international center for TRANSITIONAL JUSTICE

6 June 2002
AIHRC

Discussion Paper on the Legality of Amnesties

21 Feb. 2010

1. Introduction

This paper aims to briefly present an analysis of the position of international law and practice vis-à-vis amnesties, with an application to the Afghan National Assembly Resolution regarding Reconciliation and General Amnesty (hereafter Amnesty Resolution). It reviews the extent to which amnesties concerned with the gravest international crimes (or 'core international crimes'), namely genocide, crimes against humanity (CAH), war crimes, and torture are prohibited under international law. In the first part, it reviews the applicable law, including of the duty to prosecute and the legality of amnesties under international law. In a second part, the paper draws some general conclusions from international experiences with amnesties and applies these to Afghanistan.

2. Amnesty under International Law

The question whether amnesties are illegal under international law is complicated. International law generally has several sources, including treaties between States and customary international law. Amnesties are generally neither explicitly prohibited nor explicitly required by international treaty law. No international treaty as of now includes a definition of what constitutes an amnesty, but a recent OHCHR document gives the following definition:

> Legal measures that have the effect of:
> (a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specific criminal conduct committed before the amnesty's adoption; or
> (b) Retroactively nullifying legal liability previously established.
> Amnesties do not prevent legal liability for conduct that has not yet taken place, which would be an invitation to violate the law. [1]

[1] OHCHR, Rule-of-Law Tools for Post-Conflict States, Amnesties, HR/PUB/09/1 (2009), p. 41.

NOTE: The Amnesty Resolution qualifies as an amnesty, but also attempts to prevent legal liability for acts that have not yet taken place, which is unusual compared to other amnesty laws and which could be said to openly promote impunity (Art. 3 (2)).

Customary international law does not yet generally prohibit amnesties for serious crimes, although new state practice is emerging in this regard. This will be discussed further below.

Finally it is worth noting Art. 6(5) of Additional Protocol II, which states: "At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, whether they are interned or detained." This clause has been interpreted to allow amnesties for participation in conflict or insurgencies, but *not* to condone violations of international law.

a. International Conventions and the duty to prosecute

International treaty law imposes an obligation on States to prosecute certain serious crimes.[2] This obligation exists, for example, in the context of international armed conflict for grave breaches under the 1949 four Geneva Conventions[3]. In addition the Convention on the Prevention and Punishment of the Crime of Genocide,[4] and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment[5] entail an obligation for state parties to prosecute the crime of torture and genocide respectively. Also the 2006 International Convention on Enforced Disappearances, which is not yet in force, requires States to criminalize enforced disappearances and to take necessary measures to extradite or prosecute (including appropriate measures to investigate the crime) any person responsible for committing, ordering, soliciting, inducing or participating in an enforced disappearance. An obligation on the part of States to

---

[2] Sometimes, this obligation is framed as an alternative: to "extradite or prosecute" (*aut dedere aut judicare*). The principle of *aut dedere aut judicare* entails a duty for states to prosecute a person having committed a crime under international law, or to extradite that person for prosecution elsewhere. The principle is laid down in a number of multilateral treaties, such as the Geneva Convention for grave breaches in the context of an international armed conflict, in the Torture Convention and in the Convention against enforced disappearances.

[3] See: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 U.N.T.S. 31, arts 49 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 U.N.T.S. 85, arts. 50 (Art 50 is in the same terms as Art 49 of Geneva Convention I) (entered into force 21 October 1950) ('*Geneva Convention II*'); Geneva Convention relative to the Treatment of Prisoners of War opened for signature 12 August 1949, 75 U.N.T.S. 135, art 129, (*entered into force* Oct. 21, 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 U.N.T.S. 287, arts. 146 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

[4] Opened for signature 9 December 1948, 78 U.N.T.S. 277, arts. 1–3 (entered into force 12 January 1951) ('*Genocide Convention*').

