Amnesties in Strasbourg

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1. Introduction

This article is about the compatibility of amnesties from criminal prosecution with the European Convention on Human Rights (the Convention or ECHR). The judicial review of amnesties has been a feature of human rights law in other jurisdictions over the last two decades. For instance, the Inter-American Court of Human Rights has heard a number of challenges to amnesties granted before or during Latin America's political transitions.[1] Likewise, the South African Constitutional Court was called upon to judge the constitutionality of the amnesty that helped to facilitate the country's transition from apartheid to democracy.[2] So far, the European Court of Human Rights (the Court) has not heard a similar direct challenge to an amnesty law.[3] But when that case comes, as it likely will, there is a good chance that the Court will make a serious error. That error will be to hold that the Convention requires *in all circumstances* the prosecution of perpetrators of gross human rights abuses. It will be to hold that amnesties for the most serious abuses are always

[1] See eg *Barrios Altos v Peru* IACHR Series C no 83 (2001); *Gelman v Uruguay*, IACHR Series C no 221 (2011). It is beyond the scope of this article to consider the rich and influential case law of the Inter-American Court of Human Rights on this question. For an overview, see Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 ICLQ 645.

[2] *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* CCT17/96 [1996] ZACC 16.

[3] See section 3 below.

impermissible under the Convention. Such a decision would be legally, politically, and institutionally indefensible.

To reiterate, the Court has not yet made such an error, and, as shown below, its case law betrays a degree of ambivalence about an unqualified position on the impermissibility of amnesties. However, it has laid the groundwork to do so, influenced by a wider political current that condemns impunity for the gravest wrongs and its own case law on the cluster of duties to which absolute rights give rise. The cluster of duties to which absolute rights give rise has been held, quite rightly, to include a duty to prosecute violations of the right.[4] The problem, however, lies in the way that the duty to prosecute has been constructed, together with an underlying assumption that each of the duties to which an absolute right gives rise carries that absolute status.

That underlying assumption – the failure to disaggregate the duties to which absolute rights give rise – sets a trap for the Court. It has four implications, each pernicious, for how the Court is likely to review the compatibility of an amnesty with the Convention. *First*, most obviously, to treat the duty to prosecute as absolute excludes from consideration other relevant interests. This exclusion prioritizes the ends served by criminal trials in the face of genuinely conflicting moral and political demands. *Second*, to treat the duty to prosecute as absolute is to inhibit the way that the margin of appreciation ought to operate in amnesty cases. This has the consequence of unduly limiting the Court's deference to national decision-makers. *Third*, relatedly, to treat the duty to prosecute as absolute has a similar effect on the scope of deference that courts ought to provide to political decision-makers on a question such as this. Where the second consequence concerns deference on the international-

[4] See eg *Ali and Ayşe Duran v Turkey* ECtHR 8 April 2008.

local axis, the third is institutional as between courts and political actors. And *fourth*, to treat the duty to prosecute as absolute renders it non-derogable under Article 15(2) ECHR. This does not make sense in terms of the delicate structure of Article 15(2) – the specification of derogable and non-derogable rights – and closes a valuable means of political flexibility built into the Convention.

In other words, the doctrinal groundwork is in place for the Court to invalidate a legitimate amnesty. It need not be so. Indeed, all of the doctrinal tools required to properly resolve an amnesty case are embedded in the Convention and case law of the Court. That solution would be for the Court to recognise that not every duty grounded in an absolute right is itself absolute. This may be done in one of two ways – either explicitly or implicitly. To do it explicitly would be to entertain the possibility of justified displacement of the duty. To do so implicitly would be to build into the specification of the duty a qualification that enables the consideration of other legitimate interests.[5] Either solution would be a step towards remedying each of the four consequences set out above. It would be to recognize the conflicting moral and political demands that bear on the justifiability of criminal trials. It would force the Court to grapple with considerations flowing from its supranational and judicial character. And it would, in exceptional cases, open up the possibility of derogation.

The resolution of this specific issue is thus connected to three other rich streams of scholarship. The first concerns the conflicting values and ends at stake in transitional societies and the continuing utility of amnesties in peace negotiations.[6] The second concerns

[5] See Natasa Mavronicola, 'What is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 HRLR 723. See further Alan Gewirth, 'Are There Any Absolute Rights' (1981) 31 *The Philosophical Quarterly* 1, 5.

[6] See eg Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart 2008); Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (CUP 2009). For a

the rise of what is sometimes called the anti-impunity movement in international politics – a set of political and legal developments that coalesce in support of criminal trials as a central response to grave human rights abuses.[7] The third concerns the structure of the ECHR and the Court's approach to reasoning about rights.[8] Indeed, these three streams intersect where the Court is called upon to determine the compatibility of an amnesty with the Convention.

To make its argument, this article is structured as follows. Section 2 sets out four preliminary points. Section 3 analyses the two lines of relevant case law – the Court's articulation of the procedural duty under Article 3 ECHR and its tentative discussions of amnesties. Section 4 argues against the assumption that each of the duties to which Article 3 gives rise carries with it the right's absolute status and demonstrates that the problem is particularly salient given the way that the Court has constructed the duty to prosecute. Section 5 argues that the Court's approach has the four pernicious implications noted above. Section 6 briefly proposes how the Court ought to reason through these cases, while Section 7 concludes.

2. Clearing the Ground: Four Preliminary Points

This section sets down four preliminary points. First, it proposes a working definition of amnesty. Second, it notes the emergence of a powerful anti-impunity norm in international law and politics. Third, it considers how an amnesty case might come before the Strasbourg Court. Finally, it specifies violations of Article 3 ECHR – the right against torture – as the focus of the analysis and briefly considers the relationship between human rights law and

wider overview, see Leslie Vinjamuri and Jack Snyder, 'Law and Politics in Transitional Justice' (2015) 18 *Annual Review of Political Science* 303.

[7] See eg Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 *Journal of Law and Society* 411; Karen Engle, Zinaida Miller and Dennis Davis, *Anti-Impunity and the Human Rights Agenda* (CUP 2016).

[8] See eg Janneke Gerards and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7 ICON 619; Mavronicola (n 5).

international criminal law. That relationship is important in connecting literature from those two fields.

As to definition, then, Freeman's approach is helpful: '[a]mnesty is an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law'.[9] This definition is not itself sensitive to the legitimacy of the particular amnesty; those granted by a regime to its own agents in bad faith are included.[10] It also captures the myriad ways that amnesties are enacted and structured; for present purposes, these differences are of secondary concern.[11] Amnesties can be available to those who have not yet faced prosecution or those who have been prosecuted and convicted or, as was the case in South Africa, both groups.[12] As Seibert-Fohr puts it, we are dealing with 'the legal basis for the decision by a government not to punish offenders for particular crimes or offences committed within a fixed period of time or specified situation.'[13]

The legitimacy of amnesties has come under sustained assault over the last twenty years. In part, this assault has been driven by a powerful political and legal idea – the idea of ending impunity.[14] One irony of the rise of the anti-impunity norm is that it picked up speed after the use by South Africa of an amnesty that was central to securing the transition from apartheid

[9] Freeman (n 6) 13.

