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Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?

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Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?

MICHAEL P. SCHARF†

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A compact by which a whole nation is called upon to suspend its memories of torture, murder, forcible "disappearances" of loved ones, a compact which would have citizens pretend that the tragic losses and suffering which they have undergone never occurred, this . . . is no bargain. This is not amnesty; it is forcible amnesia. The "peace" that is bought at this price is supported by a thread slenderer even than the thread by which the sword of Damocles was suspended.

Ambassador Oliver H. Jackman, Chairman
Inter-American Commission on Human Rights

I. INTRODUCTION

On September 15, 1994, U.S. President Bill Clinton told a national radio and television audience that the military leaders in Haiti are "plainly the most brutal, the most violent regime anywhere in our hemisphere." He later added that "their reign of terror—a campaign of murder, rape, and mutilation—gets worse with every passing day," and said that "the brutal atrocities . . . threaten tens of thousands of Haitians." Just three days after describing what were seemingly crimes against humanity, President Clinton again addressed the American people about the situation in Haiti—this time to explain why an accord providing the Haitian military leaders amnesty from prosecution after describing what were seemingly crimes against humanity, "a good agreement for the United States and for Haiti." A contrary view was offered by Richard Goldstone, the Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, who said the Haitian amnesty accord is "an example of the wrong way to deal with these [atrocities]. It doesn't serve justice and it ignores the victims."6

In light of the growing number of countries like Haiti that are presently wrestling with their repressive pasts,7 the question of the permissibility of granting amnesty8 from

4. Letter from President Clinton to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 18, 1994), in The Crisis in Haiti, supra note 3 (hereinafter Letter from President Clinton).
5. President Bill Clinton, Oval Office Address to the Nation (Sept. 15, 1994), in The Crisis in Haiti, supra note 3.
7. See Orentlicher, supra note 1, at 2548 n.36. During the last 25 years, numerous countries have turned from dictatorship to elected civilian government. In the 1970s, three countries in southern Europe (Portugal, Greece, and Spain) experienced such transitions. In the 1980s, 11 Latin American countries (Argentina, Bolivia, Brazil, Chile, Ecuador, Honduras, Nicaragua, Panama, Paraguay, Peru, and Uruguay) and 15 African countries moved away from repressive one-party or military rule and held democratic multiparty elections. In the 1990s, the former Soviet Republics, El Salvador, South Africa, and finally Haiti are having to grapple with their repressive pasts. Of these, amnesty laws or decrees have been adopted in Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Namibia, Nicaragua, South Africa, Suriname, and Uruguay.
domestic prosecution to leaders of prior governments for their gross violations of human rights' has become the focus of one of the most important and heated debates in modern international law. To date, most of the scholarly writing on the subject has been in the abstract, glossing over the political realities and jurisprudential nuances that come into play in a specific factual context. In this way, these writings have been afflicted by what Professor Bruno Simma describes variously as "wishful thinking," "missionary aspirations," and "human rights vigilantism." In contrast, this Article, which is written from the perspective of a former State Department lawyer and delegate to the U.N. Commission on Human Rights, explores the amnesty question through the critical lens of a concrete case study: the amnesty given to the military leaders in Haiti as part of the peace accords in 1994, negotiated under the auspices of the United States and the United Nations.

Morris Abrams, the former U.S. Ambassador to the U.N. Commission on Human Rights, recently remarked:

"It is a very tough call whether to point the finger or try to negotiate with people. As a lawyer, of course, I would like to prosecute everybody who is guilty of these heinous things. As a diplomat or as a politician or as a statesmen, I also would like to stop the slaughter, bring it to a halt. You have two things that are in real conflict here... I don't know the proper mix."

By examining the political realities of the Haiti situation and the applicable provisions of treaty and customary law, this Article seeks to assess whether the Haitian amnesty did indeed achieve "a proper mix." To this end, the Article begins with a description of the abuses reportedly committed by Haiti's military regime and the international community's attempts to restore the democratically-elected government to power. Next, it explores the policy arguments for and against amnesty as applied to the Haitian situation and analyzes the scope of both the Haitian amnesty law and President Aristide's amnesty decree. This section is followed by a detailed analysis of the relevant international instruments and

8. The term "amnesty" is derived from the Greek word amnestia, which means forgetfulness or oblivion. Norman Weisman, A History and Discussion of Amnest... amnesty. See United Nations Economic and Social Council, Commission on Human Rights, Progress Report on the Question of the Impunity of Perpetrators of Human Rights Violations, U.N. Doc. E/CN.4/Sub.2/1993/6 at 12 (1993) (hereinafter Progress Report). Amnesties are generally exercised on behalf of certain classes of persons who are subject to trial but have not yet been prosecuted or convicted. A pardon is to be contrasted from amnesty in that it does not overlook the offense or expunge the conviction. Weisman, supra, at 530.

9. In this Article, the terms "gross violations of human rights," "atrocities," "human rights abuses," and "human rights crimes" are used interchangeably to indicate acts such as murder, disappearances, rapes, and torture, which would qualify as crimes against humanity assuming they were committed as part of state policy on a mass scale. See the discussion of the definition of crimes against humanity in note 218 infra.


customary law that potentially limit a government’s prerogative to issue an amnesty. While the Article’s main focus is the international law applicable to the Haitian situation, this inquiry has far-reaching implications beyond Haiti’s shores, which are explored in the Conclusion.

II. THE SITUATION IN HAITI

A. Atrocities Committed by the Military Regime

On December 16, 1990, Jean-Bertrand Aristide, a Catholic priest, garnered sixty-seven percent of the vote in a U.N.-monitored election to become Haiti’s first democratically elected President.14 Just eight months later, the Haitian military overthrew Aristide’s civilian government in a coup, which unleashed a massive outbreak of the worst imaginable human rights violations.15 Aristide and high ranking members of his government were forced into exile while the military forces consolidated their rule through ruthless repression and violence against those perceived as Aristide supporters and those deemed to resist military rule, including members of the clergy, the judicial system, radio stations, trade unions, and popular associations.16

According to the 1994 U.S. Department of State Interim Human Rights Report on Haiti17 and the reports of various human rights groups,18 over 3,000 Haitian civilians were murdered by the military regime during Aristide’s 1,111 days in exile.19 These sources also indicate that during this period the people of Haiti were subjected to state-sanctioned massacres,20 disappearances and assassinations,21 widespread political rapes,22 arbitrary

20. For example, in Cit Soleili, a vast neighborhood of shuns on the edge of Port-au-Prince, soldiers killed from 50 to 150 people ostensibly in reprisal for the lynching of two soldiers. See RETURN TO THE DARKEST DAYS, supra note 16, at 4.
arrests and detentions in inhumane conditions, and torture. The persons allegedly responsible for these abuses were the leaders of the military junta—namely, Lieutenant General Raoul Cedras, Brigadier General Philippe Biamby, and many of the 7,000 members of the Armed Forces of Haiti under their command. Also implicated were Haiti’s 500 section chiefs (rural sheriffs, integrated into the army and reporting to the local sub-district commanders), their attachés (armed civilian auxiliaries that served as death squads), and the members of FRAPH (Front pour l’Avancement et le Progrès d’Haiti), a quasi-political organization armed by the Haitian military.

During his nationally-televised address on September 15, 1994, President Clinton offered the following description of the atrocities in Haiti:

Cedras and his armed thugs have conducted a reign of terror—executing children, raping women, and killing priests. As the dictators have grown more desperate, the atrocities have grown ever more brutal. Recent news reports have documented the slaying of Haitian orphans by the nation’s deadly police thugs. The dictators are said to suspect the children of harboring sympathy toward President Aristide for no other reason than he ran an orphanage in his days as a parish priest... International observers uncovered a terrifying pattern of soldiers and policeman raping the wives and daughters of suspected political dissidents—young girls, 13 years old, 16 years old. People were slain and mutilated, with body parts left as warnings to terrify others. Children were forced to watch as their mothers’ faces were slashed with machetes.

Summing up the situation in Haiti from September 1991 to October 1994, the spokesman for the American Embassy in Haiti concluded that the “...human rights violations were among the worst in the world—if not in scale, certainly in degree.”

B. International Efforts to Reinstate the Aristide Government

In an effort to facilitate the return of the democratically-elected government to Haiti and bring an end to the human rights abuses of the Haitian military regime, the United Nations and the Organization of American States (OAS) appointed Dante Caputo, the former

21. The most egregious examples were the extra-judicial execution of Justice Minister Guy Malary and the abduction and disappearance of Port-au-Prince Chief Prosecutor Laraque Exantus, who had been responsible for several sensitive criminal investigations into cases involving the military and paramilitary groups. See NAT’L COALITION FOR HAITIAN REFUGEES, NO GREATER PRIORITY: JUDICIAL REFORM IN HAITI 2 (1995) [hereinafter NO GREATER PRIORITY].

22. Before being expelled from Haiti, the United Nations/Organization of American States International Civilian Mission to Haiti (MICIVIH) documented 66 cases of politically motivated rape committed by military, police, and paramilitary forces during a five-month period. See RAPE IN HAITI, supra note 17, at 3, 17, 19.

23. According to MICIVIH, in 1993, detainees were incarcerated in facilities lacking electricity, potable water, toilets, and medical supplies. Men, women, and children were kept together in close, overcrowded quarters, and prisoners were forced to sleep on the floor. Sexual abuse and disease were rampant. See NO GREATER PRIORITY, supra note 21, at 5.


25. Hereinafter, “the military regime.”

26. President Bill Clinton, Oval Office Address to the Nation (Sept. 15, 1994), in The Crisis in Haiti, supra note 3.

Argentine foreign minister, to serve as mediator between the “de facto military government”28 and the government-in-exile. Caputo’s first goal was to convince the military regime to allow entry into Haiti of a U.N./OAS human rights monitoring mission.29 While Caputo originally pushed for a team of 500 personnel, the military regime ultimately consented to accept a group of only eighteen observers.30 When the military subsequently refused to act on the mission’s complaints about specific violations31 and after Caputo’s repeated attempts to persuade the military leaders to meet with Aristide proved futile, the U.N. Security Council [Security Council imposed a worldwide oil and weapons embargo (enforced by a cordon of international shipping) and a worldwide freeze of Haitian government assets and the personal assets of the military leaders and their leading civilian supporters.32

With fuel growing scarce and the military regime’s backers becoming increasingly anxious over the actions taken against them, the military leaders indicated their willingness to sit down with Aristide at the bargaining table and negotiate a settlement. The meeting took place from June 27 to July 3, 1993, at Governors Island in New York Harbor. During the meeting, Caputo and President Clinton’s Special Envoy, Ambassador Lawrence Pezzullo, were able to persuade the two sides to accept an agreement that called for: (1) the suspension of the Security Council-imposed sanctions after the confirmation of a new prime minister (Aristide supporter Robert Malval), (2) the return of Aristide as President of Haiti on October 30, 1993, (3) the “early retirement” of General Raoul Cedras, and (4) “an amnesty granted by the President of the Republic within the framework of article 147 of the National Constitution.”33

Under pressure from Caputo and Pezzullo, Aristide reluctantly acquiesced to the amnesty clause of the Governors Island Agreement,34 which, according to a senior Clinton Administration official, “is about as ambiguous as you can get with respect to what kind of amnesty is contemplated.”35 Privately, however, Clinton Administration officials reportedly argued that a broad amnesty was necessary to satisfy the demands of the de facto rulers.36 In fact, U.S. officials have acknowledged that during August and September of

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30. Id.
31. Id. at 111.
34. See Irwin P. Stotzky, Haiti: Searching for Alternatives, in IMPUNITY, supra note 11, at 188 (Professor Stotzky served as Aristide’s Legal Adviser while Aristide was in exile in the United States).
1993, they presented Prime Minister designate Malval with drafts of amnesty laws similar to those passed in other countries, which covered not just crimes against the state but also serious human rights abuses against civilians. Aristide, for example, was reported to be very much influenced by the Salvadoran and South African approaches to amnesty in particular. El Salvador’s National Reconciliation Act provides for an amnesty for all persons involved in political offenses or in ordinary offenses related to political ones. South Africa’s Promotion of National Unity and Reconciliation Act (then in draft) required the perpetrators of human rights crimes to acknowledge publicly their crimes as a precondition to receiving a pardon.

The Security Council immediately “declared [its] readiness to give the fullest possible support to the Agreement signed on Governors Island,” which it later said constitutes “the only valid framework for the solution of the crisis in Haiti.” In accordance with the Governors Island Agreement, on August 27, 1993, the Security Council suspended the sanctions which it had imposed on the military regime. Nevertheless, it subsequently reinstated the embargo when the Haitian military expelled the U.N./OAS monitoring mission, effectively blocked Aristide’s return, and turned away the U.S.S. Harlan County, which was carrying 200 peacemaking troops to help with the transition. After renewed sanctions failed to dislodge the military leaders and reports of human rights abuses in Haiti continued, on July 31, 1994, the Security Council took the extreme step of authorizing an invasion of Haiti by a multinational force.

