

# AMNESTY: A BLESSING IN DISGUISE?

Making good use of an important  
mechanism in peace processes

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**Cover picture:** tiles from the peace exhibit *Fragmentos* (Fragments), a “counter-monument” designed by Colombian sculptor Doris Salcedo to commemorate the end of over five decades of war in Colombia. The piece is made of melted down weapons handed in by the Revolutionary Armed Forces of Colombia (FARC) as part of the peace agreement signed in 2016. It was created with the help of women who were victims of violence and will be on display at the National Museum of Colombia, in Bogotá, for at least 52 years (the duration of the conflict).

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# Summary

- The vast majority of peace agreements today contain some crucial elements related to governance and security as well as social and economic issues, and justice and reconciliation. The last area is particularly sensitive, as justice and reconciliation are likely to involve not only significant political, legal and strategic dimensions (who will be prosecuted or receive an amnesty), but also highly emotional issues around the interpretation of the rights and wrongs of the conflict and the responsibilities associated with it. For that reason, of all the hot issues in peace processes, the amnesty issue is often the hottest.
- Amnesties can have a destructive effect when they consolidate impunity and promote violence. They can be constructive when they facilitate a peace accord, encourage fighters to abandon their armed struggle, and encourage dictators to give up power and restore the rule of law.
- With the creation of the International Criminal Court (ICC) and the jurisprudence of other international criminal Tribunals, there is a body of opinion to support the existence of a customary prohibition on amnesties for international crimes. However, other legal cases from domestic and hybrid courts together with state practice on amnesties does not reflect an established, explicit and categorical customary prohibition of amnesties for international crimes. Within International Human Rights Law (IHRL), there are differences in the approach of the regional human rights courts on whether there is an obligation to prosecute gross violations of human rights.
- It is essential that amnesties are perceived as legitimate by the population. Hence the need to establish objective and transparent criteria for amnesties and to impose conditions on those who benefit from them. These may include the need to participate in reparation and DDR (Disarmament, Demobilisation and Reintegration) programmes, as well as to reveal crimes they have committed or witnessed.
- Numerous states have developed pragmatic solutions when setting out conditional amnesties. In Colombia, for example, a law passed on the 28 December 2016 granted amnesty to FARC fighters, state officials and civilians “condemned, sentenced or accused of reprehensible acts [. . .] in direct or indirect relation with the armed conflict.” However, perpetrators of crimes against humanity, massacres and/or rapes had to submit to a special judicial process.<sup>1</sup> This could condemn them to alternatives to jail sentences (such as participating in reparation or de-mining programmes) provided they told the whole truth about the acts they were accused of carrying out. In South Africa, criminals who confessed their political crimes, including serious human rights violations, in front of the Truth and Reconciliation Commission were granted amnesty. In some regions of Niger, communities propose to reintegrate ex-Boko Haram members provided they publicly ask for forgiveness and take an oath on the Koran to give up violence.
- It is generally better to individualise an amnesty process to strengthen its credibility, legitimacy and acceptance. When possible, it is recommended that the amnesty is linked to compensation or reparation for the victims so they – and, beyond them, the whole society – do not get the impression that the aggressor has been rewarded while those affected have been forgotten.

# Amnesty: a blessing in disguise?

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Boko Haram members who surrendered in exchange for amnesty gather for prayer in a prison courtyard in the Diffa region, Niger. Most of them were eventually released as part of the agreement. © Pierre Hazan, July 2017

Amnesties are, without a doubt, as ancient as war. The oldest known undeclared but consciously desired mutual amnesty dates back to the Egyptian-Hittite Treaty of Kadesh from 1269 BC. In 403 BC, Thucydides documented the first amnesty law during the Peloponnesian war. For centuries, amnesties have been used to put an end to wars and to facilitate the reconciliation process by imposing on a society to collectively forget crimes committed during war-time. As a result of the development of international criminal justice in the 20th century, the introduction of the concept of crimes against humanity and genocide at the end of the Second World War, and the creation of the International Criminal Court (ICC) in 2002, the notion of amnesty has become subject to significant criticism and has been denounced as a legal warranty for the impunity of criminals.