[10] ibid.

[11] For a comprehensive analysis, see Mallinder (n 6).

[12] Promotion of National Unity and Reconciliation Act, 34 of 1995 (South Africa).

[13] Anja Seibert-Fohr, 'Amnesties' 2010 *Max Planck Encyclopedia of Public International Law* [2].

[14] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Review* 1073-1079; Engle et al (n 7).

to democracy.[15] Moyn describes the rise of anti-impunity as a 'dramatic and transformative event' in international governance.[16] In a wider sense, anti-impunity as a political idea places criminal accountability 'at the centre of our current vision of international or global justice.'[17] In a narrower sense, it seems to leave no room for amnesties.

The next issue, then, is to ask how an amnesty might come before the Strasbourg Court. The most likely path is through a direct challenge to an amnesty by victims or their families – this is the conventional framing of cases in other jurisdictions.[18] The claim itself will most likely be based on the procedural duty to prosecute rights violations. In practical terms, it is tempting to see the amnesty debate as one not directly relevant to the Convention's regional space. This would be a mistake. The transition from conflict to peace is relatively recent in a number of Council of Europe states, some of which are currently debating how to deal with abuses committed in the past. To take Northern Ireland as an example, the question of amnesties for Troubles-era crimes continues to be a matter of serious political controversy.[19] Likewise, the rise of the anti-impunity norm, discussed in more detailed below, may drive an attempt to revisit political settlements in Eastern Europe or the Balkans. This would mirror the progression of events in Latin America.[20]

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[15] For an overview, see Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Interstentia 2004).

[16] Samuel Moyn, 'Anti-Impunity as Deflection of Argument' in Engle et al (n 7) 68, 69.

[17] ibid 69.

[18] See generally Mallinder (n 6) 201-246.

[19] See Louise Mallinder et al, Amnesties, Prosecutions and Public Interest in the Northern Ireland Transition, 'Report on Investigations, Prosecutions, and Amnesties under Articles 2 and 3 of the European Convention on Human Rights' (March 2015).

[20] See Francesca Lessa and Leigh Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012). For a powerful critique of aspects of the Inter-American Court of Human Rights' decisions on this question, see Roberto Gargarella, 'Democracy and Rights in *Gelman v. Uruguay*' (2015) 109 *AJIL Unbound* 115.

Moreover, in bare terms, parts of Europe are at war. In Eastern Ukraine, separatist forces are engaged in conflict with the Ukrainian government.[21] Extensive media reports have detailed Russian involvement in the conflict.[22] Both Russia and Ukraine are parties to the ECHR, and there is no doubt that gross human rights abuses have occurred, including torture.[23] If, (or when), peace negotiations are revived, the question of criminal prosecutions for those abuses will have to be part of the discussion. To put that another way, if the settlement includes amnesties,[24] there is the possibility of legal challenge under the Convention. Even without the Court's involvement, legal advisers' understanding of the space left by the Convention may well play a role in structuring negotiations.[25]

That is the central case – a direct challenge to an amnesty granted by a contracting party to the Convention. There are other possibilities. Many European states have enacted forms of extraterritorial jurisdiction for international crimes, thus opening up the possibility of prosecution in European domestic courts of participants in non-European conflicts.[26] It may be that a domestic prosecutor brings charges against the recipient of an amnesty, who then challenges the prosecution under the Convention. In such a case, the state may well defend its decision to prosecute on the basis that the Convention in fact *obliges* it to do so.

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[21] For recent discussion in the Security Council, see UNSC, S/PV.7876 (2 February 2017).

[22] See eg David Herszenhorn and Peter Baker, 'Russia Steps Up Help for Rebels in Ukraine' *New York Times* (25 July 2014); Sam Jones and Roman Olearchyk, 'Russia Ups the Ante in Ukraine with Eye on G20' *Financial Times* (17 August 2016).

[23] See eg Amnesty International, 'Breaking Bodies: Torture and Summary Killings in Eastern Ukraine' (22 May 2015) at <https://www.amnesty.org/en/documents/eur50/1683/2015/en/> accessed 1 October 2017; Human Rights Watch, '"You Don't Exist": Arbitrary Detentions, Enforced Disappearances, and Torture in Eastern Ukraine' (21 July 2016) at <https://www.amnesty.org/en/documents/eur50/4455/2016/en/> accessed 1 October 2017.

[24] See Point 5, 'Package of Measures for the Implementation of the Minsk Agreements' agreed by Trilateral Contact Group at the Summit in Minsk (12 February 2015).

[25] See relatedly, Christopher McCrudden and Brendan O'Leary, 'Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-sharing Settlements' (2013) 24 EJIL 477, 498.

[26] For a survey, see Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update' (9 October 2012) at <https://www.amnesty.org/en/documents/ior53/019/2012/en/> accessed 1 October 2017.

Conversely, where the recipient of an amnesty granted by a foreign state is on the territory of a contracting state – perhaps a foreign official undertaking a state visit – a victims' group may challenge the decision of the European state *not* to bring charges.[27] For instance, in the recent peace talks in Colombia, the question of prosecutions and amnesties was, and continues to be, delicate.[28] No doubt there are difficult questions of jurisdiction and immunity embedded here. But it is possible that a court in a Council of Europe member state will end up judging the compatibility with the Convention of an amnesty granted by a foreign state.

All of this is simply to say that there is a good chance that the Court will be seized of an amnesty case in the near future. In this article, Article 3 ECHR grounds the analysis, though the argument applies with as much force to a claim under Article 2 ECHR. The focus on Article 3 may be explained as follows. As a matter of fact, it is a rare conflict in which acts of torture and inhuman treatment do not take place. As a matter of litigation strategy, given the absolute status of Article 3 and the Court's repeated emphasis of its centrality to the system of rights protection established by the Convention, it would be wise for a claimant to centre their case on its infringement. And legally, it is in respect of Article 3 that the relationship between international criminal law and international human rights law is most easily understood.

[27] See generally Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' (2009) 30 *Michigan Journal of International Law* 927.

[28] See 'Symposium on the Colombian Peace Talks and International Law' (2016) 110 AJIL Unbound 161; René Urueña, 'Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003-2017' (2017) 111 AJIL 104.

