would allow the Prosecutor broad discretion to find that Ugandan courts were "unavailable" in the Article 17 sense, due in large part to the inherent breadth of Article 17(2)).

could be a bar to ICC investigation.

Another limitation on the application of Article 17 has been put forth via analysis of Article 17(3). Article 17(3) indicates that inability to prosecute under Article 17 may include the "unavailability of the [the state's] national judicial system."[104] Specifically regarding Uganda, some scholars have argued that, per Article 17(3), despite Uganda's largely independent judiciary, its courts could be considered "unavailable," within the Article 17(3) meaning,[105] "because the presence of the accused in a neighboring state [Sudan] prevents Uganda from taking them into custody."[106]

Some scholars have determined that, given that the purpose of the Statute is to eliminate international impunity,[107] the complementarity principle ought to be construed as restrictive, requiring genuine prosecutions (as opposed to simply investigations)[108] of persons accused of international crimes in order to contravene ICC jurisdiction.[109] In that way, the ICC would "function... in a way that is complementary to the administration of *criminal justice* by nation states."[110] As such, "[t]he concept of impunity relates closely to the complementarity underlying the jurisdiction of the ICC."[111] This type of interpretation suggests that an actual criminal prosecution might be a necessary component to a state's invocation of Article 17, so as to prevent impunity.

Another relevant question emerges from Article 17(1) and its requirement that a prosecution and/or investigation be "genuine."[112] The argument that blanket amnesties, without more, do not prevent the ICC from exercising jurisdiction under Article 17[113] raises a more difficult question.

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[104] *See* Rome Statute, *supra* note 3, art. 17(3) ("In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.").

[105] *Id.*

[106] *See* Akhavan, *supra* note 6.

[107] *See supra* note 83 and accompanying text.

[108] It is not clear from the text of Article 17 whether an investigation *alone* would be enough to remove jurisdiction from the ICC, or whether a prosecution *must* follow if there is reasonable and sufficient evidence to prosecute. *See* Rome Statute, *supra* note 3, art. 17.

[109] *See* George Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 555 (2005).

[110] *Id.* (emphasis added).

[111] *Id.*

[112] Rome Statute, *supra* note 3, art. 17(1)(a), (b).

[113] This conclusion is hardly an unreasonable one, as Article 17 seems to stress criminal prosecution (especially given the goal of the Rome Statute to end impunity). Similarly, amnesties granted without precedent investigations seem to fail the Article 17(1)(b) test on its face. *See infra* note 117.

Would amnesties granted as part of the establishment and functioning of a truth and reconciliation commission[114] ("TRC") — or some derivation thereof[115] — be sufficient to circumvent the ICC?[116] The answer to this question would depend in large part on whether we construe the workings of a TRC to be a "genuine"[117] investigation which, in turn, would depend on the type of TRC that was instituted.[118] While guidelines for effective TRCs have been proposed by numerous scholars,[119] there is no single type of effective TRC.[120] Furthermore, the way in which one measures effectiveness is likewise subjective.[121]

Numerous academics have addressed the issue of the relationship between TRCs and Article 17 specifically, and yet, no consensus has emerged.[122] Those who suggest that a TRC ought to be considered a

[114] According to John Dugard, member of the UN ILC, "Since 1974, twenty-one TRCs have been established to inquire into the immediate past of particular societies that have emerged from repression, with the goal of achieving reconciliation by means of exposing the historical record." John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY 694 (Antonio Cassese et al. eds, 2002). *See also* Priscilla B. Hayner, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2002) (the seminal work on truth commissions).

[115] This is especially relevant because Uganda's traditional reconciliation process, mato oput, has as its goals the reconciliation and re-assimilation of the accused back into society, much like the goals of a truth and reconciliation commission.

[116] This implicates Rome Statute, art. 17(1)(a), (b). The following articulates the appropriate 17(1)(a)/(b) test: "In order to satisfy the terms of Article[s] 17(1) [(a),] (b), it would have to be possible to say, first, that the truth commission or other body 'investigated' the matter; second, that it 'decided' not to prosecute; and third, that the decision did not result from the unwillingness or inability of the state to prosecute." Robinson, *supra* note 6, at 499.

[117] *See* Rome Statute, *supra* note 3, art. 17(1)(a), (b).

[118] If the TRC is like that which operated in South Africa to investigate and forgive certain crimes committed during the reign of apartheid, the argument is stronger that it *does* constitute a genuine investigation. *See* Goldstone & Fritz, *supra* note 6, at 664 ("In South Africa, the Truth and Reconciliation's Amnesty Committee is empowered to award amnesty to individuals when they have made a full disclosure of their crimes, those crimes are proportional to the ends sought and are deemed to be political acts.").

[119] *See, e.g.*, Landsman, *supra* note 91, at 89-90 (discussing limits on the use of TRCs that ought to be "insisted upon in the international community"); *see also* Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197, 219 (1996) (describing "amnesty guidelines based on international jurisprudence"); Priscilla Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, 59 LAW & CONTEMP. PROBS. 173, 178 (1996) (contemplating the "minimal guidelines for the creation and operation of a truth commission.").

[120] *See* Dugard, *supra* note 114.

[121] *See supra* note 120.

[122] *See* John Holmes, *The Principle of Complementarity, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 77 (R.S. Lee ed., 1999); *see also*

"genuine" investigation,[123] as the term is used in Articles 17(1)(a) and (b) of the Rome Statute, predicate their arguments on the fact that certain TRCs have been highly investigative in the past.[124] Additionally, this argument implies that a prosecution need not follow an investigation, even if the individual(s) in question committed crimes worthy of international criminal prosecution.[125] Those who disagree with the notion that a TRC is a genuine investigation ostensibly look to the object and purpose of the Rome Statute, and argue that the purpose of avoiding impunity is flatly inconsistent with amnesty.[126]

Notably, while scholars have waged much intellectual debate over the issue, the conflict has largely been avoided in practice. In the few instances of international criminal prosecution, TRCs have either: been left off the table,[127] coexisted with criminal prosecutions,[128] or been deemed insufficient by the TRC itself.[129]

Blumenson, *supra* note 7, at 815 n.43; John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law? Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 119-20 n.244 (2003); Goldstone & Fritz, *supra* note 6, at 661; Newman, *supra* note 6, at 317-18; Robinson, *supra* note 6, at 499 n.81, 501; Scharf, *supra* note 7, at 372 n.129; Carsten Stahn, *Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUST. 695, 711 (2005); Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 940-42 (2002).