Over the last few decades, the development of International Human Rights Law (IHRL) and International Criminal Justice (ICJ) has contributed to reducing the scope of amnesties and permissive immunities in international jurisdiction. In 2010, Ban Ki-Moon, then Secretary-General of the United Nations, welcomed this evolution, claiming that “the world has turned the page of impunity” and that from now on “we have entered the era of responsibility.”<sup>2</sup> This statement was overly optimistic in view of the war crimes and crimes against humanity which are still committed today in Syria, Yemen and elsewhere.

According to the United Nations (UN), amnesty is forbidden for the perpetrators of gross International Humanitarian Law (IHL) violations and gross human rights violations, although there is no treaty

law or customary international law (including state practice) explicitly forbidding such amnesties. Case law shows a nuanced use of amnesties by states, even if those amnesties may not be recognised by other states or international jurisdictions. Moreover, in the case of mass violence, it is not possible to prosecute all the individuals who participated in international crimes.

In recent years, HD has faced challenges around, and sometimes been asked to provide its expertise on, several justice, amnesty and reconciliation projects in African countries and elsewhere. In Niger, for example, the authorities proposed the idea of granting amnesty to Boko Haram members who were prepared to defect.<sup>3</sup> In late 2018, the President of Mali mentioned a possible amnesty for “our children led astray” and now part of armed groups. In the Central African Republic (CAR), the February 2019 Peace and Reconciliation Accord excludes any amnesties for gross human rights and IHL violations, but includes the right to pardon (Article 13).<sup>4</sup> Before the situation in Burundi worsened in April 2015, the Government had proposed to pardon the perpetrators of crimes committed between independence in 1962 up to 2008. This offer was made in the framework of a transitional justice process and the creation of a Truth and Reconciliation Commission (TRC).

Under existing law, the prospect of an amnesty opens up a range of possibilities in a peace process. The aim of this paper is to demonstrate that amnesties: (1) have always been, and will always be, an essential factor in the development of peace processes; (2) may each have radically different objectives and can be as destructive as they are constructive, depending on the context; and (3) may take different forms, whether these are legal or not.

In its capacity as a facilitator and mediator, HD is confronted by the challenges associated with amnesties and their relation to the interests of parties in peace processes. HD can offer its expertise in suggesting types of amnesties which conform with IHL, IHRL and International Criminal Justice and can contribute to peaceful conflict resolution.

This paper is consequently divided into three parts: the first part defines the relevant terms and provides an overview; the second part offers an analysis of the legal framework for amnesties; and the

third part points to possible solutions offered by transitional justice which can overcome the debate around peace versus justice.

## 1. Amnesty: a definition (and debates)

### 1.1 Amnesty: neither mercy nor pardon

The term ‘amnesty’ comes from the ancient Greek word ‘amnēstia,’ from a-(privation) and mnēsis (memory). A legal definition of amnesty does not exist in IHL, although the International Committee of the Red Cross (ICRC) and the UN provide definitions:

- According to the ICRC: “An amnesty generally refers to an official act on the part of the legislative or executive authority which prevents, in the future or retroactively, the investigation of a person, a group or a category of persons for certain violations or any criminal prosecutions against them, and cancels all sanctions taken against them. Thus, an amnesty can halt imminent or ongoing prosecutions, quash convictions already handed down and/or lift sentences already imposed. In some cases, amnesties may be granted by way of an international treaty or a political agreement;”<sup>5</sup>
- The UN defines amnesty as follows: “The word amnesty refers to 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 specified criminal conduct committed before the amnesty’s adoption; or b. Retroactively nullifying legal liability previously established.”<sup>6</sup>

At the risk of confusion (which is sometimes deliberately maintained for political reasons), several terms are frequently used in relation to amnesty, such as mercy (grace) and pardon:

- If the amnesty is receiving bad press, pardon falls within the religious domain which makes it more acceptable, even if, in French, both terms are often used interchangeably;
- Mercy or grace applies to people who have already been convicted and who are then

exempted from the pursuit of their sentence. The conviction remains, it is only part or the whole of the sanction which is consequently cancelled. Generally, mercy is granted individually and pronounced by the Head of State.