Indeed, understanding this relationship is key to connecting two bodies of scholarship that are sometimes disconnected.[29] On one hand, the development of international criminal law over the last two decades has been accompanied by rich scholarly attention to the putative state duty to prosecute those crimes.[30] With the establishment of a range of international *criminal* tribunals, the debate has encompassed an institutional dimension. Central, in this institutional dimension, is whether, and if so how, domestic amnesties fit with the Rome Statute of the International Criminal Court.[31]

On the other hand, conduct that gives rise to international *criminal* liability entails, almost by definition, a gross infringement of human rights. For this reason, to understand state obligations in respect of that conduct, we also have to look to international human rights law and, in particular, international and regional human rights courts. Huneeus describes these courts as having a quasi-criminal jurisdiction.[32] This is the practice of an international court or other body 'ordering, monitoring, and guiding national prosecutions.'[33] It is, as she describes it, 'international criminal law by other means.'[34]

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[29] For integrated analyses, see Nigel Rodley, 'The Definition(s) of Torture in International Law' (2002) 55 CLP 467; Paola Gaeta, 'When is the Involvement of State Officials a Requirement for the Crime of Torture' (2008) 6 JICJ 183; William Schabas, 'Synergy or Fragmentation: International Criminal Law and the European Convention on Human Rights' (2011) 9 JICJ 609.

[30] See foundationally Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 YLJ 2537; M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63.

[31] Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 EJIL 481; Anja Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 MPYUNL 553; Talita de Souza Dias, '"Interests of justice": Defining the Scope of Prosecutorial Discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court' (2017) 30 LJIL 731.

[32] Alexandra Huneeus, 'International Criminal Law by other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 AJIL 1.

[33] ibid 2.

[34] ibid.

In the prohibition on torture we see this overlap. This is not to say that the definition(s) of torture in human rights law and international criminal law overlap entirely.[35] But in many cases, conduct that violates Article 3 ECHR will also give rise to international criminal responsibility. Where committed as part of a widespread or systematic attack on a civilian population, torture is a constituent element of a crime against humanity.[36] During either international or non-international armed conflict, torture is a war crime.[37]

Thus to sum-up: this article is concerned with conduct that both gives rise to individual criminal responsibility under international law and implicates the prohibition on torture in Article 3 ECHR. It is concerned with the grant of an amnesty by the state for that conduct – the taking of 'an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability.'[38] And it is concerned with how one particular human rights court – the ECtHR – will determine its permissibility.

3. The Case Law of the Court

The first step is thus to set out how the duty to prosecute has developed in the case law of the Court. The second is to consider the few cases in which the Court and previously, the Commission, have addressed the permissibility of amnesties. The Court is edging towards an unqualified position on the duty to prosecute, though it seems to anticipate that there may be troubles to come.

A. The Duty to Prosecute under Article 3 ECHR

[35] See Rodley; Gaeta (n 29).

[36] See ICC Statute art 7(1)(f).

[37] See ICC Statute arts 8(2)(a)(ii) and 8(2)(c)(i).

[38] Freeman (n 6).

Recent scholarship has analysed with increased sophistication the set of duties to which rights in the Convention give rise.[39] As a general framework, Ashworth's tripartite classification is helpful. The case law establishes duties to:

(a) Put in place effective criminal law provisions and enforcement machinery;
(b) Take operational measures to protect individuals at risk of the violation of their rights; and
(c) Establish effective investigative machinery and ensure that there is an effective and thorough investigation capable of leading to the identification and punishment of those responsible.[40]

It is probably the operational duty – the *Osman* duty – that has received the most attention in practice and scholarship.[41] In England and Wales, its relationship with basic principles of tort liability remains under scrutiny.[42] In addition, the Court has clarified what it means to undertake an effective investigation.[43] For present purposes, however, the crucial thing is what the Court has said about the duty to prosecute.

In general, the duty to prosecute tends to receive less independent treatment in the case law. This is because such a failure is ordinarily a consequence of the lack of a thorough and effective investigation, and the state's failure is analysed in those terms.[44] In these cases, the

[39] See eg Laurens Lavrysen, *Human Rights in a Positive State* (Intersentia 2016); Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (CUP 2017).

[40] Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart 2013). See also Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009) 111-152.

[41] See *Osman v UK* (2000) 29 EHRR 245. In respect of Article 3 ECHR, see *Z and Others v UK* (2002) 34 EHRR 3.

[42] See *Michael and Others v The Chief Constable of South Wales Police and Another* (2015) UKSC 2.

[43] See *Nachova and Others v Bulgaria* (2006) 42 EHRR 43; *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25. See also *Commissioner of Police of the Metropolis v DSD and another* (2018) UKSC 11.

[44] See eg *Assenov v Bulgaria* (1999) 28 EHRR 652.

most we see is the general statement that the 'investigation … should be capable of leading to the identification and punishment of those responsible.'[45]

There are cases, however, where prosecution and punishment are directly at issue. In *Krastenov v Bulgaria*, the applicant was subjected to inhuman treatment in breach of Article 3 by the police.[46] He pursued, and won, a claim of civil compensation from the state. The prosecuting authority, fully aware of the facts of the civil claim, did not take forward any prosecution of the responsible officers. In this respect, the Court held:

> If the authorities could confine their reaction to incidents of intentional police ill treatment to the mere payment of compensation, while remaining passive in the prosecution of those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity and the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice.[47]

In 2008, in *Ali and Ayse Duran v Turkey* the Court articulated the duty in slightly stronger terms.[48] The case was brought by the parents of a man, Bayram Duran, who died in a police station in Istanbul after being beaten by four police officers. Eventually, criminal proceedings were brought, which resulted in a judicial determination of the facts and pronouncement of relatively short prison sentences.[49] These sentences were not executed. As to the general principles in play, the Court held:

> The requirements of Articles 2 and 3 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law and the prohibition of ill treatment. While there is no absolute obligation for all prosecutions to result in conviction or in a

[45] ibid [102].

[46] *Krastanov v Bulgaria* (2005) 41 EHRR 50.

[47] Ibid [60]. See also *Gäfgen v Germany* (2011) 52 EHRR 1 [119]; *Grecu v Moldova* ECtHR 30 May 2017 [18].

[48] *Ali and Ayşe Duran v Turkey* (n 4).

[49] ibid [32], [65].

> particular sentence, *the national courts should not under any circumstances be prepared to allow life endangering offences and grave attacks on physical and moral integrity to go unpunished.*[50]

In the application of this principle, the Court noted that it would grant substantial deference to national courts in the determination of appropriate sanctions.[51] Nonetheless, it retained a power of review 'in cases of manifest disproportion between the gravity of the act and the punishment imposed.'[52] This was the case here. The Court emphasised that:

> [W]here a State agent has been charged with crimes involving ill-treatment, it is of the utmost importance that criminal proceedings and sentencing are not time-barred and that measures such as the granting of an amnesty or pardon should not be permissible… In the Court's view, suspension of the execution of the convicted police officers' prison sentences pursuant to Law no. 4616 is comparable to a partial amnesty … and is a measure which cannot be considered permissible under its jurisprudence since, consequently, the convicted officers enjoyed virtual impunity despite their conviction.[53]

To reiterate, this was a case in which criminal proceedings had occurred; the problem was the failure of the state to execute the penalty. Interestingly, we see the language of impunity in the judgment. Likewise, in the recent Grand Chamber case of *Jeronovics*, the Court reiterated that '[i]n cases of wilful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim.'[54] These cases establish the proposition that a failure by the state to prosecute and punish conduct that breaches Article 3 ECHR would violate the Convention.