[123] *See* Newman, *supra* note 6, at 317-18; Robinson, *supra* note 6, at 500 ("For example, the Court could determine that the term 'investigation' also comprises a diligent, methodical effort to gather the evidence and ascertain the facts relating to the conduct in question, in order to make an objective determination in accordance with pertinent criteria."); Stahn, *supra* note 122, at 711.

[124] The South African TRC, for example, was essentially an investigative body that, instead of pursuing criminal prosecution, offered truth, amnesty, and reconciliation. *See* Goldstone & Fritz, *supra* note 6. *See also* Robinson, *supra* note 6, at 501 ("[T]he truth commission would have to have the power to deny amnesty. The South African model would satisfy this requirement.").

[125] Hence the role of amnesties.

[126] *See* Claudia Angermaier, *The ICC and Amnesty: Can the Court Accommodate a Model of Restorative Justice,* 1 EYES ON THE ICC 131, 144 (2004); Czarnetzky & Rychlak, *supra* note 122, at 123; Holmes, *supra* note 122.

[127] *See* Dugard, *supra* note 114, at 693 ("Suggestions that TRCs be established in Bosnia-Herzegovina and Rwanda have not been implemented with the result that the ICTY and ICTR have not been faced with the problem of a TRC.").

[128] This was the case in Sierra Leone, as the Special Court of Sierra Leone prosecuted atrocities alongside the work of the Sierra Leone Truth and Reconciliation Commission. *See* Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72E, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, ¶¶ 61-74 (March 13, 2004); Schabas, *supra* note 91; *cf.* Shaw, *supra* note 91 (who argued that the people of Sierra Leone would rather forget than undertake criminal prosecutions). However, the Appeals Chamber of the Special Court did not adopt Shaw's argument when faced with the issue of amnesty, generally.

[129] This was the case in East Timor, where the Commission for Reception, Truth and

D. *Why the Analysis Must Proceed Further*

At this juncture, the strongest piece of evidence denying that amnesty can be read into Article 53 is the "object and purpose"[130] of the Rome Statute, as articulated in the Statute's Preamble.[131] The language in the Preamble appears sufficiently strong to lead to an interpretation of Article 53 requiring prosecution and not providing an exception vis-à-vis an amnesty agreement. Accordingly, any arguments to the contrary would need to be supported by equally strong language.[132] No such language exists. Additionally, interpretations of the meaning of the word "justice" in the Statute, especially guided by reference to the rest of the Statute, also suggest that prosecution is required without an exception for amnesty agreements .

Nevertheless, commentators have acknowledged that certain provisions in the Statute reflect a "creative ambiguity,"[133] leaving a "doorway"[134] open to allow for resolution by the Court itself. Therefore, this article turns to the final step in the analysis, as indicated by the VCLT, and considers "relevant rules of international law applicable in the relations between the parties."[135]

IV. RECOURSE TO INTERNATIONAL LAW & THE WORK OF INTERNATIONAL COURTS

Article 38 of the Statute of the International Court of Justice ("ICJ"), known as the "doctrine of sources," provides the seminal definition of international law.[136] Article 38(1) states that international law comes from,

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Reconciliation indicated, in its Final Report, that impunity for the crimes committed in Timor-Leste had become "entrenched" and the perpetrators must be held accountable. Commission for Reception, Truth, and Reconciliation, Final Report, Part 11, Recommendations, at 24, http://www.ictj.org/static/Timor.CAVR.English/11-Recommendations.pdf (last visited Jan. 11, 2008) ("Finally, any response to impunity should face the challenge of how to ensure that the major perpetrators are accountable in spite of the current protection they enjoy.").

[130] Vienna Convention, *supra* note 63, art. 31(1).

[131] Rome Statute, *supra* note 3, Preamble.

[132] Otherwise, arguments would have to be policy-driven. While there is nothing inherently wrong with policy arguments, they are not relevant for the purposes of this article.

[133] *See supra* note 9 and accompanying text (recounting Scharf's interview with Kirsch).

[134] *See* Robinson, *supra* note 6, at 499 (describing South Africa's contentions that the Statute ought to include a provision for truth and reconciliation commissions but that, "[d]ue to the politically controversial and philosophically difficult nature of any such provision, the issue was deliberately sidestepped in Article 17, although a narrow doorway was left for the Court. . . .").

[135] Vienna Convention, *supra* note 63, art. 31(3)(c).

[136] *See* Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 35-37 (1991) (discussing the doctrine of sources in Article 38); Justin C. Danilewitz, *The Ties That Bind: U.S. Foreign Policy Commitments and the Constitutionality of Entrenching Executive Agreements*, 14 J. TRANSAT'L L. & POL'Y 87, 98 n.50 (2004) (noting that Article 38, known as the doctrine of sources, provides one definition of international law); Duncan B. Hollis, *Why*

inter alia "(d)... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[137] Despite receiving some criticism,[138] Article 38 still represents the most definitive conception of what constitutes international law.[139] Thus, for the purposes of this analysis, Article 38 serves as "'the codification' of the formal sources of law...."[140]

Much has been written regarding whether amnesty is *per se* illegal in international law — with reference to subsections (a) – (c) of Article 38 — relying mostly on international conventions and treaties creating a customary international norm requiring states to prosecute certain violations thereof.[141] On the other hand, there is also literature arguing that amnesty is not *per se* illegal.[142]

The remainder of this article focuses on international jurisprudence,[143]

State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law, 23 BERK. J. INT'L L. 137, 141 (2005) ("Most international lawyers . . . rely on the articulation of sources in Article 38 of the Statute of the International Court of Justice — treaties, custom, and recognized general principles — to identify what legal rules to apply in a particular case.").