Amnesties can consequently take effect before, as well as after, a conviction. If an amnesty is in place before a legal procedure, it shuts down any legal action or prevents the opening of any future criminal investigations. The amnesty can also be individual or collective. And individual amnesties could be revoked if individuals do not adhere to conditions. As a politico-legal decision, an amnesty law can also be repealed.

However, it should be noted that there is a fourth term involved, namely impunity, which amnesty is often accused of promoting. Impunity is defined as the absence of punishment. The links between amnesty and impunity will be explored later in this paper.

## 1.2 Why are amnesties generating so much debate?

For decades, the UN did not oppose the use of general amnesties for serious offences, in fact, in many countries it encouraged amnesties as part of efforts to resolve conflict. Gradually, that started to change with the development of judicial diplomacy and the struggle against impunity in the aftermath of the Cold War. Still, in 1998, after the adoption of the Rome Statute of the ICC, the then UN Secretary-General, Kofi Annan, who was visiting South Africa, publicly supported the efforts of Mandela's government to come to terms with apartheid by stating: "It is unconceivable that, in such case, the [ICC] would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future."<sup>7</sup> At the time, South Africa was implementing its own amnesty agreement through the establishment of a Truth and Reconciliation Commission.<sup>8</sup> However, the UN subsequently changed its approach to amnesties. This was initially communicated confidentially in 1999, but the position became public soon after through a disclaimer to the Lome Peace Accord.<sup>9</sup> The UN, serving as one guarantor of the agreement, signed the agreement, "with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in article IX of the

agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."<sup>10</sup>

In 2004, the Secretary-General specifically requested the Security Council to "reject any endorsement of amnesty for genocide, war crimes or crimes against humanity" and for gross human rights violations.<sup>11</sup>

Mark Freeman framed this change of discourse: "We have gone from a time when amnesties were treated above all as a political issue, fully within the exclusive and sovereign domain of States to a time when they are treated above all as a legal issue that extends beyond the prerogative of any State."<sup>12</sup> Today, the space for amnesty is bitterly discussed whenever there is an attempt to resolve a bloody crisis. From Colombia to Nepal, from the CAR to Argentina, the same questions are raised and continue to be raised.

This debate around the link between peace and justice takes numerous forms. In the early 2000s (when the ICC was about to become functional), a major dividing line emerged between mediators who believed that peace remained the pre-condition to the administration of justice on one side, and the promoters of international jurisdiction who argued that there could not be peace without justice on the other. The UN and the ICC – as this paper will show later – have acknowledged the tension between justice and peace and have attempted to manage it, with limited success.

In numerous crises where HD is involved, amnesty is one of the most politically sensitive issues and, almost inevitably, provokes intense disputes. Amnesties link ethical and security issues together in divided societies, where local actors – including members of armed groups and representatives of political authorities, security forces and victims' associations – hold widely different views. In the background of these disputes are the positions which may be adopted by the UN, the ICC, the European Union and the African Union, to name but a few of the regional and international actors.

The debate is all the more intense because of the range of situations which might result in debates around amnesties: some amnesty projects stem from governments which aim to weaken armed

groups; others stem from military leaders who want to grant themselves an amnesty; while others propose a deal to other political parties in order to move on from the debate about past crimes. Under the existing laws surrounding war, some of these projects or amnesty demands would be legal, but not all of them. Some would be considered positive in the name of peace, others may be considered likely to lead to more violence.

Two catchphrases crystallise these opposing positions and, at the same time, radicalise them: on one side, “no peace without justice,” on the other side “no peace, no justice.” Both catchphrases explore the role of amnesty in justice, understood here as criminal prosecution and punishment for international crimes: justice is seen, either as a pre-condition for peace, or, on the contrary, as an additional obstacle on the path to peace. This paper will later examine the triangular relationship between amnesty, peace and justice.

