

REPORTS AND DOCUMENTS

Amnesties and international humanitarian law: Purpose and scope

ICRC Advisory Service on International Humanitarian Law

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States party to the 1949 Geneva Conventions and Additional Protocol I of 1977 have an obligation to take measures necessary to suppress all acts contrary to their provisions. Moreover, States must investigate war crimes allegedly committed by their nationals or on their territory, and other war crimes over which they have jurisdiction, such as on the basis of universal jurisdiction, and, if appropriate, prosecute the suspects. In accordance with these obligations and the limits they impose, States may adopt certain measures during and in the aftermath of armed conflicts to promote reconciliation and peace, one of which is amnesties. International humanitarian law (IHL) contains rules pertaining to the granting and scope of amnesties. Specifically, Article 6(5) of Protocol II additional to the Geneva Conventions relating to non-international armed conflicts (NIACs) provides that, at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict. Importantly, under customary IHL (as identified in Rule 159 of the ICRC customary IHL study¹), this excludes persons suspected of, accused of, or sentenced for war crimes in NIACs.

Definition of amnesty

There is no legal definition of amnesty in international law but it can be understood as an official legislative or executive act whereby criminal investigation or prosecution of an individual, a group or class of persons and/or certain offences is prospectively or retroactively barred, and any penalties cancelled. In such cases, an amnesty can halt imminent or ongoing prosecutions, quash convictions already handed down and/or lift sentences already imposed. Amnesties may also take the form of a treaty or political agreement.²

An amnesty is generally distinguished from a pardon. A pardon occurs post-prosecution and revokes the penalty without absolving the individual(s) concerned of responsibility for the crime.³ In other words, a pardon does not extinguish penal responsibility but exempts those convicted of an offence from serving all or part of their sentence.

Purposes of amnesties

In relation to a situation of armed conflict, the aim of an amnesty is to encourage reconciliation and contribute to restoring normal relations in the life of a nation affected by such a situation.⁴ As a tool of transitional justice they serve many functions, including (but not limited to) encouraging the establishment of the truth and/or preventing resurgence or protraction of an armed conflict.

Provided that they are not extended to war crimes, amnesties can be an important incentive to respect IHL – in particular for non-State armed groups in the context of NIACs.

The UN Security Council, UN General Assembly, UN Commission on Human Rights (Res. 1996/71 and Res. 1996/73), NATO and the European Union have all encouraged the granting of amnesties to those who have merely participated in hostilities.⁵

1 See <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

2 See ICRC, *Commentary on the Additional Protocols*, 1987, para. 4617; OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, 2009; Anne-Marie La Rosa and Carolin Wuerzner, “Armed Groups, Sanctions and the Implementation of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 90, No. 870, June 2008, pp. 327–341; Laura M. Olson, “Provoking the Dragon on the Patio – Matters of Transitional Justice: Penal Repression vs. Amnesties”, *International Review of the Red Cross*, Vol. 88, No. 862, June 2006, pp. 275–294; Simon M. Meisenberg, “Legality of Amnesties in International Humanitarian law: The Lomé Amnesty Decision of the Special Court for Sierra Leone”, *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, pp. 837–851; and Yasmin Naqvi, “Amnesty for War Crimes: Defining the Limits of International Recognition”, *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 583–625.

3 See ICRC, *Commentary on the Additional Protocols*, 1987, paras 4617–4618.

4 *Idem*.

5 For more information, see “Related Practice” under Rule 159 of the ICRC customary IHL study.

Obligation of States to investigate and prosecute war crimes committed in international and non-international armed conflicts

Under the system of grave breaches set out in the four Geneva Conventions of 1949 (Arts. 49, 50, 129 and 146, respectively) and Additional Protocol I of 1977 (Art. 85) States Parties are obliged to impose effective penal sanctions for persons committing, or ordering to be committed, any of those grave breaches during an international armed conflict (IAC). They must search for persons alleged to have committed, or to have ordered to be committed, grave breaches and bring such persons, regardless of their nationality, before their own courts, or extradite them. In addition, States Parties must take measures necessary for the suppression of all acts contrary to the Conventions other than the grave breaches.

Furthermore, in both IACs and NIACs, it has been established under customary IHL that States must investigate all war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.⁶

Granting of amnesties under IHL

In NIACs, Article 6(5) of Additional Protocol II of 1977 provides that at “the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”.