137 Statute of the International Court of Justice, art. 38(1) (emphasis added) [hereafter Statute of the ICJ].

138 *See* Robert Y. Jennings, WHAT IS INTERNATIONAL LAW AND HOW DO WE TELL IT WHEN WE SEE IT? (Schweitzerisches Jahrbuch für Inter-nationales Recht) 59, 61, 70-73, 80-83 (1981), *reprinted in* SOURCES OF INTERNATIONAL LAW 27, 29, 38-41, 48-51 (Martti Koskenniemi ed., 2000) (stating that it is "an open question whether [Article 38] is now itself a sufficient guide to the content of modern international law," and proposing alternative sources); Jose E. Alvarez, *Positivism Regained, Nihilism Postponed*, 15 MICH. J. INT'L L. 747, 747-48 (1994) (criticizing the doctrine of sources for ignoring "soft-law" factors).

139 G. M. Danilenko, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 31 (1993).

140 *Id*.

141 *See* Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of Past Regimes,* 100 YALE L.J. 2537 (1991); *see also* M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 17-18 (1996); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990); Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 970-80 (2006).

142 *See supra* note 91. One major criticism of the "duty to prosecute" argument, based on international instruments allegedly creating such an obligation, is that they only apply to "international" conflicts. *See* Scharf, *supra* note 2, at 516 ("[t]he duty to prosecute grave breaches under the Geneva Conventions is limited to the context of *international* armed conflict.") (emphasis added). This duty is said to emerge from Common Article 3 to the four Geneva Conventions. *See* Orentlicher, *supra* note 141, at 2563 n.100 ("Although Article 3 common to all four conventions proscribes such conduct as torture and summary execution in the context of non-international armed conflict, it is generally thought that the 'grave breaches' provisions apply only to acts committed during international armed conflicts.").

143 *See* Orentlicher, *supra* note 141.

which, when coupled with developing customary norms [144] construing amnesty for international crimes as violative of international law, recognizes a crystallizing norm reflecting the illegality of amnesty agreements.[145]

A. Brief IACtHR History

In 1948, the Organization of American States[146] adopted the American Declaration of the Rights and Duties of Man[147] in Bogotá, Columbia.[148] The adoption of the American Declaration marked the birth of the Inter-American human rights system.[149] In 1959, the Inter-American Commission on Human Rights ("IACHR") was created, and less than a decade later the American Convention on Human Rights ("American Convention") was

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[144] *See infra* note 146. *See also* Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995) ("Numerous federal court decisions and an ever-growing number of international agreements and conventions have established beyond question that the use of official torture is strictly prohibited by the most fundamental principles of international law."); Kenneth Anderson, *Squaring the Circle: Recognizing Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1304 (2005) ("Justice O'Connor has similarly remarked that although international law and the laws of other nations are 'rarely binding on our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.'").

[145] *See* Igor P. Blischenko, *Judicial Decisions as a Source of International Humanitarian Law, in* THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 51 (Antonio Cassese ed., 1979) ("[I]nternational humanitarian law owes a great deal to decisions handed down by national and international courts."); Robert Cryer, *Of Custom, Treaties, Scholars, and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFL. & SEC. L. 239, 245 (2006) ("Although judicial decisions are only mentioned as a subsidiary means for determining the law in article 38(1)(d) of the ICJ Statute, this understates the practical effect that judicial decisions have on the ascertainment, in particular, of customary international law."); *see also* OPPENHEIM'S INTERNATIONAL LAW 41 (Robert Y. Jennings & Arthur Watts eds., 1992) ("[d]ecisions of international tribunals . . . exercise considerable influence as an impartial and considered statement of the law . . . it is probable in view of the difficulties surrounding the codification of international law, international tribunals will in the future fulfill . . . a large part of the task of developing international law.").

[146] In 1968, twenty-one nations met in Bogotá and established the Organization of American States, codifying a mutual commitment to certain goals the organization deemed most important. *See* Organization of American States, OAS History at a Glance, http://www.oas.org/assembly2001/assembly/gaassembly2000/gahistory.htm (last visited Jan. 11, 2008).

[147] American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21, rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6, rev.1, at 18, art. 1 (1992) [hereafter American Convention].

[148] *See* Inter-American Commission on Human Rights, What is the IACHR?, http://www.cidh.org/what.htm (last visited Jan. 11, 2008).

[149] *Id.*

adopted.[150] The Convention entered into force in 1978, and created the Inter-American Court of Human Rights.[151] As of today, twenty-five countries have ratified the Convention,[152] and twenty-one countries are subject to the Court's jurisdiction.[153]

B. The Relevant Provisions of the American Convention of Human Rights, and an Analogy to the African Charter on Human and Peoples' Rights

"Article 33 of the American Convention on Human Rights... gives competence 'with respect to matters relating to the fulfillment of the commitments made by the States Parties to the Convention' to both the IACHR and the Inter-American Court of Human Rights, established by Chapter VIII of the ACHR."[154] The main function of the IACtHR is to adjudicate alleged human rights violations — which are referred by the Inter-American Commission — with reference to the American Convention.

With respect to the analysis in this article, IACtHR decisions are relevant only insofar as they deal with the issue of amnesty and its inconsistency with the American Convention. Petitioners have challenged, and the IACtHR has struck down, domestic amnesty laws in, *inter alia*, the following countries: Argentina,[155] Chile,[156] El Salvador,[157] Honduras,[158]

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[150] Inter-American Court of Human Rights, Information, http://www.corteidh.or.cr/historia.cfm (last visited Jan. 11, 2008).