On the eve of the invasion on September 18, President Clinton sent a delegation—consisting of former President Carter, Senator Sam Nunn, and former Chairman of the Joint Chiefs of Staff Colin Powell—to try to reach a last-minute agreement with the Haitian military leaders that would enable the sides to avoid armed conflict. Just minutes after American military aircraft had taken off toward Haiti, a deal was struck, whereby General Cedras agreed to retire his command “when a general amnesty will be voted into law by the Haitian Parliament, or October 15, 1994, whichever is earlier.” Secretary of State Christopher stated for the record the U.S. interpretation of the amnesty agreed to by the United States—that it would be “a broad amnesty for all the members of the military.” As further inducement, the United States arranged for the top military leaders to receive

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37. Id.
40. See Republic of South Africa Promotion of National Unity and Reconciliation Bill (on file with the Texas International Law Journal); see also Mandela Sets Commission on Crimes in Apartheid, BOSTON GLOBE, July 20, 1995, at 6 (reporting its enactment into law).
44. O’Neil, supra note 29, at 121.
45. See S.C. Res. 940, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994) [hereinafter S.C. Res. 940]. The Security Council stated that it was “gravely concerned by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties . . . .”
46. Id. ¶ 4.
47. See President Bill Clinton, Radio Address to the Nation (Sept. 17, 1994), in The Crisis in Haiti, supra note 3.
political asylum in Panama, transported them on a U.S.-supplied jet to their new home, gave their relatives safe passage to the United States, freed their money held in U.S. banks, and even agreed to rent three of General Cedras' estates in Haiti at a monthly fee of twelve thousand dollars.\(^{50}\) Administration sources were quoted as saying that the total cost to the United States for sending the military leaders into exile could "run into the millions."\(^{51}\) In addition, a senior presidential advisor said that the fortune thought to belong to the military leaders had never been found and presumably remained under their control.\(^{52}\)

C. Swapping Amnesty for Peace

Normally, the way a new civilian government chooses to deal with the crimes of the former regime reflects the new government's perception of its strength. The more durable the government perceives itself, the more likely it is to choose prosecution over less invasive options—such as making monetary reparations to the victims or their families, establishing a truth commission to document the abuses and perhaps identify perpetrators by name, instituting employment bans and purges that keep abusers from positions of public trust, or providing amnesty to some or all of the perpetrators.\(^{53}\) In this respect, every new government's situation is perhaps unique, but the Haitian situation was altogether unprecedented in that the choice to pursue amnesty rather than prosecution of the military leaders was by and large imposed upon the Aristide government by the United States and the United Nations, who had their own interests which did not necessarily correspond with the long-term interests of the Aristide government.

1. The Interests of the United States and United Nations

The reason the United States pushed Aristide to make concessions on the Haitian military regime's accountability for its crimes was, as one commentator noted, that the United States was "afraid of getting lost in voodoo politics, haunted by the ghosts of American soldiers killed in Somalia, [and] horrified of sinking into a quagmire like Vietnam."\(^{54}\) The other members of the U.N. Security Council, in turn, perceived the Haitian situation as largely an American problem and were therefore satisfied to yield to U.S. interests in resolving it.\(^{55}\)
Both the United States and United Nations saw the carrot of amnesty, together with the stick of threatened force, as the best way to persuade the military leaders to step down without a fight. It was thought that the anticipation of prosecution and punishment would encourage the military leaders to fight to retain power, much as Bosnian Serb leaders initially became more intransigent in the face of prosecution before the International Tribunal created by the Security Council. Despite its saber-rattling, the United States did not want to send troops into Haiti without the consent of the military regime. During a press briefing, a Senior Administration official acknowledged: "From our perspective the fundamental and most important objective . . . [was the] ability to permissively put 15,000 multinational forces in the country." President Clinton said he believed the amnesty deal was necessary to avoid "massive bloodshed and perhaps an extended period of occupation that could have been troubling to our country and to the world."

A second and related reason for amnesty reflected concern that the newly installed democratic government would be unlikely to survive the destabilizing effects of politically charged trials without massive foreign military support. A reinstated democracy in Haiti was bound initially to be a frail construct, and Haiti was prone to remain a polarized society—with the members of the military, the section chiefs, the attaches, and members of FRAPH constituting a continued threat to the civilian government. Under these circumstances, a decision to prosecute members of the military regime might have appeared "inappropriate, and even nonsensical—if not downright dangerous."

Experience in other countries had proven that efforts to prosecute often induce the military to close ranks, challenge democratic institutions, or attempt to overthrow the incipient democratic government. The Argentina case, in particular, likely weighed heavily with an insight into the views of many foreigners of U.S. foreign policy:

This is the usual post cold war charade, of course, in which the U.S. uses a tame U.N. to give international legitimacy to the pursuit of its own very particular foreign policy objectives. We saw the same thing in Somalia, and—though here the international interest was genuinely widespread—Kuwait.

But it is not enough for the American to have Britain's signature to the policy they wish to carry out. They also want us to make the pretence of an 'international task force' even more believable by the actual involvement of non-American troops. And for some reason the State Department considers Britain the most useful stooge in such endeavours.


57. Briefing, supra note 35 (emphasis added).

58. President Bill Clinton, Remarks at White House Press Conference (Sept. 19, 1994), in The Crisis in Haiti, supra note 3. Based on the Clinton Administration's actions in Haiti, and more recently in Bosnia, political analysts have concluded that "[r]isk avoidance appears to have acquired the force of doctrine at the Pentagon. In the Clinton administration, the concern borders on an obsession with both military and civilian leaders whose view on the use of force was molded by the war in Vietnam." Chris Black, US Options Seen Fewer as Military Avoids Risk, BOSTON GLOBE, July 23, 1995, at 12.

59. Indeed, after the return of Aristide, it was reported that the attaches and local chieftains had retained their weapons and had found refuge in the hills and remote communities throughout the Haitian countryside. America and the World, supra note 28.

60. Orentlicher, supra note 1, at 2611.

61. In 1986, when military defendants refused to respond to summonses issued by Uruguayan courts to appear before them to answer charges relating to rights violations committed in the 1970s, President Julio Maria Sanguinetti "hastily pushed" through Congress an amnesty law covering the controverted prosecutions, thereby averting a challenge to the supremacy of civilian institutions with which the government was not prepared to deal. Id. at 2545 n.28.
in the minds of the U.S. and U.N. negotiators. In Argentina, the humiliation suffered by the army in the Falkland Islands conflict with the United Kingdom led to the collapse of military rule and the establishment of a democratically-elected government determined to prosecute the abuses committed by the former regime, which had been responsible for the disappearance of some 9,000 persons during the “dirty war.” However, members of the military responded to prosecutions of military officers by launching a series of rebellions during the 1980s against the civilian government of President Raul Alfonsin, who was forced to call a premature end to the ill-fated proceedings. Alfonsin’s successor as president, Carlos Saul Menem, thereafter pardoned the junta leaders that had already been convicted.

While there have also been some notable success stories in prosecuting members of former regimes, such as Greece in the mid-1970s and more recently Ethiopia, tolerance in the handling of past abuses was seen as the more prudent course to pursue for Haiti. In essence, the attitude was that “there is a dragon living on the patio and we had better not provoke it,” especially since the United States and the United Nations lacked the political will to commit troops in a combat situation in Haiti. At the constant prodding of Caputo and Pezzullo, Aristide reluctantly acquiesced in the view that democratic consolidation could best be furthered by implementing a policy of reconciliation embodied in an amnesty law covering past violations. Thus, in explaining his support for the amnesty, Aristide said: “This amnesty is part of the reconciliation and rebuilding process. Let our commitment to peace be our contribution to democracy.” The amnesty deal had its desired effect:

62. See id. at 2545 n.27.
63. Id.
64. Id. Professor Orentlicher has argued that the chief lesson of the Argentina experience is not that prosecutions are destabilizing per se but that prosecutions of indefinite duration and scope are likely to destabilize. For support of this thesis, Orentlicher notes that the rebellions did not begin during the trials of the top military commanders, but only after prosecutions began to sweep more broadly, thereby tarnishing the military institutionally. Dianne F. Orentlicher, Addressing Gross Human Rights Abuses: Punishment and Victim Compensation, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 438 (Louis Henkin & John L. Hargrove eds., 1995).
65. Tina Rosenberg, Overcoming the Legacies of Dictatorship, 74 FOREIGN AFF. 146, 146 (1995) (discussing Latin America and Eastern Europe’s struggle to reconcile the dictatorships of the past with the democracies of the future).
66. One of the few countries where large scale prosecutions and disciplinary proceedings took place is Greece. After the Colonels lost power in 1974, the civilian regime tried both the military leaders of the former regime and hundreds of lower-ranking military officers accused of having committed torture. Edelenbos, supra note 39, at 13.
68. In an interview with wire reporters on September 14, President Clinton explained his continued support of amnesty for members of the military regime: “In the Governors Island Agreement the military leaders and the police leaders were promised safe exit. And yes, this is horrible, but the most important thing we can do is to quickly create a spirit of reconciliation and to try to move to a point where we can do that.” President Bill Clinton, Remarks in Interview by Wire Reporters (Sept. 14, 1994), U.S. Newswire, Sept. 15, 1994, available in LEXIS, News Library, CURNWS File.
69. Huyse, supra note 67, at 341.
70. President Jean-Bertrand Aristide, Remarks in the East Room of the White House at the Meeting of the Multinational Force Coalition (Sept. 16, 1994), in The Crisis in Haiti, supra note 3. Aristide’s remarks were almost identical to the justification of the Uruguay amnesty law provided 7 years earlier by Uruguayan President Julio Maria Sanguinetti:

The Uruguayan government has decided to take measures of magnanimity or clemency utilizing a mechanism provided for in the Constitution of the Republic (the amnesty). The 12 years of
Aristide was permitted to return to Haiti and reinstate a civilian government, the military leaders left the country, much of the military surrendered their arms, and most of the human rights abuses promptly ended—all with practically no bloodshed or resistance.  

In the short run, the amnesty achieved far more for the restoration of human rights in Haiti than what would have resulted by insisting on punishment and risking political instability and continued social divisiveness. Yet, the amnesty deal in Haiti may have jeopardized broader, long term interests of the United States and United Nations. A problem inherent in amnesties that are given the imprimatur of the international community is that they invariably encourage rogue regimes in other parts of the world to engage in gross abuses. For example, history records that the international amnesty given to the Turkish officials responsible for the massacre of over one million Armenians during World War I encouraged Adolf Hitler some twenty years later to conclude that Germany could pursue his genocidal policies with impunity.  

In 1939, in relation to the acts of genocide and aggression committed by German forces, Hitler remarked, “Who after all is today speaking about the destruction of the Armenians?”  

When the international community encourages or even merely condones an amnesty for human rights abuses, it sends a signal to other rogue regimes that they have nothing to lose by instituting repressive measures; if things start going badly, they can always bargain away their crimes by agreeing to restore peace. As one news analyst has pointed out, the United States’ support for amnesty in Haiti “could weaken [its] moral authority in dealing with other rogue regimes abroad. Those regimes now may think that behaving obnoxiously and dangerously is one way to exact tribute from Washington.” In this regard, the Haiti precedent was all the more glaring coming as it did on the heels of the U.N. Security Council’s decision to rescind the arrest order for Somali warlord Mohamed Farrah Aidid and to release his followers from U.N. custody in an effort to “foster a political dialogue which can lead to national reconciliation.”  

Richard Goldstone, the Chief Prosecutor of the U.N. War Crimes Tribunal for the Former Yugoslavia, and Graham Blewitt, his Deputy Prosecutor, publicly expressed their concern that those involved in the former Yugoslavia might seek to gain some precedent out of the Haitian amnesty: “If people look at this as being an avenue for obtaining peace, it hinders our work,” Blewitt remarked. In particular, the Haitian action undermined the integrity of U.S. official statements that “the United States will never allow amnesty for

dictatorship have left scars which will need a long time to heal and it is good to begin to do so. The country needs reconciliation to face a difficult but promising future.

Letter from President Sanguietti to Amnesty International (Mar. 31, 1987), reprinted in Orentlicher, supra note 1, at 2545 n.26.  


72. 1 MORRIS & SCHARF, supra note 53, at xiv n.1.  


74. Jim Hoagland, Deal with Cedras Undermines Clinton’s Moral Authority, DALLAS MORNING NEWS, Oct. 21, 1994, at 29A.  


those who have committed atrocities in the former Yugoslavia, even as the price for a Balkan peace settlement.\footnote{77} Yet, during the negotiations with the Haitian military leaders, these broader long-term concerns were eclipsed behind the overriding objective of avoiding American casualties in a military operation that did not have the support of the American people.\footnote{78}

2. Countervailing Interests Supporting Prosecution

Much has previously been written about the moral and ethical reasons for prosecuting leaders responsible for grave human rights crimes,\footnote{79} and Jean-Bertrand Aristide, as a Catholic priest, may have been uniquely influenced by such considerations. There were also several important practical factors counseling against the granting of amnesty that explained Aristide’s initial aversion to an amnesty-for-peace swap with the military leaders. As detailed below, prosecuting high-level members of the military regime could serve to discourage future human rights abuses in Haiti, deter vigilante justice, and reinforce respect for the law and the new democratic government.

