The Customary International Law Duty To Prosecute Crimes Against Humanity: A New Framework

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Within its assumed analytical framework, contemporary scholarship cannot assert plausibly that customary international law imposes a duty on states to prosecute crimes against humanity. Amnesties are necessarily inconsistent with a duty to prosecute, and the sheer glut of state practice granting amnesties in times of crisis to perpetrators of these crimes is seen to prevent the duty to prosecute from arising. Although scholars recognize the normative shortcomings of this conclusion, this is the position the present analytical framework requires. A new framework alters the outcome. This Article transplants the derogation provisions of international human rights law into customary international law, retrospectively analyzing the six well-known amnesties. If the amnesty in question was granted at a "time of public emergency" as defined in the human rights instruments, it should properly be seen as derogation from the putative duty to prosecute rather than state practice contradicting the assertion of that duty. This new analytical framework diverts the bulk of state practice seen by scholars to be contrary to the duty to prosecute into a separate category constituting an exception from that duty. Combined with new evidence in support of the duty, it is now plausible to assert that customary international law imposes on states a duty to prosecute crimes against humanity from which a small derogation exception is carved.

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I. INTRODUCTION

Robert H. Jackson's opening statement at Nuremberg leaves the necessity of prosecuting war's monsters in no doubt. He compels us to believe that justice *must* be done:

> In the prisoners' dock sit twenty-odd broken men. . . . Merely as individuals, their fate is of little consequence to the world.
>
> What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust. [We will show them to be] living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power. . . . Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive.[1]

Not every conflict ends as decisively as World War II. That Nuremberg ideal—a United States Supreme Court justice reborn as a war crimes prosecutor lecturing a vanquished enemy in the dock—is often out of reach. South Africa is the perfect example. Though the apartheid regime differed in many ways from Hitler's Germany, those traits to which Jackson referred—the racial hatred, the violence, the cruelty and arrogance of power—were unmistakably present. Assassination, detention, and torture were the tools of the state. But as apartheid fell, the negotiators of the new South Africa disobeyed Jackson's command: they compromised. They had to. A powerful military regime stood

1. Robert H. Jackson, Chief of Counsel for the United States, *Opening Statement Before the International Military Tribunal (Nov. 21, 1945)*, *reprinted in* ROBERT H. JACKSON, THE NÜRNBERG CASE 31-32 (1947).

unconquered, and given the specter of violence hanging over the proceedings, the liberating elites' choice to compromise seems prudent. But however one looks back on that bargained miracle, justice lost out to peace, stability, and change.

Every transitional society faces these competing interests, and the choices leaders make in times of emergency inevitably face political, sociological, and anthropological examination. But customary international law—or more precisely, customary international legal scholarship—has not come to terms with the possibility that the values at stake in decision-making during such times of public emergency may differ from those in play in times of stability. Current scholarship is suffering under the constraints of unwarranted, self-imposed rigidity. This has caused contemporary descriptive analyses of customary law to misrepresent its actual state. My claim is rooted in a particular offense—crimes against humanity—and a particular question—whether there is a customary international law duty to prosecute these crimes. At present, academic and judicial descriptions of the existence or nonexistence of this duty proceed from a shared assumption: customary international law prescribes a single rule—either there is a duty to prosecute crimes against humanity in all cases, or there is not. This analytical starting point necessitates a zero-sum inquiry. There is no room for nuance.

This zero-sum framework splits international scholarship on this question into two camps. On one hand, the idealists, those who argue that there is a universal duty to prosecute crimes against humanity, are driven by a normatively convincing vision of an international rule of law; their logic of ending impunity is immaculate. But in most cases their descriptive argument is driven more by philosophical conviction than evidence. Witness the archidealist M. Cherif Bassiouni's invocation of a Talmudic commentary: "If justice is realized, truth is vindicated and peace results"; the Prophet Mohammed: "If you see a wrong you must right it"; and Pope Paul VI: "If you want peace, work for justice," to justify his position that prosecution is mandatory in all cases.[2] On the other hand, the realist position denies the existence of a customary duty. It is rooted in hard evidence: state practice. Realists emphasize the sheer number of amnesties granted by states over the past twenty-five years as a means to end conflict. And amnesties are necessarily inconsistent with an all-encompassing duty to prosecute. Given the centrality of state practice to the creation of customary international law, the realists'

2. M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59(4) LAW & CONTEMP. PROBS. 9, 9 (1996).

position is far more credible. Within this shared, zero-sum analytical framework, it cannot be argued convincingly that there is a customary duty to prosecute crimes against humanity.

In fact, this position is normatively reprehensible. The prohibition against crimes against humanity is becoming the most potent weapon of international justice. Firstly, as a customary law crime, its jurisdictional scope extends far beyond that of conventional international law offenses suffering from the evils of nonratification. Secondly, its elements are far easier to prove than the specific intent threshold required for genocide. Thirdly, its protections are not restricted only to circumstances of armed conflict. But without a corresponding obligation that potential crimes against humanity must be investigated, prosecuted, and punished, the substantive prohibition itself and the protections it grants are undermined. This is the argument the idealists have been trying to communicate for so many years. But until now, they have failed to convert this philosophical outlook into a plausible description of international law. In retrospect, it seems that this failure has been a function of the idealists' own ambition: their position is wedded to the idea that to be morally worthy, a duty to prosecute crimes against humanity must apply in all cases and situations. This ambition pushed them to adopt the analytical framework used by the realists: customary international law prescribes a single rule.

A different analytical framework reveals a different outcome. The analysis below transplants the derogation provisions of international human rights instruments into customary international law, creating a binary rather than unitary framework. All of the norm-creating materials which determine whether a duty to prosecute exists are thereby split into two categories: times of stability and times of public emergency. In current legal scholarship within the zero-sum framework, every grant of amnesty reinforces the realist position. It is not plausible to assert that a duty to prosecute exists in the face of such a glut of amnesties. But within the new binary framework, the necessary prior question is whether or not the amnesty was granted during a time of public emergency threatening the life of the nation, as defined by international human rights instruments. If the amnesty was granted during such a public emergency, it no longer constitutes state practice that undermines the putative duty to prosecute, but rather contributes to the formation of an exception to that duty. These amnesties are thus taken out of the pool of state practice which previously prevented the plausible assertion that a customary duty to prosecute exists, therefore strengthening the case for the duty.

Viewed through the lens of this new binary framework, customary international law does impose a duty to prosecute crimes against humanity from which a small public emergency exception allowing derogation is carved. This Article takes no position on whether this is the most morally attractive position nor on the overarching "peace versus justice" debate over the worth or opprobrium of allowing a concession to tyrants in the name of peace. The sole claim is that the descriptive position reached through the application of the binary framework is more defensible than the outcome of present analyses—that there is no duty to prosecute at all.

II. THE STATE OF THE LITERATURE AT PRESENT

A. The Idealist Position

The idealist position holds that customary international law imposes a universal obligation to prosecute crimes against humanity. Unsurprisingly, Nuremberg is its anchor, and the trials are seen as law's final rebuttal of the attitude most powerfully expressed by Hitler in reference to the Armenian Genocide of 1915: "Who, after all, speaks today of the annihilation of the Armenians?"[3] As Diane Orentlicher puts it: "The Nuremberg precedent, as subsequently ratified, reflects the international community's resolve that atrocious crimes carried out as part of a mass campaign of persecution must not go unpunished."[4] For her, the International Criminal Court (ICC) picks up where Nuremberg left off. Never more clearly has this notion of justice been on display than at the opening for signature of the Rome Statute in 1998, when U.N. Secretary General Kofi Annan proclaimed that "[t]he establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."[5] In the idealist position, impunity is a thing of the past.

In terms of legal argument, the idealist position focuses on U.N. General Assembly (General Assembly) resolutions. Orentlicher, the most well known of idealist scholars, invokes the General Assembly's 1973 Principles of Co-operation as the primary legal basis for her argument.[6]

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3. Ronald Grigor Suny, Book Review, 45 SLAVIC REV. 568, 568 (1986) (reviewing KEVORK B. BARDAKJIAN, HITLER AND THE ARMENIAN GENOCIDE (1986)).

4. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2586 (1991).

5. Kofi Annan, United Nations Secretary-General, Statement at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court (July 18, 1998), *available at* http://www.un.org/icc/speeches/718sg.htm.

6. Orentlicher, *supra* note 4, at 2593.

It declares: "War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation[,] and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment."[7] The resolution passed without opposition: not a single state expressed resistance to the declaration that all crimes against humanity must be investigated and subsequently prosecuted.[8]

The Principles of Co-operation is not a unique resolution.[9] But perhaps sensing the paucity of evidence she had put forward, Orentlicher quickly shifts to a policy argument: "Preeminent values underlying the international legal order are best served if a government whose predecessors committed crimes against humanity assumes responsibility for punishment."[10] She is in no doubt of "international law's insistence . . . that crimes against humanity must not escape punishment."[11]

The work of Bassiouni confirms the overlay of policy argument in the idealist position. His arguments appear to rest on two assumptions. First, human evil of the scale of international crimes is partly enabled by lack of external constraint.[12] An international rule of law—including a duty to prosecute—imposes an external constraint, thereby shaping the decisions of potential perpetrators. Second, even when the crime has been committed—where the socializing constraints have broken down—proper punishment is necessary to secure lasting peace.[13] For him, the short term peace that may be gained through negotiated compromise with evil will never last. "Justice, justice, shalt thou pursue."[14]

Bassiouni's legal base is partially similar to Orentlicher's in his reliance on General Assembly resolutions. But he supplements these with other arguments. Much of his work has been devoted to the development of *aut dedere aut judicare* (the duty to extradite or

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7. Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, G.A. Res. 3074, 28 U.N. GAOR Supp., U.N. Doc. A/9030/Add.1 (Dec. 3, 1973), *available at* http://www.unhchr.ch/html/menu3/b/p_extrad.htm.

8. Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty To Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 22 (1996).