B. Amnesty Cases

[50] ibid [61] (emphasis added).

[51] ibid [66].

[52] ibid [66]. See also *Gafgen v Germany* (n 47) [123]; *Cestaro v Italy* ECtHR 7 April 2015 [207].

[53] *Ali and Ayşe Duran v Turkey* (n 4) [69] (citations omitted). See also *Okkali v Turkey* (2010) 50 EHRR 43 [71]-[78]; *Mocanu and Others v Romania* (2015) 60 EHRR 19 [326].

[54] *Jeronovičs v Latvia* ECtHR 5 July 2016 [105]. For a subtle analysis, see *Commissioner of the Police for the Metropolis v DSD and NBV and Alio Koraou v Chief Constable of Manchester* [2015] EWCA Civ 646.

Separate from this line of authority, there is a set of cases in which the permissibility of amnesties under the Convention is discussed. Four are worth noting – *Dujardin v France*, *Tarbuk v Croatia*, *Ould Dah v France*, and *Margus v Croatia*.

Dujardin is an admissibility decision of the Commission from 1991.[55] The applicants, relatives of four gendarmes murdered during an attack on the New Caledonian island of Ouvéa, challenged France's failure to prosecute the perpetrators. The failure to prosecute was sanctioned by the enactment of a general amnesty law in early 1990. In declaring the application inadmissible, the Commission's reasoning was brief. It first noted that an amnesty for murder did not, per se, 'contravene the Convention unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes.'[56] It then engaged directly with the specifics of the case. Here, its reasoning is worth setting out in full:

> The Commission notes that as a result of the amnesty law adopted in this case in the light of the special circumstances, i.e. the political situation in New Caledonia, the prosecution of those suspected of murdering the applicants' close relatives lapsed.
>
> Accordingly, the question which arises is whether this infringed the right protected by Article 2 of the Convention. The Commission considers in this connection that the amnesty law, which is entirely exceptional in character, was adopted in the context of a process designed to resolve conflicts between the various communities of the islands.
>
> It is not for the Commission to assess the advisability of the measures taken by France to that end. The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law. In the present case, the Commission considers that such a balance was maintained and that there has therefore been no breach of the above mentioned provision.[57]

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[55] *Dujardin and Others v France (Admissibility)* ECtHR (1991) 72 DR 236.

[56] ibid 243.

[57] ibid 243-244.

As argued below, this reasoning, despite its brevity, provides a helpful starting point. But a few points of qualification are necessary. First, the case concerns Article 2 ECHR – the right to life – rather than Article 3.[58] As has been widely discussed, the fundamental status of Article 3 has driven doctrinal developments in a number of areas of the Convention's application.[59] Second, it is an admissibility decision of the Commission. And third, most importantly, it was handed down in 1991. It predates the development of the investigative and prosecutorial duty discussed in the preceding subsection,[60] and predates the emergence of the powerful idea of anti-impunity in international politics.

The core of the holding in *Dujardin* was reiterated by the Court in 2012 in *Tarbuk v Croatia*, albeit in a slightly obscure context.[61] Here, the claimant challenged the effects of an amnesty that precluded his recovery of civil damages from the state. In the midst of the discussion, the Court repeated the Commission's formulation in these terms:

> [T]he Convention organs have already held that, even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.[62]

To reiterate, these cases concerned Article 2 ECHR. Where the former precedes the development of the duty to prosecute, the latter's engagement with the issue is peripheral to

[58] See Mallinder et al (n 19) 22.

[59] See eg Christopher Michaelsen, 'The Renaissance of Non-Refoulement: The *Othman (Abu Qatada)* Decision of the European Court of Human Rights' (2012) 61 ICLQ 750.

[60] Mallinder et al (n 19) 15.

[61] *Tarbuk v Croatia* ECtHR 11 December 2012.

[62] ibid [50].

the case itself. Nonetheless, they seem to promise a degree of flexibility in how the Court will address the permissibility of amnesties.[63]

In respect of Article 3, however, the situation is different. In *Ould Dah v France*, the applicant, a Mauritanian national, was alleged to have committed acts of torture while serving as an intelligence officer.[64] In 1993, a general amnesty was enacted in Mauritania. No proceedings were brought. Five years later, the applicant arrived in France to undertake a training course. A criminal complaint was lodged; proceedings led to a conviction in France. The applicant challenged the conviction on the basis of Article 7 ECHR – the prohibition on retroactive criminalization and punishment. This challenge failed.

In the course of the judgment, handed down in 2009, the Court considered the effect of the amnesty law in terms that are not altogether clear. It is certainly the case that the Court's general position doubts the permissibility of amnesty – it held that '[l]ike the United Nations Human Rights Committee and the ICTY, the Court considers that an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts.'[65] In then held:

> Admittedly, the possibility of a conflict arising between, on the one hand, the need to prosecute criminals and, on the other hand, a country's determination to promote reconciliation in society cannot, generally speaking, be ruled out. In any event, no reconciliation process of this type has been put in place in Mauritania. However, as the Court has already observed, the prohibition of torture occupies a prominent place in all international instruments relating to the protection of human rights and enshrines one of the basic values of democratic societies. The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law.[66]

[63] Mallinder et al (n 19) 15-16.

[64] *Ould Dah v France (Admissibility)* (2013) 56 EHRR SE17.

[65] ibid 17.

[66] ibid 17.

There are two ways to read this paragraph.[67] On one hand, it could be that the Court is acknowledging that transitions involve trade-offs and that the general requirement of prosecution might give way to a legitimate countervailing interest. Because no such interest was at stake in the specific case, there was no need consider that possibility further. On the other hand, the Court may be saying that even if there were such a specific countervailing interest, the gravity of the crime of torture means that non-prosecution cannot extend to torture itself.

The latter interpretation seems more accurate. Textually, the term 'however' seeks to draw a contrast with the preceding sentence that contemplates the possibility of a reconciliation process. Moreover, the preceding paragraphs put great weight on the *jus cogens* status of the prohibition on torture, the potential frustration of universal jurisdiction, and, in the Court's words, 'the absolute necessity of prohibiting torture and prosecuting anyone who violates that universal rule.'[68] This is the kind of reasoning – a focus on the gravity of the wrong – that has driven claims of an unqualified duty in other contexts.[69]

More recently, the question of amnesties received attention in *Margus v Croatia*.[70] In *Margus*, the applicant was indicted in 1993 on charges of murder and other offences committed during the war in Croatia at the start of the 1990s. The proceedings were terminated in 1997 following the enactment of a general amnesty law the previous year. The decision to terminate was later overturned; a second set of proceedings was instituted; and the applicant

[67] See Mallinder et al (n 19) 22-24.

[68] *Ould Dah* (n 64) 17.

[69] See eg *Barrios Altos* (n 1) [41].