[151] *Id.*

[152] *Id.*

[153] Inter-American Court of Human Rights, Welcome, http://www.corteidh.or.cr/index.cfm (last visited Jan. 11, 2008).

[154] Abby F. Janoff, *Rights of the Pregnant Child v. Rights of the Unborn Under the Convention on the Rights of the Child*, 22 B.U. INT'L L. J. 164, 184 (2004); *see also* American Convention, *supra* note 147, art. 33.

[155] *See* Consuelo v. Argentina, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92, OEA/Serv.L/V/II.83, doc.14 at 41 (1993), *available at* http://www1.umn.edu/humanrts/cases/28-92-ARGENTINA.htm; *see also* Resolución del Juez Federal Gabriel R. Cavallo declarando la inconstitucionalidad y la nulidad insanable de los arts. 1 de la Ley de Punto Final y 1, 3 y 4 de la Ley de Obediencia Debida. III (2001) (translation by Human Rights Watch). For a discussion of the "Cavallo decision," *see* Human Rights Watch, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators*, at VI (December 2001), *available at* http://www.hrw.org/reports/2001/argentina/; *see also* Corte Suprema de Justicia [Supreme Court of Argentina], June 14, 2005, "Simon, Julio Hector y otros s/privacion illegitima de la libertad," (2005S-1767) (Arg.) (Supreme Court of Argentina upholding the Cavallo decision).

[156] Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R., Report No. 19/03, OEA/Ser.L/V/II.118, doc.70 rev.2 at 558 (2003), *available at* http://www1.umn.edu/humanrts/cases/19-03.html; Hermosilla v. Chile, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L/V/II.95, doc.7 rev. at 156 (1997), *available at* http://www1.umn.edu/humanrts/cases/1996/chile36-96.htm.

[157] Romero and Galdamez v. El Salvador Case 11.481, Inter-Am. C.H.R., Report No.

Peru,[159] and Uruguay,[160] in the last twenty years. In this way, the IACtHR has developed a rich jurisprudence indicating the inconsistency of domestic amnesty laws protecting violators of international human rights law with the norms protected in the American Convention on Human Rights.[161] With relatively few exceptions,[162] the IACtHR has relied on Articles 1, 8, and 25 of the Convention[163] in striking down the amnesty laws.[164]

The notion that the IACtHR jurisprudence outlawing amnesty for international crimes — coupled with decisions from various other courts and tribunals[165] — constitutes international law[166] is made even stronger with reference to Uganda. As seen below, one can draw an analogy between the provisions of the American Convention that the IACtHR has relied upon, and similar provisions in Africa's analog to the American Convention, the African Charter on Human and Peoples' Rights.[167]

37/00, OEA/Ser.L/V/II.106, doc. 3 rev. at 671 (1999), *available at* http://www1.umn.edu/humanrts/cases/37-00.html; Parada Cea v. El Salvador, Case 10.480, Inter-Am. C.H.R., Report No. 1/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 7 rev. at 531 (1998), *available at* http://www1.umn.edu/humanrts/cases/1998/elsalvador1-99.html.

[158] Velasquez Rodriguez Case, Inter-Am. C.H.R. (Ser. C) No. 4 (July 29, 1988), *available at* http://www1.umn.edu/humanrts/iachr/b_11_12d.htm.

[159] Barrios Altos Case, Inter-Am. C.H.R. (Ser. C) No. 83 (Sept. 3, 2001), *available at* http://www1.umn.edu/humanrts/iachr/C/83-ing.html.

[160] Mendoza v. Uruguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14 at 154 (1993), *available at* http://www1.umn.edu/humanrts/cases/29-92-URUGUAY.htm.

[161] *See supra* notes 155-60 and accompanying text (citing the relevant cases).

[162] *See Velasquez Rodriguez Case,* Inter-Am. C.H.R. (Ser. C) No. 4 (*Velasquez Rodriguez* did not deal directly with amnesty, but did discuss a duty to prosecute emanating from the American Convention).

[163] American Convention, *supra* note 147, arts. 1, 8, 25.

[164] *See supra* notes 155-60 and accompanying text (citing the relevant cases).

[165] *See infra* note 233.

[166] Or suggests a crystallizing norm.

[167] *See* African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereafter African Charter]. Uganda signed the African Charter on August 18, 1986. *See* List of Countries Who Have Signed, Ratified/Adhered to the African Charter on Human and Peoples' Rights (as of Jan. 7, 2005), http://www1.umn.edu/humanrts/instree/ratz1afchr.htm (last visited Jan. 11, 2008). The African Charter's history and purpose largely mirrors that of the American Convention. *See* African Commission on Human and People's Rights, History, http://www.achpr.org/english/_info/history_en.html (last visited Jan. 11, 2008); *see also* Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN. ST. L. REV. 679, 681 (2004) (noting that the African Charter was created by the Organization of African Unity ("OAU") — now the African Union ("AU") — and that it is the "central document in the African human rights system."). Unlike the "American system," the African system's court — the African Human Rights Court — is not yet operational. *Id.* at 685. Thus, the system relies on investigations and reports published by the African Commission on Human and Peoples'

The relevant articles of the American Convention for this analysis are Articles 1, 8, and 25. First, Article 1 sets out the "general obligation to respect rights."[168] In some cases, the IACtHR has intimated that this article simply informs the rest of the articles in the Convention.[169] In other cases, the Court has actually based its decisions on the obligations stated in Article 1.1, and the idea that the "obligations" actually create substantive rights.[170]

Second, Article 8 of the Convention protects the "[r]ight to a fair trial," and Article 8.1 states that:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.[171]

Despite appearing to protect the accused, the IACtHR has interpreted this article as creating rights in the victim, and has focused on that right in requiring prosecution of human rights violations.[172]

Lastly, Article 25, the "Right to judicial protection," states that:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.[173]

Article 25 appears to protect the rights of victims to adjudicate their cases, yet the Court has interpreted this Article as providing the procedure to

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Rights, which functions much like the American Commission. *Id.* at 682-83. For a more detailed history, see *id.* at 685-97.