Importantly, the corresponding customary IHL rule applicable in NIAC clarifies that persons suspected of, accused of, or sentenced for war crimes are excluded from such an amnesty.⁷

IHL does not address amnesties in IACs. However, combatant immunity would preclude the prosecution of persons who are entitled to prisoner-of-war status for merely participating in hostilities.

Amnesties, or any other measures that would, in effect, preclude any genuine investigation and prosecution cannot be extended to those suspected of having committed war crimes or ordering them to be committed. This would be incompatible with States’ obligation to investigate and, if appropriate, prosecute alleged offenders.⁸

6 See Rule 158 of the ICRC customary IHL study: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.

7 See Rule 159 of the ICRC customary IHL study: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159.

8 See ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 2845: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84>. Also, for example, the European Court of Human Rights (ECHR) held, via the Grand Chamber decision in *Marguš v. Croatia* (27 May 2014), that criminal proceedings for charges of torture and ill-treatment should not be time-barred or subject to an amnesty and that an amnesty is generally incompatible with the duty to investigate and prosecute serious crimes, including war crimes.

The issue of amnesties for war crimes has been addressed by various international courts, which have generally supported the proposition that war crimes may not be the object of an amnesty.⁹

Relationship between peace processes, transitional justice and amnesties

Transitional justice can be defined as the range of processes and mechanisms that seek to address the legacy of a violent past linked to an armed conflict or other situations of violence, and thus bring about major political changes in post-conflict societies. These processes comprise both judicial and non-judicial mechanisms, the particular aims of which are to:

- (i) establish the truth about gross violations of human rights and war crimes that occurred in the past;
- (ii) strengthen the rule of law;
- (iii) ensure reparation for victims; and (iv) impose sanctions on the perpetrators. The investigation and prosecution of war crimes are therefore essential components of transitional justice processes and mechanisms.

The granting of partial or conditional amnesties may be considered as part of a negotiated settlement to end a NIAC, or in the broader context of any transitional justice process. However, they must not bar or hamper the investigation of war crimes, or the prosecution of alleged perpetrators.

Regional courts have dealt with this issue in various decisions. For example, the *Masacre del Mozote* case was the first in which a court analysed an amnesty law for war crimes committed in a NIAC. The Inter-American Court of Human Rights (IACHR) held that “the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are sometimes justified to pave the way to a return to peace”.¹⁰ However, the IACHR interpreted Article 6(5) of Additional Protocol II to exclude amnesties that preclude the investigation and prosecution of war crimes.

This case (as well as others mentioned above) illustrates that the right balance must be struck between the pursuit of peace and ensuring accountability.

9 For example: i) the Special Court for Sierra Leone, in the *Decision on Challenge to jurisdiction: Lomé Accord Amnesty* (2003), stated that the granting of amnesties by a State did not rule out prosecution for war crimes and other international crimes before an international tribunal; ii) the *Furundžija* judgment (1998) of the International Criminal Tribunal for the former Yugoslavia, which dealt with the war crime of torture, outlined that an amnesty covering crimes whose prohibition had attained the status of *jus cogens* was invalid; and iii) the Extraordinary Chambers in the Courts of Cambodia (in 2011) affirmed that an amnesty by royal decree could not relieve Cambodia of its “absolute obligation to ensure the prosecution or punishment of perpetrators of grave breaches of the 1949 Geneva Conventions, genocide and torture”.

10 See *Massacres of El Mozote and Nearby Places v. El Salvador* (2012), Inter-American Court of Human Rights.

Resulting limitations on amnesties for war crimes

As noted above, amnesties, or any other measures that would, in effect, preclude any genuine investigation and prosecution cannot be extended to those suspected of having committed war crimes or ordering them to be committed. This would be incompatible with States' obligation to investigate and, if appropriate, prosecute alleged offenders.¹¹

In addition, commanders and other superiors can be held criminally responsible for war crimes committed pursuant to their orders, or owing to their failure to prevent, repress or report such acts.¹² If they are suspected or found guilty of the commission of a war crime under one of these forms of liability, then they may not benefit from an amnesty.

Extension to crimes against humanity, genocide and other international crimes

In addition to war crimes, amnesties cannot apply to genocide, crimes against humanity, torture and other gross violations of international human rights law.