While prosecution and punishment can serve as a strong deterrence, impunity breeds contempt for the law. The U.N. Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities have concluded that impunity is one of the main reasons for the continuation of grave violations of human rights throughout the world.\footnote{80} Indeed, fact-finding reports on Chile and El Salvador indicate that the granting of amnesty or de facto impunity has led to an increase in abuses in those countries.\footnote{81} In this context, failure to prosecute human rights

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77. Carol Williams, No Amnesty for Perpetrators of Balkans Atrocities, U.S. Says, L.A. TIMES, Jan. 7, 1994, at A6. During the Bosnian Peace Negotiations in Dayton, Ohio in November 1995, the Chief Prosecutor of the Yugoslavia Tribunal formally asked the United States to make the surrender of indicted suspects a condition for any peace accord. See Stephen Engelberg, Panel Seeks U.S. Pledge on Bosnia War Criminals, N.Y. TIMES, Nov. 3, 1995, at A1. The United States responded that it would not make such a condition a “show stopper” to the larger peace settlement. Id. at A12. The final accord ultimately contained only a vague commitment from the parties to “cooperate” with the Tribunal. Thereafter, Russia reportedly offered asylum from prosecution to General Ratko Mladic, the military leader of the Bosnian Serbs, who has been indicted by the Yugoslavia Tribunal for the crime of genocide, Dusko Dodor, Russia Is Said to Offer Asylum to Bosnian Serb, BOSTON GLOBE, Dec. 16, 1995, at 2, and NATO troops reportedly permitted Radovan Karadzic, the leader of the Bosnian Serbs who was indicted for war crimes by the International Tribunal, to pass unhindered through NATO checkpoints. Dean Murphy, Bosnia Pact Reported on War Crimes, BOSTON GLOBE, Feb. 13, 1996, at 2.


80. Paragraph 344 of the 1990 report of the Working Group on Enforced or Involuntary Disappearances reads:

Perhaps the single most important factor contributing to the phenomenon of disappearances may be that of impunity. The Working Group’s experience over the past ten years has confirmed the age-old adage that impunity breeds contempt for law. Perpetrators of human rights violations, whether civilian or military, will become all the more brazen when they are not held to account before a court of law.


crimes in a country like Haiti—which has suffered from an endless cycle of violence and abuse going back nearly two hundred years—could serve as a virtual license to repeat the crimes. 82

The past decade has seen the rise of revisionist arguments that try to challenge historical facts in order to deny them or tone them down, thereby ridding them of their character of extreme gravity. 83 A significant benefit of prosecutions is that they establish an authoritative record of abuses that can withstand the challenge of revisionism. While there are various means to achieve a full accounting of the truth, 84 the most authoritative rendering of the truth is possible only through the crucible of a trial that accords full due process. Criminal trials can generate a comprehensive record of the nature and extent of violations, how they were planned and executed, the fate of individual victims, who gave the orders, and who carried them out. Supreme Court Justice Robert Jackson, the Chief Prosecutor at Nuremberg, said that one of the most important legacies of the Nuremberg trials following World War II was that they documented the Nazi atrocities “with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.” 85 The granting of amnesty, in contrast, encourages the guilty to try to escape the judgment of history by reinventing the truth. If, to paraphrase George Santayana, a society is condemned to repeat its mistakes when it has not learned the lessons of the past, 86 then it is more likely to do so when it fails to take steps to establish an authoritative record that can endure the test of time and resist the forces of revisionism.

In addition to truth, there is a responsibility to provide justice. While a state may appropriately forgive crimes against itself, such as treason, serious crimes against persons, such as rape and murder, are an entirely different matter. Holding the violators accountable

82. According to the London-based human rights group Amnesty International, “[!]etting killers and torturers off the hook undermines long-term solutions to the country’s continuing human rights crisis because it sends a message that they can continue their abuses.” Haiti Agreement Lets Rights Violators Off Hook, supra note 6.
83. PROGRESS REPORT, supra note 8, at 26.
84. See generally Priscilla B. Hayner, Fifteen Truth Commissions—1974 to 1994: A Comparative Study, in Kritz, 1 TRANSITIONAL JUSTICE, supra note 10, at 223. Indeed, the day the Haitian amnesty decree was enacted, the Parliament also approved legislation establishing a truth commission and a fund to compensate victims of human rights abuses committed since the military seized power three years ago. Larry Rohter, Haitian Bill Doesn’t Exempt Military from Prosecution, N.Y. TIMES, Oct. 8, 1994, § 1, at 9, available in LEXIS, News Library. CURNWS File. In December 1994, Aristide formed a seven-member commission to investigate crimes committed in Haiti during his exile. Claudio R. Santorum & Antonio Maldonado, Political Reconciliation or Forgiveness for Murder—Amnesty and its Application in Selected Cases, 2 HUMAN RIGHTS BRIEF 15, 15 (1995). Truth commissions, however, are a poor substitute for prosecutions. They do not have prosecutorial powers such as the power to subpoena witnesses or punish perjury. Hayner, supra, at 228. They are inherently vulnerable to politically imposed limitations and manipulation: their structure, mandate, resources, access to information, willingness or ability to take on sensitive cases, and strength of final report are all largely determined by political forces at play when they are created. Id. at 244. When truth commissions name perpetrators, they impose the moral punishment of public condemnation, sometimes combined with the sanction of disfranchisement (the disqualification from public office). Truth commissions’ institutional limitations, however, prevent them from providing those named as perpetrators with the panoply of rights available to a criminal defendant. Id. at 252–55. Finally, to the extent that the establishment of a truth commission purports to replace criminal punishment, it diminishes the authority of the legal process by implicitly conceding that the “machinery of justice” lacks the power to punish even those crimes that any civilized society views as most injurious. Orentlicher, supra note 1, at 2546 n.32.
85. See Justice Robert H. Jackson, Report to the President (June 7, 1945), reprinted in 39 AM. J. INT’L L. 178, 184 (Supp. 1945) (stressing the importance of prosecuting Nazi leaders).
86. JOHN BARTLETT, FAMILIAR QUOTATIONS 388 (Justin Kaplan ed., 1992) (quoting George Santayana in his 1 THE LIFE OF REASON (1905–06)).
for their acts is a duty owed to the victims and their families.\footnote{87} Prosecuting and punishing the violators would give significance to the victims’ suffering and serve as partial remedy for their injuries.\footnote{88} Moreover, prosecutions help restore victims’ dignity and prevent private acts of revenge by those who, in the absence of justice, would take it into their own hands.\footnote{89} In Haiti, the risk of vigilante justice is not a mere theoretical concern. Following the downfall of President Jean Claude Duvalier in February 1986, lynch mobs took justice into their own hands and executed soldiers, members of the Tontons Macoutes, and others suspected of being involved in the brutalities committed by the Duvalierists.\footnote{90} Likewise, Haitian citizens who have suffered at the hands of the military regime have confided to reporters and human rights observers that they were likely to seek personal revenge if the military leaders responsible for their suffering are not able to be brought to justice.\footnote{91} The inevitable occurred on October 3, 1995, when one of the highest ranking members of the military regime to remain in Haiti, former General Henri Max Mayard, was gunned down in his car as he drove down a busy thoroughfare in Port-au-Prince.\footnote{92}

While prosecution and punishment can reinforce the significance of the law by displacing personal revenge, failure to punish former leaders responsible for widespread human rights abuses encourages cynicism about the rule of law and distrust toward the political system.\footnote{93} To the victims of human rights crimes, amnesty represents the ultimate in hypocrisy: while they struggle to put their suffering behind them, those responsible are allowed to enjoy a comfortable retirement—in this case, subsidized by the United States.\footnote{94} When those with power are seen to be above the law, the ordinary citizen will never come to believe in the principle of the rule of law as a fundamental necessity in a democratic country.\footnote{95}

What a new or reinstated democracy like Haiti’s needs most is legitimacy, which cannot be achieved by an international accord or 20,000 foreign troops; what is required above all is a fair, credible, and transparent account of the events that took place and the persons responsible. Consequently, prosecution of responsible leaders is “necessary to assure the supremacy of democratic values and norms and to encourage the public to believe in them.”\footnote{96} In the case of trials of military officers in particular, decisions of tribunals affirm the authoritativeness and vigor of the new democratic institutions. Punishmen would enable a new government to assert its authority over individual and institution violators and thereby foster the observance of constitutional and other legal prescriptions.\footnote{97} Additionally, institutional disapproval of official policies that resulted in human rights abuse

\footnote{87} The Chief Prosecutor of the Yugoslavia War Crimes Tribunal, Richard Goldstone, recently remarked “What politicians have the moral, legal or political right to forgive people charged with . . . crimes against humanity . . . without consulting the victims. I just find it abhorrent.” UN Unit Warns on Amnesty in War Crimes, BOSTON GLOBE, Nov. 15, 1995, at 7.

\footnote{88} Alice Henkin, Conference Report, in STATE CRIMES, supra note 79, at 3.

\footnote{89} Rosenberg, supra note 65, at 148.

\footnote{90} LAWYERS COMM. FOR HUMAN RIGHTS, PAPER LAWS, STEEL BAYONETS: BREAKDOWN OF THE RULE OF LAW IN HAITI 196 (1990).


\footnote{92} See Former General is Killed in Haiti, BOSTON GLOBE, Oct. 4, 1995, at 4.


\footnote{94} See supra notes 50–51 and accompanying text.

\footnote{95} Broadbent, supra note 81, at 227.


\footnote{97} Id.
emphasizes the discontinuity between the policies and practices of the previous regime and the new government. Failure to prosecute, on the other hand, can give birth to conspiracy theories in which the leaders of the new regime are labeled as the hidden agents of the old order being treated in a suspiciously lenient way.

While prosecutions might initially provoke resistance, many analysts believe that national reconciliation cannot take place as long as justice is foreclosed. Yet, the international community proved unwilling to pay the price for justice, which would have required sending troops into Haiti to dislodge the military regime and to protect the new government from rebellions while prosecutions of the military leaders were pending.

D. Interpreting the Scope of the Haitian Amnesty

In keeping with the September 18, 1994 Port-au-Prince agreement, Aristide provided the Haitian parliament with draft legislation that would authorize him to grant amnesty to the members of the military regime. On October 6, 1994, Haiti’s lower house, the Chamber of Deputies, voted fifty to two in favor of the legislation, with the Haitian Senate following suit the next day by a vote of nine to one. The newly enacted Amnesty Law provides as follows:

Whereas, in order to end this crisis that is so cruelly eating away at the country, to the extent that the State’s own existence is imperilled, an Amnesty is likely to reconcile the nation with itself by covering it with a lawful shield of oblivion to general political events that disrupted the life of the nation;

Article 1: Article 3 of the law of 24 September 1860 is thus modified: the right to amnesty granted to the President by the Constitution only applies to political matters, that is to say in all cases of crimes and misdemeanors against the state, internal and external security, crimes and misdemeanors affecting public order and accessory crimes and misdemeanors as defined by the Penal Code. Amnesty can be declared either before or after prosecutions and even after convictions in absentia.

Article 2: The Amnesty Order, issued with strict respect for the present law can in no case be revoked.

100. Orentlicher, _supra_ note 1, at 2550 n.44 (citing Hannah Arendt’s view that “men are unable to forgive what they cannot punish.”). Prosecutions act as a sort of ritual cleansing. A country in which such cleansing remains unfinished will be plagued by continuous brooding and pondering. Postwar France, where the collaboration with the Nazis was never fully tried, provides the paradigmatic example. French historian Henri Rousso has labelled this absence “a never ending neurosis.” Huyse, _supra_ note 67, at 335, 338.
102. Aristide Reinstated, _supra_ note 50.
Article 3: The present law repeals all laws or clauses of the law; all decrees or clauses of the decree; all statutory orders or clauses of the statutory order that oppose it and will be enforced at the Minister of Justice's behest.¹⁰⁴

Although the Amnesty Law was approved with little debate, the lawmakers emerged from the chambers of the Haitian parliament with widely divergent interpretations of the law's scope. For example, Senator Turneb Delpe of the National Front for Change and Democracy, the party on whose ticket Aristide was elected, took the position that "this amnesty is only for political matters. A rape is not a political matter."¹⁰⁵ Other members of the parliament expressed the view that the law protected the military rulers from prosecution for human rights abuses since it authorizes the President to grant amnesty for "accessory crimes and misdemeanors."¹⁰⁶ One member said in exasperation, "we approved the amnesty that Jean-Bertrand Aristide presented. Go ask President Aristide if the text he sent down is restrictive or broad."¹⁰⁷ Another summed up the situation by saying that the complex and nebulous language of the legislation is such that "lawyers are going to be kept busy for years figuring out what this means."¹⁰⁸

The Amnesty Law authorizes amnesty for "political matters," which it defines as crimes and misdemeanors "against the internal and external security of the State" or "affecting the public order" as well as "accessory crimes and misdemeanors." Clearly, the law authorizes amnesty for pure political crimes against the state, such as treason or sedition. Consequently, the members of the military regime would not be prosecuted merely for their participation in the coup. The reference to "accessory crimes and misdemeanors" suggests that the law would also authorize amnesty for related political offenses—otherwise common crimes committed in connection with a political act or objective. In such cases, the question would be whether the nexus between the crime and the political act is sufficiently close for the crime to be deemed political under the amnesty law. For example, the killing of military forces loyal to Aristide during the October 1991 coup would probably be considered a political matter, but what about the so-called "political rapes," detentions, torture or executions of "political opponents," and the massacres of civilians in reprisal for attacks against soldiers?¹⁰⁹

Since the issue of what constitutes a political offense is frequently raised in the context of extradition, the jurisprudence of extradition law may provide some guidance in answering this question. The U.S. case most closely on point is Artukovic v. Boyle,¹¹⁰ which involved a request by the Government of Yugoslavia for the extradition of a former Interior Minister of the puppet Croatian government which took over a portion of Yugoslavia following the German invasion in April 1941.¹¹¹ Artukovic was charged with directing the murder of hundreds of thousands of civilians in concentration camps between April 1941

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¹⁰⁵. Rohter, supra note 84, at 4.