9. *See, e.g.*, Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2712, 25 U.N. GAOR Supp., U.N. Doc. A/8028 (Dec. 15, 1970); Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2840, 26, U.N. GAOR Supp., U.N. Doc A/8429 (Dec. 18, 1971).

10. Orentlicher, *supra* note 4, at 2594.

11. *Id.*

12. *See* Bassiouni, *supra* note 2, at 25.

13. *Id.* at 27.

14. *Deuteronomy* 16:20 (Torah).

prosecute) as a principle of international law. For Bassiouni, this principle has assumed customary status in international law and attaches to the commission of crimes against humanity. Furthermore, he sees the duty to prosecute all international crimes, including crimes against humanity, arising from their *jus cogens* nature: "The crimes establish inderogable protections and the mandatory duty to prosecute or to extradite accused perpetrators, and to punish those found guilty."[15] Unfortunately, he fails to back up this assertion, and it is not necessarily the case that something inherent in the concept of *jus cogens* demands prosecution. The idealist position as it stands at the moment is both unconvincing and underdeveloped.

B. The Realist Position

The realist position rejects the idealist's claim that customary international law recognizes a duty to prosecute crimes against humanity. In his 1996 case study of the Haitian amnesty accords, Michael P. Scharf provides a detailed interrogation of this question.[16] It is clear that Scharf's normative sensibilities favor the duty, and he cites U.N. investigations into Chile and El Salvador as evidence that amnesties and/or de facto impunity, far from sustaining a fragile peace, have contributed to increased human rights violations.[17] In addition, he writes that prosecutions establish a legal record of abuse which buffers against revisionist history, that they might go some way to restoring the dignity of victims, and indeed may contribute to a new government's internal and international legitimacy.[18] All in all, Scharf believes in the good that a customary duty of prosecution will bring, but he cannot find enough evidence to reasonably assert its existence.

The major sticking point is the array of state practices granting amnesties. Scharf forcefully puts it thus: "To the extent any state practice in this area is widespread, it is the practice of granting amnesties or de facto impunity to those who commit crimes against humanity."[19] The last three decades have seen extensive use of amnesties as a means to resolve internal conflicts. Particularly within Latin America and Africa, broad amnesty laws, as well as de facto proclamations, have eased postconflict transitions. Indeed, entire books have been written on the

15. Bassiouni, *supra* note 2, at 17.
16. Scharf, *supra* note 8, at 1.
17. *Id.* at 12.
18. *Id.* at 13-15.
19. *Id.* at 36.

amnesty accords of the last three decades.[20] Some amnesties are well known and garner the attention of the international community—events in South Africa, Haiti, Argentina, Chile, and Sierra Leone spring to mind. Others remain under the radar—Guatemala, El Salvador, and Romania—but still contribute to the pervasiveness of state practice. It might be argued that these states are simply continuing a long and distinguished tradition dating back to 1286 BC, when Rameses II is said to have granted amnesty to the Hittites in the aftermath of the battle of Kadesh.[21] The Athenians used it, the Romans granted it, and even article II of the Treaty of Westphalia of 1648 sanctioned it.[22] The granting of amnesties throughout the 1980s and 1990s thus would seem to be nothing new. It is perhaps the key element in negotiating a peaceable end to conflict.

This pervasive state practice effectively undermines the idealist position. For those who argue that a customary duty exists, one response is to classify these amnesties as illegal under international law. Scharf explains that idealist scholars who make this argument find refuge in a famous dictum from the United States Court of Appeals for the Second Circuit decision of *Filártiga v. Peña-Irala*: "States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law."[23] This is an interesting argument, and arguably it applies to the crime of torture. Despite the widespread practices of torture, it is virtually impossible to find a state justifying its actions or arguing that it is not bound by the prohibition against torture. But this line of reasoning is disingenuous when applied to the use of amnesties in crisis states, because none of these states manifests any outward acceptance of the duty.[24] Moreover, in the instances that domestic constitutional courts—courts which by the terms of their constitutional mandate are bound by international law—have had to assess the internal amnesty laws, there is little evidence of acceptance that international law is being violated.[25] These states generally do not believe their actions to be illegal.

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20. ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 35 (2002).

21. *Id.* at 5.

22. *Id.* at 6-8.

23. Filártiga v. Peña-Irala, 630 F.2d 876, 884 (2d Cir. 1980), *quoted in* Scharf, *supra* note 8, at 38.

24. *See* Scharf, *supra* note 8, at 38.

25. *See, e.g.*, AZAPO v. President of the Republic of S. Afr. 1996 (4) SA 562 (CC) (S. Afr.).

In addition, the response of the international community, either state by state or through multilateral fora, indicates its acceptance of amnesties in some situations. In terms of U.N. support, the U.N. Commissioner to the El Salvadorian Commission for Truth, Thomas Buergenthal, offers an interesting window into the U.N. position: "[T]he decision whether to grant amnesty was one for the people of El Salvador."[26] Furthermore, the exiled Haitian president Jean-Bertrand Aristide initially opposed the grant of a broad amnesty as part of the Governors Island Agreement. His final acceptance of the terms, negotiated in part by U.N. appointee Dante Caputo, only came after persuasion from the United Nations.[27] State by state, similar responses abound. The international community met South Africa's Truth and Reconciliation Commission (TRC) process, including its amnesty mechanism, with almost universal appreciation. Indeed, it has gone on to become something of a celebrated model of peaceful transition. The Haitian amnesty was created with powerful support from the United States and the Organization of American States. More generally, a cessation of hostilities is usually welcomed by states, even where gross crimes have been committed. Only in rare cases does widespread condemnation follow a grant of amnesty.

So there is pervasive state practice granting amnesties in times of transition, as well as widespread acceptance by other states and multilateral institutions of this practice. For the realists, this practice is fatal to the idealist cause. As Scharf puts it:

> [N]otwithstanding an array of General Assembly resolutions calling for the prosecution of crimes against humanity and the strong policy and jurisprudential arguments warranting such a rule, the practice of states does not yet support the present existence of an obligation under customary international law to refrain from conferring amnesty for such crimes.[28]

Within his analytical framework he is undoubtedly correct, and his conclusion is well-supported in the literature. John Dugard, for instance, a scholar well respected for his human rights work, argues that although customary international law is evolving to recognize such an obligation,

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26. Thomas Buergenthal, *United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 536 (1994).

27. Scharf, *supra* note 8, at 6; *see also* William W. Burke-White, *Protecting the Minority: A Place for Impunity? An Illustrated Survey of Amnesty Legislation, Its Conformity with International Legal Obligations, and Its Potential as a Tool for Minority-Majority Reconciliation*, J. ETHNOPOLITICS & MINORITY ISSUES IN EUR., Winter 2000, at 14, *available at* http://www.ecmi.de/jemie/download/JEMIE03BurkeWhite30-07-01.pdf.

28. Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation To Prosecute Human Rights Crimes*, 59(4) LAW & CONTEMP. PROBS. 41, 59 (1996).

the norm has not yet crystallized.[29] Jessica Gavron explains that while the rhetoric around the adoption of the ICC focused on ending impunity, state practice with respect to amnesties has not been so stringent.[30] Both of these conflict the authors' ideological positions. Within the present literature, the realist denial of a duty to prosecute seems unassailable.

III. UPDATING THE IDEALIST POSITION

A. Introduction

Major developments have occurred in international justice since Bassiouni and Orentlicher first asserted the existence of a customary duty to prosecute crimes against humanity. Looking for a legal hook on which to hang their policy arguments, they fixated on General Assembly resolutions, declarations once thought of as merely hortatory, but which were slowly taking on a norm-generating character.[31] Still, there was simply insufficient evidence to make a convincing case. Times have changed. It is argued below that their position has been strengthened by four developments in international law: *aut dedere aut judicare*, judicial decisions, the Rome Statute, and the doctrine of command responsibility.

B. Aut Dedere Aut Judicare *as a Customary Law Principle*

Aut dedere aut judicare is a principle of treaty law that requires a state either to extradite or prosecute the suspect of a particular crime. In many cases, its effects are equivalent to a duty to prosecute. For instance, imagine, as Michael J. Kelly does, that a Nazi camp commander, against whom a prima facie case of genocide can be constructed, is found in Tajikistan.[32] Israel asks for extradition and the request is refused. Now Tajikistan has not ratified the Genocide Convention and is thus under no conventional legal obligation to extradite the commander. But, as Kelly explains, if *aut dedere aut judicare* constitutes customary international law with respect to genocide, Tajikistan will be obligated either to extradite or prosecute the suspect.[33] Now imagine that neither Israel nor

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29. John Dugard, *Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?*, 12 LEIDEN J. INT'L L. 1001, 1003 (1999).

30. Jessica Gavron, *Amnesties in Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 INT'L & COMP. L.Q. 91, 106 (2002).

31. *See* Military and Paramilitary Activities (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (June 27) (recognizing a role for the General Assembly in international lawmaking).

32. Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of* Aut Dedere Aut Judicare *into Customary Law & Refusal To Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 496 (2003).

33. *Id.*

any other state requests extradition. Imagine the suspect is a genocidaire from Rwanda, and neither Rwanda nor any other state has any interest in prosecuting him. If *aut dedere aut judicare* has attained customary status for genocide in international law, Tajikistan would be obligated to prosecute the defendant. In many cases, there will not be a state such as Israel with such a powerful interest in prosecuting an offender. In these cases the extradition arm of the principle will not be engaged. Thus, although *aut dedere aut judicare* is rooted in extradition law, often it will perform the same function as the more specific obligation to prosecute international crimes.