[5] Opened for signature 10 January 1984, 1465 U.N.T.S. 85, arts. 2, 4, 6 (entered into force 26 June 1987) ('*Torture Convention*').

investigate and prosecute core international crimes arguably also emanates from the Statute of the International Criminal Court, as State Parties risk an intervention by the International Criminal Court if there is no investigation or prosecution.[6]

> *NOTE: Afghanistan is currently a member of the Geneva Conventions I-IV (ratified 1956); Additional Protocols (ratified 2009), the Genocide Convention (1956), the International Covenant on Civil and Political Rights (1983), the Torture Convention (1987), the Rome Statute of the International Criminal Court (2003). In addition, Afghanistan is a party to the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity (1983), which specifically bars State Parties from enacting legislation that provides for statutory or other limitations to the prosecution and punishment for crimes against humanity and war crimes and requires them to abolish any such measures which have been put in place (Art. IV).*

In addition, key human rights treaties[7] obligate states to "ensure" the rights enumerated therein and to provide an "effective remedy" to those persons whose rights and freedoms have been violated under the respective treaty.[8] In their text, they usually do not explicitly oblige states to investigate or prosecute grave human rights violations; however the bodies charged with interpreting these treaties have implied that such a duty exists.

> *NOTE: It is doubtful whether Art. 3 (3) of the Amnesty Resolution would constitute an effective remedy under the ICCPR, as it does not put any obligation on Afghanistan as a State to investigate or bring to justice perpetrators of criminal offences.*

b. Customary international law

---

[6] Its Preamble insists that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

[7] International Covenant on Civil and Political Rights *opened for signature 16 December 1966, 999 U.N.T.S. 171 (*entered into force *23 March 1976),* the American Convention on Human Rights *O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123* (entered into force *July 18, 1978*) and the European Convention for the Protection of Human Rights and Fundamental Freedom opened for signature *4 November 1950, CETS No.:* 005 (entered into force 3 September 1953). Previous provisions which had been amended or added by Protocols were replaced by Protocol No. 11 (ETS No. 155), from the date of its entry into force on 1 November 1998. The case law of the Inter American Court on Human Rights has been particularly influential on the issue of amnesties. Recently, there is also authority that amnesties are prohibited under the African Charter on Human and People's Rights

[8] ICCPR Art. 2 (3): Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

Some argue that additional duties arise from customary international law. To refer to customary international law is particularly important for crimes which are not included in treaties listed before, such as crimes against humanity and war crimes in internal armed conflict.

Customary international law is composed of (1) *opinio juris*, i.e. what States say they think is the law; and (2) state practice. It is problematic at this stage to assert that there is a general and consistent practice followed by States to investigate and prosecute international crimes, and therefore to claim that there is a general customary rule providing for a duty to prosecute international crimes.[9] This is because State practice is very inconsistent and some States are still granting amnesties, including in some situations for serious crimes. Some recognized authorities in the field of international criminal law (Orentlicher, Cassese) contend that, despite the practice of several States which have adopted amnesties, there is a gradual evolution of customary prohibition of amnesty for the above crimes. [10] They argue that States' general obligation to ensure the enjoyment of fundamental rights is incompatible with impunity or blanket amnesties for international crimes.

At the center of this practice is the recent development of international criminal law, especially with the establishment of the International Criminal Court. The establishment and operations of several other international and hybrid criminal tribunals since the beginning of the 90s, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, hybrid tribunals in Kosovo and East Timor, and the Extraordinary Chambers of the Criminal Court in Cambodia, is cited as evidence of the international resolve to ensure that those most responsible for core international crimes do not escape punishment. The ICC Statute is often construed as imposing (or at least assuming) an obligation on the part of the States that negotiated it to investigate and prosecute core international crimes.

- *NOTE: The ICC Statute will only apply in respect of crimes committed after Afghanistan became a State Party in 2003. The Prosecutor has stated that Afghanistan is currently under "preliminary examination" i.e. under scrutiny for such crimes.*

---

[9] As Louise Mallinder notes in the most comprehensive study to date of state practice on amnesties: "Perhaps the most significant period in the relationship between international crimes and amnesties is after the UN changed its approach to amnesty laws with the signing of the Lomé Accord on 7 July 1999. Between this date and December 2007, 34 amnesty laws have excluded some form of international crimes, which has inspired human rights activists to point to a growing trend to prohibit impunity for these crimes. This research has found, however, that during the same period, 28 amnesty laws have granted immunity to perpetrators of international crimes, and that consequently, it is too early to suggest that an international custom is developing."