[168] American Convention, *supra* note 147, art. 1.

[169] *See Velasquez Rodriguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 at ¶ 166; *Mendoza*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14 at ¶ 50.

[170] *See Hermosilla*, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L/V/II.95, doc.7 rev. at 156 at ¶ 50; *Romero and Galdamez*, Case 11.481, Inter-Am. C.H.R., Report No. 37/00, OEA/Ser.L/V/II.106, doc. 3 rev. at 671 at ¶ 74.

[171] American Convention, *supra* note 147, art. 8.1.

[172] *See supra* notes 155-60 (discussed in more depth below). Article 7 of the African Charter appears to invite a similar interpretation. *See* African Charter, *supra* note 167, art. 7. Yet this similarity could also lead to the conclusion that it is similarly susceptible to an IACtHR-like construction.

[173] American Convention, *supra* note 147, art. 25.1.

back the substance of Article 8.[174] This fact lends support to a strong analogy between Article 8 of the American Convention and Article 7 of the African Charter, as demonstrated below.[175]

Similar to Article 8 of the American Convention, Article 7 of the African Charter states, in pertinent part, "Every individual shall have the right to have his cause heard."[176] Read in isolation, this sentence is at least as strong — regarding a right in the victim to try his/her case before a court — as Article 8.1 of the American Convention.[177]

Additionally, if all Article 25 of the American Convention does is call for proper judicial mechanisms to ensure effective adjudication of disputes under the American Convention, then one can draw an analogy to Article 26 of the African Charter. Article 26 of the Charter states: "States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."[178] Article 26 of the Charter seems to do on its face what the IACtHR has interpreted Article 25 of the American Convention to do — provide the procedure to protect the right of the victim to try his/her case before a court.[179]

Thus, by way of comparing the particular articles of the two documents — analogizing the IACtHR's construction of Articles 8 and 25 of the American Convention to Articles 7 and 26 of the African Charter, respectively — this part of the article has laid a foundation for applying the IACtHR's jurisprudence to Uganda and the African human rights system.[180]

C. The IACtHR Jurisprudence

It is important to recall that, under Article 38(1)(d) of the ICJ Statute, judicial decisions may be considered to constitute international law.[181] While this may be a minority view,[182] the text of the ICJ Statute certainly

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[174] *See supra* notes 155-70.

[175] *See infra* note 178.

[176] African Charter, *supra* note 167, art. 7.1.

[177] American Convention, *supra* note 147, art. 8.1 ("Everyone has the right to a hearing."). The further one reads Article 8, the less it appears to be about protecting the right of a victim to adjudicate a case against the perpetrator. The same is true of Article 7 of the African Charter. Yet, when read in isolation, each provision appears at least reasonably susceptible to an interpretation granting a victim the right to try his/her defendant for the crime committed.

[178] African Charter, *supra* note 167, art. 26.

[179] *See* American Convention, *supra* note 147, art. 25.1 and accompanying text.

[180] This analogy is necessary because, as of yet, the African human rights system has not established a functioning court to adjudicate its own cases.

[181] *See*, Statute of the ICJ, *supra* note 137, art. 38(1)(d); *see also supra* note 145.

[182] *See, e.g.*, Cryer, *supra* note 145, at 247 ("Cases are useful repositories of practice, and

supports the notion that judicial decisions may constitute international law,[183] and numerous scholars agree.[184] Further, if international law prohibits amnesty for violations thereof, one must consider this prohibition in construing the "interests of justice" provision in Article 53 of the Rome Statute,[185] per the instruction of Article 32 of the VCLT.[186]

D. Article 8.1 in Conjunction with Article 25.1, Read in Light of Article 1.1: Prohibiting Amnesty Laws for Violations of Rights Protected Under the Convention

As discussed above, the IACtHR has tended to rely on some combination of Articles 1, 8, and 25 in striking down or denying the applicability of amnesty laws for human rights violations.[187] For this section, this article will discuss decisions of the IACtHR *ad hoc*, within the larger framework of analysis the Court used, and how the Court developed that framework.[188]

"Article 46(1)(a) of the [American] Convention [on Human Rights] speaks of 'generally recognized principles of international law.' Those principles refer not only to the formal existence of [adequate] remedies [for victims of human rights violations], but also to their adequacy and effectiveness...."[189] This text, from the IACtHR's *Velasquez Rodriguez* decision, laid the groundwork for much of the Court's jurisprudence regarding the question of domestically enacted amnesty laws that sheltered human rights violators.[190] Though *Velasquez* did not deal directly with an amnesty law,[191] the young Court gave a distinctive voice to the nature of its

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the views taken on them by international judges are entitled to respect. However, the two are and ought to be separable.").

[183] Statute of the ICJ, *supra* note 137, art. 38(1)(d).

[184] *See supra* note 145. For an interesting account as to *why* this has been a minority view, *see* Ian Brownlie, THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE 50TH ANNIVERSARY OF THE UNITED NATIONS 33 (1998) (purporting that the "hegemonical approach [sic]" tends to disfavor using decisions of international courts and tribunals to develop international law, because such institutions cannot be dominated by the few, most powerful countries.).

[185] Rome Statute, *supra* note 3, arts. 53(1)(c), 53(2)(c).

[186] Vienna Convention, *supra* note 63, art. 31.

[187] *See supra* notes 155-80 and accompanying text.

[188] While Article 1 is relevant, Articles 8 and 25 are substantively more important, as Article 1 is something of a *chapeau* to the rest of the Convention.