Aut dedere aut judicare has a distinguished treaty law history, ranging from the 1970 Hijacking Convention to the 1989 Mercenaries Convention.[34] Although the language occasionally differs, all in all, over seventy international conventions include the principle.[35] It has long been recognized that obligations found in treaty law can distill into custom over time; indeed this process constitutes "one of the recognized methods by which new rules of customary international law may be formed."[36] In looking for a derived customary norm, the scope of the norm must be carefully categorized. On the one hand, there is the idea that the obligation to prosecute or extradite the perpetrator of an offense has become custom with respect to that particular crime. This is termed in the scholarship as the narrow argument for customary status.[37] So it may be argued that article 5 of the Hostages Convention is accompanied by sufficient state practice and *opinio juris* to require all states—even those not party to the treaty—to extradite or prosecute alleged hostage takers. Given the absence of an international convention on crimes against humanity,[38] this argument is of little use in the context of this Article.

The broader argument, on the other hand, posits that the obligation to extradite or prosecute exists in customary international law in general, and attaches to certain categories of crimes. The range of categories, however, is in dispute. Bassiouni asserts that *aut dedere aut judicare* attaches to all international offenses. For him, following his interpretation of Grotius's idea of the common good, every international offence is one against "world public order" and must be punished

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34. M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 3 (1995).

35. *See id.*

36. N. Sea Cont'l Shelf Cases, 1969 I.C.J. 41 (Feb. 20) (requiring a widespread and representative participation); *see* O'SHEA, *supra* note 20, at 216 n.96.

37. BASSIOUNI & WISE, *supra* note 34, at 20; *see also* Kelly, *supra* note 32, at 497.

38. *See* M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 457 (1994).

accordingly.[39] Almost no other scholar—not even his coauthor Edward Wise—joins him in this claim. As Kelly puts it, notwithstanding "natural law notions," it has been widely accepted that there is no customary obligation to extradite or prosecute the perpetrators of all international offences.[40] In any event, such a broad claim is not necessary for the purposes of this Article. All that must be shown is that the obligation to prosecute or extradite attaches to core international crimes, a category which certainly includes crimes against humanity. This restrictive claim is arguably more congruent with the underlying principle of Grotius's idea of the common good: International crimes "threaten the peace, security and well-being of the world."[41]

The customary status of *aut dedere aut judicare* for international crimes has been spurred not only by a heightened post-Cold War appreciation of the horrors of atrocities and the dangers of impunity, but also by the increased fear in much of the Western world of terrorism. Indeed, before 9/11 there was doubt as to whether even international crimes entailed such an obligation. In 1999, Michael Plâchta asserted that the "principle *aut dedere aut judicare* has not gained the status of a norm of international customary law."[42] Writing in 2003, after the terror of 9/11, Kelly shows how the terms of the debate have changed. It is now assumed that core international crimes—termed by him *jus cogens* crimes—give rise to this principle. The debate focuses on whether international terrorism has reached the level of *jus cogens* so as to trigger the obligation. He writes: "However, if the doctrine has only become binding under the more restrictive approach [i.e., only for *jus cogens* crimes], *a much easier argument to accept and currently the most agreed upon*, then the proper question is whether terrorism has entered the *jus cogens* canon?"[43] His assertion that this restrictive ground is widely accepted is echoed in Ian Brownlie's standard text on public international law; the author asserts that war crimes and crimes against humanity give rise to an exception to the orthodox position that extradition cannot be demanded in the absence of a treaty.[44] With respect to these crimes, a state must either extradite or prosecute the offender. Here, Theodore

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39. BASSIOUNI & WISE, *supra* note 34, at 24-25.

40. Kelly, *supra* note 32, at 497.

41. Rome Statute of the International Criminal Court, July 17, 1998, pmbl. U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999, 1004 [hereinafter Rome Statute].

42. Michael Plâchta, Aut Dedere Aut Judicare*: An Overview of Modes of Implementation and Approaches*, 6 MAAS. J. 331, 331 (1999).

43. Kelly, *supra* note 32, at 503 (emphasis added).

44. BASSIOUNI & WISE, *supra* note 34, at 23 (quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 315 (4th ed. 1990)).

Meron's point that the "repetition of certain norms in many human rights instruments is [in] itself an important articulation of state practice" is particularly applicable.[45] Indeed, Naomi Roht-Arriaza terms the obligation to extradite or prosecute the "clearest place where a treaty obligation may have transmuted into customary law."[46] As argued above, the effects of this principle will often be the same as a specific obligation to prosecute crimes against humanity. The idealist's case is therefore strengthened.

C. Decisions of International and National Courts

In his dissent in the *Libyan Arab Jamahiriya v. United States* (*Lockerbie*) decision at the International Court of Justice, Judge Weeramantry asserted that *aut dedere aut judicare* constituted a well-established principle of customary international law. Against the majority, he explicitly supported Bassiouni's contention that this customary status has arisen out of the widespread use of the principle in international conventions.[47] In 2004, the Appeals Chamber of the Special Court for Sierra Leone, referred to the specific obligation to prosecute in the following terms: "Under international law, states are under a duty to prosecute crimes whose prohibition has the status of *jus cogens*."[48] Though the bounds of *jus cogens* are still contested, it is rarely disputed that crimes against humanity fall into this category. Indeed, the following paragraph in the Appeals Chamber's judgment implicitly refers to crimes against humanity, along with genocide, war crimes, and "other serious violations of international humanitarian law."[49] Even though the holdings of the Special Court are confined to the Court's own statutory mandate, its position as a U.N.-created hybrid tribunal give it serious weight in assessing developments in international law.

More compelling evidence of a generalized duty to prosecute international crimes can be found in the jurisprudence of the South African Constitutional Court (Constitutional Court). Recently, the

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45. Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation To Investigate, Prosecute, and Provide Redress*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 41 (Naomi Roht-Arriaza ed., 1995) (quoting THEODORE MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 92 (1989)).

46. *Id.*

47. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), 1992 I.C.J. 114, 160-81 (Apr. 14) (Weeramantry, J., dissenting).

48. Prosecutor v. Gbao, Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Appeals Chamber, SCSL-04-15-PT-141, 25 May 2004, ¶ 10.

49. *Id.*

Constitutional Court explicitly recognized the existence of an obligation to prosecute crimes against humanity. In the high-profile *State v. Wouter Basson* case, the Constitutional Court upheld the State's application for leave to appeal against a decision of the Supreme Court of Appeal partly on the basis that the lower court failed to properly consider South Africa's international obligations in reaching its decision. At the preliminary hearing, Justice Ackermann, joined by the majority of the Constitutional Court, held:

> Moreover, the State's obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force. It is relevant to this enquiry that *international law obliges the State to punish crimes against humanity and war crimes*.[50]

In addition to sustaining the argument of this Part that there is an obligation to prosecute crimes against humanity, this case is useful as a comparison with the *AZAPO v. President of the Republic of South Africa* case in 1995.[51] In that case, the Azanian People's Organization (AZAPO) and family members of high profile apartheid victims, Griffiths Mxenge, Fabian and Florence Riberio, and Steve Biko, argued that South Africa's amnesty was a violation of their right of access to justice under Section 22 of the Interim Constitution.[52] Here was a direct challenge to an amnesty, one negotiated in a time of public emergency. Given that the Interim Constitution directly prescribed a role for international law in adjudication, the Constitutional Court had to examine the extent of South Africa's international obligations.[53] Although aspects of its reasoning were problematic, the Constitutional Court found that no international obligation bound South Africa to prosecute the perpetrators of apartheid era crimes.[54]

Ordinarily, this would be strange behavior from a court generally used to receiving high praise, and some might write it off as sheer inconsistency. But that explanation is not convincing. In the *AZAPO* case, Orentlicher's famous article was put before the Constitutional Court, and it heard argument on this question.[55] It still rejected the claim that international law imposed an obligation on the new South African

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50. The State v. Wouter Basson, 2005 SA 30/03 (CC) ¶ 37 (emphasis added).
51. AZAPO v. President of the Republic of S. Afr. 1996 (4) SA 562 (CC) (S. Afr.).
52. *See* John Dugard, *Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question*, 13 S. AFR. J. ON HUM. RTS. 258, 261 (1997).
53. *Id.*
54. *Id.*
55. *Id.* at 264.

government to prosecute its predecessors.[56] Seven years later in *Basson*, it condemned a lower court for failing to consider this very obligation.[57] The two decisions can be explained by applying the analytical framework suggested in this Article. The *AZAPO* decision concerned the validity of an amnesty negotiated at a time of public emergency. Indeed, the amnesty was a critical part of the transition from apartheid to democracy. Even though the Constitutional Court did not couch its decision in terms of derogation from a general rule, it is clear that the exceptionalism of the transitional context was strong at hand in Mahomed DP's judgment.[58] By the time of the *Basson* case in 2003, the country was not in a state of public emergency, and thus the Constitutional Court correctly recognized the existence of the customary international law obligation to prosecute crimes against humanity.

D. The Rome Statute

The creation of the ICC sustains the argument for the existence of a duty to prosecute crimes against humanity in two ways. Firstly, the complementarity principle in the Rome Statute of the ICC essentially mirrors the function of *aut dedere aut judicare* with respect to municipal jurisdictions. The member state must try the suspected offender or submit him to the jurisdiction of the ICC.[59] As crimes against humanity fall within the ICC's jurisdiction, any prosecutions of this crime, either in The Hague or nationally, essentially constitute affirmation that the member states are under a duty to prosecute. Furthermore, the ratification of the Rome Statute by more than 100 states manifests each state's intention to enact legislation compelling it to punish these crimes domestically or submit the suspect to ICC prosecution.[60] Although not every state is fully compliant as yet, this development is still significant in terms of gathering evidence for the duty. As indictments continue to be issued, the workings of the rule will be clear and its existence confirmed.

Secondly, the preamble to the Rome Statute speaks directly to the duty to prosecute international crimes. Articles 4 through 6 of the preamble read as follows:

> *Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their

56. *Id.*
57. *Id.*; *see Basson*, 2005 SA 30/03A(CC) ¶ 37.
58. *See* AZAPO v. President of the Republic of S. Afr. 1996 (4) SA 562 (CC) (S. Afr.).
59. Rome Statute, *supra* note 41, art. 17(1)(a).
60. *Id.* art. 17(1)(a)-(b).

> effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> *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.[61]

The use of the term "recalling" brings to mind a technique of treaty-making epitomized by the Genocide Convention, which in article 1 provides: "The Contracting Parties *confirm* that genocide . . . is a crime under international law which they undertake to prevent and to punish."[62] This phraseology, whether intentionally or not, enables a smoother passage of the obligation from treaty to custom. However, article 1 of the Genocide Convention is of a different legal character from the preamble to the Rome Statute—the latter does not create legal obligations in and of itself. Some may therefore suggest that too much weight should not be placed on articles 4 through 6. This objection misses the point. Of course, the preamble does not create independent treaty obligations for the parties. This is indisputable. But treaty obligations are not at issue in the present analysis. The question is how the preamble might contribute to the emergence of customary law. Combined with the preamble's introduction, article 6 reads: "State Parties to this Statute . . . [recall] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[63] This is the formulation onto which those 104 states have signed. In terms of evidence of an emerging customary law, this is powerful evidence of broad state support.

E. Command Responsibility

Finally, powerful support for the existence of a customary duty to prosecute crimes against humanity can be found in the international humanitarian law doctrine of command responsibility. Most modern accounts of this doctrine trace it back to the trial, conviction and execution of General Yamashita of Japan before a U.S. Military Commission in the aftermath of World War II.[64] The Court held:

> Nevertheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to

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61. *Id.* pmbl.

62. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (emphasis added).

63. Rome Statute, *supra* note 41, pmbl, art. 6.

64. Andrew D. Mitchell, *Failure To Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381, 388 (2000).

> discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[65]

The phrase "may be held responsible" suggests a permissive standard. But this is a permissive standard for prosecutions of the superior himself. The concern of this section is with the obligation placed on that superior with respect to the actions of his subordinates. Subsequent developments have confirmed that it is mandatory that he punish subordinates who commit international crimes.

The most compelling evidence for this position is the Rome Statute. Either a military or nonmilitary superior may be liable where he or she "failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."[66] Although there have, as yet, been no prosecutions at the ICC under this standard, guidance on the content of the duty can be obtained from the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY statute uses slightly different language in imposing command responsibility, requiring, in addition to other elements, that "the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[67] In the judgment of *Prosecutor v. Kordic & Cerkez*, the Trial Chamber held that the duty to punish "includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself."[68] The obvious corollary of this statement is that in cases where the superior does have the power to sanction, it must be exercised. It should be conceded, however, that the obligation is not stated in absolute terms, and it is hedged by the phrase "necessary and reasonable measures."[69] In *Prosecutor v. Delalic* (*The Celibici Case*), the Trial Chamber addressed this and found:

> [I]nternational law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. . . . [W]e conclude that a

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65. 4 Law Reports of the Trials of War Criminals 1, 35 (1948), *quoted in* Mitchell, *supra* note 64, at 389-90.

66. Rome Statute, *supra* note 41, art. 28(1)(b).

67. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 7(3), May 25, 1993, 32 I.L.M. 1159, 1175 [hereinafter ICTY Statute].

68. Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T ICTY, ¶ 446 (Feb. 26, 2001).

69. *Id.* ¶ 442.

> superior should be held responsible for failing to take such measures that are within his material possibility.[70]

Still, the Trial Chamber made clear that short of impossibility, the commander is under a powerful obligation to punish offenders. Furthermore, this is not confined only to the ICTY statute, but, as confirmed by its inclusion in the Rome Statute arguably constitutes customary international law. As Greg Vetter puts it, the *Celibici* decision is the "best evidence of customary international law for command responsibility."[71] The doctrine recognizes the heinous nature of international crimes and requires their punishment. If commanders are under an obligation to prosecute their soldiers in times of war, there is a good case to be made that the same obligation applies with respect to crimes against humanity committed in times of peace.

IV. A NEW FRAMEWORK

A. Introduction

The idealist case that a duty to prosecute crimes against humanity exists in customary international law is now much stronger. Since the early days of Bassiouni and Orentlicher, developments in international justice—the Rome Statute, *aut dedere aut judicare*, judicial decisions, and the doctrine of command responsibility—have combated the realist objection that this putative customary norm is dependent entirely on the exclamations of the U.N. General Assembly. But the essence of the realist objection remains as valid as ever: states still grant amnesties to the perpetrators of gross crimes. Even with this new evidence, it is still implausible to assert that the duty to prosecute exists. A new analytical framework is needed. The best place to look is human rights law.

The three most widely used and analyzed human rights treaties—the International Convention on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the American Convention on Human Rights (ACHR)—allow states to derogate from the obligations imposed therein. Customary international law is assumed not to contain such a mechanism. This assumed inability of states to derogate from customary norms has powerful implications for the formation of legal rules. When a state derogates from the ICCPR's article 14 trial rights, the derogation confirms the existence of the rule.

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70. Prosecutor v Delalic, Judgment No. IT-96-21-T ICTY, ¶ 395 (Nov. 16, 1998); *see* Mitchell, *supra* note 64, at 410.

71. Mitchell, *supra* note 64, at 400 (quoting Greg Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 YALE J. INT'L L. 89, 111 (2000)).

In treaty law, this is not important, because the existence of the rule is plain in the text of the convention. But in uncodified customary international law, the inability to derogate has radically different implications. When a state acts in a manner contrary to a putative duty, the duty is seen to be undermined. In the context of the duty to prosecute crimes against humanity, every amnesty is thus seen as state practice contradicting the duty. This renders doubtful the existence of the duty itself.

However, there is no reason that the terms of derogation provisions of human rights treaties cannot be transplanted into customary international law. When a grant of amnesty falls within the terms of derogation, this practice is removed from the pool of state practice, which is seen to prevent the duty to prosecute from congealing. Instead, it starts to constitute the bounds of the exception to the duty. Over time, the exact bounds of the derogation exception will change, and thus of course the case law from international human rights will simply be a starting point. Still, human rights law provides a framework which enables the plausible assertion that a duty to prosecute crimes against humanity exists, out of which a small derogation exception is carved.

B. The Thresholds of Derogation

Although each derogation provision of the three human rights conventions is slightly different, the spirit is the same. Given its centrality, article 4.1 of the ICCPR provides a prudent starting point:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[72]

The formulation in the ECHR is slightly different, introducing another head: "In time of *war* or other public emergency."[73] It also fails to include the nondiscrimination requirement. In the ACHR, the nondiscrimination condition is back, and the initial formulation is different: "In time of war, public danger, or other emergency that threatens the inde-

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72. International Covenant on Civil and Political Rights art. 4, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

73. European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* Sept. 3 1953) (emphasis added) [hereinafter ECHR].

pendence or security of a State Party."[74] Clearly the threshold in each case is intended to be high.

In fleshing out the requirements of derogation, the recent House of Lords decision in *A & Others v. Secretary of State for the Home Department* is helpful.[75] Although a background question of judicial institutional capacity and proper role in reviewing national security determinations permeates this case, their Lordships approvingly quoted the European Commission's finding in the *Greek Case* that a public emergency must have four characteristics:

> (1) It must be actual or imminent.
> (2) Its effects must involve the whole nation.
> (3) The continuance of the organized life of the community must be threatened.
> (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[76]

The House of Lords noted that imminence was not actually found in article 15 of the ECHR or in article 4 of the ICCPR, but that it has become an accepted requirement at the European Court of Human Rights and in the work of distinguished scholars.[77] Furthermore, an analogy can be drawn from the International Law Commission's Articles on State Responsibility. In article 25, necessity precludes wrongfulness if the act taken is "the only way for the State to safeguard an essential interest against a grave and *imminent* peril."[78] Imminence must surely feature within the derogation provision.

The inclusion of the *Greek Case*'s second criterion, that the entire nation must be affected, is more doubtful. Subsequent authorities have relaxed this requirement so as potentially to include specific regions within a state, or perhaps a secessionist province.[79] An interesting parallel might be drawn from the genocide jurisprudence of the ITCY. Under the ICTY statute, and under the Genocide Convention, the specific intent required for the crime to be committed must be to

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74. Org. of Am. States, American Convention on Human Rights art. 27(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

75. A & Others v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 WLR 87 ¶ 18.

76. The Greek Case, App. No. 1969, 12 Y.B. Eur. Conv. on H.R. 1, 71-76 (Eur. Comm'n on H.R.).

77. A & Others, [2004] UKHL 56 ¶ 21.

78. Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 25, GAOR (56) Supp. No. 10 (A/56/10) (emphasis added).

79. *See, e.g.*, Aksoy v. Turkey, 23 Eur. Ct. H.R. 553 (1996).

"destroy, in whole or in part, a national, ethnical, racial or religious group."[80] The ICTY had to face up to situations where this intent existed with respect to a particular geographical location within one state, rather than against the protected class in the state as a whole. In *Prosecutor v. Radislav Krstic*, the Trial Chamber held: "[T]he physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue."[81] Though the analogy is not direct to the concept of a public emergency, it is plausible to argue that an actual or imminent threat to a particular region within one state is able to threaten the life of the nation as a whole. It is thus arguable that this criterion should be excluded.

Finally, the ECHR and ACHR follow the ICCPR in introducing a second side to the derogation test: a focus on the measures imposed. In each case, these measures must be "strictly required by the exigencies of the situation."[82] Plainly, even once a public emergency has been found, the measures taken must address the imminent or actual emergency. This criterion will be particularly important in amnesty cases for it ensures that the impunity sanctioned by the amnesty is not merely gratuitous and self-serving, but is actually aimed at stabilizing the public emergency. Putting these together, the standard to be applied to previous grants of amnesty is this: it must be an exceptional act which (1) is commissioned in the face of an actual or imminent public emergency threatening the life of at least a part of the nation and (2) is aimed at addressing the exigencies of the situation.