[10] See notably Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100, no. 8 (1991): 2537-2618; and "Settling Accounts Revisited", International Journal of Transitional Justice, Vol. 1, 2007, 10–22, at p. 13; or Antonio Cassese, International Criminal Law, Oxford University Press, 2003, at p. 313. Cassese cites notably the revision of the French Constitution to implement the ICC Statute, in particular of the principle that laws on amnesty may not be relied upon for crimes falling within the ICC mandate (International Criminal Law, 314-315).

In addition the wide ratification of conventions providing for a clear duty to prosecute serious crimes, the following show that there is a growing practice on prohibition of amnesties:

- Various UN Documents referring to a prohibition of amnesty for serious crimes, including war crimes, crimes against humanity and genocide;[11]
- The growing body of jurisprudence by regional human rights courts ruling that amnesties violate a state's obligation to ensure an effective remedy for serious violations of human rights.

These are all indications of a growing belief by states, and thus a reflection of *opinio juris*, that amnesties for war crimes, crimes against humanity, and genocide as well as certain other grave violations of human rights are impermissible under customary law. The United Nations, as represented by the UN Secretary General, has consistently maintained the position that in the context of peace negotiations, amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

c. The duty to prosecute and its relation to the prohibition of amnesties

As outlined before, international law generally imposes a 'duty to prosecute' (or in some cases extradite) persons who have committed certain crimes, including genocide, torture and grave breaches of the Geneva Conventions. As such, the States that have adhered to these treaties are required to ensure that criminal proceedings are instituted against those suspected of those violations. How does this relate to the prohibition of amnesty for such crimes, i.e. is there a clear and automatic link between the duty to prosecute a crime and the prohibition on the adoption of laws granting an amnesty for that crime?

Amnesties adopted by a State Party for one of these crimes for which a duty to prosecute exists would generally be inconsistent with its international obligations. To the extent that they foreclose prosecution of certain internationally defined crimes, amnesties are indeed incompatible with these treaty obligations or any existing obligation under customary international law. In cases such as torture, scholars argue (and the ICTY has held) that States *cannot* derogate from some of these international legal undertakings which are often considered as constitute "peremptory norms" (referred to as *jus cogens*), which means that these norms supersede any other competing or countervailing treaty or

[11] The Declaration on the Protection of All Persons from Enforced Disappearances Persons states that those who have or are alleged to have committed acts of enforced disappearance shall not benefit from any special amnesty law or similar measures that effectively might exempt them from any criminal proceedings or sanction. It also makes clear that in the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account. G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), Adopted by General Assembly resolution 47/133 of 18 December 1992, Principle 18.

customary rights and obligations.[12] International crimes such as genocide are deemed to constitute attacks on universal values: as such, no single State can decide to remove the possibility of a legal proceeding for such crime. Blanket amnesties "exempt broad categories of serious human rights offenders from prosecution and / or civil liability without the beneficiaries having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about the crimes covered by the amnesty, on an individual basis," [13] and are deemed particularly prohibited.

> *NOTE: The Afghan amnesty qualifies as a blanket amnesty and violates Afghanistan's international obligations. It is especially remarkable that Afghanistan would pass such an amnesty after becoming a State Party to the Rome Statute on the International Criminal Court.*

In some situations, such as in the aftermath of massive atrocities, States parties may not be in a position to prosecute *every* prohibited offense. This means they could satisfy their treaty obligations through a limited number of prosecutions – focusing, for example, on those who bear the greatest responsibility or on individuals believed to have committed notorious crimes.[14]

> *NOTE: The language of Art. 3(3) of the Amnesty Resolution on "individual crimes" seems to indicate that prosecution for mass crimes will not be allowed, and may also rule out responsibility for those who had indirect participation in such crimes (for instance through ordering, allowing subordinates to commit such crimes etc.)*

3. The international practice on amnesties

As stated above, States continue to use amnesties. In many cases, States that have resorted to amnesties were in political transition after periods of dictatorship, authoritarian rule, war or repression. Often, these States fear that prosecution would destabilize the new government and that the military remained a potent force within the society. They argue that amnesties are necessary for the sake of peace and reconciliation.