[189] *Velasquez Rodriguez Case*, Inter-Am. C.H.R. (Ser. C) No. 4 at ¶ 62.

[190] *See* Andreas O'Shea, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 65 (2002) (noting that the *Velasquez Rodriguez* case "gave the legal foundation for future challenges [concerning the legality of amnesty laws] before the Inter-American Commission of Human Rights.").

[191] *Id.* *Velasquez Rodriguez* involved the "violent detention" of a Honduran college

founding Convention, and foreshadowed the future failure of amnesty laws that would be challenged in the years to come.[192] Relying on Article 1.1, the Court held in *Velasquez* that Honduras, as a state party to the Convention, had an affirmative duty to "prevent and investigate any violation of rights recognized by the [American Convention]."[193] In its holding in *Velazquez*, the Court did not invoke either Article 8 or Article 25 of the American Convention. Yet the Court set the stage, making it clear that, even if Article 1.1 did not create substantive rights and obligations, at the very least it animated the application of Articles 8 and 25.[194]

Four years after *Velazquez*, in *Mendoza v. Uruguay*,[195] the IACtHR received a petition alleging that an Uruguayan amnesty law[196] violated Articles 8 and 25 of the American Convention, as they related to Article 1.1.[197] The Court proceeded to strike down the Uruguayan amnesty law, insofar as it operated to prevent punishment of human rights violations.[198] However, the Court did not address the petitioners' allegations that Articles 8 and 25 were violated vis-à-vis the Amnesty Law, and held on narrower ground that it was simply applying *Velasquez* and Article 1.1 of the American Convention.[199]

The following year petitioners in Argentina would bring another successful challenge to an amnesty law in *Consuelo v. Argentina*.[200] This

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student by members of the National Office of Investigations and the Armed Forces of Honduras. *Velasquez Rodriguez Case*, Inter-Am. C.H.R., (Ser. C) No. 4 at ¶ 3. Velasquez's case was referred to the Inter-American Commission, which, upon investigation, received resistance to the IACtHR's jurisdiction from the Honduran Government because the Government had not yet exhausted all local remedies. *Id.* at ¶ 5. The Commission was not convinced of this, however, and the case made its way to the Inter-American Court. *Id.* at ¶ 10.

[192] *See* O'Shea, *supra* note 190.

[193] *Velasquez Rodriguez Case*, Inter-Am. C.H.R., (Ser. C) No. 4 at ¶ 166.

[194] Some of the IACtHR's decisions have simply read Article 1.1 as *informative* rather than *substantive*. *See Consuelo*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92, OEA/Serv.L/V/II.83, doc.14 at 41; *Mendoza*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14 at 154.

[195] *Mendoza*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14 at 154.

[196] The challenged law, Amnesty Law (Law N 15,848), held that "any State action to seek punishment of crimes committed prior to March 1, 1985, by military and police personnel for political motives, in the performance of their functions or on orders from commanding officers who served during the *de facto* period, has hereby expired." *Id.* at ¶ 3.

[197] *Id.* at ¶ 10.

[198] *Id.* at ¶ 50.

[199] *Id.* at ¶ 52.

[200] *Consuelo*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92, OEA/Serv.L/V/II.83, doc.14 at ¶¶ 9, 16, 33.

time, however, the Court held the amnesty law was contrary to an individual's right to a fair trial under Articles 8 and 25 of the American Convention.[201] In *Consuelo*, the challenged laws were two-fold. First, "Law 23,492 set a 60-day deadline for terminating all criminal proceedings involving crimes committed as part of the so-called 'dirty war.'"[202] Second, "Presidential Decree of Pardon N 1002, of October 7, 1989... ordered that any proceedings against persons indicted for human rights violations who had not benefited from the earlier laws be discontinued."[203]

Pursuant to petitioners' allegations, the Court held that "[t]he laws and the Decree sought to, and effectively did obstruct the exercise of petitioners' right under Article 8.1...."[204] In so holding, the Court allowed for an interpretation of Article 8.1 that protected "the victims' right to a fair trial."[205] As noted in the discussion of Article 8.1 above, the interpretation appears curious, given the entirety of the language in Article 8.1.[206] However, the Court gave some insight as to its interpretation when it noted that "[i]n a good number of the criminal law systems in Latin America, the victim... has the right to be the party making the charge in a criminal proceeding."[207]

The IACtHR built upon the foundation laid by *Velasquez,*[208] *Mendoza,*[209] and *Consuelo*[210] in the cases that followed. In 1997, for example, a petitioner challenged a Chilean amnesty law in *Hermosilla v. Chile*.[211] The Court in *Hermosilla* called the challenged amnesty law a "violation of the *right to justice*," engendering "consequent impunity."[212] There again the Court held, "[t]he State has the duty to provide effective recourse (Article 25), which must be 'substantiated in accordance with the rules of due legal process (Article 8.1).'"[213]

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[201] *Id.*

[202] *Id.* at ¶ 2.

[203] *Id.* at ¶ 3.

[204] *Id.* at ¶ 37.

[205] *Id.* at ¶ 33.

[206] *See supra* note 171 and accompanying text (stating the entirety of Article 8.1.).

[207] *Consuelo*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92, OEA/Serv.L/V/II.83, doc.14 at ¶ 34.

[208] *Velasquez Rodriguez Case*, Inter-Am. C.H.R., (Ser. C) No. 4.

[209] *Mendoza*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14 at ¶ 54.

[210] *Consuelo*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92, OEA/Serv.L/V/II.83, doc.14 at 41.

[211] *Hermosilla*, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L/V/II.95, doc.7 rev. at 156.

[212] *Id.* at ¶ 59 (emphasis added).

[213] *Id.* at ¶ 63.