C. Challenges to Derogation

Under most international human rights regimes, states may not derogate from certain obligations therein. If duties akin to the putative duty to prosecute crimes against humanity are of such a character, the new approach proposed herein is open to challenge. Fortunately, however, in all three human rights conventions at issue, the right to an effective remedy is omitted from the nonderogable list. Given the nexus between the right to an effective remedy and the putative customary international law duty to prosecute crimes against humanity, this omission augurs well for the proposition that the customary duty may be

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80. ICTY Statute, *supra* note 67, art. 4, ¶ 2.

81. Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, ICTY Trial Judgment ¶ 590 (Aug. 2, 2001).

82. ICCPR, *supra* note 72, art. 4.

subject to derogation. Unfortunately, this textual argument does not resolve the question. In General Comment 29, the Human Rights Committee (HRC) controversially asserted that the list of nonderogable provisions in article 4.2 ICCPR was not exhaustive, opening the door for other nonenumerated, nonderogable rights.[83] These rights are referred to by the HRC as other "peremptory norms." At first glance, this extension appears unproblematic, given that the duty to prosecute crimes against humanity does not fall into this category. Though the prohibition against crimes against humanity is most certainly a peremptory norm of international law, the obligation to punish such crimes is not of the same order.

Still, scholars have argued that where the substantive right is nonderogable, it carries attendant remedial obligations that are equally nonderogable. Developing this argument, Roht-Arriaza asserts:

> Certain actions—torture, for example—are prohibited by a nonderogable right because such actions are so repugnant to the international community that no circumstances, no matter how exigent, can justify them. Thus, when these underlying rights are at issue, the right to state-imposed sanction and remedy by the state must also be nonderogable. The nonderogable nature of the underlying right would be meaningless if the state were not required to take action against those who violate the right.[84]

Her argument is set around torture, which is ascribed nonderogable status in the text of the ICCPR. Given that General Comment 29 asserted that other peremptory norms are nonderogable, her reasoning would extend to crimes against humanity, on the basis of that norm's peremptory status. She is not alone in this view. In General Comment 29, the Committee held:

> It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.[85]

This, then, is a powerful challenge to the entire framework proposed in this Article. But it may be attacked on two fronts. Firstly, the authority of the HRC and its General Comments might be challenged. The HRC's

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83. Human Rights Comm., General Comment 29, States of Emergency art. 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

84. Naomi Roht-Arriaza, *Special Problems of a Duty To Prosecute: Derogation, Amnesties, Statutes of Limitations, and Superior Orders*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 45, at 57, 63.

85. General Comment 29, *supra* note 83, ¶ 15.

mandate fails to grant it status as the official interpretive body of the ICCPR—it was created as an administrative body to examine state compliance with the terms of the Convention.[86] Furthermore, this is a single General Comment, decided by "human rights" minded people. This is the United Nations Human Rights Committee! Of course they are going to take progressive positions. This objection is not overly convincing, given that most states seem to recognize the authority of the HRC and the General Comments, and states that signed on to the ICCPR more recently did so with knowledge of how the HRC operates.[87] There is some degree of tacit consent to the authoritative nature of its interpretations.

But there is a stronger objection. Even those who take the forthright position that nonderogable rights carry nonderogable remedial obligations do not generally assert that these inherent remedial obligations include a requirement of prosecution. In this respect, Roht-Arriaza is out on a limb. The language of General Comment 29 makes this clear in not mentioning prosecution at all. A lesson here might be drawn from the approach of the European Court of Human Rights (European Court) in *Tas v. Turkey*. Muhsin Tas, a Turkish national, was taken into custody by Turkish security forces. The government argued that he subsequently escaped. He was never seen again.[88] In the claim arising out of this sequence of events, the European Court discussed the state's remedial obligations. Article 13—the right to an effective remedy—was found to require: "[I]n addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure."[89] Here there is a specific reference to punishment. But article 13 is a derogable provision, so if Turkey had entered a valid derogation, there would have been no breach. However, the European Court also spoke directly to the remedial obligations arising out of the right to life in article 2. In full, it held:

> The investigation carried out into the disappearance of the applicant's son was neither prompt, adequate or effective and therefore discloses a breach of the State's procedural obligations to protect the right to life. There has

86. Scharf, *supra* note 8, at 26.
87. *Id.* at 27.
88. Tas v. Turkey, 33 Eur. H.R. Rep. 15 ¶¶ H1-H3 (2000).
89. *Id.* ¶ 91.

> accordingly been a violation of Article 2 of the Convention on this account also.[90]

The difference between the two is evident. The procedural obligations attached to the substantive right generally carry only as far as investigation—albeit a prompt, adequate, and effective one. Further evidence that the duty to prosecute breaches of peremptory norms may be derogated even if investigation is required may be found in the text of the Convention Against Torture. Although the prohibition on torture is given nonderogable status even in times of war, political instability, or public emergency, the duty to prosecute or extradite the offender is not.[91] Implicitly, the Convention Against Torture accepts that it may be suspended.[92]

There is one final objection to the transferability of international human rights derogation provisions to customary international law. Under the three conventions, there is a treaty body or court which stands to judge whether the threshold requirements of derogation are actually met in the case at hand. But how would this work in customary international law? How will an objective standard be imposed upon a state's internal decision to derogate from the duty to prosecute crimes against humanity? Essentially, who decides? The answer simply lies in the acceptance and responses of other states. This is not a satisfying response to those used to the luxury of a judicial or quasi-judicial body determining whether a state's derogation is valid. But in customary international law there is no such luxury, and the applicable standards will have to be defined over time through state practice. There is no logical or principled bar to the transplant of these derogation provisions into customary international law.

V. THE NEW FRAMEWORK APPLIED

A. Introduction

There is no room in this Article to study the numerous instances of amnesties over the last twenty-five years. Instead, it will focus on six prominent grants of amnesty. The derogation standard drawn from the ICCPR, ECHR, and ACHR will be retrospectively imposed upon the

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90. *Id.* ¶ H-24.

91. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, art. 2(2), *reprinted in* 23 I.L.M. 1027 (1984), 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (*entered into force* June 26, 1987) [hereinafter Convention Against Torture].

92. Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 724 (1999).

factual situations in which the amnesties were granted. If the grant of amnesty considered falls within the threshold requirements of derogation, that case is removed from the corpus of state practice so often used to deny the existence of a customary duty of prosecution. It instead constitutes the small public emergency exception to the duty. Of course, if the amnesty was granted in a context falling outside the definition of a public emergency, it remains in the pool of examples that constitute contrary state practice.

B. Six Amnesties

1. South Africa

The grand narrative of South Africa's peaceful transition to democracy is well known. Nelson Mandela and F.W. de Klerk, the peaceful elections, the orderly transfer of power: these are the symbolic images of apartheid's end. The story of the Rainbow Nation offers a dual temptation. Firstly, it nudges us to forget apartheid's violence and oppression and to think solely of moving forward. In the spirit of forgiveness and reconciliation, the past is said to be behind us; there is no need to dredge up prior sins. And secondly, it glosses over the mechanics of the negotiated settlement itself, instead presenting a veneer that denies the backroom dealing that created the Interim Constitution of 1993.[93] Prior to the first democratic election in 1994, shocking cycles of violence plagued South Africa. This was the context in which the amnesty agreement was reached. It is tempting to look to the legislation that granted amnesty, the Promotion of National Unity and Reconciliation Act of 1995, and argue that at that time there was hardly a threat to the life of the nation. This was 1995, a year after the election, and the beginnings of South Africa's consequent political stability. But 1995 was not when the amnesty route was chosen. Amnesty was a crucial part of the negotiations in 1993, and indeed, its provision was demanded by the addition of a "postamble" to the Interim Constitution hammered out during that process.[94] As Mahomed DP's judgment in *AZAPO* makes clear, once the postamble was in place, the subsequent grants of amnesty were mandated.[95] Dugard explains that during negotiations, "[t]he choice was between unconditional amnesty, favoured by the National Party, or

93. *See, e.g.*, ALISTAIR SPARKS, TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT (1994).

94. Dugard, *supra* note 52, at 259.

95. AZAPO v. President of the Republic of S. Afr. 1996 (4) SA 562 (CC) (S. Afr.).

conditional amnesty."[96] Thus the correct date for analysis purposes is 1993—in the midst of preelection tension and violence.

As the *Greek Case* before the European Court makes clear, a public emergency may be actual or imminent. It is possible to argue that at the time of the amnesty decision, there was sufficient violence within South Africa so as to constitute an actual public emergency. The TRC Report conservatively found that in the months of June, July, and August of 1993, 1577 people were killed in political violence throughout the country.[97] The Human Rights Committee of the TRC estimated that in one region in the Transvaal—just one region—4756 people were killed in political violence from the announcement of negotiations in 1990 to June 1993.[98] This was not simply the African National Conference (ANC) against security force violence. Many of the attacks stemmed from the traditional animosity between the Inkatha Freedom Party and the ANC, animosity that, as confirmed by the Goldstone Commission, was stoked by the apartheid state.[99] In *Lawless v. Ireland*, the European Court upheld the Irish government's derogation order under article 15 of the ECHR, partly on the basis of "the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957."[100] The level of violence in South Africa in the three years prior to the amnesty agreement far outstripped that in Ireland between 1956 and 1957 and indeed constituted an actual public emergency that threatened the life of the nation.

There is, however, a strong objection to the use of this actual public emergency as the basis for derogation; the amnesty provision was not specifically required by the exigencies of that situation. The preelection conflict was not about the threat of post-TRC prosecutions, and the amnesty agreement manifested in the postamble to the Interim Constitution was not reached in response to that conflict. Although the amnesty agreement was a crucial part of the negotiations that were aimed at restoring stability to the country, its inclusion was not in any way a

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96. Dugard, *supra* note 52, at 258 (explaining that the postamble was included in the Interim Constitution after the multiparty negotiations for an interim constitution at Kempton Park in mid-1993, but before presentation of that document to parliament at the end of the year).

97. 2 FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA ch. 7, ¶ 5 (1998), *available at* http://www.doj.gov.za/tre/report/finalreport/TRC%20VOLUME%202.pdf.

98. *Id.* ¶ 9.