¹⁰⁷. Id.

¹⁰⁸. Id.

¹⁰⁹. See generally infra note 18.

¹¹⁰. Artukovic v. Boyle, 140 F. Supp. 245, 246 (S.D. Cal. 1956), aff'd, Karadzole v. Artukovic, 247 F.2d 198, 202 (9th Cir. 1957), vacated per curiam on other grounds, 355 U.S. 393 (1958). This case has been described as "one of the most roundly criticized cases in the history of American extradition jurisprudence." Eain v. Wilkes, 641 F.2d 504, 522 (7th Cir.), cert. denied, 454 U.S. 894 (1981).

and October 1942. The Ninth Circuit Court of Appeals found this to be a non-extraditable political offense because it occurred during and in furtherance of the armed struggle to establish Croatia. The court considered but was unpersuaded by the argument that Artukovic's crimes were so barbaric and atrocious that they could not be deemed political crimes.

Some thirty years later, the Ninth Circuit in dictum determined that the Artukovic case had been wrongly decided because Artukovic had been charged with "carrying out a governmental policy calling for acts of destruction whose nature and scope . . . exceeded human imagination . . . [which] are certainly in our view to be excluded from coverage under the political offense exception." Short of such acts, however, the Court made clear that "the tactics that are used in . . . internal political struggles are simply irrelevant to the question whether the political offense exception is applicable."

The parallels between the Artukovic case and that of the Haitian military regime are self-evident. At least one commentator has noted that "the Haitian killings were political in nature, somewhat like acts of war." In particular, the killings and rapes were part of an effort to establish a new regime and to consolidate power vis-à-vis those perceived as its opponents. To the extent that the Haitian abuses were not so numerous and heinous as to "exceed human imagination," one might conclude that they would fall within the political offense exception to extradition. By analogy, then, this extradition jurisprudence would suggest that the military regime's crimes could be considered political crimes for purposes of the Amnesty Law.

To a large extent the question is moot since the Amnesty Law is designed to give discretion to Aristide to determine its scope. Indeed, the version that was adopted by the Haitian Senate was "punctiliously renamed the 'law relative to amnesty,' to underline that the members of the Senate were shifting full responsibility onto Aristide." However, Aristide's Amnesty Decree, issued the day after the Haitian Parliament enacted the Amnesty Law, was just as ambiguous as the Amnesty Law. The Decree provides amnesty for "the authors and accomplices of the coup d'état of 30 September 1991 which brought about the forced departure for exile of President of the Republic, Jean-Bertrand Aristide, and his government." It does not clarify whether the amnesty applies only to acts committed during the actual coup in 1991 or more generally to acts committed from 1991 to 1994 in support of the military regime's efforts to consolidate power and repress opposition.

While Aristide had previously said that he would not grant amnesty to any one engaged in "general or criminal actions," after issuing the Amnesty Decree he confirmed that "there are no plans to prosecute members of the security forces and their allies" for their
human rights crimes. Instead, following the South African and Salvadoran models, Aristide established a seven-member truth commission to investigate and document the human rights crimes committed in Haiti during his exile as well as a fund to compensate victims. He also dismissed all Haitian military officers above the rank of major from Haiti’s armed forces, but that was as far as he would go to punish the leaders of the military regime. Indeed, Aristide personally requested Panamanian President Ernesto Perez to grant amnesty to the top members of the military regime. This action effectively precluded Haiti from pursuing their prosecution and punishment in the future, irrespective of how the Amnesty Law and Decree are interpreted.

III. THE DUTY TO PROSECUTE UNDER INTERNATIONAL LAW

While the decision to grant amnesty to the military leaders in Haiti reflected a balance of ethical imperatives against political constraints, there is no indication that international law was factored into the equation. It is one thing to suggest that the decision to grant amnesty did not make sense from a broad policy perspective; it is quite another to conclude that the granting of amnesty violated international law. Were such a conclusion possible, the amnesty given to the military regime in Haiti could be invalidated in a proceeding before either the Haitian courts or an international forum. In addition, given the United

121. Weekend Edition, supra note 38. Aristide has, however, pursued prosecutions (mostly in absentia) of a few members of paramilitary groups and former members of the military and police for assassinations of his major supporters. See Judge Sentences 14 Haitians to Life, BOSTON GLOBE, Sept. 27, 1995, at 4 (reporting the in absentia trial and conviction of Port-au-Prince police chief Michel Francois and 13 others who were accused of the 1993 assassination of leading Aristide supporter Antoine Izemery); Trial Begins in Haiti Killing, BOSTON GLOBE, Aug. 25, 1995, at 11 (reporting the trial of Gerard Gustave also for the assassination of Antoine Izemery); Haiti Convicts Ex-Army Officer, BOSTON GLOBE, July 2, 1995, at 13 (reporting on the trial in absentia of former Lieutenant Jean Emery Firmam, accused of killing Aristide supporter Jean-Claude Museau); John Goshko, Haitian Paramilitary Chief Held, Arrest Made by INS in New York, PLAIN DEALER, May 13, 1995, at 2 (reporting request by Aristide Government for the deportation of Emmanuel “Toto” Constant, leader of the Fraph, who is wanted on murder charges). Unfortunately, most of these in absentia prosecutions amount to little more than “show trials,” lasting a few short hours, with verdicts rendered within minutes. Telephone Interview with William O’Neill, Haitian Human Rights Observer (Sept. 20, 1995). Defendants tried in this manner are not able to inform their appointed counsel of any alibi or exculpatory circumstances to be weighed by the court. Thus, trials in absentia are generally disfavored under international law. See International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, art. 14, ¶ 2(d), 999 U.N.T.S. 171, 176.

122. See Santorum & Maldonado, supra note 84, at 15.


124. See Agence France Presse, Oct. 12, 1994, available in LEXIS, News Library, CURNWS File. In a note to Panamanian President Ernesto Perez, Aristide expressed gratitude for accepting Cedras and Bramly. He claimed this would “help us bring peace and democracy to Haiti.” Id. While Panama granted asylum to General Raoul Cedras and Brigadier General Philippe Bramly, the third leader of the military junta, Port-au-Prince police chief Joseph Michel Francois, was granted asylum in the Dominican Republic. Id

125. The Aristide Government could conceivably seek the prosecution of lower level members of the military regime who remain in Haiti. It would seem unfair, however, to hold the citizens and soldiers responsible for following the orders of the military commanders who had been granted de facto or de jure amnesty. See 1 MORRIS & SCHARF, supra note 53, at 112–14.

126. When Salvadoran citizens brought suit before domestic courts in an attempt to have the El Salvador amnesty law declared invalid, the Supreme Court of Justice of El Salvador ruled that the granting of amnesty in these circumstances constituted a political question that the courts lacked competence to address. See El Salvador: Supreme Court of Justice Decision on the Amnesty Law, Proceedings No. 10-93 (May 20, 1993), reprinted in Kritz, 3 TRANSITIONAL JUSTICE, supra note 67, at 549. However, the issue before the Court was the constitutionality of the amnesty law in relation to the powers of the legislature, not whether the amnesty law was invalid as a violation of international law. Indeed, the Court made clear that “there are cases where there is constitutional jurisdictional control over amnesty, and it is the competence of the Constitutional Chamber to pronounce itself over its [merits or lack of merits] ab initio, or to initiate proceedings, in accordance [with] the case, inasmuch as they
Nations' encouragement and endorsement of the Haitian amnesty arrangement (as contained in the Governors Island Agreement), a determination that such amnesty violates international law would do serious damage to the credibility of the United Nations as an institution committed to the rule of law.\textsuperscript{124}

The analysis that follows explores whether there existed an obligation under international law to prosecute the types of offenses committed by the Haitian military regime and whether such a duty was applicable to the Haiti situation.

A. Crimes Defined in International Conventions

The prerogative of a state to issue an amnesty for an offense can be circumscribed by treaties to which the state is a party. As Article 27 of the Vienna Convention on the Law of Treaties provides, "a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."\textsuperscript{129} Moreover, according to the Haitian Constitution, treaties to which Haiti is a party take precedence over domestic statutes whenever the two are in conflict.\textsuperscript{130} This combination of laws means that, under Haitian constitutional law, the Amnesty Law and any amnesties granted under its authority would be invalid if they conflicted with an obligation contained in a treaty to which Haiti is a party.

There are several international conventions that clearly provide for a duty to prosecute the humanitarian or human rights crimes defined therein. Of particular note for the Haitian situation are the Geneva Conventions of 1949, the Genocide Convention, and the Torture Convention.\textsuperscript{131} When these Conventions are applicable, the granting of amnesty to persons

\textsuperscript{127} Challenges to amnesty laws enacted in Argentina, El Salvador, Suriname, and Uruguay have been lodged with the Inter-American Commission on Human Rights of the Organization of American States. See Orentlicher, supra note 1, at 2540 n.5.

\textsuperscript{128} The U.N. Charter provides:

The Purposes of the United Nations are . . . [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

U.N. CHARTER art. 1, ¶ 1 (emphasis added).


\textsuperscript{130} Article 276-2 of the Constitution of 1987, reproduced in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: HAITI 52 (Albert P. Blaustein & Gilbert H. Flanz eds., 1987), provides that "[f]orces international treaties or agreements are approved and ratified in the manner stipulated by the Constitution, they become part of the legislation of the country and abrogate any laws in conflict with them." This position contrasts sharply with the U.S. constitutional system, under which statutes and treaties are deemed to be of equal force, and whichever was enacted or ratified later in time controls where there is a conflict between the two. See United States v. Palestine Liberation Org., 695 F. Supp. 1456 (S.D.N.Y. 1988).

\textsuperscript{131} There are several other human rights conventions that provide a duty to prosecute, but which were clearly not applicable to the Haiti situation. See, e.g., International Convention on the Suppression and Punishment of the Crime of Apartheid (entered into force July 18, 1976), reprinted in 1 UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/I/Rev.4 (Vol. I/Part 1) at 80, 83 (1993) [hereinafter INTERNATIONAL INSTRUMENTS]; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (entered into force Apr. 30, 1957), reprinted in INTERNATIONAL INSTRUMENTS, supra, at 209, 211; Convention for the Suppression of the Traffic in Persons and
responsible for committing the crimes defined in these conventions would constitute a breach of a treaty obligation for which there can be no excuse or exception.

1. The 1949 Geneva Conventions

The four Geneva Conventions were negotiated in 1949 to codify the international rules relating to the treatment of prisoners of war and civilians in occupied territory. Haiti is a party to the Geneva Conventions, as is almost every other country in the world. Each of the Geneva Conventions contains a specific enumeration of "grave breaches," which constitute war crimes under international law for which there is individual criminal liability and for which states have a corresponding duty to prosecute. Grave breaches include willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, extensive destruction of property not justified by military necessity, willfully depriving a civilian of the rights of fair and regular trial, and unlawful confinement of a civilian—all of which are acts that were reportedly undertaken by the Haitian military regime.

Parties to the Geneva Conventions have an obligation to search for, prosecute, and punish perpetrators of grave breaches of the Geneva Conventions, unless they choose to hand over such persons for trial by another state party. The Commentary to the Geneva Conventions, which is the official history of the negotiations leading to the adoption of these treaties, confirms that the obligation to prosecute is "absolute," meaning, inter alia, that state-parties can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches of the Conventions.

The duty to prosecute grave breaches under the Geneva Conventions is, however, limited to the context of international armed conflict. There are two reasons why the


132. As of February 1, 1994, 185 states were party to the Geneva Conventions. See Edelenbos, supra note 39, at 12 n.21 (1994).

133. See 1 MORRIS & SCHARF, supra note 53, at 64–65.

134. Id.

135. See notes 19–24 supra and accompanying text.


137. According to Article 32 of the Vienna Convention, supra note 129, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to . . . determine the meaning" when the text of a treaty provision "leaves the meaning ambiguous or obscure."

138. See 1 MORRIS & SCHARF, supra note 53, at 114 n.341, n.356. See also THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 215 (1989) (discussing how the Geneva Conventions are not subject to derogation).

Haiti situation from 1991 to 1994 cannot be deemed an international armed conflict for purposes of the Geneva Conventions. First, there is a high threshold of violence necessary to constitute a genuine armed conflict, as distinct from the lower level disturbances (such as riots or isolated and sporadic acts of fighting) that occurred in Haiti during the reign of the military regime. Second, notwithstanding the determination of the Security Council that the situation in Haiti constituted "a threat to international peace and security in the region," the violence in Haiti did not have an international character as recognized by the Geneva Conventions.