[70] *Margus v Croatia* (2016) 62 EHRR 17.

was convicted and sentenced to fourteen years' imprisonment.[71] Relying on Article 4 of Protocol 7 to the Convention, the applicant argued that he had been unlawfully tried a second time for the same offence.[72]

The factual peculiarities of *Margus* render it relatively unhelpful – it is not a direct challenge to the permissibility of amnesties. Nonetheless, the Grand Chamber's judgment contains some discussion of the position under the Convention. First, the Grand Chamber reiterates the position that where a state agent has been charged with crimes involving a breach of Article 3, the grant of an amnesty or pardon should not be permissible.[73] Second, the judgment explicitly notes the Convention ought to be interpreted in harmony with general principles of international law. This leads to a meandering discussion of various treaty instruments, which sheds little light on the problem.[74] Third, the judgment *notes*, in consecutive paragraphs, (a) the interveners' argument that 'there is no agreement among States at the international level when it comes to a ban on granting amnesties without exception for grave breaches of fundamental human rights, including those covered by Articles 2 and 3 of the Convention' and (b) the Inter-American position that 'no amnesties were acceptable in connection with grave breaches of fundamental human rights since any such amnesty would seriously undermine the States' duty to investigate and punish the perpetrators of such acts.'[75] Finally, the judgment concludes equivocally in the following terms:

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[71] ibid [23]. The sentence was later increased to fifteen years by the Supreme Court.

[72] Article 4(1) of Protocol 7 ECHR reads: 'No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.'

[73] *Margus* (n 70) [126].

[74] ibid [131]-[136]. Wider discussion of the legality of amnesties under customary international law is beyond the scope of this article. Suffice it to say that unqualified claims as to impermissibility tend not to grapple with persisting state practice granting amnesty and other states' acceptance thereof.

[75] ibid [138].

> A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.[76]

The Court concluded that Croatia's decision to bring a fresh indictment complied with the Convention.

In conclusion, the Court is evidently unsure of how to deal with amnesties.[77] On one hand, the doctrinal development of the duty to prosecute conduct that breaches rights drives a position that denies the permissibility of amnesties. This drive is given more force by the Court's understanding of the nature of the right in Article 3 cases – the fundamental status of the prohibition on torture. On the other hand, the Court's judgments in the amnesty cases in particular indicate a degree of hesitancy about an unequivocal position of impermissibility. Nonetheless, it seems to be heading in that direction.

4. Article 3 and its Duties

That, then, is the state of the case law. This section argues that the Court has set itself a trap for how it is likely to reason through an amnesty case. That trap is created by the Court's failure to pay attention to how the absolute status of the underlying right translates into *each* of the duties to which it gives rise.

To explain this argument, it is helpful to return to Article 3 ECHR. Here, the case law makes explicit what is implicit in the text of the Convention: 'The Convention prohibits in absolute

[76] ibid [139].

[77] See further *Mocanu*, (n 53) Partly Dissenting Opinion of Judge Wojtyczek [11]: 'The Court's precise position on the issues of limitation and amnesty has thus yet to be clarified.'

terms torture and inhuman or degrading treatment or punishment...'.[78] Article 3 is the paradigmatic absolute right.[79] The implications of such a status entail a range of theoretical and practical controversies.[80] As a starting point, it is taken to mean that the right itself cannot be justifiably infringed or subject to derogation.[81] In doctrinal terms, the right is non-limitable and non-derogable: no public or community interest, or national crisis, is capable of justifying an infringement.[82]

The critical question, though, is what the absoluteness of the right means for each of the cluster of duties to which it gives rise.[83] In human rights law and scholarship, those duties are categorised in a range of ways. The basic framework of duties to respect, protect, and fulfil remains popular.[84] Others draw different lines.[85] There is a risk of spending too much time on categorisation at the expense of delineating the specific duties that any particular right generates.[86]

Those specific duties are particular to the right under consideration and are also informed by what Waldron calls the 'complex, messy reality of political life.'[87] Thus, as he explains:

> The right not to be tortured, for example, clearly generates a duty not to torture. But, in various circumstances, that simple duty is likely to be backed up by other duties: a

[78] *Ireland v United Kingdom* (1979-1980) 2 EHRR 25 [163].

[79] *Al Adsani v United Kingdom* (2002) 34 EHRR 11 [59].

[80] See eg Gewirth (n 5); Jerrold Levinson, 'Gewirth on Absolute Rights' (1982) 32 *The Philosophical Quarterly* 73; Mavronicola (n 5); John Finnis, 'Absolute Rights: Some Problems Illustrated' (2016) 61 *The American Journal of Jurisprudence* 195.

[81] For a helpful discussion, see Mavronicola (n 5).

[82] cf ECHR art 8; ECHR art 15.

[83] See Sandra Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights' (2006) 21 PL 498.

[84] For a brief history, see Ida Koch, 'Dichotomies, Trichotomies or Waves of Duties' (2005) 5 HRLR 81, 84-87.

[85] See ibid.

[86] ibid. See further Lavrysen (n 39) 10-15.

[87] Jeremy Waldron, 'Rights in Conflict' (1989) 99 *Ethics* 503, 510.

> duty to instruct people about the wrongness of torture; a duty to be vigilant about the danger of, and temptation to, torture; a duty to ameliorate situations in which torture might be thought likely to occur; and so on. Once it is discovered that people have been tortured, the right generates remedial duties such as the duty to rescue people from torture, the duty on government officials to find out who is doing and authorizing the torture, remove them from office, and bring them to justice, the duty to set up safeguards to prevent recurrence of the abuses, and so on. If these duties in turn are not carried out, then the right generates further duties of enforcement and enquiry with regard to them. And so on.[88]

The distinction between the simple duty not to torture, as Waldron calls it, and the other duties is not a distinction between negative and positive duties. Indeed, the latter distinction has the potential to mislead both in how we understand different kinds of duties and in thinking through the implications of absoluteness.[89]

Moving from this starting point to the case law, aspects of the Court's development of the set of duties generated by Convention rights have been criticized by scholars.[90] For the moment, the key issue is that the Court does not seem to have thought through how the absolute status of the right translates into *each* of the duties to which it gives rise. This is the crucial point. We can take it as given that absoluteness applies to the simple duty not to torture.[91] Neither general state interests nor the potential implication of other rights can justify torture.[92] But the assumption seems to be that each of the duties grounded in the absolute right is itself absolute. Thus to return to Waldron's list, this would entail an absolute duty to instruct people about the wrongness of torture, an absolute duty to be vigilant about the danger of, and temptation, to torture; an absolute duty to remove torturers from office; an absolute duty

[88] ibid 510. See also Joseph Raz, *The Morality of Freedom* (OUP 1988) 171.

[89] See generally Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

[90] See Lavrysen (n 39) 8-9 and sources cited therein.

[91] See Finnis (n 80) on the simple duty.