99. *See generally* GOV'T OF S. AFR., THE COMMISSION OF INQUIRY REGARDING THE PREVENTION OF PUBLIC VIOLENCE AND INTIMIDATION: FINAL REPORT ON ATTACKS ON MEMBERS OF THE SOUTH AFRICAN POLICE (Apr. 21, 1994), http://www.anc.org.za/ancdocs/history/transition/gold_sapatack.html.

100. Lawless v. Ireland, Eur. Ct. H.R. (ser. B), 1960-1961, 15.

response to the cyclical violence ongoing in KwaZulu Natal, the Witwatersrand, and other parts of the country. Thus, it is likely that the amnesty agreement was not strictly required by the exigencies of the situation.

Instead, there was another *imminent* public emergency in response to which the amnesty agreement was strictly required. This was the threat from the military and white right within the country to unleash chaos unless their postdemocracy freedom from prosecution was guaranteed. Jeremy Sarkin notes that the amnesty was at least partly a measure designed to "protect the result of the first democratic election and the black majority rule government against possible right-wing or security force attempts to overthrow it."[101] Although part of the far right was something of a joke, particularly the blundering forces of the Eugene Terre'Blanche's Afrikaner Weerstandbeweging, the might of the military was beyond doubt. In addition to the military, leading South African Police generals made clear that they would not protect the electoral process if the upshot of the election was their own prosecution and punishment.[102] This was not lost on the ANC and their negotiators. Indeed, Dullah Omar, one of the chief negotiators and later Minister of Justice, conceded in public that "without an amnesty agreement there would have been no elections."[103] It is sometimes easy to forget the unstable nature of the negotiations and broader sentiments within the country. The previous three years' spiral of violence left the country's stability on a knife's edge. Within the South African Defense, there was significant resentment of F.W. de Klerk's supposed selling out the Afrikaner population. If the final talks had broken down, the country would most likely have plunged into self-perpetuating cycles of violence and retaliation, and there would have been no elections. The new South Africa would not have come into existence. The very life of the nation was at stake, and the amnesty agreement was an exceptional measure strictly required by the situation. On this basis, it is suggested that South Africa's amnesty agreement falls within the threshold of the exception.

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101. JEREMY SARKIN, CARROTS AND STICKS: THE TRC AND THE SOUTH AFRICAN AMNESTY PROCESS 49 (2004).

102. Paul van Zyl, *Dilemmas of Transitional Justice, The Case of South Africa's Truth and Reconciliation Commission*, 52 J. INT'L AFF. 647, 650 (1999).

103. *Id.* at 650 (quoting Dullah Omar, Informal Remarks Prior to Speech: Justice and Impunity: Germany and South Africa Compared, Address Before Community Law Center, Cape Town (Oct. 1994)).

2. Haiti

On Jean-Bertrand Aristide's democratic ascension to the Haitian presidency in February 1991 there was a new hope for a nation with such a long and tortured history of oppression. But his rule did not last long, and he was deposed seven months later in a September 1991 coup. What followed was the stuff of nightmares. The Haitian abuses under Raoul Cédras's junta are well documented. In his late-1994 address to the nation, U.S. President Bill Clinton sprinkled his plea for support of his decision to call up troops in case of military action in Haiti with details of the atrocities committed by the regime: the slaying of orphans, the killing of priests, and mass rape, torture, and mutilation of civilians.[104] His assertions were supported by numerous reports by human rights organizations monitoring the island at the time, as well as other accounts from within the country.[105] The authors of the repression were many and comprised the organized Haitian Military, a number of informal death squads, and quasi-political militia supported by the Haitian Army.[106] In terms of the level of violence ordinarily constituting a public emergency under international standards, the situation in Haiti clearly measures up. In contrast to the imminent public emergency threatening the life of the nation in the South African case, here was an actual emergency, one that engulfed the island and pushed it into an abyss of despair.

Secondly, the amnesty measure was necessary to meet the exigencies of the situation. As noted above, the regime's repression was pervasive, and there seemed to be little hope of reinstalling the exiled Aristide government. Negotiations under U.N. and OAS-appointed mediator Dante Caputo initially stalled and then seemed futile. In response, the U.N. Security Council imposed an arms embargo and froze the de facto government's assets abroad.[107] After much brinksmanship, the regime eventually accepted the Governors Island Agreement, which included a broad amnesty provision, but failed to fulfill its most elementary terms. War was the next step. Moments before U.S. planes were to take off in support of the planned invasion, a final deal was reached with Cédras whereby he and members of his military were to be granted a broad amnesty covering all crimes.[108] Furthermore, regardless of the threat of war from the United States, the exiled government's acceptance of the amnesty staved off the public emergency threatening

104. Scharf, *supra* note 8, at 2.
105. *Id.* at 4.
106. *Id.* at 5.
107. *Id.* at 6.
108. *Id.*

the nation that was Cédras's murderous regime. This is perhaps the quintessential case in which justice was sacrificed for peace, and it certainly falls within the derogation thresholds outlined above. Thus, as in South Africa's case, the Haitian amnesty is removed from the pool of state practice that contradicts the putative duty to prosecute.

3. Chile

Many Latin American dictators of the late 1970s and 1980s foresaw the threat to their liberty if they ceded power without a self-conferred amnesty. Others waited until peace negotiations to demand immunity. This Article considers four Latin American amnesties from this period, together with the response of the Inter-American Commission on Human Rights some years later.

In many respects, the Chilean regime under Augusto Pinochet was the model for others to follow.[109] After President Salvador Allende was overthrown in 1973, the regime imposed a five-year period of martial law extending to March 1978.[110] In 1978, with the stroke of a pen, the Law of Amnesty was decreed to wipe out any potential accountability for the abuses of the previous five years. Although it made exceptions for certain common law crimes, genocide, torture, and crimes against humanity were not among them.[111] Today, there is little doubt, even among supporters of Pinochet and his regime, that widespread torture, forced disappearance, detention, and assassination were committed by the junta. In *Hermosilla v. Chile*, the Inter-American Commission of Human Rights (Inter-American Commission) confirmed: "Government had used virtually every known means of physical elimination against dissidents, including: disappearances, summary executions of individuals and groups, executions decreed in trials without due process, and torture."[112] For the purposes of this Article, the key point is that the amnesty law was not passed in a context constituting an actual or imminent public emergency which threatened the life of the nation. The military was in complete control by the time of the decree, and indeed Pinochet remained in power until 1989. It was merely a self-serving protective measure designed to prevent any use of the little court access

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109. *See generally* Jorge Correa S., *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 NOTRE DAME L. REV. 1455 (2002) (discussing the political implications of the amnesty for successor governments in Chile).

110. Jorge Mera, *Chile: Truth and Justice Under the Democratic Government*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 45, at 179.

111. Burke-White, *supra* note 27, at 8.

112. Garay Hermosilla et al. v. Chile, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 46 (1997).

still open to its victims. By no means was the amnesty strictly required by the exigencies of the situation.

On this basis, the amnesty falls outside of the threshold of a public emergency. But mass condemnation did not follow, for this was in the 1970s. The regime's victims would not be easily cowed, however, and they petitioned the Inter-American Commission for redress in 1991 with respect to the arrest and disappearance of seventy citizens of Chile. Their attempt to bring a claim within Chile eventually ran into the Amnesty Law of 1978, the constitutionality of which was affirmed by the Chilean Supreme Court in 1990. The Inter-American Commission found Chile in violation of the ACHR, partly on the basis of the illegitimate nature of the de facto government which had issued the self-serving decree.[113] In its findings, the Inter-American Commission found Chile in violation not only of its investigative and reparatory duties,[114] and of its broader ACHR obligations in failing to revoke or amend the amnesty law,[115] but recommended Chile take steps aimed at "establishing their [the perpetrators] responsibilities and *effectively prosecuting them*."[116] This was a powerful decision by the Inter-American Commission in the face of strong political pressure. Thus the Chilean amnesty is one which falls outside the threshold of derogation according to this Article's framework, and it was met with a powerful response requiring prosecution by the Inter-American Commission.

4. Argentina

The Argentinean case is more difficult to evaluate. When Raúl Alfonsín was elected president in 1983, he replaced a decade's worth of autocratic juntas. Dealing with his country's past was a priority, and indeed there was a lot of history to confront. The Dirty War of 1976-83 waged by successive regimes on their "leftist" enemies was a new low for human rights abuses in its astoundingly wide-ranging use of forced disappearances. The report of the National Commission on the Disappearance of Persons, commissioned by Alfonsín, conservatively confirmed the forced disappearance of 8960 people during this time.[117] Alfonsín took a number of measures aimed at combating past impunity,[118]

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113. *Id.* ¶¶ 26-31.

114. *Id.* ¶ 61; *see also* Burke-White, *supra* note 27, at 32.

115. *Id.* ¶¶ 73-78.

116. *Id.* ¶ 111 (emphasis added).

117. COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS, NUNCA MAS [NATIONAL COMMISSION ON THE DISAPPEARANCE OF PERSONS, NEVER AGAIN] (4th ed. 1984).

118. Carlos S. Nino, *The Duty To Punish Past Abuse of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2624-25 (1991).

one of which was his controversial annulment of the previous regime's amnesty law.[119] Commonly known as the Law of National Pacification, this law had been passed by the outgoing regime as a means of indemnifying themselves from prosecution. It was nothing if not self-serving. Once Alfonsín's government had annulled the immunity, charges against military leaders were brought. There were some initial trials in Buenos Aires, but as feared, delays threatened the process.[120] The government finally acted and passed two laws—Law 23,492 of December 24, 1986, and Law 23,521 of June 4, 1987—both of which, though not amnesties by name, conflicted with any duty of prosecution. The former was the Full Stop Law, which laid a sixty-day timeframe for complaints to be lodged even though part of that time was judicial recess.[121] The latter clarified the meaning of a long held "due obedience" provision, thus granting an effective amnesty to intermediate officers who perceived themselves as bearers of unjust responsibility.[122] In effect, it was an amnesty grant. These two laws were at issue in the case of *Consuelo v. Argentina* before the Inter-American Commission.[123]

It is difficult to gauge without more in depth analysis whether the growing military unhappiness at the fruits of democracy in 1986 and 1987 constituted an imminent public emergency. Fortunately, Carlos Nino, scholar and constitutional advisor to President Alfonsín during this time, narrated his "from the trenches" experiences of the period.[124] The Argentinean military, unlike in some comparable cases, was united in its opposition to trials.[125] Nino records that Alfonsín knew he could not coerce military officers into attending their own trials and feared that public proof of his government's lack of power might delegitimize his rule and increase his vulnerability to a coup. This was not an empty threat, and by the end of 1986, the threat to his government was real.[126] It was in this context that the Full Stop Law was passed. The Due Obedience Law of six months later was passed in even more threatening circumstances, as the Full Stop Law had not assuaged military fears.[127]

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119. O'SHEA, *supra* note 20, at 57.