The international conflict requirement derives from Common Article 2 of the four Geneva Conventions, which describes such conflicts as cases of declared war or any other armed conflict that may arise between two or more of the contracting powers, even if the state of war is not recognized by one of them, and cases of partial or total occupation of the territory of the contracting party, even if such occupation meets no armed resistance. Prior to the introduction of the multinational troops in October of 1994, the situation in Haiti could not be deemed an armed conflict between Haiti and one or more foreign states. Accordingly, the Geneva Conventions did not preclude the granting of amnesty to the Haitian military regime.

2. The Genocide Convention

The Genocide Convention entered into force on January 12, 1952, and 112 states including Haiti were parties as of December 31, 1993. Like the Geneva Conventions, the Genocide Convention provides an absolute obligation to prosecute persons responsible for genocide as defined in the Convention. The Convention defines genocide as one of the following acts when committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such":

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

141. S.C. Res. 841, supra note 32 (imposing economic sanctions); S.C. Res. 940, supra note 45 (authorizing invasion by multinational force).
143. See Edelenbos, supra note 39, at 6.
144. Article 4 of the Genocide Convention states: "[p]ersons committing genocide or any of the acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Article 5 requires states to "provide effective penalties" for persons guilty of genocide. Article 6 provides that "[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the state in the territory of which the act was committed . . . ." Convention on the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.
145. Id.
Again, there are two reasons why the acts committed by the Haitian military regime would not meet this definition. First, it would be hard to argue that the abuses were committed with the specific intent required by the Genocide Convention. While the killings and abuses in Haiti were ostensibly intended to repress opposition, it would be extremely difficult to argue they were intended literally to destroy the opposition, especially since only about 3,000 people were killed out of the total population of six and a half million (a substantial majority of which could be described as Aristide supporters). Second, and even more importantly, the victims in Haiti do not constitute one of the designated groups enumerated in the Genocide Convention—namely, national, ethnic, racial, or religious. Rather, the violence in Haiti was politically motivated. The target groups were persons who supported Aristide or opposed the military regime, irrespective of their nationality, ethnicity, race, or religion. In this respect, it is noteworthy that the drafters of the Genocide Convention deliberately excluded acts directed against “political groups” from the Convention’s definition of genocide.

The best case that could be made for application of the Genocide Convention to the Haiti situation would focus on the arrests and attacks on Haiti’s Catholic priests, nuns, and Church workers. Here, a parallel could be drawn between the situations in Cambodia and in Haiti. In Cambodia, the Khmer Rouge regime killed over a million Cambodian civilians during the 1970s. Like in Haiti, the violence was targeted primarily at opponents of the regime. Nevertheless, the United Nations’ Special Rapporteur on Genocide has stated that the Khmer Rouge was guilty of genocide “even under the most restricted definition, since the victims included target groups such as... Buddhist monks.”

However, there is a significant distinction between the Cambodian situation and the situation in Haiti. While the Khmer Rouge murdered almost all the Buddhist monks in Cambodia, the Haitian regime mostly subjected the members of the Haitian clergy to temporary detentions and harassment, although there were a few extralegal executions and disappearances. Consequently, it would be difficult to make the case that the treatment of the Catholic clergy triggered the Genocide Convention’s duty to prosecute in the context of the situation in Haiti.

146. See supra note 19 and accompanying text.
148. The exclusion of “political groups” was due in large part to the fact that the Convention was negotiated during the Cold War, during which the Soviet Union and other totalitarian governments feared that they would face interference in their internal affairs if genocide were defined to include acts committed to destroy political groups. According to Professor Kuper, “one may fairly say that the delegates, after all, represented governments in power, and that many of these governments wished to retain an unrestricted freedom to suppress political opposition.” LEO KUPER, GENOCIDE 30 (1982).
149. See SILENCING A PEOPLE, supra note 18, at Appendix A (listing names of priests, members of the seminary, nuns, monks and church workers that have been victims of repression during the reign of the military regime between 1991 and 1994).
3. The Torture Convention.

The Torture Convention entered into force on June 26, 1987 and currently has only 79 parties.\(^{154}\) The Convention defines "torture" as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\(^{155}\)

Many of the brutal atrocities committed by the Haitian military regime would fall within this definition. Perhaps the clearest example would be that of the "political rapes" of Aristide supporters and their relatives. In describing these abuses, the U.N./OAS Civilian Mission said:

the scenario is always substantially the same. Armed men, often military or FRAPH members, burst into the house of a political activist they seek to capture. When he is not there and the family cannot say where he is, the intruders rape his wife, sister, daughter or cousin.\(^{156}\)

These rapes would easily meet the definition of torture since they manifestly: (1) were committed by and with the acquiescence of persons acting in an official capacity; (2) were not incidental to lawful sanctions; (3) constituted acts by which severe pain or suffering is intentionally inflicted; and (4) were committed with the purpose of punishing the family members of activists for their perceived opposition to the military regime or to intimidate or coerce such activists to abandon their support of Aristide.

The Torture Convention requires each state party to ensure that all acts of torture are offenses under its internal law\(^{157}\) and establishes its jurisdiction over such offenses in cases where \textit{inter alia} the alleged offender is a national of the state.\(^{158}\) Several commentators have argued that the peculiar wording of the Torture Convention might allow for some types of amnesties, whereas the Genocide Convention contains a more airtight obligation to prosecute and punish.\(^{159}\) The argument focuses on the fact that the Genocide Convention mandates that persons who commit genocide "shall be punished"\(^{160}\) and requires states


\(^{155}\) Torture Convention, supra note 154, art. 1.

\(^{156}\) MICIVIH Press Release, Ref. CP/94/20, May 19, 1994, reprinted in RAPE IN HAITI, supra note 17, at 6.

\(^{157}\) Torture Convention, supra note 154, art. 4. The Article also requires parties to criminalize acts which "constitute complicity or participation in torture." Id.

\(^{158}\) Id. art. 5.

\(^{159}\) See Orentlicher, supra note 1, at 2604; Jose Zalaquett, Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints, in STATE CRIMES, supra note 79, at 42.

\(^{160}\) Genocide Convention, supra note 144, art. 4.
to "provide effective penalties,"\textsuperscript{161} while the Torture Convention requires only that states "submit" cases involving allegations of torture to the "competent authorities for the purpose of prosecution"\textsuperscript{162} and merely requires the state to make torture "punishable by appropriate penalties which take into account their grave nature."\textsuperscript{163} Thus, the Torture Convention, these commentators assert, "does not explicitly require that a prosecution take place, let alone that punishment be imposed and served."\textsuperscript{164}

Such an argument misconstrues the nature of the prosecute or extradite formulation used in the Torture Convention, which is reproduced verbatim in several other modern international criminal conventions.\textsuperscript{165} The Torture Convention was carefully worded to reflect the developments in international standards of due process that had occurred in the nearly forty years since the Genocide Convention was drafted in 1948. Of particular importance was the adoption in 1966 of the International Covenant on Civil and Political Rights, which obligates states to ensure the rights of criminal defendants including "the right to be presumed innocent"\textsuperscript{166} and the right "to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."\textsuperscript{167} To be consistent with these rights, the Torture Convention had to be worded in such a way as to avoid the suggestion of a predetermined outcome of the judicial proceedings and to recognize that there are legitimate reasons for the termination of an investigation or the dismissal of a case prior to trial.\textsuperscript{168}

Nor should any significance be assigned to the slight difference in the wording of the two conventions' punishment clauses. The manifest intent of both conventions was to ensure that persons convicted of genocide or torture serve harsh sentences. In the view of the Torture Convention's drafters: "In applying article 4 (which requires states to make torture 'punishable by appropriate penalties which take into account their grave nature,') it seems reasonable to require that the punishment for torture should be close to the penalties applied to the most serious offenses under the domestic legal system."\textsuperscript{169} Thus, this wording of the Torture Convention should not be construed to suggest the permissibility of amnesties or pardons.

\textsuperscript{161} Id. art. 5.

\textsuperscript{162} Torture Convention, supra note 154, art. 7(1).

\textsuperscript{163} Id. art. 4(2).

\textsuperscript{164} Orentlicher, supra note 1, at 2604.


\textsuperscript{167} Id. art. 14(2). The International Covenant has been adopted by over 100 states. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 610 (1993).

\textsuperscript{168} Orentlicher, supra note 1, at 2604 n.306.

Unfortunately, Haiti is not a party to the Torture Convention; nor is it a party to the similarly worded Inter-American Convention to Prevent and Punish Torture.\textsuperscript{170} Still, some might argue that these conventions are relevant to the amnesty of the Haitian military regime based on the Committee Against Torture's 1990 decision concerning the Argentinean amnesty laws. In that case, the Committee Against Torture—a treaty body created by the Torture Convention to facilitate its implementation—decided that communications submitted by Argentinean citizens on behalf of their relatives who had been tortured by Argentinean military authorities were inadmissible since Argentina had ratified the Convention only after the amnesty laws had been enacted. However, in dictum, the Committee stated "even before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture."\textsuperscript{171}

The Committee's statement should not be mistakenly construed as suggesting that amnesties for persons who commit torture are invalid under customary international law. By using the word "should," the Committee indicated that its statement was aspirational rather than a declaration of binding law. On the basis of its decision, the Committee urged Argentina to provide remedies for the victims of torture and their surviving relatives; it did not suggest that international law required that Argentina do so.\textsuperscript{172} Nor did it specify that the remedy should be prosecution of those responsible, rather than some other appropriate remedy such as compensation. The Committee's decision, therefore, should not be read as indicating that states that are not parties to the Torture Convention such as Haiti are required to prosecute those who commit torture.

B. General Human Rights Conventions

Unlike the Geneva Conventions, the Genocide Convention, and the Torture Convention, the general human rights conventions to which Haiti is a party (such as the International Covenant on Civil and Political Rights\textsuperscript{173} and the American Convention on Human Rights\textsuperscript{174}) are silent about a duty to punish violations of the rights they were designed to protect. These general human rights conventions do, however, obligate states to "ensure" the rights enumerated therein. Some commentators take the position that the duty to ensure rights implies a duty to prosecute violators.\textsuperscript{175}

\textsuperscript{170}. Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 67 O.A.S.T.S., \textit{reprinted in} 25 I.L.M. 519 (1986). Article 8 of the Convention provides that "[i]f there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed ex officio and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process."


\textsuperscript{172}. \textit{Id.}


\textsuperscript{175}. \textit{See} Roht-Arriaza, \textit{supra} note 11, at 467; Orentlicher, \textit{supra} note 1, at 2568; Thomas Buergenthal, \textit{To Respect and To Ensure: State Obligations and Permissible Derogations}, \textit{in} THE INTERNATIONAL BILL OF RIGHTS 72, 77 (Louis Henkin ed., 1981) ("obligation to 'ensure' rights creates affirmative obligations on the state—for example, to discipline its officials.").
To support their position, the commentators point to the "authoritative interpretations" rendered by the Human Rights Committee, which was established to monitor compliance with the Covenant on Civil and Political Rights. The Committee is empowered to comment on communications received from individuals who are from states that have ratified the Optional Protocol to the Covenant and who claim to have suffered a violation of any of the rights protected by the Covenant. Three communications issued by the Committee have been cited as particularly noteworthy. First, in response to a communication alleging acts of torture in Zaire, the Committee issued a comment stating that Zaire was "under a duty to . . . conduct an inquiry into the circumstances of [the victim's] torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future." Second, in response to a communication alleging extralegal executions in Suriname, the Committee urged the government "to take effective steps (i) to investigate the killings . . . [and] (ii) to bring to justice any persons found to be responsible." And finally, in a case involving disappearances (forced abductions by state agents followed by denials of knowledge of the victim's whereabouts) in Uruguay, the Committee concluded that the government of Uruguay should take "immediate and effective steps . . . to bring to justice any persons found to be responsible for [the victim's] disappearance."

In addition, the Human Rights Committee periodically elaborates on the obligations of states pursuant to specific articles of the Covenant through issuance of the Committee's "General Comments." In 1992, the Committee issued a Comment asserting that amnesties covering acts of torture "are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future."

The authoritative interpretation rationale is based on the notion that parties to the Covenant, having undertaken the treaty obligations contained therein, are subsequently bound to accept, for the purposes of interpreting these obligations, the interpretations rendered by the Human Rights Committee. This rationale is, however, somewhat of an overstretch. The Human Rights Committee is not a judicial body authorized to render authoritative interpretations of the Covenant but is rather an administrative body established to monitor compliance with the treaty. Moreover, during the negotiations of the Covenant, the delegates specifically considered and rejected a proposal that would have required states to prosecute violators. Consequently, to read in such a requirement on the basis of the Human Rights Committee's comments would be inconsistent with the understanding of the Conventions' drafters, upon which the majority of parties relied when ratifying the

176. See, e.g., Orentlicher, supra note 1, at 2568; Naomi Roht-Ariaza, Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress, in IMPUNITY, supra note 11, at 28–30.
181. Orentlicher, supra note 64, at 464 n.20.
183. Cf. SIMMA, supra note 12, at 223.
Convention. Nevertheless, an increasing number of commentators, as well as the state-parties themselves, seem to consider the Committee’s General Comments as Covenant jurisprudence. Arguably, countries that have more recently ratified the Covenant enter the system with full knowledge of this jurisprudence and an awareness that the Cold War context of the legislative history is increasingly obsolete.