---

[12] It is argued by some scholars that amnesty laws which are in violation of a *jus cogens* norm are lacking any legal effect. The ICTY, in its Furundzija case, indicated this when it stated that: "It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law." The jurisprudence of the Human Rights Committee on the ICCPR also states that amnesty for gross human rights violations, such as torture, is contrary to the non-derogable rights provided for in international law: amnesty laws would thus be null and void and would not have any legal effect.

[13] OHCHR, Rule-of-Law Tools for Post-Conflict States, Amnesties, HR/PUB/09/1 (2009), p. 41.

[14] This practice is emerging while none of the treaty instruments nor the general human rights obligations explicitly make such distinctions. On this point, see Naomi Roht-Arriaza, Transitional Justice and Peace Agreements, at para. 53. The United Nations in general and its Secretary-General in particular agreed with this position in respect to the explicit limitation of the jurisdiction of the Special Court of Sierra Leone: limiting it to the most responsible perpetrators. The Office of the Prosecutor of the ICC has publicly agreed, in effect, to honor the 2000 Amnesty law in Uganda to all perpetrators of crimes against humanity and war crimes during the conflict between the Government of Uganda and the Lord's Resistance Army for persons who applied for amnesty before they were subject to arrest warrants by the ICC.

However, it is questionable whether measures that ignore the rights of victims, promote impunity and undermine accountability contribute to stability and reconciliation in the long run. Increasingly, there is a worldwide acceptance that true reconciliation requires accountability and measures of transitional justice, including investigation and prosecution, truth-seeking, reparations and institutional reform.[15]

> *NOTE: Afghanistan itself recognized the need for a holistic approach on transitional justice in its Action Plan on Peace, Justice and Reconciliation, adopted by the Cabinet in 2006.*

Neither are such measures necessarily sustainable. International experience indicates that even those amnesties which were promoted for reconciliation do not always stand the test of time and some are legally overturned when the political situation has stabilized. Countries like Argentina and Peru have overturned their amnesty laws after some time, particularly after the Inter-American Commission and Court for Human Rights ruled that certain amnesties are illegal. In fact, Fujimori was recently convicted in Peru for crimes which were previously amnestied. Self-amnesties, which are put in place by human rights abusers to ensure their own impunity, may be viewed as particularly unsustainable over time due to their lack of legitimacy (for instance, in the case of Augusto Pinochet in Chile).

Different factors may contribute to the successful challenge of amnesties. The synergy of a strong regional system of human rights protection with the pressure of civil society organizations demanding accountability, even years after transitions, created a perfect combination for the renunciation of these amnesties by national courts, often holding them to be in breach of guarantees of fundamental rights found in the Constitution or international conventions. But timing is an important factor. There may well be arguments that can be raised (legal or political) but these need to be raised in a context where they may be accepted.

These are some observations drawn from recent practice:

- Some argue that an amnesty should withstand political and also legal scrutiny if it has democratic legitimacy, for instance if it is based on widespread public consultations involving all stakeholder groups in the society concerned. For example there was a widespread consultation before the adoption of the Promotion of National Unity and Reconciliation Act in South Africa. On the other

[15] See for instance the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in 2005 (Res. 60/147). See also the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (2005), Security Council Res. 1674(2006), which emphasized "the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law …" and the Secretary-General's Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations, S/2004/616.

hand, the UN OHCHR has recently stated: "democratic processes cannot transform an amnesty that would otherwise be invalid into a lawful amnesty."[16] (It is worth noting that the South African example of granting amnesties through a truth commission has not been applied elsewhere.)