[92] See *Gafgen* (n 52).

to investigate, prosecute, and punish torture; and so on.[93] Alternatively, to put it in the doctrinal terms of the case law, it would mean an absolute duty to put in place criminal law and enforcement machinery designed to protect individuals from torture; an absolute duty to take measures to protect individuals from the risk of torture; and an absolute duty to investigate and prosecute torture, and so on.[94]

Expressed like this, the problem is clear. Each of these duties relates differently to the rights of others and general state interests – differently amongst themselves but, more importantly, differently compared to the simple duty not to torture.[95] Consider the classic protective duty – the duty to protect individuals from acts of torture by private actors. It is impossible to think through its scope without considering both the rights of other individuals and general state interests. In respect of the former, liberty and privacy rights of the suspected torturer, for instance, necessarily feature in the analysis.[96] Few would argue that the right against torture generates a duty to imprison anyone who might commit such an act in the future. In respect of the latter, questions of resource allocation necessarily inform what must be done. Few would suppose that, as Waldron puts it, 'any project associated with the prevention of torture, no matter how marginal, has priority' over all other projects not associated with an absolute right.[97]

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[93] Waldron (n 87).

[94] For an overview, see Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 43-66.

[95] See Waldron (n 87) 515.

[96] See Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in Julian Roberts and Lucia Zedner (eds), *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (Hart 2012) 135.

[97] Waldron (n 87) 515.

To make this point is not to deny the close connection between the underlying right and the other duties it generates. Indeed, this is what the Court is driving at where it justifies the development of the duty to investigate and prosecute on the basis that the Convention's guarantees must be 'practical and effective.'[98] It is simply to say that the absolute status of the right does not necessarily extend beyond the simple duty not to torture to those other duties.

Now, in partial response, one might object that this is a non-problem in reality. It is a non-problem because the Court's *specification* of the scope of those other duties tends to include a qualified standard.[99] Recall that the protective duty demands that the state take 'reasonable steps' to prevent the harm.[100] So long a qualified standard of this kind conditions the specification of the duty, considerations based on the rights of others as well as general state interests might enter the analysis at the definitional stage.[101] In this analysis, the reasonableness criterion that specifies the scope of the duty does much the same work as an explicit consideration of the rights of others and general state interests would do in determining its application.[102]

This response seems to me correct. But it is only a partial response – it only works in so far as the duty is conditioned by a standard that accommodates the incorporation of either the rights of others or state interests in its specification. This is so for the protective duty, through the standard of reasonableness. But, in respect of the duty to prosecute, the Court has now

[98] See eg *Ali and Ayse Duran* (n 4) [59].

[99] See Mavronicola (n 5).

[100] *Z v UK* (n 41) [73].

[101] ibid [74]: 'The Court acknowledges the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life.'

[102] See Mavronicola (n 5) 740.

specified what is required *without* reference to reasonableness or another qualified standard. Thus, in *Ali and Ayse Duran v Turkey* we see the conclusion that 'the national courts should not under any circumstances be prepared to allow life endangering offences and grave attacks on physical and moral integrity to go unpunished.'[103]

In sum, the problem lies at the intersection of three developments. First, there is the laudable development of a set of protective and procedural duties grounded in the substantive right. Second, with respect to the procedural duty, the Court has specified in unqualified terms what is required as to prosecution. And third, there is a background assumption that this duty to prosecute carries with it the absolute status of the right.

5. Four Consequences

These developments have four potential consequences, each pernicious, for how the Court will likely deal with an amnesty case. These concern the exclusion of conflicting interests from the Court's analysis; the closing down of the margin of appreciation; the limiting of judicial deference to political decision-makers; and the unbalancing of the derogation clause of the Convention. To reiterate, the Court has not yet taken this step and, indeed, its hesitancy in *Margus* displays some unease about the direction of its own case law. But the groundwork has been laid for the Court to indefensibly invalidate an amnesty.

A. The Exclusion of the Conflicting Interests

The first consequence is the obvious one – by holding that the right against torture generates an absolute duty to prosecute, the latter duty is endowed with unjustified weight. On one hand, the ends served by criminal trials may be in tension with other ends. These may include,

[103] *Ali and Ayşe Duran v Turkey* (n 4) [61].

in differing combinations, political stability and peace, economic justice, reconciliation, the uncovering of historical truth, and institutional reform. There is no space at present to summarize the rich, contextually-sensitive analyses in political science, area studies, and transitional justice that bear out this claim.[104] But, in brief, decision-makers in these situations are best understood as facing, as Pensky puts it, 'a spectrum of tough choices over potentially incommensurable goods, whose rank-ordering is both highly contentious on moral and pragmatic grounds, and also foundational to the needs of a fragile democracy.'[105]

On the other hand, amnesties may, in certain circumstances, be a valuable means of securing one or more of these other goods. Amnesties, where conditional and linked to a Truth Commission, may facilitate the disclosure of information about past abuses, including the location of victims' bodies.[106] Amnesties, as a counterpoint to criminal trials, may be judged, in the particular case, to be conducive to bringing about reconciliation – they may form part of a wider restorative agenda.[107] And, most importantly, amnesties may be an unpalatable but politically necessary way of bringing powerful actors into a peace-deal, securing stability, and enabling the pursuit of a range of other goods.[108]

Indeed, it is this last tension in particular that negates the defensibility of imposing an absolute duty to pursue criminal trials. It is the rare case that those subject to prosecution are

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[104] For two early accounts, see Carlos Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 YLJ 2619; Jose Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43 *Hastings Law Journal* 1425. For a recent overview of the field, see Snyder and Vinjamuri (n 6).

[105] Max Pensky, 'Amnesty on Trial: Immunity, Accountability and the Norms of International Law' (2008) 1 *Ethics and Global Politics* 1.

[106] For an account of efforts in South Africa, see J. Aronson, 'The Strengths and Limitations of South Africa's Search for Apartheid-Era Missing Persons' (2011) 5 IJTJ 262.

[107] See generally Jennifer Llewellyn and Daniel Philpott (eds), *Restorative Justice, Reconciliation, and Peacebuilding* (OUP 2014).

[108] Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2003/2004) 28 *International Security* 5; Freeman (n 6).

so politically and militarily defeated that trials put nothing at risk. Nuremberg is the wrong image to carry in our minds.[109] More often, it is simply a wrenching case of compromise – of difficult ethical choice pursued within the constraints of political possibility.[110] As Moyn has argued, the idea of an absolute duty, informed by a normative ideal of anti-impunity, denies the need for argumentative justification where such justification is sorely needed.[111]

In Convention terms, then, the way that the Court has articulated the duty to prosecute combined with the assumption that it carries the underlying right's absolute status has the potential to exclude from consideration legitimate conflicting demands. It gives undue priority to the ends served by criminal trials, and denies the moral and political complexities at stake in transitions.