As the Court began to hear more and more cases involving challenges to amnesty laws, it clarified its doctrine significantly. In *Romero v. El Salvador*, the Court stated plainly that "[t]he Commission has indicated repeatedly that the application of amnesty laws that impede access to justice in cases of serious human rights violations renders ineffective the obligation of the States parties to the American Convention to respect the rights and freedoms recognized therein."[214] As such, state parties are required to provide adequate judicial remedies for all parties involved in a transaction or occurrence involving the violation of human rights. Moreover:

> Such remedies must be substantiated in accordance with the rules of due process of law (Article 8.1), all within the general obligation of the States Parties to guarantee the free and full exercise of the rights recognized to vest in all persons under the jurisdiction of said states (Article 1.1). In addition, the Court has said that Article 25.1 of the American Convention incorporates the principle of the effectiveness or efficacy of the procedural means or instruments aimed at guaranteeing the rights protected therein. By virtue of this, the non-existence of effective domestic remedies leaves victims of human rights violations defenseless and justifies international protection.[215]

The amnesty law challenged in *Romero*[216] was a blanket amnesty offered for crimes committed by El Salvadoran death squads prior to the signing of the UN Peace Accords in 1993.[217] The Peace Accords established a Truth Commission to investigate crimes committed during the decades of violence that enveloped El Salvador in a "fratricidal conflict."[218] Following publication of the Truth Commission's report, El Salvador adopted the General Amnesty Law, which was allegedly "aimed at ensuring the existence of a democratic state at peace as the only way to preserve human rights."[219] The IACtHR, however, was not sympathetic to the aims of the new El Salvadoran government, and interpreted its actions as merely fostering an environment of impunity.[220]

As the IACtHR has aged, its position on the amnesty issue has not receded. Rather, the IACtHR's jurisprudence on this issue has become more concrete and potentially more expansive. The Court demonstrated this in the

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214 *Romero and Galdamez*, Case 11.481, Inter-Am. C.H.R., Report No. 37/00, OEA/Ser.L/V/II.106, doc. 3 rev. at 671 at ¶ 126.
215 *Id.* at ¶ 74 (internal citations omitted).
216 *Id.* at ¶ 126.
217 *Id.* at ¶¶ 16, 20.
218 *Id.* at ¶ 20.
219 *Id.*
220 *See, e.g.*, *id.* at ¶ 98.

landmark *Barrios Altos Case*, involving the prosecution of those responsible for the Barrios Altos massacre in Lima, Peru,[221] and *Parada Cea v. El Salvador*,[222] a case involving the El Salvadoran civil war.

V. THE IACTHR, INTERNATIONAL LAW, AND CONCLUDING THOUGHTS

Considering the IACtHR's jurisprudence, in addition to that of the Special Court of Sierra Leone,[223] the International Criminal Tribunal for the Former Yugoslavia,[224] the Supreme Court of Mexico,[225] and the Supreme Court of Argentina,[226] what can one conclude regarding Article 53 of the Rome Statute? If these international judicial decisions create an international norm which nullifies domestic amnesty laws protecting violators of human rights, Article 53 should bar the Prosecutor from considering the value of amnesty as it relates to the "interests of justice."

There is no question about the certainty of the IACtHR's jurisprudence on the issue of amnesty laws and violations of human rights.[227] However, there is some question regarding the actual role of judicial decisions in creating international law. As the ICJ Statute notes, judicial decisions are to

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[221] *Barrios Altos Case*, Inter-Am. Ct. H.R. (Ser. C) No. 83. The gravity of the decision to deny amnesty to the perpetrators is reflected in the following passage of concurring Justice Trindado:

> These considerations of the Inter-American Court constitute a new and great qualitative step forward in its case-law, to the effect of seeking to overcome an obstacle which the international organs of supervision of human rights have not yet succeeded to surpass: the impunity, with the resulting erosion of the confidence of the population in public institutions. Moreover, they meet an expectation which in our days is truly universal. It may be recalled, in this respect, that the main document adopted by the II World Conference of Human Rights (1993) urged the States to 'abrogate legislation leading to impunity for those responsible for grave violations of human rights . . .and prosecute such violations . . .

Id. at ¶ 4 (Trindado, J., concurring).

[222] *Parada Cea*, Case 10.480, Inter-Am. C.H.R., Report No. 1/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 7 rev. at 531. *Parada Cea* is notable because the Court invoked *norms* of international law in its decision, due to the international knowledge of the El Salvadoran conflict. *Id.* at ¶ 65 ("Now, given that it was a known fact, both nationally and internationally, that at the time of the events in question [1989] El Salvador was engaged in an internal armed conflict, in addition to the rules of the American Convention, the rules of international humanitarian law . . . are also applicable.").

[223] *See infra* note 233.

[224] *See infra* note 233.

[225] *See infra* note 233.

[226] *See infra* note 233.

[227] *See supra* notes 190-223 and accompanying text.

be considered a "subsidiary means,"[228] and some commentators have interpreted this to indicate that judicial decisions are evidence of law, but not creative of it.[229] Yet some scholars have disputed this position.[230] Thus, the impact of the IACtHR's decisions on international law generally — as opposed to on parties to the American Convention — is debatable. However, with essentially one exception,[231] the domestic, regional, and international courts that have adjudicated this issue have concluded that governments may not grant amnesty for international crimes.

Additionally, nobody can deny that the text of the ICJ Statute and the consistency, breadth, and clarity of the IACtHR's jurisprudence on amnesty are evidence of a crystallizing norm of international law prohibiting amnesty agreements protecting those who violate human rights.[232] This emerging international norm indicates that domestic amnesty laws protecting violators of human rights are *ipso facto* illegal.[233]

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[228] Statute of the ICJ, *supra* note 137, art. 38(1)(d).