120. Nino, *supra* note 118, at 2627.

121. *Id.* at 2628.

122. Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 45, at 162.

123. Consuelo et al. 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/Ser.L/V/II.83, doc. 14 ¶ 1 (1993).

124. Nino, *supra* note 118, at 2622.

125. *Id.* at 2623.

126. *Id.* at 2627.

127. Malamud-Goti, *supra* note 122, at 162.

During Easter 1987, army forces led by Lieutenant-Colonel Aldo Rico commandeered a military compound in an attempt to protect another officer charged with torture.[128] Nino explains that slow negotiation was the only option after the "President could not obtain sufficient force to overcome the resistance."[129] After much negotiation, the government adopted the Due Obedience Law in the hope that it would prevent another uprising or, failing this, would at least split the army's unanimity. Notably, the government rejected a broader blanket amnesty in favor of this more tailored fit. This did not prevent all opposition to remaining trials, and indeed there were another two rebellions against the state.[130] But Alfonsín's inclinations were correct, and the Due Obedience Law brought the majority of army support into his hands. He was able to crush the rebellions.[131]

It is perhaps easy to sit back and judge Alfonsín's fears of overthrow as a sign of paranoia. But remember the history of the country and the ease with which military-supported leaders had seized power in the past. Nino's firsthand account details, without grandstanding, the threat faced by the government and the sensibility of the measures taken. The two laws were arguably passed in the face of an imminent public emergency. Furthermore, these measures were strictly required by the exigencies of the situation. As noted above, the Due Obedience Law did not exculpate the real leaders of the repression; the government rejected this approach for a more measured one. This choice, along with the success of the choice in splitting the military, strengthens the argument that it fulfilled the second ground of derogation.

When *Consuelo* came before the Inter-American Commission, these laws were properly analyzed. The Inter-American Commission found them inconsistent with Argentina's obligations of investigation and compensation under the ACHR. But for our purposes, the interesting point is that the Inter-American Court did not go so far as it would later in the Chilean case examined above. There was no recommendation of prosecution, or of punishment.[132] So here is an amnesty granted within the terms of the public emergency exception, thus putting it in the same category as the aforementioned amnesties in South Africa and Haiti.

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128. *Id.*

129. Nino, *supra* note 118, at 2619.

130. *Id.*

131. *Id.*

132. Consuelo et al. v. Argentina, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No. 28/92, Inter-Am. C.H.R., OEA/Ser.L/V/II.83, doc. 14 ¶ ¶ 41, 52 (1993).

Notably, in response, the Inter-American Commission did not call for prosecutions.[133]

5. El Salvador

In 1983, the Salvadoran security forces massacred seventy-four people, all members of the National Association of Indigenous Nations of El Salvador (ANIS), near Las Hojas. All seventy-four were shot at point-blank range. Slowly, the judicial process commenced within the country, and after much judicial maneuvering, it looked as if at least some of the perpetrators would stand trial. But on October 28, 1987, an Amnesty Decree was passed by the Salvadoran Legislative Assembly. At the time it was passed, there was no actual or imminent threat to the life of the nation, and indeed, this was simply a government sanctioned grant of impunity. This takes the case outside of the derogation provisions proposed herein. The lower courts and then the Supreme Court of Argentina quickly held the Amnesty Decree to extend to the events at Las Hojas. Any internal route for the victims was thus closed. The victims' families petitioned the Inter-American Commission, and it issued its decision in 1993 in the *Masacre Las Hojas* case.[134] The first part of the Inter-American Commission's recommendations mirrors the obligations of investigation and compensation imposed a month later in *Consuelo v. Argentina*. But the second part is much stronger, requiring El Salvador to "*submit the [suspects] to justice* in order to establish their responsibility so that they receive the sanctions demanded by such serious actions."[135] This is similar to the recommendation in *Hermosilla v. Chile*, and though it is not exactly the same as the requirement of "prosecution" demanded therein, it is certainly qualitatively different from mere recommendations of investigation and compensation. Thus, as in the Chilean case, an amnesty, granted where there was no actual or imminent public emergency, was found inconsistent, not only with obligations of investigation and compensation, but also with the duty to prosecute.

6. Uruguay

In 1986, the Uruguayan Congress passed Law 15,848 (Amnesty Law), which conferred a very wide amnesty for all crimes perpetrated

133. *Id.*

134. Masacre Las Hojas v. El Salvador, Case 10.287, Inter-Am. C.H.R., Report No. 26/92, OEA/Ser.L/V/II.83, doc. 14 ¶ 1 (1993).

135. *Id.* conclusion ¶ 5a (emphasis added).

during the prior de facto period of military rule.[136] At the time of the Amnesty Law's passing, there was no real threat to the life of the nation in Uruguay. The military dictatorship years of 1973-85 were in the past, and the country seemed to have returned to political stability. David Pion-Berlin argues that the Amnesty Law of 1986 was not demanded by any previous agreement: "There is no evidence that the secretive Club Naval Talks . . . included a promise by the new democratic government to exculpate the military for human rights transgressions."[137] Further, he quotes former Uruguayan President Julio María Sanguinetti in support of this. If this is true, then it is that date (1986) which must be tested against the public emergency requirements. It is unlikely to fulfill those requirements given the beleaguered state of the military[138] at that stage and the fact that parliament was fully functional.[139] This would constitute an amnesty falling outside the terms of derogation.

But by some reports, the Amnesty Law was the inexorable outcome of an earlier settlement, much like the South African case.[140] The settlement in question, known as the Naval Club Pact, is said to have implicitly promised amnesty in exchange for elections and the military's withdrawal from control.[141] This is altogether more plausible given the unlikelihood that the military handed over power without some concessions. If this is so, then this date, the time of negotiations, is the key one for analyzing the situation on the ground. During these negotiations, the military and government came to the table as equals, and neither was able to impose its wishes unilaterally.[142] Although it cannot be said with certainty how much of a threat existed, it is clear that the military had a history of serious human rights abuses[143] and that they retained considerable power. Furthermore, the country, politically stable for most of the twentieth century, was coming out of thirteen years of military dictatorship.[144] Without a firsthand account such as Nino's in

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136. *See* Mendoza et al. 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 ¶ 3 (1993).

137. David Pion-Berlin, *To Prosecute or Pardon? Human Rights Decisions in the Latin American Southern Cone*, 15 HUM. RTS. Q. 105, 120 (1993).

138. *Id.* at 121.

139. Naomi Roht-Arriaza, *Case Studies: Latin America, Overview*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 45, at 148.

140. *Id.*

141. *Id.*

142. Pion-Berlin, *supra* note 137, at 114.

143. Roht-Arriaza, *supra* note 139, at 148.

144. Jeffrey Cason, *Electoral Reform and Stability in Uruguay*, 11(2) J. OF DEMOCRACY 85, 86 (2000).

Argentina, it is difficult to determine conclusively whether the situation constituted a public emergency. When the Amnesty Law was challenged before the Inter-American Commission, its response was very similar to that in *Consuelo v. Argentina*. Only investigation and compensation were recommended. There was no talk of prosecutions or punishment.[145]

C. Conclusion: The Operation of the New Framework

Four Latin American amnesties of the 1970s and 1980s were considered by the Inter-American Commission within a four-year time period. The conventional reading of these decisions groups together the three decisions of 1992-1993 (Argentina, Uruguay and El Salvador) and sets them apart from the Chilean case of 1996. William Burke-White, for instance, explains that the first three cases found the amnesties inconsistent only with duties of investigation and compensation.[146] The obligation to prosecute violations is said not to be found in these three decisions. For him, *Hermosilla v. Chile* in 1996 constituted a qualitative step forward from the prior case law, insofar as it confirmed the obligation to prosecute.[147] On this basis, he classifies the decisions temporally: a 1992-1993 period and now the 1996-onwards period. But Burke-White's reading of the Inter-American Commission's response to the Salvadoran amnesty is incorrect. As explained above, the actual response did indeed emphasize compensation and investigation, but it also called for the perpetrators to be submitted to justice and sanctioned if found guilty.[148] Thus the temporal classification breaks down. In reality, the Inter-American Commission twice called for only investigation and compensation, and twice went a step further by demanding prosecutions.

The following points may be drawn from my analysis of these six amnesties. Firstly, of the six, certainly three—South Africa, Haiti and Argentina—and arguably a fourth—Uruguay—would have fallen within the derogation framework transplanted from international human rights law. If these four are taken out of the pool of evidence that undermines the customary duty to prosecute crimes against humanity, the case for the duty is greatly strengthened. These four cases go instead to establish the

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145. Mendoza et al. v. Uruguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, Inter-Am. C.H.R., OEA/Ser.L/V/II.83 doc. 14 ¶ 154 (1993).

