



# Peacebuilding, Reconciliation and the Rule of Law: What Role for Amnesties?

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## Objectives

- From ATLAS project 'aims and objectives':
  - Analyse if amnesties, impunities and criminal justice are antagonistic or if they can be reconciled in a manner that satisfies the requirements of (1) international human rights law, and (2) the rule of law
  - Determine how amnesties, impunities and criminal justice contribute to post-conflict national reconciliation
- Will explore nature of amnesty laws and their relationship to (1) peace, (2) rule of law and international law, and (3) reconciliation
- Paper adopts UNSG position that 'in post-conflict countries, the vast majority of perpetrators [of serious crimes] will never be tried, whether nationally or internationally'



## Defining Amnesties

- Lack of conceptual clarity and no international definition
- In general, legal tools deployed by governments to remove criminal and/or civil sanctions from specified categories of offenders or offences
- Different legal rules in different countries (enactment process, scope, conditions and effects)
- These differences can impact on legality of amnesty under domestic and international law
- Blurring of boundaries: pardons, use immunity, probation and plea bargaining



## Beyond the Courts?

- Often yes for automatic, unconditional amnesties
- Domestic courts can in some circumstances
  - Decide on constitutionality of amnesty law
  - Decide whether an individual case falls within scope of amnesty – some will not?
  - Review decisions of administrative bodies
  - Narrow or annul amnesty laws
- International human rights courts explore compliance with constituent treaties
- International criminal courts decide whether to apply or overlook amnesty to individual case



## Amnesties, 'Negative' Peace and Stability

- 'Negative' peace is 'absence of violence, absence of war'
- 50% of 389 amnesties in past 30 years to end conflict
  - Getting signatures on the agreement
  - DDR and prisoner release
  - Encouraging exiles to return
- Denotes short-term efforts to bring stability so other reforms can take place
- Some measures continue to have international support, eg funding DDR and refugee return



## Amnesties and the Rule of Law

- Rule of law is a broad concept and in peacebuilding can entail many measures
- Issues of rebuilding it most relevant to amnesties and limited prosecutions are:
  - Principle of equality (design and implementation)
    - Non-discrimination in wake of ethnic violence
    - Avoidance of self-amnesty
  - Domestic amnesty rules
  - Principle of legality (clear, ascertainable and non-retrospective)

## Duty to Prosecute

- No explicit prohibition
  - 'Regime merge' to develop accountability framework
  - A role for both amnesty and criminal accountability?
- Clear duty for genocide and 'grave breaches' – but not relevant in all post-conflict states
- Unsettled nature of CIL on amnesties for crimes against humanity and war crimes in NIACs: enactment of amnesties, support for amnesties, absence of treaty prohibition
- Transnational crimes: torture and disappearances – only public officials, allow states to decide whether to prosecute like serious ordinary crimes, mitigating circumstances for truth
- Human rights violations: which crimes? Consensus on requirement to investigate, not to prosecute

## Limited Prosecutions and 'Accountable' Amnesties

- Some amnesties allow for prosecutions:
  - Exhaustive list of crimes or offenders
  - Exclusion of specified crimes or persons
  - Limited temporal scope
  - Conditional amnesty and penalties for recidivism
- Accountability can be understood more broadly than trials to encompass non-judicial mechanisms for (1) answerability and (2) enforcement
- Amnesties often can be integrated into non-judicial accountability mechanism, eg truth commissions, restorative justice, vetting, reparations



## Amnesties, National Reconciliation and 'Positive' Peace

- Reconciliation used to mean amnesties to 'forgive' and 'forget' past crimes, now such amnesties are seen as damaging for reconciliation
- What does reconciliation mean today?
  - 'Positive' peace is absence of structural violence, integration of society (Galtung, 1964, 1969)
  - Can denote efforts to establish peaceful coexistence
  - Or longer-term efforts to address root causes and restore relationships
- Restorative approaches to peacebuilding emphasise reintegrating offenders and inclusive participation (cf alienation of individuals, and no communal responsibility)
- Where amnesties are individualised and designed on restorative principles may contribute to reintegrating offenders, addressing wider forms of responsibility and identifying wider range of harms and root causes



## Recommendations

- EU recognises TJ in peacebuilding strategies
- But inconsistent approach to amnesties, both historic amnesties within EU and amnesties in non-EU post-conflict states
- If adopting a coherent approach to amnesties, the EU should inter alia
  - Ensure that accountability is pursued for serious human rights violations
  - But reject a blanket prohibition on amnesties in peacebuilding