B. The Margin of Appreciation and the Role of Courts

The exclusion of conflicting interests, discussed in the preceding section, is the most significant consequence of how the Court has articulated the duty to prosecute. In addition, the Court's approach also has the potential to exclude other doctrinal and institutional considerations that ought to play a role in its decision-making. These concern the margin of appreciation and scope of judicial deference, which will be taken together in this section. The consequences, respectively, of this exclusion are to push decision-making from the national level to the international level and from political decision-makers to the Court.

As to the former, these are exactly the cases in which a wider margin of appreciation ought to be granted to national authorities. Recent work, building on foundational accounts by Letsas

[109] Zalaquett (n 104) 1428.

[110] Pensky (n 105) 25; Zalaquett (n 104) 1430.

[111] Moyn (n 16) 71.

and Legg, has clarified the Court's use of the margin of appreciation.[112] Numerous controversies persist, both in providing an accurate account of the doctrine and in considering its justification. This section adopts Arnadottir's argument that the margin of appreciation has 'a dual justification (functional and normative), and … a dual function (the systemic distribution of competences between decision making bodies and the normative function of allowing pluralism and flexibility in the interpretation and application of rights).'[113] These are often termed the doctrine's systemic and normative functions.[114] In terms of reasoning, the former is based on an idea of deference to national authorities on the basis of the Court's institutional competence; the latter is concerned with the substantive question at issue.[115]

How these two functions bear on any particular case is complicated by their sometimes-inconsistent use.[116] Nonetheless, the following elements ought to drive the Court to grant a wide margin in an amnesty case. First, the Court has emphasized that a wider margin of appreciation may be applicable to cases concerning positive duties.[117] This is true, in principle, for positive duties that flow from absolute rights.[118] Second, complexity as to the actual political constraints in play point towards deference from the Court to the national level. A central lesson of two decades of work in transitional justice is the importance of the

[112] See George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 OJLS 705; A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012); Matthew Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 HRLR 745; Oddný Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 ECLR 27.

[113] Arnardóttir (n 112) 42.

[114] See originally Dean Spielmann, 'Whither the Margin of Appreciation' (2014) 67 CLP 49. cf Letsas (n 112).

[115] Arnardóttir (n 112) 42-43. See relatedly Letsas (n 112) 721.

[116] Arnardóttir (n 112) 43-45. See also Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 ICLQ 21.

[117] See eg *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471 [67]. See also Matthias Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) 71 ZaöRV 691, 711.

[118] *Beganovic v Croatia* ECtHR, 25 June 2009; *Opuz v Turkey* (2010) 50 EHRR 28 [165]. See Lavrysen (n 39) 194.

local context, a lesson foreshadowed in Nino's famous illustration of the difficulties facing the Alfonsin government in Argentina in deciding whether to pursue criminal trials for human rights violations committed by the former regime and opposition groups.[119] In the language of the Court, these may be situations in which national authorities are 'better placed' to assess the situation.[120] Third, the case law provides some indication that the particular political or historical context may widen the margin of appreciation.[121] Thus in *Rekvényi v Hungary*, the applicant argued that a domestic constitutional amendment that barred members of the armed forces, police, and security services from joining a political party and engaging in political activity violated his right to freedom of expression under Article 10(2).[122] The Court's determination that the measure served a pressing social need was informed by Hungary's historical experience of one party rule.[123]

Each of these is, as Gerards terms them, an intensity-determining factor in how the Court deploys the margin of appreciation.[124] We can take the point further. Murphy argues that there is no consensus on the morally appropriate way for post-conflict states to respond to wrongdoing of the past.[125] In particular, there is widespread disagreement on where retributive justice, even if politically possible, fits into a broader demand of justice.[126] Murphy's argument is convincing; we should be alive to the possibility of plural approaches

[119] Nino (n 104). See, in particular, Nino's conclusion that the 'required knowledge of factual circumstances of each case, in order to reach just and prudent solutions, excludes in general [an] epistemologically elitist attitude…' – ibid 2640.

[120] For variations of this language, see eg *Ireland v United Kingdom* (n 77) [207]; *Koval v Ukraine* (2009) 48 EHRR 5 [118]; *Stummer v Austria* (2012) 54 EHRR 11 [89]. See Arnardóttir (n 112) 39-42.

[121] If the previous two examples are better understood as engaging the margin of appreciation's systemic aspect, here we are primarily concerned with its normative function.

[122] *Rekvényi v Hungary* (2000) 30 EHRR 519.

[123] ibid [47]-[48].

[124] See Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 ELJ 80.

[125] Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (CUP 2017) 1.

[126] For a sophisticated account, see Murphy (n 125).

to dealing with atrocity. In considering the Court's role, a wide margin of appreciation gives due recognition to this disagreement.

These considerations encompass ideas of deference based on both international-national and legal-political dimensions. Nonetheless, the latter is worth drawing out further. Implicit in the construction of an absolute duty to prosecute is an assertion of legal constraint over political flexibility.[127] Looking to the South African case, the negotiations that preceded and opened up the transition to democracy were fraught and complex. They involved false-starts, retreats, compromises, and defeats.[128] The question of amnesty was one issue amongst many in talks that sought to construct a multiparty democracy out of the broken apartheid state that nonetheless held a degree of military and political power.

Now picture the Constitutional Court in *AZAPO* being called upon to adjudicate a challenge to the amnesty – a central plank of these transitional negotiations.[129] A proper understanding of its own role could not help but include a degree of modesty and restraint – a modesty and restraint informed by limits on its political legitimacy and expertise.[130] And so it was, in Mahomed DP's lead judgment:

> The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations. It is an act calling for a judgment falling substantially within

[127] For a similar argument in respect of consociationalism and the prohibition of discrimination, see McCrudden and O'Leary (n 25).

[128] See generally Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (Norton 1997).

[129] See Kader Asmal, *Politics in my Blood: A Memoir* (Jacana 2011) 166-191.

[130] McCrudden and O'Leary (n 25) 493. cf Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 HRQ 843, 879-880.

> the domain of those entrusted with lawmaking in the era preceding and during the transition period. The results may well often be imperfect… There can be legitimate debate about the methods and the mechanisms chosen by the lawmaker to give effect to the difficult duty entrusted upon it in terms of the epilogue. We are not concerned with that debate or the wisdom of its choice of mechanisms but only with its constitutionality.[131]

In sum, then, the Court's nature as a judicial and supranational institution ought to caution restraint in its exercise of review. The specification of an absolute duty closes down this possibility.

C. Derogation

The Court's articulation of the duty to prosecute in unqualified terms has a final consequence. Article 15(1) ECHR provides to states, in times of war or public emergency, flexibility to take measures derogating from their obligations under the Convention. Article 15(2) specifies certain non-derogable rights. This is a narrow set – the right to life, other than deaths resulting from lawful acts of war, the right against torture, the right against slavery and servitude, and the right against retroactive criminalisation and punishment.[132] Given the terms of its specification by the Court, the duty to prosecute conduct that infringes Article 3 ECHR is transformed into a non-derogable duty. Similar to the transformation of the duty into a non-limitable one, as discussed above, the assumption seems to be that each of the duties to which Article 3 gives rise carries with it Article 3's non-derogable status.