Although the Human Rights Committee’s pronouncements suggest a duty for the State to do something to give meaning to the rights enumerated in the Covenant, a careful reading of the Committee’s comments reveals that the Committee never actually concluded that there was an obligation to prosecute attendant to the duty to ensure the rights provided in the Covenant. Rather, the Committee “urged” Suriname to prosecute and said that Uruguay “should” bring violators to justice. Nor did the Committee state that Zaire had to undertake criminal prosecutions but only that it had a duty to punish those found guilty by an inquiry. Thereby, the Committee left the door open to alternative measures, including dismissing the perpetrator from the military, canceling his government pension, banning him from public office, and/or requiring him to pay damages through administrative fines or civil proceedings. The Committee’s 1992 General Comment is consistent with this interpretation. By stating that amnesties “are generally incompatible,” the Committee implied that some amnesties—for example, those (as in Haiti) that are accompanied by investigations to document abuses and identify perpetrators, purging them from positions of authority, and providing victim compensation—would be acceptable.

The authoritative interpretation rationale has more weight as applied to the decisions rendered by the Inter-American Court of Human Rights interpreting the American Convention on Human Rights. Commentators who argue that a duty to prosecute violators must be read into the American Convention have pointed to the Court’s “landmark decision” in the Velásquez Rodríguez Case to support their position. That case concerned the unresolved disappearance of Manfredo Velásquez in September 1981. The Court heard testimony indicating that he had been tortured and killed by Honduran security forces. Writing of the duty under Article 1(1) of the American Convention to “ensure” rights set forth in the Convention, the Court stated:

This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

The Court then proceeded to find the Honduran government to be in breach of its duties under the Convention and ordered it to pay compensation to the victim’s relatives.

One must be careful, however, not to read too much into the Velásquez Rodríguez Case with respect to the duty to prosecute violations of the American Convention. In particular, it is important to note that the Court, in ordering remedies, did not direct the Honduran government to institute criminal proceedings against those responsible for the disappearance

185. See Roht-Arriaza, supra note 11, at 28–30.
186. See supra note 180.
188. See, e.g., Orentlicher, supra note 64, at 429.
189. Velásquez Rodríguez, 95 I.L.R. at 295.
190. Id. at 301.
of Manfredo Velásquez, notwithstanding the fact that the lawyers for the victims' families and the Inter-American Commission had specifically requested such injunctive relief. Indeed, although the Court said that "States must prevent, investigate and punish any violation of the rights recognized by the Convention," it did not specifically refer to criminal prosecution as opposed to other forms of disciplinary action or punishment.

In the wake of the 1989 Velásquez judgment of the Inter-American Court, the Inter-American Commission revisited the question of the permissibility of amnesty laws in cases concerning El Salvador, Uruguay, and Argentina. In all three cases, the Commission determined that the amnesties were incompatible with the American Convention's right to a remedy (Article 25) and right to judicial process (Article 8), read together with Article 1's obligation to ensure rights. These cases are, however, distinguishable from the Haiti situation in that the amnesties affected the domestic law right to initiate or participate in the public criminal process as well as civil redress, which was closely connected with criminal prosecution. The Amnesty Law, in contrast, allows for private suits against members of the military regime. While an unqualified amnesty of persons who violated the rights contained in the American Convention is not likely to pass the Inter-American Court's muster, it is not at all clear that the Inter-American Court would find fault with the Haitian response to the abuses of the military regime that combines a truth commission, purges of officers from the military, limited prosecutions, and a program of victim compensation and civil redress.

C. Customary International Law: Crimes Against Humanity

In 1988, the Aspen Institute and the Ford Foundation sponsored a conference on "State Crimes: Punishment or Pardon," which brought together some of the leading academic and governmental experts on the issue of the responsibility of states to prosecute the gross violations of human rights committed by prior regimes. The Conference participants reached consensus that there was no duty under customary international law to prosecute such violators and that such a duty existed only where there was a relevant treaty obligation. In reaching this conclusion, however, the Conference participants concentrated on general human rights violations and failed to consider whether crimes against humanity under customary international law might uniquely carry with them the obligation to prosecute in the absence of a controlling treaty. Several commentators have subsequently taken the position that there is, in fact, a duty under customary international law to prosecute the perpetrators of crimes against humanity and that the granting of amnesty to those who commit such crimes is a violation of international law. The following section of this Article examines the contemporary definition of crimes against humanity, analyzes whether

191. See Roht-Arriaza, supra note 11, at 31.
193. Id.
195. One by One, supra note 118.
196. See supra notes 121-23 and accompanying text.
198. Id. at 4.
199. See Edelenbos, supra note 39, at 15; Orentlicher, supra note 1, at 2585, 2593; Bassioumi, supra note 73, at 492, 500-01.
the Haitian abuses would meet this definition, and explores whether there is, in fact, a duty under customary international law to prosecute such crimes.

1. The Historical Development of Crimes Against Humanity

The term "crimes against humanity" as the label for a category of international crimes recognized under customary international law originated in the joint declaration of the governments of France, Great Britain, and Russia of May 28, 1915, denouncing the Turkish massacre of over a million Armenians in Turkey as constituting "crimes against civilization and humanity" for which the members of the Turkish Government would be held responsible.200 The Charter of the Nuremberg War Crimes Tribunal was the first international instrument in which crimes against humanity were codified.201 The basis for the inclusion of crimes against humanity in the Nuremberg Charter included the 1899 and 1907 Hague Conventions; experiences and practices in the aftermath of World War I, and the Allied declarations during World War II. In addressing the defense claim of ex post facto law, the Nuremberg Tribunal concluded:

The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation and to that extent is itself a contribution to international law.202

The Nuremberg Charter defined crimes against humanity as follows:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal [i.e., war crimes or crimes against peace], whether or not in violation of the domestic law of the country where perpetrated.203

Under the Nuremberg Charter, the only difference between war crimes and crimes against humanity was that the former were acts committed against nationals of another state, while the latter were acts committed against nationals of the same state as that of the perpetrators.204 Both, moreover, had to be committed in connection with the war.205 While the Nuremberg Tribunal ruled that it did not have jurisdiction over acts of persecution against German Jews committed before the beginning of the war in 1939, the judgment left unclear whether the Tribunal believed the linkage to war to be required by international law or

200. BASSIOUNI, supra note 73, at 168.
201. Id. at 2.
202. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 461 (1949), quoted in BASSIOUNI, supra note 73, at 120.
204. See Egon Schelble, Crimes Against Humanity, 23 BRIT. Y.B. INT’L L. 178, 206 (1946).
205. Id.
The answer to that question is critical to our inquiry concerning the Haiti situation since, as discussed above, the atrocities in Haiti were not committed during war.

Although at least one commentator has concluded that "the post-Nuremberg developments have failed decisively to resolve the nexus issue," a cursory survey of these developments should remove any doubt that the concept of crimes against humanity under customary international law now extends to atrocities committed during peacetime. First, the linkage to war was not included in the definition of crimes against humanity contained in Control Council Law No. 10, which was adopted after the Nuremberg Charter to provide a uniform basis for the trial of German war criminals other than the major war criminals tried by the Nuremberg Tribunal. Second, in its authoritative report on the development of the laws of war at the conclusion of the Nuremberg trials and Control Council Law No. 10 trials, the U.N. War Crimes Commission concluded that international law may now sanction individuals for crimes against humanity committed not only during war but also during peacetime. Third, in the International Law Commission's (ILC) formulation of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, the Commission indicated that crimes against humanity of the inhuman-act type could be committed apart from war, while it retained the restriction for crimes against humanity of the persecution type. Fourth, the 1968 Convention on the Non-Applicability of Statutory Limitations to Certain War Crimes and Crimes Against Humanity provides in Article I that such limitations do not apply to "[c]rimes against humanity whether committed in time of war or in time of peace." Finally, the

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207. Orentlicher, supra note 1, at 2590.
208. See Bassio.png, supra note 73, at 35. The jurisprudence of the trials under Control Council Law No. 10, however, was mixed on whether crimes against humanity could be committed during peacetime. In the Einsatzgruppen Case and the Justice Case, the courts recognized that crimes against humanity were not limited to atrocities committed during a war. In the Flick Case and Ministries Case, the courts followed the precedent of the International Military Tribunal and required the connection to war notwithstanding the differences in the Nuremberg Charter and Control Council Law No. 10. See I Morris & Scharf, supra note 53, at 75 n.242, 76 n.243.
209. According to the United Nations War Crimes Commission:

[There exists] a system of international law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of people and individual persons, that is inhuman acts, constitute international crimes not only in time of war, but also, in certain circumstances, in time of peace.

210. The ILC is a group of 34 distinguished international legal experts elected by the United Nations General Assembly with a mandate to encourage "the progressive development of international law and its codification." See New Zealand Ministry of External Relations and Trade, 1992 United Nations Handbook 25 (1992). In 1947, the U.N. General Assembly directed the ILC to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal." Id. In 1950, the ILC adopted and submitted the Nuremberg Principles to the General Assembly. These included the following formulation on crimes against humanity: "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime." Bassio.png, supra note 73, at 480 (emphasis added).
211. Convention on the Non-Applicability of Statutory Limitations to Certain War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 (entered into force Nov. 11, 1970). This Convention, however, has not been widely ratified. It is not in itself strong evidence of customary international law.
Secretary-General’s Report on the Statute of the Yugoslavia Tribunal—which was prepared by the United Nations Office of Legal Counsel on the basis of rules that were considered to be “beyond doubt customary international law”—stated that international law now prohibits crimes against humanity “regardless of whether they are committed in an armed conflict.”212 This statement was confirmed by the first decision of the Appeals Chamber of the Yugoslavia Tribunal. The Tribunal found “[t]he obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict.”213

2. Were the Haitian Abuses Crimes Against Humanity?

The Statute of the International Criminal Tribunal for Rwanda,214 which constitutes the most recent international codification of crimes against humanity, defines such crimes in Article 3. This Article states:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.215

212. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (1993), reproduced in 1 MORRIS & SCHARF, supra note 53, at 12. The submission of the Commission of Experts established by Security Council Resolution 780, as well as the submissions of other organizations and States, expressed the view that the Yugoslavia Statute should define crimes against humanity irrespective of armed conflict. No state or organization took the position that crimes against humanity under international law could only be committed during war. 1 MORRIS & SCHARF, supra note 53, at 82 n.262. The actual statute, however, provides that the Tribunal has jurisdiction over crimes against humanity only “when committed in armed conflict . . . .” Id. at 82. This restriction was a result of the context in which the Yugoslavia Tribunal was created, rather than a reflection of a rule of customary international law. Id. at 83–84.


215. See id. at 4. This definition departs slightly from that contained in the Statute of the Yugoslavia Tribunal. It replaces the phrase “when committed in armed conflict, whether international or internal in character, and directed against any civilian population” found in the article on crimes against humanity in the Statute of the Yugoslavia Tribunal with the phrase, “when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, U.N. Doc. S/25704 (1993), reprinted in 321
This definition of crimes against humanity contains four general criteria. These criteria include that the acts must be: (1) inhumane in character; (2) widespread or systematic; (3) directed against a civilian population; and (4) committed on national, political, ethnic, racial or religious grounds.

The first of these criteria distinguishes crimes against humanity from lawful acts (e.g., imprisonment or deportation) done pursuant to a valid judicial or administrative decision following a full and fair hearing. The second criterion requires that the inhumane acts be widespread or systematic rather than isolated inhumane acts or random acts of violence. The third criterion indicates that crimes against humanity are restricted to inhumane acts committed against civilians as distinguished from members of the armed forces. The fourth criterion, which includes acts committed on political grounds, highlights a critical difference between crimes against humanity under customary international law and the crime of genocide which the Genocide Convention defines to exclude acts directed against "political groups."

The customary practice of states, evidenced in international and military prosecutions, allows for fairly concise definitions of crimes against humanity when the four aforementioned criteria are met. Pursuant to such definitions, the atrocities committed by the Haitian military regime would unquestionably meet the first and third criteria for crimes against humanity. Numerous "inhumane acts" of murder, extermination, imprisonment, torture, rape, persecution, and mutilation committed against civilians have been documented by international observer missions. Moreover, these acts clearly reflected state action


216. This is indicated by the phrase "other inhumane acts." The canon of construction known as ejusdem generis suggests that the listed crimes proceeding "other inhumane acts" must be construed to be limited to things of the same kind. The crimes listed include all of the inhumane acts enumerated in the Nuremberg definition, with the addition of three inhumane acts that were expressly recognized as being of such gravity as to qualify as crimes against humanity in Control Council Law No. 10, namely imprisonment, torture, and rape. See BASSIOUNI, supra note 73, at 35.

217. Although the phrase "widespread or systematic" does not appear in the Nuremberg Charter, it is synonymous with the phrase "committed against any civilian population" as used in the Nuremberg definition. See Schwelb, supra note 204, at 191 (concluding that the phrase any civilian population "indicates that a larger body of victims is visualized and that single or isolated acts committed against individuals are outside its scope.").

