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 — participating states waged great debate over domestic amnesty agreements and their role in the era of the new International Criminal Court. The treaty that resulted from these negotiations, the Rome Statute of the International Criminal Court (“the Statute”), does not mention amnesty, however, and the state parties have not resolved the issue despite it being one fraught with contention.

Due in large part to the increasing relevancy of the amnesty issue,
speculation has mounted that the role of domestic amnesty was somehow imbedded in a curiously ambiguous provision of Article 53 of the Statute.\footnote{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.\footnote{8} The provision’s ambiguity is arguably intentional,\footnote{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.\footnote{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.\footnote{11} The question remains: can one interpret Article 53 in good faith


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”).

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. When former leader Idi Amin’s reign...
of terror ended with exile in 1979. 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. Museveni and the NRA’s campaign encountered its main resistance in the north, where Acholi leader Alice Lakwena, founder and leader of the Holy Spirit Movement (“HSM”), fought against the NRA’s abusive tactics. 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. 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. Such tactics have arguably been helpful in turning Kony’s forces, made up largely of abducted children, into loyal “zombie fighters.” While the LRA

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16 See Uprooted and Forgotten, supra note 13, at 8.
18 See Uprooted and Forgotten, supra note 13, at 8.
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{24} Mato oput, practiced within the local Acholi tribe, is a traditional reconciliation ceremony.\textsuperscript{25} Following the ceremony, the village welcomes back the repentant.\textsuperscript{26} Such rituals have been “used to reintegrate former LRA soldiers, despite their awful acts,”\textsuperscript{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.\textsuperscript{28} Under the Amnesty Act “approximately 14,000 soldiers had fled the LRA and several other rebel groups to seek amnesty.”\textsuperscript{29} However, despite the large number of surrenders, the fighting has continued and the LRA

\begin{itemize}
\item \textsuperscript{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.”).
\item \textsuperscript{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). When 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/BrockUtneTradvConfResolution.pdf (last visited Jan. 11, 2008).
\item \textsuperscript{25} See McLaughlin, supra note 21.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{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.
\item \textsuperscript{29} Blumenson, supra note 7, at 808.
\end{itemize}
leadership remains at large.\textsuperscript{30}

In 2002, Uganda and Sudan signed an agreement aimed at containing the LRA,\textsuperscript{31} and peace talks between the Ugandan government and the rebels began in earnest in 2004.\textsuperscript{32} These talks, however, never produced a peace deal and the fighting that had abated in November 2004 began anew in January 2005.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{36} The Juba talks led to a historic cease-fire between the rebels and the government, which the parties signed on August 28, 2006.\textsuperscript{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.\textsuperscript{38}

\textsuperscript{30} See id.
\textsuperscript{32} See Uprooted and Forgotten, supra note 13, at 15.
\textsuperscript{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).
\textsuperscript{35} Id.
\textsuperscript{36} Id.
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. 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. Prosecutor Ocampo’s investigation led to the issuance of arrest warrants for five senior LRA leaders.

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


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


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: “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.”

President Museveni’s current position is two-fold: the arrest warrants should stay, but amnesty is still on the table. Museveni, as the one who referred the LRA case to the ICC in the first place, 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.”

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. 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
capability to continue to draw out the war.\textsuperscript{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\textsuperscript{59} will hold.\textsuperscript{60} Regardless of what happens, the progression of the ICC’s investigation only increases the importance of resolving the amnesty issue.\textsuperscript{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,\textsuperscript{62} and as such, the definitive text on treaty interpretation — Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”)\textsuperscript{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,”\textsuperscript{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.”\textsuperscript{65} Thus, the interpretive process involves three steps. First, one must define the “ordinary meaning”

\textsuperscript{58} See id.

\textsuperscript{59} See supra note 38 and accompanying text.

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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. . . .”).

\textsuperscript{64} See Jiménez de Aréchaga, supra note 63.

\textsuperscript{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 dictionary68 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

66 Id.
67 See Vienna Convention, supra note 63, arts. 31(1), (2) (indicating that context shall mean, inter alia, the “text”).
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).\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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\textsuperscript{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.\textsuperscript{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,

\textsuperscript{77} See id. arts. 17(2)(c), 20(3)(b).
\textsuperscript{78} See supra note 76.
\textsuperscript{79} Rome Statute, supra note 3, art. 65(4). Article 65 is titled “Proceedings on an admission of guilt.” \textit{id.}
\textsuperscript{80} More on this infra.
\textsuperscript{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...

Resolved to guarantee lasting respect for and the enforcement of international justice....