Regional courts have held that an amnesty cannot cover crimes against humanity generally,¹³ nor prevent the investigation and punishment of those responsible for gross violations of human rights, such as torture,¹⁴ abduction, forced imprisonment, arson, destruction of property, kidnapping,¹⁵ extrajudicial, summary or arbitrary execution, and forced disappearance.¹⁶

Such decisions are based on obligations under international law, including existing regional human rights obligations.¹⁷

Furthermore, international and regional human rights bodies, such as the UN Human Rights Committee and the Inter-American Commission on Human Rights, have stated that amnesties are incompatible with the duty of States to

11 For more information, see ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 2845: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84>.

12 For more information, see the ICRC Advisory Service's *Command Responsibility and Failure to Act* factsheet: www.icrc.org/en/document/command-responsibility-and-failure-act-factsheet.

13 In *Almonacid-Arellano et al v. Chile* (2006), the Inter-American Court of Human Rights held that an amnesty could not cover crimes against humanity.

14 In *Abdülsamet Yaman v. Turkey* (2004), the ECHR highlighted that where a State agent is charged with crimes involving torture or ill-treatment, an amnesty or pardon should not be permissible.

15 See *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2006), African Commission on Human and Peoples' Rights.

16 See the *Barrios Altos case* (2001), Inter-American Court of Human Rights.

17 For example: i) in *Malawi African Association and Others v. Mauritania* (2000), the African Commission on Human and Peoples' Rights held that an amnesty law adopted with the aim of nullifying suits or other actions cannot shield the country from fulfilling its international obligations under the African Charter on Human and Peoples' Rights; and ii) in *Yeter v. Turkey* (2009), the ECHR reaffirmed that when an agent of the State is accused of crimes that violate Article 3 of the European Convention on Human Rights, the granting of an amnesty or pardon should not be permissible.

investigate serious crimes under international law and violations of non-derogable human rights law.¹⁸

Amnesties and statutes of international criminal tribunals

Statutes of various international criminal tribunals have explicitly declared that amnesties granted under national law to any person falling within the tribunal's jurisdiction shall not be a bar to prosecution.¹⁹

With respect to the International Criminal Court (ICC) and the principle of complementarity under the ICC Statute, the effect of an amnesty law will be assessed in light of Article 17 of the Statute, especially with regard to a State's unwillingness to prosecute.

Legality/constitutionality of amnesties (before national courts)

At the national level, courts in various jurisdictions have declared amnesties void or inapplicable in the case of various international crimes.²⁰ In addition, many amnesty laws specifically exclude from their scope persons suspected of having committed war crimes under international law.²¹

Crimes committed by children who have taken part in hostilities

IHL establishes the obligation for States to investigate and punish those responsible for committing war crimes. In general, this obligation applies to all persons who commit such acts, and there is no exception for children. However, it is essential to consider special treatment for children who may face criminal prosecution for acts committed while taking part in hostilities, given their age and limited capacity to make decisions in armed conflict.

The ICRC's *Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups* (2009) outline that children who are alleged to have committed war crimes should be considered primarily as victims and treated as such.

The *Paris Principles: Principles and Guidelines on Children Associated with Armed Forces and Armed Groups* (2007) reflect a similar point: Paragraph 3.6

18 For example, see *Juan Gelman et al. v. Uruguay*, Case 438-06, Report No. 30/07, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007).

19 See Article 10 of the Statute of the Special Tribunal for Sierra Leone, and Article 6 of the Statute of the Special Tribunal for Lebanon.

20 For more information, see "Related Practice" under Rule 159 of the ICRC customary IHL study: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159.

21 For example, see Act No. 2003-309 of 8 August 2003, Côte d'Ivoire; Act No. 08-020 of 13 October 2008, Central African Republic; Act No. 014/006 of 11 February 2014, Democratic Republic of the Congo; and Law 1820 of 30 December 2016, Colombia.

outlines that children “must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles”.

In addition, the Special Representative of the UN Secretary-General for Children and Armed Conflict has called on States to consider alternatives to prosecution and detention of children on the grounds of their alleged or actual association with armed groups.²²

It is therefore necessary to consider alternatives to criminal justice when dealing with children who have taken part in hostilities and are accused of having committed war crimes.

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22 See Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict (A/HRC/28/54), Human Rights Council, twenty-eighth session, 29 December 2014.