It is doubtful that such an assumption makes sense in terms of the Convention's own structure. To be sure, it is not in every potential situation under discussion that the derogation clause will be relevant – not every situation will meet the triggering threshold of a time of

[131] *AZAPO* (n 2) [21].

[132] ECHR art 15(2).

war or public emergency threatening the life of the nation.[133] But some will. Indeed, the pressures that drive the necessity of compromise in peace-negotiations may well trigger the application of Article 15 ECHR. Where those pressures are present, to ascribe to the duty to prosecute non-derogable status is to grant it unjustified weight.

This claim is underpinned by much the same analysis as in respect of the limitability of the duty. But it may also be shown by consideration of the derogation clause itself.[134] To reiterate, very few rights are non-derogable. In times of emergency, the state is granted wider leeway to infringe the right to liberty under Article 5, the right to a fair trial under Article 6, the right to privacy under Article 8, the right to freedom of thought, conscience, and religion under Article 9, and so on.[135] Here, infringe the right means, as Waldron termed it above, to breach the simple duty that flows from each – the duty not to infringe liberty, not to try someone without fair trial guarantees, and so on. It seems to get the moral weighting wrong to say that the state is permitted to detain civilians in situations of international armed conflict in line with the relatively permissive rules of the law of armed conflict but is obliged under all circumstances to prosecute conduct that infringes Article 3.[136] Likewise, it would be strange to recognise the permissibility of trials that fall short of the fair trial guarantees of Article 6 ECHR while requiring in all circumstances the prosecution of other individuals.[137]

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[133] For discussion of this threshold, see Aly Mokhtar, 'Human Rights Obligations v Derogations: Article 15 of the European Convention on Human Rights' (2004) 8 IJHR 65; Stephen Tierney, 'Determining the State of Exception: What Role for Parliament and the Courts' (2005) 65 MLR 668.

[134] This leaves aside wider problems with derogation, particularly the risk of abuse of the exception.

[135] Derogation seems less relevant to Articles 8-11 given their limitation clauses. See, in respect of the International Covenant on Civil and Political Rights, Sarah Joseph, 'Human Rights Committee: General Comment 29' (2002) 2 HRLR 81, 90-91.

[136] See *Hassan v UK* ECtHR 16 September 2014.

[137] On the limits of derogation in respect of Article 6, see Evelyne Schmid, 'The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights' (2009) 1 GJIL 29.

Admittedly, it might seem strange, at first glance, to hold that a duty generated by an absolute right is derogable.[138] But the need to disaggregate the duties generated by absolute rights applies with as much force to the issue of derogation as to the question of limitation. Without disaggregation, the final consequence of the doctrinal developments discussed above is to unbalance the choice to render certain rights non-derogable under the Convention. In at least some potential amnesty cases, this has the consequence of excluding valuable political flexibility.

6. A Better Approach

Thus to fall into the trap would be to hold in unqualified terms that amnesties are impermissible under the Convention. However, in thinking through how the Court ought to deal with an amnesty case, two other points are crucial. First, we must confront the fact that amnesties do implicate the rights of individual victims.[139] The Court's development of the procedural obligation under Article 3 is justifiable and captures something important inhering in the right against torture. Indeed, it is not surprising that victims and victims' families often seek to challenge the permissibility of amnesties.[140]

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[138] For discussion of the converse – the non-derogable status of aspects of a derogable right – see UNHRC, General Comment 35: Article 9 (Liberty and Security of Person), CCPR/C/GC/35 (16 December 2014) [65]-[68].

[139] See Mallinder (n 6) 262-279.

[140] ibid 355-378. See eg *AZAPO* (n 2) [9]:

> The effect of an amnesty undoubtedly impacts upon very fundamental rights. All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded those aggrieved by such invasion have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally. An amnesty to the wrongdoer effectively obliterates such rights.

Second, many amnesties are not a result of a genuine attempt to balance incommensurable ends within the confines of actual political possibility and constraint.[141] States do grant amnesties to their own agents in bad faith.[142] The point is not that these are easy to identify – Freeman cautions that some amnesties granted to state agents might be a way for a government to protect constitutional rule.[143] Rather, it is that we should not assume that amnesties pursue a legitimate interest or, indeed, are necessary.

Within the Convention space, these two points implicate the Court. The question, though, is how the Court ought to reason through a challenge to an amnesty based on Article 3. The critical point is to accept the potential conflict between the (prima facie) duty to prosecute and other considerations. Doctrinally, there are two ways to achieve this. One way would be to recognise explicitly the possibility of justified displacement of the duty. This would render the assessment similar to a proportionality analysis under Articles 8-11 of the Convention. The other would be to hold that the procedural duties that flow from Article 3 ECHR are also qualified by an overarching standard of reasonableness. That is, similar to the protective duty, the state is obliged to take reasonable investigative and prosecutorial measures in relation to conduct that breaches Article 3.

Whichever route is taken, it will be necessary to confine the permissibility of amnesty to exceptional situations, where the state is pursuing a compelling public interest in good faith. In the vast majority of cases, the requirements of an independent investigation and prosecution persist; the case law discussed above gives helpful specificity to the procedural duty. Even in exceptional situations, where an amnesty covers systematic breaches of Article

[141] See Zalaquett (n 104) 1431.

[142] See Freeman (n 6) 152 citing Turkey 1961, France 1962, Peru 1967, Philippines 1994, and Russia 1999.

[143] ibid 152.

3 and/or the gravest international crimes, these requirements should be given more weight. And in all cases, the Court's overarching supervisory jurisdiction is preserved, demanding justification from the state for its decision.[144]

Nonetheless, recognition of the potential conflict opens up the possibility of the state defending its amnesty on the basis of compelling countervailing considerations. The Court's assessment would be context-specific, and informed by considerations relating to its supranational and judicial character.[145] In the exceptional case, the wider public interest might outweigh the individual injustice to victims.

7. Conclusion

An amnesty case will come to the Court, and there is a risk that the Court will make a serious error. That error will be to hold that amnesties for conduct that infringes Article 3 are always impermissible under the Convention. Such a holding would be blind to the difficult and complex choices facing political decision-makers in peace negotiations, and to the value of amnesties in securing other legitimate ends. However, the Court has not yet made such an error, and some of its decisions on amnesties betray a helpful hesitancy about the direction of the case law. By thinking through the nature of the duties to which absolute rights give rise and reconsidering how the Court has specified the duty to prosecute, this article has sketched an alternative approach to an unqualified position on impermissibility. Such an approach would allow the Court, in exceptional circumstances, to uphold the compatibility of certain amnesties with the Convention.

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[144] See, more generally, Etienne Mureinik, 'A Bridge to Where: Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31.

[145] For a similar idea, see *Sejdić and Finci v Bosnia and Herzegovina* (2011) 28 BHRC 201 (Dissenting Opinion of Judge Bonello).