The Preamble articulates the primary purpose of the ICC: to end impunity and to bring those responsible for atrocities "to justice." 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/fm (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

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-
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
visited Jan. 11, 2008); Villa-Vicencio, supra note 6.
ought to be construed to include amnesty. 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.” 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. 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? The most relevant provision in this respect — and to which we will now turn our attention — is Article 17, governing complementarity. Article 17 states that the Court shall determine a case “inadmissible” — i.e. the Court will not investigate — if, \textit{inter alia}, “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution....” Article 17 represents a compromise between the state parties to the statute and the ICC itself,
leaving jurisdiction implicitly in the hands of the States unless they are unwilling or unable to prosecute.\textsuperscript{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,”\textsuperscript{99} answers this inquiry, in part.

Presuming that amnesty is granted in good faith,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.”).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{102} See Rome Statute, supra note 3, art. 17(1)(a), (b).

\textsuperscript{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)).
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.” 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, “because the presence of the accused in a neighboring state [Sudan] prevents Uganda from taking them into custody.”

Some scholars have determined that, given that the purpose of the Statute is to eliminate international impunity, the complementarity principle ought to be construed as restrictive, requiring genuine prosecutions (as opposed to simply investigations) of persons accused of international crimes in order to contravene ICC jurisdiction. In that way, the ICC would “function... in a way that is complementary to the administration of criminal justice by nation states.” As such, “[t]he concept of impunity relates closely to the complementarity underlying the jurisdiction of the ICC.” 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.” The argument that blanket amnesties, without more, do not prevent the ICC from exercising jurisdiction under Article 17 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.


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 commission114 ("TRC") — or some derivation thereof115 — 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

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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.”).


120 See Dugard, supra note 114.

121 See supra note 120.

“genuine” investigation, 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. 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. 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.

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, coexisted with criminal prosecutions, or been deemed insufficient by the TRC itself.

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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 Angermair, 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” of the Rome Statute, as articulated in the Statute’s Preamble. 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.

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,” leaving a “doorway” 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.”

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.

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

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


¹⁴⁰ Id.


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 construing amnesty for international crimes as violative of international law, recognizes a crystallizing norm reflecting the illegality of amnesty agreements.1

A. Brief IACHR History

In 1948, the Organization of American States adopted the American Declaration of the Rights and Duties of Man in Bogotá, Columbia. The adoption of the American Declaration marked the birth of the Inter-American human rights system. 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

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.”).


149 Id.
adopted. The Convention entered into force in 1978, and created the Inter-American Court of Human Rights. As of today, twenty-five countries have ratified the Convention, and twenty-one countries are subject to the Court’s jurisdiction.

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.” 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, Chile, El Salvador, Honduras, etc.
Peru,\textsuperscript{159} and Uruguay,\textsuperscript{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.\textsuperscript{161} With relatively few exceptions,\textsuperscript{162} the IACtHR has relied on Articles 1, 8, and 25 of the Convention\textsuperscript{163} in striking down the amnesty laws.\textsuperscript{164}

The notion that the IACtHR jurisprudence outlawing amnesty for international crimes — coupled with decisions from various other courts and tribunals\textsuperscript{165} — constitutes international law\textsuperscript{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.\textsuperscript{167}

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

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


\textsuperscript{161} See supra notes 155-60 and accompanying text (citing the relevant cases).

\textsuperscript{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).

\textsuperscript{163} American Convention, supra note 147, arts. 1, 8, 25.

\textsuperscript{164} See supra notes 155-60 and accompanying text (citing the relevant cases).

\textsuperscript{165} See infra note 233.

\textsuperscript{166} Or suggests a crystallizing norm.

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.” In some cases, the IACtHR has intimated that this article simply informs the rest of the articles in the Convention. In other cases, the Court has actually based its decisions on the obligations stated in Article 1, and the idea that the “obligations” actually create substantive rights.

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.

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.

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.

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.


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. 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.

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 case heard.” 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.

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.” 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.

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.

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. While this may be a minority view, 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.
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, and numerous scholars agree. 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, per the instruction of Article 32 of the VCLT.

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. 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.

“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....” 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. Though Velasquez did not deal directly with an amnesty law, the young Court gave a distinctive voice to the nature of its 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.
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. 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].” In its holding in Velasquez,
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.

Four years after Velasquez, in Mendoza v. Uruguay, the IACtHR
received a petition alleging that an Uruguayan amnesty law violated
Articles 8 and 25 of the American Convention, as they related to Article
1.1. The Court proceeded to strike down the Uruguayan amnesty law,
insofar as it operated to prevent punishment of human rights violations.
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.

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

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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,
195 Mendoza, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375,
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 Consuelo210 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.).
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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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

\(^{221}\) *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,” and some commentators have interpreted this to indicate that judicial decisions are evidence of law, but not creative of it. Yet some scholars have disputed this position. 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. This emerging international norm indicates that domestic amnesty laws protecting violators of human rights are ipso facto illegal.

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


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 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 ilegitima de la libertad, Supreme Court causa No. 17.768, (14 June 2005) S.1767.XXXVIII (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.