146. Burke-White, *supra* note 27, at 32.

147. *Id.*

148. Masacre Las Hojas v. El Salvador, Case 10.287, Report No. 26/92, Inter-Am. C.H.R., OEA/Ser.L/V/II.83, doc. 14 ¶ 83, conclusion ¶ 5c (1993).

terms of the exception from the duty to prosecute. With respect to this exception, the focus of the Inter-American Commission on investigation and compensation makes it likely that blanket amnesties—those where no investigation takes place—are illegal in international law. The South African case sustains this finding, given that most of the international community's support for the TRC was premised on its exhaustive investigation. Although investigation was not part of the amnesty settlement in Haiti, on his return to power, President Aristide established by executive order the Haitian National Truth and Justice Commission to investigate the abuses of the junta. Its final report was issued on February 5, 1996.[149]

Secondly, there are two cases—El Salvador and Chile—which fall outside the derogation provisions. Under the framework proposed here, these would be illegal and indeed constitute state practice liable to undermine the existence of a customary duty. Nothing can be done about this, and it would have been unrealistically optimistic to hope that all amnesties were granted during times of public emergency. Still, the analysis above shows that in these two cases, the Inter-American Commission issued especially forceful condemnations that emphasized prosecutions and punishment. The Inter-American Commission, a widely respected international body, implicitly recognizes the qualitative difference between amnesties from prosecution granted at a time of crisis and amnesties granted where no such threat exists. The new framework proposed in this Article enables a reading of customary international law that confirms this qualitative difference.

VI. THE NEW FRAMEWORK CONFIRMED: AN ANALOGY FROM THE ICC

Just as Nuremberg anchored the following half-century of international criminal law, so the Rome Statute will continue to be the focal point of legal development in this field from now on. For present purposes, a detailed examination of how the ICC might contemplate the question of amnesties in transitional settings is unnecessary. There is already an emerging body of excellent scholarship on this issue.[150] The

149. RÉPUBLIQUE D'HAITI: RAPPORT DE LA COMMISSION NATIONALE DE VÉRITÉ ET DE JUSTICE [REPUBLIC OF HAITI, REPORT OF THE NATIONAL TRUTH AND JUSTICE COMMISSION] (Feb. 5, 1996), http://www.haiti.org/truth/table.htm.

150. *See, e.g.*, Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507 (1999); Gavron, *supra* note 30; Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481 (2003); Thomas Clark, *The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance*, 4 WASH. U. GLOBAL STUD. L. REV. 389 (2005).

contention of this Article is simply that the model of customary norm plus derogation is consistent with the Rome Statute's approach to national amnesties. The text of the treaty itself is ambiguous—deliberately ambiguous[151]—as to how prosecution should proceed where it potentially threatens an unstable peace. There are two key provisions in this regard: (1) article 16, under which the U.N. Security Council may use its chapter VII powers to suspend, or to prevent the commencement of, an investigation or prosecution for twelve months (it is renewable under the same conditions)[152] and (2) article 53, under which the prosecutor may choose not to prosecute if it would not serve the "interests of justice" taking into account all circumstances (it is subject to review by the pretrial chamber).[153]

It has been argued that the article 16's power is more important than article 53 in dealing with internally granted amnesty which may be necessary to preserve peace.[154] This remains to be seen. It is clear, though, that such a deferral must be preceded by a chapter VII determination of a threat to the peace, a breach of the peace, or an act of aggression. However, given the multiplicity of interests at play in the U.N. Security Council, it is quite unlikely that its decisions to suspend or prevent prosecutions will form an easily discernible pattern.

Far more interesting is the power of the prosecutor to choose not to prosecute crimes against humanity in the interests of justice. In discussing how this prosecutorial discretion might be used, Darryl Robinson invokes the notion of necessity, a concept related to, but slightly different from, derogation.[155] He suggests that in addition to supposed necessity, the prosecutor should look to a number of factors including, (1) whether there is full and effective inquiry, (2) whether there is some sort of reparation, and (3) whether there is at least some identification or lustration of the offenders.[156] Other writers also push the investigative line, condemning blanket amnesties as utterly inconsistent with the Rome Statute and suggesting that there could never be a deferral to such a national initiative.[157] This is consistent with the emphasis

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151. Scharf, *supra* note 150, at 522 (asserting this on the basis of his own conversations with Philippe Kirsch, Chairman of the Rome Diplomatic Conference).

152. Rome Statute, *supra* note 41, art. 16.

153. *Id.* art. 53.

154. Scharf, *supra* note 150, at 522.

155. Robinson, *supra* note 150, at 497.

156. *Id.* at 497-98.

157. *See* Clark, *supra* note 150, at 409.

placed on investigation in regional jurisprudence[158] and by the U.N. Human Rights Committee.[159] Though interesting, the mechanics of this debate are not key to the argument of this Article. It is enough to point to that fact that the centerpiece of the international movement to end impunity—the ICC—allows for a small exception to the otherwise strict requirement of prosecution. Customary law is, of course, a different regime, but it still makes sense to look to the Rome Statute as a guide. Rather than the flimsy requirement of "in the interests of justice," the derogation standard under international human rights conventions should be used for customary derogations. This would enable international lawmakers to draw on an established body of jurisprudence to determine the legitimacy of amnesties.

VII. PRACTICAL APPLICATION OF THE DUTY AND EXCEPTION: THE CASE OF SOUTH AFRICA

Crimes against humanity and apartheid are inextricably linked. Today, the Rome Statute lists the "crime of apartheid" as one of the predicate acts of crimes against humanity. It is now one amongst many. But in the 1970s and 1980s, stirred by increasing condemnation by the U.N. General Assembly,[160] the two terms were synonymous. Although the crimes of the Apartheid regime were varied, I will focus on one: torture. Under the ICTY and the Rome Statute, torture is a predicate act of crimes against humanity. At times, the state was brazen in its use of sophisticated methods of torture on detainees. In 1983, the Detainees' Parents Support Committee (DPSC) issued its Report on Torture in Detention. Its opening paragraph states:

> Ever since the Detainees' Parents Support Committee was formed in late 1981, we have been approached by a steady stream of released detainees asking for assistance and advice, and also relating to "us" their experiences at the hands of the security police. It soon became clear to us that torture and assault during the interrogation process was commonplace. The more we heard, the more we realised that this abuse is widespread and systematic, not just the work of a handful of sadists. The pattern of torture

158. *See, e.g.*, Velasquez Rodriguez Case, 1988 Inter-Am. Ct.H.R. (ser. C) No. 4, ¶ 194 (July 29, 1988).

159. *See, e.g.*, Human Rights Comm., General Comment 31, para. 18, U.N. Doc. A/59/40 (2004).

160. *See* BOUTROS BOUTROS-GHALI, THE UNITED NATIONS AND APARTHEID 5 (1996).

> was much the same in Port Elizabeth, Durban, Soweto, John Vorster Square or Jeffreys Bay.[161]

The DPSC's report detailed both physical and psychological torture, including the use of electric shocks, suffocation until loss of consciousness, solitary confinement for up to a year or more, and threats against family members.[162] Furthermore, in 1985 a study by psychologists at the University of Cape Town (UCT) found that eighty-three percent of interviewed detainees (145 out of 175) had been subject to torture in detention.[163] Both the UCT and DPSC reports were validated in extensive TRC hearings on detention in custody. These were not rogue policemen acting out of line. As stated in the TRC's final report, they were following the orders of a tightly controlled bureaucratic hierarchy and were the cogs in a systematic practice of torture.[164]

Under the new framework proposed in this Article, South Africa was under a customary international obligation to prosecute the perpetrators of these crimes. The TRC, or more particularly its amnesty provision, constituted a legal derogation from this obligation, because it was set up during a time of public emergency. The amnesty process is now over—as is the public emergency—and the country is in the midst of a debate over what action to take against those individuals who did not apply for, or failed to receive, amnesty. This class of individuals includes many ordinary rank and file policemen, as well as high-level military leaders, including former President F.W. de Klerk. There are many elements to this debate, some divisive and controversial, but one is clear: the country is under a customary international obligation to prosecute the perpetrators of crimes against humanity. South Africa's reintegration into the international community is one telling difference between the old South Africa and the new. The exception to the duty to prosecute has run its course, and the rule reattaches to the country. If South Africa is to take seriously its position as an emerging leader in the community of nations, fulfilling its customary international obligations is paramount.

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161. HUMAN RIGHTS COMM. OF S. AFR., A CRIME AGAINST HUMANITY: ANALYZING THE REPRESSION OF THE APARTHEID STATE 53 (Max Coleman ed., 1998).

162. *Id.* at 54-55.

163. MARTIN MEREDITH, COMING TO TERMS: SOUTH AFRICA'S SEARCH FOR TRUTH 119 (1999).

164. 2 FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, *supra* note 97, at 91.

VIII. CONCLUSION

Many international conflicts still rage. Peace talks start up and die out all the time. It is not far-fetched to suggest that in some of the world's ongoing internal repressions, civil conflicts, and wars, abuses rising to the level of crimes against humanity have been committed. As democracy and stability settle in these nations, questions of the permissibility of amnesty in international law will recur. As a matter of policy, the least defensible position is for international law to take no stance against amnesties at all, for international scholars to concede that state practice in granting amnesties is too pervasive to assert plausibly that a duty to prosecute exists. This is exactly the position necessarily reached by analyses of customary law conducted within the prevailing zero-sum framework.

This Article proposes an alternative framework, one that transplants the derogation provisions of international human rights law into customary international law. The consequence of this transplantation is increased flexibility in the creation of customary norms. No longer must every grant of amnesty be read as state practice contradicting the positive evidence for a duty to prosecute. Four of the six prominent amnesties analyzed in this Article should properly be seen as derogations from the customary duty rather than denials of its existence. The two which were not granted during a public emergency are, of course, contrary state practice. But tellingly, in these two cases, the Inter-American Commission of Human Rights visited more powerful condemnation upon the states in question and indeed called for prosecution. If this analytical move, which splits the amnesties into two categories, is combined with the increased evidence in favor of the duty to prosecute—the Rome Statute, the doctrine of command responsibility, the development of *aut dedere aut judicare*, and judicial decisions of international and national courts—the case for the existence of the duty is convincing. Customary international law does recognize a duty to prosecute crimes against humanity.