[229] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW IN THE UNITED STATES §§ 102(1), 102 reporters' note 1, 103(2), 103 cmt. a (1987); Charles H. Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT'L L. 347, 357 n.57 (2006) ("Properly understood, [subsidiary means] designates judicial decisions and teachings as evidence of international law, but not an independent source of international law."); *cf.* Brent Wible, *"De-Jeopardizing Justice": Domestic Prosecutions for International Crimes and the Need for Transnational Convergence*, 31 DENV. J. INT'L L. & POL'Y 265, 268 n.16 (2002) (stating that, while ICJ decision are not necessarily binding precedent, "decisions of international tribunals adjudicating questions of international law are persuasive evidence of what the law is.").

[230] *See* Mark Toufayan, *The World Court's Distress When Facing Genocide: A Critical Commentary on the Application of the Genocide Convention Case (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 40 TEX. INT'L L.J. 233, 252 n.104 (2005) ("It may be argued, however, that the Court [of International Justice] is playing an important, more general law-determination function. . . ."); Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUM. J. TRANSNAT'L L. 35, 47 (2003) (noting that Article 38(1)(d) could be interpreted as noting the "law-determining" authority of international tribunals."); *see also* Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 18-23 (6th ed. 2003); Michael Byers, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 122 (1999) (both discussing the role of judicial decisions in "crystallizing" international law.); Filartiga v. Pena-Irala, 577 F. Supp. 860, 884 (E.D.N.Y. 1984) (appearing to place judicial opinions on equal footing with state practice in deriving international law).

[231] That being the South African Supreme Court. *See infra* note 233.

[232] *See infra* note 233 and accompanying text. Similarly, as early as 1950, "the International Law Commission included *the decisions of international and national courts* . . . as examples of the various forms of State practice." Byers, *supra* note 230, at135 (emphasis added).

[233] As noted, this position is stronger in light of the decisions of other courts. *See* Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72E, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, ¶ 34 (March 13, 2004) (the Appeals Chamber of the SCSL holding that "[a]ny amnesty that encompasses crimes against humanity, serious war crimes, genocide

This article has explored various potential constructions of the "interests of justice provision" of Article 53 of the Rome Statute as it applies to the situation in Northern Uganda, and whether the provision would permit the Prosecutor of the ICC to defer prosecution of LRA leaders on the basis of Uganda's amnesty law. It has considered the usage of the word "justice" in other articles of the Statute, the Article 53 provision in the context of Article 17 of the Statute, which potentially obstructs the ICC from exercising jurisdiction, and the purposive jurisprudence of the Inter-American Court of Human Rights on the amnesty issue. Similarly, this article has acknowledged that other courts and international tribunals have considered the amnesty issue and have rejected the position that amnesty for violation of international human rights law is tenable.

The signatories to the Rome Statute of the International Criminal Court plainly conceived it to combat impunity, and the Preamble, as well as numerous other usages of the word "justice" in the Statute make this clear. Moreover, Article 17, which is the most definitive article concerning instances in which the ICC may not reach the acts of a violating state party, requires genuine investigation and/or genuine prosecution. While it is not clear whether a ceremony such as mato oput would satisfy these requirements, and scholarship is split on the general issue, one thing is clear: amnesty and truth commissions receive no specific mention in the Rome Statute.

Lastly, the IACtHR has made it clear that, at least with respect to signatories of the American Convention, amnesty that shields human rights violators is unacceptable. One would be hard-pressed to argue that, especially within the region of the Americas, amnesty in such instances is

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or torture would be of doubtful validity under international law," and thereby striking down the Lome Agreement which granted amnesty to all those involved in the conflict.); Ricardo Miguel Cavallo, Procede el Amparo en Revision [Decision on the Extradition of Ricardo Miguel Cavallo], Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], (Junio de 2003), Tesis P./J. 140/2002 (Mex.), *excerpts translated in* 42 I.L.M. 888 (2003) (holding that Argentina's amnesty laws were not applicable in Mexico) (interpreted as "creating an environment against impunity," in Luis Benavides, *Introductory Note to Supreme Court of Mexico: Decision on the Extradition of Ricardo Miguel Cavallo*, 42 I.L.M. 884, 889 (2003)); Resolución del Juez Federal Gabriel R. Cavallo declarando la inconstitucionalidad y la nulidad insanable de los arts. 1 de la Ley de Punto Final y 1, 3 y 4 de la Ley de Obediencia Debida. III (2001) (holding that Mexican amnesty laws were incongruous with international obligations), *in conjunction with* Simon, ulio Hector y otros s/privacion illegitima de la libertad, Supreme Court causa No. 17.768, (14 June 2005) S.1767.XXXVIIII (Supreme Court of Argentina upholding the "Cavallo decision"); Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 153-57 (Dec. 10, 1998) (indicating that the *jus cogens* nature of torture creates an obligation to prosecute those who have committed torture). *But see Azanian People's Organization v. President of the Republic of South Africa* 1996 (8) BCLR 1015 (CCT),(S. Africa), *available at* http://www.saflii.org/za/cases/ZACC/1996/16.html (holding South Africa's amnesty laws constitutional).

permissible. Similarly, by way of analogy to the African Charter, this paper has argued that the IACtHR's jurisprudence could be reasonably imported into the African human rights system.

Whether or not international jurisprudence can create customary international law is not clear. However, international jurisprudence receives specific mention in Article 38(1)(d) of the ICJ Statute — which is generally accepted as the definitive codification of what constitutes international law — despite being called a "subsidiary means" of determination. Numerous scholars have argued that international court decisions are on equal footing with other formative conduct, and at least where international jurisprudence is virtually unanimous, international court decisions are no longer "subsidiary."

To be sure, the question of whether Ugandan amnesty laws could reasonably thwart ICC prosecution is not clear. However, the ICC has expressed no willingness to accede to the LRA's demands for amnesty. Moreover, the ICC's investigation has been helpful in steering this conflict toward a peaceful conclusion. If in fact, in its first case, the ICC chose to defer to the Ugandan rebels and forgo prosecution, such decision would be erroneous and potentially contrary to both the Rome Statute of the ICC, the Vienna Convention on the Law of Treaties, and the general corpus of international law.