218. The requirement that the attack must be on "political, ethnic, racial or religious grounds" is drawn from the Nuremberg Charter's reference to "persecutions." This requirement was not included in the Statute of the Yugoslavia Tribunal, and an argument can be made that it unnecessarily blurs the distinction between the two different types of crimes against humanity recognized at Nuremberg, namely inhumane act-type crimes and persecution-type crimes. On the other hand, the drafters may have meant for this requirement to merely clarify that crimes against humanity are restricted to acts committed as part of state action or policy. See BASSIOUNI, supra note 73, at 248-50.

219. See id.
220. "Murder" is "intentional killing without lawful justification," and includes killings done by knowingly creating conditions likely to cause death. BASSIOUNI, supra note 73, at 290-91. "Extermination" is murder on a large scale. Id. at 291. "Enslavement" is the exercise of power "attaching to a right of ownership over a person," including such practices as "debt bondage, serfdom, slave labor, and the exploitation of children." Id. at 299-300. "Deportation" is the "forced removal of people from one country to another." Id. at 301. "Persecution" is the "infliction upon individuals of harassment, torture, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given political, racial or religious group." Id. at 317. "Imprisonment" refers to unlawful incarceration. "Rape" would include forcible sexual intercourse and other serious assaults of a sexual nature. "Other inhumane acts," although an exact definition does not exist, would include such acts as unlawful human experimentation and torture. Id. at 321-22, 327. All of the aforementioned acts do not necessarily constitute crimes against humanity per se. For acts such as rape, imprisonment, and torture to be internationally cognizable, they must be "the product of state action or policy." Id. at 327.
221. See supra notes 19-24 and accompanying text.
or policy and were committed on political grounds as required by the fourth criterion. As Deputy Secretary of State Strobe Talbott told the Senate Foreign Relations Committee:

It was nearly four years ago that a military coup transformed Haiti’s newborn democracy into a nightmare of repression . . . . Murder, mutilation, rape, and the kidnapping of children were not just officially sanctioned—often officially perpetrated—crimes; they became common tools for dealing with citizens and families suspected of supporting democracy.222

Whether these acts met the “widespread and systematic” requirement of the second criterion is a slightly more difficult call. Certainly, the abuses committed by the Haitian military regime were more than isolated crimes or random acts of violence. In authorizing the invasion of Haiti by a multinational force, the Security Council noted that the acts of the military regime had amounted to “systematic violations,”223 and President Clinton told Congress that the abuses threatened “tens of thousands of Haitians.”224 Yet the scale of the Haitian abuses pales in comparison to the numbers of atrocities committed in Rwanda (where over 500,000 Tutsis were killed), Bosnia (where over 200,000 Muslims were killed and 20,000 were raped), or Nazi Germany (where over six million Jews were exterminated). However, international law has never sought to quantify the minimum number of casualties or the minimum percentage of the total population affected necessary to constitute a crime against humanity. Rather, since Nuremberg, the test has been both quantitative and qualitative—namely whether the offense passes “in magnitude or savagery any limits of what is tolerable by modern civilization.”225 The Haiti situation would seem to meet this admittedly subjective standard, which is somewhat like the “I know it when I see it” test for obscenity articulated by Justice Stewart of the U.S. Supreme Court.226

The persons criminally liable for such crimes against humanity in Haiti would include both the individual perpetrators as well as their civilian or military superiors under the theory of “command responsibility.” Indeed, international law perceives those in command as bearing greater responsibility for atrocities than those who carry them out and does not condone trials of lower level “scapegoats” as an alternative for going after the “big-wigs.”227

“Command responsibility” encompasses two distinct forms of criminal responsibility. First, a commander may be directly responsible for his own unlawful orders.228 Second, there may be imputed criminal responsibility for unlawful conduct which is not based on the commander’s orders, but rather on the commander’s failure to act to: (1) prevent an
unlawful act that he knew or had reason to know his subordinate was about to commit; (2) stop a subordinate engaged in unlawful conduct of which the commander was aware; (3) promote for general measures likely to halt or discourage unlawful conduct; (4) investigate allegations of illegal acts; or (5) prosecute, and upon conviction, punish those committing the illegal acts. 230

Under this standard, the leaders of the Haitian military regime—Raoul Cedras and Philippe Biamby—were unquestionably responsible for the crimes against humanity committed by the members of the armed forces and Haitian police under their command. 231 Moreover, precedent from the trial of Japanese General Tomoyuki Yamashita following World War II suggests that it is not a defense that these Haitian leaders did not order or were unaware of the atrocities committed by the Haitian military or police forces. Rather, under international law, it is enough to establish liability that military and civilian leaders condoned an atmosphere of lawlessness that pervaded the troops under their command. 232 The imposition of such liability in Haiti is problematic, however. Although the Haitian military had a clear-cut command structure, the ambivalent hierarchy of authority between the section chiefs, the attaches, and FRAPH complicates efforts to hold military leaders accountable based solely on their command responsibilities. 233

3. Is There a Duty to Prosecute Crimes Against Humanity?

Traditionally, those who committed crimes against humanity were treated, like pirates, as hostis humani generis (an enemy of all humankind). 234 Domestic courts of all nations could punish such persons. 235 In the absence of a treaty containing the aut dedere aut judicare (extradite or prosecute) principle, this policy of so-called “universal jurisdiction” is generally thought to be permissive, not mandatory. As noted above, however, several commentators have recently taken the position that customary international law not only establishes permissive jurisdiction over perpetrators of crimes against humanity but also

229. The Commission of Experts, established pursuant to Security Council Resolution 780 (1992) to investigate the atrocities committed in the former Yugoslavia, formulated the following indices to determine whether or not a commander must have known about the acts of his subordinates:

(o) the number of illegal acts; (b) the type of illegal acts; (c) the scope of illegal acts; (d) the time during which the illegal acts occurred; (e) the number and type of troops involved; (f) the logistics involved, if any; (g) the geographical location of the acts; (h) the widespread occurrence of the acts; (i) the tactical tempo of operations; (j) the modus operandi of similar illegal acts; (k) the officers and staff involved; (l) the location of the commander at the time.


230. See BASSIOUNI, supra note 73, at 368.

231. Although Article 263 of the Haitian Constitution requires the separation of the police from the military, from 1991 to 1994, the police remained under the direct control of the army. Stotzky, supra note 34, at 362 n.77.

232. General Yamashita had been the commanding general of the Japanese forces and the military governor of the Philippines. He was charged with the murder and mistreatment of over 32,000 Filipino civilians and captured Americans and the rape of hundreds of Filipino women committed by the Japanese forces. The prosecution did not attempt to prove that General Yamashita ordered the atrocities or even that he had direct knowledge of them. Rather, it sought to show the atrocities were so widespread that he “must have known” of them and yet he took no action to stop them. The military commission presiding over Yamashita’s trial accepted this argument and sentenced him to death on the basis of his failure “to provide effective control of [his] troops as was required by the circumstances.” BASSIOUNI, supra note 73, at 380.

233. Stotzky, supra note 34, at 197.


235. Id.
requires their prosecution and conversely prohibits the granting of amnesty to such persons.236

In addition to the policy rationales discussed above, there are strong jurisprudential reasons for recognizing such a rule. The perpetrator of crimes against humanity incurs criminal responsibility and is subject to punishment as a direct consequence of international law, notwithstanding the national laws of any state or states to the contrary. This unique characteristic of crimes under international law makes it questionable whether any state or group of states would be competent to negate this responsibility. Moreover, the notion of granting amnesty for crimes against humanity would be inconsistent with the principles of individual criminal responsibility recognized in the Nuremberg Charter and Judgment. The fundamental purpose of these principles is to remove any possibility of immunity for persons responsible for such crimes, from the most junior officer acting under the orders of his superior to the most senior government officials, including the head of state.237

Customary international law, which is just as binding upon states as treaty law,238 arises from "a general and consistent practice of states followed by them from a sense of legal obligation," referred to as opinio juris.239 Under traditional notions of customary international law, "deeds were what counted, not just words."240 Yet, those who argue that customary international law precludes amnesty for crimes against humanity base their position on non-binding241 General Assembly resolutions,242 authoritative declarations

236. See Edelenbos, supra note 39, at 15; Orentlicher, supra note 1, at 2585, 2593; Bassiouini, supra note 73, at 492, 500–01.


238. While customary international law is binding on states internationally, not all states accord customary international law equal domestic effect. A growing number of states' constitutions automatically incorporate customary international law as part of the law of the land even accord it a ranking higher than domestic statutes. See Simma, supra note 12, at 213. In the United States, customary international law is deemed incorporated into the common law of the United States. It is considered controlling, however, only where there is no contradictory treaty, statute, or executive act. See Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986) (holding that Attorney General's decision to detain Mariel Cuban refugees indefinitely without a hearing trumped any contrary rules of customary international law). For a criticism of the analysis in Garcia-Mir, see Jordan J. Paust, Paquete and the President: Rediscovering the Brief for the United States, 34 VA. J. INT'L L. 981, 989 (1994).

239. Restatement (Third) of Foreign Relations Law § 102(2) (1987); Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, 1060 (1945) (sources of international law applied by the Court include "international custom, as evidence of a general practice accepted as law.").

240. Simma, supra note 12, at 216.

241. See Oscar Schacter, International Law in Theory and Practice, 178 R.C.A.D.I. 111–21 (1982). "[U]nder the United Nations Charter, the General Assembly does not have the legal power to make law or to adopt binding decisions except for certain organizational matters (such as procedural rules, regulations for the Secretariat and subsidiary bodies and financial decisions)." Id. at 111.

of international conferences,243 and international conventions that are not widely rati-
ified,244 rather than on any extensive state practice consistent with such a rule.

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. Indeed, it
sooner had the term "crimes against humanity" been first coined with respect to the
massacres of Armenians during World War I, than the international community agreed to
amnesty for the Turkish perpetrators.245 Prosecution was also forsaken after the
Algerian war, when, pursuant to the Evian Agreement of 1962, France and Algeria decided
against trying persons who had committed atrocities.246 Similarly, after the Bangladesh
war of 1971, India and Bangladesh consented not to prosecute Pakistani charged with
genocide and crimes against humanity in exchange for political recognition of Bangladesh
by Pakistan.247 More recently, governments in Argentina, Chile, El Salvador, Guatemala

Enforced Disappearances, G.A. Res. 47/133, in UNITED NATIONS, PRESS RELEASE, RESOLUTIONS AND DECISION
ADOPTED BY THE GENERAL ASSEMBLY DURING THE FIRST PART OF ITS FORTY-SEVENTH SESSION, U.N. Doc
GA/8470 (1992) (equating disappearances to a crime against humanity and requiring states to try any perso
suspected of having perpetrated an act of enforced disappearance).

Commentators often cite the Declaration on Territorial Asylum, supra, at 81, as the earliest internationa
recognition of a legal obligation to prosecute perpetrators of crimes against humanity. The Declaration provid
that "states shall not grant asylum to any person with respect to whom there are serious reasons for considerin
that he has committed a...crime against humanity." Id. Yet according to the historic record of this resolution

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1967 U.N.Y.B. 759. This evidences that, from the onset, the General Assembly envisioned its role as advisor
rather than legislative with regard to delineating a duty to prosecute crimes against humanity.

243. The final Declaration and Programme of Action of the 1993 World Conference on Human Rights affirm
that "[s]tates should abrogate legislation leading to impunity for those responsible for grave violati
human rights such as torture and prosecute such violations, thereby providing a firm basis for the rui
law." UNITED NATIONS, WORLD CONFERENCE ON HUMAN RIGHTS, DECLARATION AND PROGRAMME OF ACTION, U.N. Do

244. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Again
Humanity, supra note 211 (no statutory limitation shall apply to crimes against humanity, irrespective of the da
of their commission). As of December 31, 1994, the Convention had been ratified by just 39 states, which did n
include Haiti. See UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL
the Convention because of its inclusion of apartheid as a crime against humanity. Orentlicher, supra note 1,
2591 n.240. The Convention’s provisions relating to crimes against humanity were so controversial that anoth
Convention on the same subject was later drafted under the auspices of the Council of Europe. Id. The Europe
Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, open
for signature Jan. 25, 1974, reprinted in 13 I.L.M. 540 (1974), applies only to crimes committed after the end
force of the Convention and omits apartheid from its definition of crimes against humanity.

245. See Schwab, supra note 204, at 182. Initially, the Allied Powers sought the prosecution of the
responsible for the massacres. The Treaty of Sevres, which was signed on August 10, 1920, would have require
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244. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, \textit{supra} note 211 (no statutory limitation shall apply to crimes against humanity, irrespective of the date of their commission). As of December 31, 1994, the Convention had been ratified by just 39 states, which did not include Haiti. \textit{See United Nations, Multilateral Treaties Deposited with the Secretary-General Status As at 31 December 1994, U.N. Doc. ST/LEG/SER.E/13 at 156–57 (1995).} So few states have ratified the Convention because of its exclusion of apartheid as a crime against humanity. Orenlicher, \textit{supra} note 1, 2591 n.240. The Convention's provisions relating to crimes against humanity were so controversial that another Convention on the same subject was later drafted under the auspices of the Council of Europe. \textit{Id.} The Europe: Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, \textit{open for signature} Jan. 25, 1974, \textit{reprinted in} 13 I.L.M. 540 (1974), applies only to crimes committed after the entry into force of the Convention and omits apartheid from its definition of crimes against humanity.