- Some countries have started to exclude serious crimes to be compatible with international law. For the latter this has been the case in Liberia, the DRC, Nepal and Kenya. In these cases, genocide, war crimes and crimes against humanity were generally excluded from the amnesties that were granted. In Colombia, a regime of reduced sentences was introduced through their Justice and Peace Law (2005), rather than an amnesty.

- In some cases where amnesties were granted for acts committed in the course of conflict, courts held that some kinds of crimes cannot be legitimately pursued in the course of conflict, including rape, torture or other crimes. For instance, in Argentina the theft of children was held to be outside scope of the amnesty law.

- In the past, even where amnesties were granted they often had a time-line and put in place mechanisms to determine whether individuals qualified. The classical example to mention here is the case of the South African Truth and Reconciliation Commission where recipients of an individual amnesty were required to adhere to the conditions to reveal the truth. The TRC also gave reparations to victims. The threat of prosecution was the stick in case amnesty was not granted or perpetrators did not come forward and apply for an individual amnesty. However, the South African amnesty may not have withstood legal scrutiny if it was measured against South Africa's international law obligations today. Also, in the end many perpetrators either did not come forward or were denied amnesty, but were not prosecuted. Nonetheless, the rights of victims were not fully denied, neither was amnesty freely given. So far international condemnation for amnesties, especially by regional and international courts, has focused on blanket that aimed to prevent investigations into human rights violations. International courts have yet to consider more individualized, conditional amnesties that aim to promote peace and reconciliation.

Courts in third countries are generally not obligated to respect amnesties from other countries but may still exercise universal jurisdiction over the crimes if their national law permits it.

4. Conclusion

In sum, it is possible to draw the following tentative conclusions on the legality of the Afghan Resolution pursuant to international law:

[16] OHCHR, Rule-of-Law Tools for Post-Conflict States, Amnesties, HR/PUB/09/1 (2009), p. 41.

- *Under its current international treaty obligations, Afghanistan has a duty to prosecute particular crimes, including war crimes (Geneva Conventions), genocide, and torture. The Amnesty Resolution breaches these obligations.*
- *Afghanistan is a State Party to the Rome Statute, which makes it particularly surprising that Afghanistan has chosen to pass such an amnesty for crimes committed since 2003.*
- *Afghanistan recognized its transitional justice obligations in its Action Plan on Peace, Justice and Reconciliation, adopted prior to the Amnesty Resolution.*
- *The Amnesty Resolution denies victims an effective remedy in violation of Afghanistan's duties under the ICCPR. This is not rectified by Art. 3 (3) of the current text.*
- *The amnesty can be qualified as a blanket amnesty. Such amnesties are condemned by international courts and the United Nations. In other situations, such as Peru and Argentina, blanket amnesties proved unsustainable over time.*
- *Even though these are some of the legal grounds on which the amnesty could be challenged, timing is an important part of the strategy around a challenge. A challenge should only be brought when there has been sufficient ground-work to make it likely to succeed.*
- *The Amnesty Resolution went through the National Assembly but was not widely consulted. If it had been consulted on a more widespread basis it would have likely received considerable opposition. It also constitutes a "self-amnesty" which generally lacks legitimacy.*
- *Other States have shown reluctance to pass blanket amnesties because of the perception that these are illegal under international law. Afghanistan is out of step with these global recent developments in issuing this amnesty.*
- *It is possible that an argument could be made that certain crimes were not perpetrated as part of the hostilities in Afghanistan. This includes crimes that were prevalent, such as rape, torture, or revenge or reprisal killings against civilians. However, the language of Art. 3(1) seems to indicate that the amnesty attaches to factions and parties rather than to acts (although its application to members of the former PDPA is rendered unclear by the preamble).*
- *It is very difficult to see how this amnesty would operate in practice. It is unusual in its open-ended nature and does not set time-lines for compliance. It is unclear from Art. 3 (2) whether certain conditions attach, such as adherence to the Constitution, disarmament, etc. Moreover, it is unclear how the extraordinary commission referenced in Art. 5 will function.*