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Uruguay, and South Africa have each granted amnesty to members of former regimes who commanded death squads that tortured and killed thousands of civilians within their respective countries. Meanwhile Panama, under international pressure, agreed to grant asylum to the Haitian military leaders, notwithstanding the United Nations Declaration on Territorial Asylum, which provides that "states shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a . . . crime against humanity." 249

To this list must be added the modern practice of the United Nations, which in the last three years has worked to block mention of prosecuting former Khmer Rouge leaders for their atrocities from inclusion in the Cambodia peace accords, pushed the Mandela government to accept an unconditional amnesty for crimes committed by the apartheid regime in South Africa, and, as detailed above, helped negotiate, and later endorsed, a broad amnesty for the Haitian military regime. 250 As one commentator recently remarked, "[w]hereas the human rights organs of the United Nations have developed clearer and more elaborate guidelines on the required treatment of past human rights violations, the peacekeeping branches of the United Nations [the Secretary-General and Security Council] have subordinated those guidelines to an ill-advised effort to bring even mass murders into the political process, in the hopes they can be placated, reformed, or at least isolated." 251

A notable exception to this trend within the U.N. peacekeeping branches can be found in the actions of the Security Council-created Yugoslavia War Crimes Tribunal with respect to the adoption of its Rules of Procedure and Evidence. In its 1992 proposal for the Tribunal's Rules, the United States suggested that low level perpetrators accused of crimes against humanity be given immunity from prosecution in exchange for their testimony against higher level officials. 252 In explaining the judges' decision not to permit granting immunity, the President of the Tribunal stated: "The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be." 253

And yet even this development sends a mixed message. On the one hand it is significant that a subsidiary organ of the Security Council refused to allow immunity for crimes against humanity. On the other, by stating that "no one should be immune," the judges used words of aspiration rather than words acknowledging a legal obligation as is necessary to evince opinio juris. In addition, the proposal for immunity that the judges rejected would have also covered breaches of the Geneva Conventions and the Genocide Conventions, which prohibit the granting of immunity and amnesty. Rather than suggesting that international law also prohibits the conferring of immunity upon persons who have committed crimes against humanity, the judges' decision may have merely reflected their

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249. See Declaration on Territorial Asylum, supra note 242, at 81.
250. Naomi Roht-Arriaza, Conclusion: Combating Impunity, in IMPUNITY, supra note 11, at 299-300.
recognition that it would have been unworkable to allow immunity for some crimes and preclude it for others within the Yugoslavia Tribunal’s jurisdiction. Moreover, that the United States even proposed a rule permitting immunity to perpetrators of crimes against humanity is another indication of state practice contrary to the existence of a customary international law obligation to prosecute.

Those who take the position that there is a customary international law duty to prosecute crimes against humanity respond to the litany of contrary state practice by asserting that “even those states which have adopted amnesty laws and thereby allowed impunity do not deny the existence, in principle, of an obligation to prosecute, but invoke countervailing considerations, such as national reconciliation or the instability of the democratic process.” Support for this line of reasoning can be found in the International Court of Justice’s Judgment in the Nicaragua case and in the frequently-cited opinion of the U.S. Court of Appeals for the Second Circuit in the Filartiga case.

There are several problems with this argument in the context of the duty to prosecute crimes against humanity, however. First, it is factually incorrect. Although a few of the states that have granted amnesty to the leaders of the former regime have characterized their action as an exception to the rule, most never mention the existence of a rule at all. Indeed, the record concerning the Haitian amnesty is completely silent on the issue. A second problem stems from the fact that the nature of the obligation to prosecute such crimes is purportedly absolute. As a consequence, appeals to exceptions or justifications supposedly contained within the rule do not in fact confirm the rule but rather deny its existence and in its place assert an alternative rule that would allow amnesty for crimes against humanity whenever justified by needs for political reconciliation. A final problem is that the rationale of the International Court of Justice and the Second Circuit really makes sense only with respect to a situation where customary law has gradually been built up.

254. Edelenbos, supra note 39, at 21; Roht-Arriaza, supra note 11, at 496-97.
255. The International Court of Justice attempted to come to terms with the problem of inconsistency between actual practice and opinio juris as follows:

In order to deduce the existence of customary rules, the Court deems it is sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, . . . the significance of that attitude is to confirm rather than to weaken the rule.

256. In Filartiga v. Peña-Irala, 630 F.2d 876, 884 (2d Cir. 1980), the Court observed:

The fact that the prohibition of torture is often honored if the breach does not diminish its binding effect as a norm of international law. As one commentator has put it, “The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. 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.”

Id. at 884 n.15 (quoting James L. Brierly, THE OUTLOOK FOR INTERNATIONAL LAW 4-5 (1944)).
258. Several commentators have argued that the duty to prosecute crimes against humanity is jus cogens, or a peremptory norm of international law, which supersedes all other principles, norms and rules of both international and national law. The essential characteristic of jus cogens as a higher rule is its nonderogability. It admits no exceptions such as force majeure or state of necessity. See Naomi Roht-Arriaza, Introduction, in IMPUNITY, supra note 11, at 6; Bassiouini, supra note 23, at 520-521; Orendicher, supra note 1, at 2609.
through State practice, and where subsequent instances of inconsistent conduct occur. The reasoning is much less convincing where, as in the case of a duty to prosecute crimes against humanity, the discrepancy between words and practice has been glaring from the very start.

Thus, notwithstanding 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. Customary international law concerning crimes against humanity, therefore, does not provide a solid basis for challenging the validity of the Amnesty Law.

IV. CONCLUSION

This Article began with the question: did the Haitian amnesty achieve a proper mix between law and political reality? On the political side, we have seen that the decision to provide amnesty to members of the former military regime was largely imposed upon the Aristide government by the United States and United Nations, whose overriding concern was to restore the democratic government to power without having to introduce troops into a combat situation in Haiti. Haitian interests in discouraging future atrocities, deterring vigilante justice, and reinforcing respect for law and the new democratic government through prosecutions were never given serious attention.

What makes the Haitian situation so unique is that the United States and United Nations actually participated in the negotiation of the amnesty-for-peace deal with the Haitian military leaders, pressured the Aristide Government to accept the deal, and then endorsed the deal as the only acceptable way to resolve the Haitian situation. While the amnesty achieved the desired short-term benefit (i.e., the democratic government was restored with almost no bloodshed and the human rights abuses came to an end), the long-term implications were perhaps not fully appreciated at the time. For, like a genie that has been let out of a bottle, this precedent cannot be undone. Nor will it be ignored. Instead, as Justice Goldstone and Graham Blewitt feared, the Haitian amnesty is likely to serve as a beacon of hope for those accused of some of history’s most shocking atrocities in Bosnia, Iraq, and Cambodia. In other parts of the globe, future dictators will be encouraged by the Haitian amnesty to commit new atrocities with impunity.

Before supporting or endorsing such amnesties and thereby condoning acts of international barbarism, the United Nations, as an organization committed to furthering human rights, and the United States, as the twentieth century’s last remaining superpower, should more fully consider whether peace achieved in this manner is worth the long-term price. Perhaps a more appropriate response would parallel U.S. policy with respect to terrorism, which prohibits the government from “making concessions of any kind to terrorists” on the ground that “such actions would only lead to more terrorism.” If the United States and the United Nations cannot prevent atrocities from occurring, they should at least seek to punish the perpetrators. This policy was the rationale behind the recent establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda—a rationale that has been undermined by the participation of the United Nations and United States in the Haitian amnesty deal.

259. SIMMA, supra note 12, at 220.
260. Id.
And what of international law? Professor Anthony D’Amato recently wrote that he knew of no “international lawyer who has objected” to the Haitian amnesty-for-peace deal. The reason public international law generalists have (until now) been silent is not that international law has nothing to say on the issue of amnesty for perpetrators of atrocities, but rather that it did not apply to the situation in Haiti. Had the atrocities in Haiti occurred during an international conflict, the Geneva Conventions would have required prosecution; had the violence been directed at ethnic, national, racial, or religious groups, the Genocide Convention would have required prosecution; and had Haiti been a party to the Torture Convention, it would have required prosecution. Any amnesty conferred would have constituted a violation of treaty law and would be subject to challenge in a variety of domestic and international fora. Unfortunately, none of these conventions applied to the Haitian situation, and, therefore, they played no role in the decision to swap amnesty for peace. Nor would these conventions apply to most of the other countries now wrestling with their repressive pasts that have concluded, or are considering, similar amnesty-for-peace deals. Like Haiti, few of these countries are party to the Torture Convention, abuses are most often targeted at political groups, and the situation rarely constitutes an international armed conflict.

While the international criminal conventions are unlikely to apply to such situations, there is growing recognition of a duty for states to do something to give meaning to the human rights enumerated in the Covenant on Civil and Political Rights and the American Convention on Human Rights, which are much more likely to be applicable. Yet, the “something” required is not necessarily prosecution of former leaders responsible for violations of these general human rights treaties. Given the precedent discussed earlier, it is likely that both the Human Rights Committee and the Inter-American Court of Human Rights would agree that the Aristide Government—which has established a truth commission, instituted purges of officers from the military, conducted limited prosecutions, and has put into place a program of victim compensation and civil redress—adequately discharged its duty to ensure human rights, notwithstanding its failure to prosecute the military leaders responsible for violations of those rights.

On the other hand, the analysis contained in this Article demonstrates that the Haitian atrocities almost certainly constituted crimes against humanity under customary international law. Customary international law recognizes permissive jurisdiction to prosecute leaders responsible for such crimes either nationally or before an international tribunal. From a legal standpoint, it would be perfectly appropriate, for example, to extend the Yugoslavia and Rwanda Tribunal’s jurisdiction to cover the crimes against humanity committed by the Haitian military leaders, although the politics of the Security Council suggest such a course of action is highly unlikely.

In addition, there are a host of compelling policy and jurisprudential reasons in favor of an international duty to prosecute crimes against humanity, which would preclude the granting of amnesties for perpetrators. Yet, despite a large collection of General Assembly resolutions calling for prosecutions of crimes against humanity, and notwithstanding the wishful thinking of a number of international legal scholars, state practice plainly does not support the existence of an obligation under international law to refrain from conferring amnesty for crimes against humanity. That the United Nations, itself, felt free of legal constraints in endorsing the Haitian amnesty deal underscores this conclusion.

In this regard, our inquiry into the permissibility of the Haitian amnesty has placed us in the midst of one of the most enduring of international legal questions—namely, what is

the nature of customary international law? There are those, especially in the field of human
rights, who would focus entirely on the words, texts, votes, and excuses themselves and
disregard inconsistent practice as either unimportant or as the exception that proves the rule.
The trouble with such an approach that focuses so heavily on words is "that it is grown like
a flower in a hot-house and that it is anything but sure that such creatures will survive in
the much rougher climate of actual state practice."263 A "rule" that is so divorced from
the realities of state practice is unlikely to achieve substantial compliance in the real world
and, therefore, cannot be said to be a binding rule at all, but rather an aspiration.

On the other side of the debate are those, including the author of this Article, who
acknowledge that such proclamations may constitute a starting point in the formation of
customary international law, but look beyond the rhetoric emanating from the halls of the
United Nations for evidence of actual state practice.264 If there exists widespread practice
in conformity with these proclamations, then it can be said that a rule has ripened into
binding customary international law.265 In such cases, a few instances of departure from
the rule will not disprove the existence of customary international law, but when the
departures are the norm and compliance is the exception as is the case of prosecuting crimes
against humanity of a prior regime, a customary international law duty cannot be deemed
to exist.

Yet, given the compelling justifications for an international duty to prosecute crimes
against humanity, waiting for state practice to catch up with the views expressed in General
Assembly resolutions does seem an unsatisfactory approach. As opposed to brokering
amnesty-for-peace deals, the better approach would be for the U.N. Security Council to play
a preemptive role by deciding in specific situations, such as Haiti, which constitute threats
to international peace and security, that no amnesty for the perpetrators of atrocities shall
be permitted or internationally respected.266 At the very least, the United Nations, having
taken the lead in attempting to fashion an emerging rule of customary international law that
would require prosecutions of crimes against humanity, should oppose amnesty in countries
where it has become deeply involved.

263. SIMMA, supra note 12, at 217.
264. See Schacter, supra note 241, at 111–23; Christopher Joyner, U.N. General Assembly Resolutions and
International Law: Rethinking the Contemporary Dynamics of Norm-Creation, 11 CAL. W. INT’L L.J. 445, 459
No. 8, at 15, U.N. Doc. E/cn.4/1/610) (recognizing that a General Assembly "Declaration creates an expectation
of adherence, and ‘insofar as the expectation is gradually justified by State practice, a declaration may by custom
become recognized as laying down rules binding upon the States.’").
266. Such a proposal was suggested by Professor Thomas Buergenthal, one of the members of the U.N. Truth
Commission for El Salvador and former President of the Inter-American Court of Human Rights, during
Congressional hearings on the situation in Bosnia. See Douglas W. Cassel, Jr., International Truth Commissions
and Justice, 5 ASPEN INST. Q. 69, 82 (1993).