Opponents often liken amnesty to legal window-dressing which aims to secure the impunity of war criminals. Amnesties can be considered ethically unacceptable or as counter-productive in terms of stability and regional security since, from this perspective, the impunity of war criminals could contribute to fuelling the renewal of violence. Thus, impunity is one of the explanations given for the violence that periodically drenches the CAR in blood. However, it should be noted that impunity has, at times, allowed for peaceful transitions. This was the case in Zimbabwe and The Gambia, where the respective Heads of State (Robert Mugabe and Yahya Jammeh) went into exile.

While amnesty is used in radically different situations, Mark Freeman has offered a classification which outlines seven objectives for amnesties: (1) to encourage fighters to surrender their weapons and to disarm; (2) to persuade authoritarian leaders to give up power; (3) to build trust between belligerents; (4) to facilitate peace agreements; (5) to release political prisoners; (6) to encourage the return of those in exile; and (7) to induce the perpetrators of crimes to participate in the establishment of truth and reconciliation programmes or contribute to material and symbolic reparations.<sup>13</sup>

The range of ways in which the term ‘amnesty’ is used complicates the way it is understood. Amnes-

ties may be used to correct past injustices or, on the contrary, to establish impunity. An amnesty may be used to intervene in times of conflict, or in the aftermath of a crisis, or be included in a peace agreement, or even used as an intervention during times of peace. Amnesties can be used to intervene before, during or after a legal process. They may be individual or collective, granted by the executive or legislative authority. They can apply to large numbers of offenders or be more limited in scope. They may be absolute or conditional, sometimes linked to reconciliation mechanisms. They may target state officials and/or members of armed groups. In the case of the latter, amnesties may aim to encourage the defection of some of these members.

Amnesties may also have different legal consequences for each beneficiary in relation to their designated infractions. These consequences can include (1) preventing the opening of investigations into new crimes; (2) interrupting criminal investigations or ongoing trials; (3) reducing prison sentences; (4) enabling release from prison; (5) granting grace/mercy; and (6) erasing criminal records.

Thus, motivations for amnesties and the reasons for pursuing them vary, depending on the governments’ intentions and the context. Mediators have to consider amnesty projects in the light of this complexity and the context they are facing. In general, broad amnesties (often defined as “blanket amnesties”) apply to everyone who committed crimes in a conflict, including international crimes or gross human right violations. Broad amnesties have the effect of preventing criminal investigations, securing impunity for people responsible for serious crimes.

Amnesties are more often perceived as legitimate when they are conceived essentially to create institutional and security conditions which seek to protect human rights in the long term, and when they demand that all the perpetrators of crimes co-operate with measures seeking to ensure transparency, responsibility and reparations.

### 1.3 Amnesties: an inescapable reality

According to the Amnesty Law Database, 289 amnesties were issued between 1 January 1990 and 31 August 2016, either during a conflict, a peace agreement or a little afterwards. These 289

amnesties affect only 75 countries, which means that on average, each of these states have adopted more than three amnesty laws. These amnesties may have been consecutive and part of a transition process which has generated a new context not initially foreseen when the amnesty was established.

According to analysis by Louise Mallinder, who created the Amnesty Law Database, some 75% of amnesties are related to conflict. In addition, over 49% of comprehensive peace agreements of these periods provided for an amnesty, and 83% of peace agreement amnesty commitments were implemented.<sup>14</sup>

Most amnesties benefited the opposition, while only 72 amnesties benefited state officials. Unlike rebels or opponents, state officials benefitted most from amnesties which are included in peace agreements or put in place afterwards. They generally feel more protected from any criminal conviction in times of conflict.

It is interesting to note Louise Mallinder's finding that a substantial number of amnesties imposed an obligation to participate in a DDR programme and/or to give up violence, while only a few were linked to transitional justice issues (the seeking of truth, justice and reparations), in spite of the fact that these demands may figure in other laws.

On the central question of whether, for the last thirty years, amnesties have tended to exclude or include the perpetrators of international crimes, Louise Mallinder concludes that there has been an equal chance of either outcome (22% granted amnesty for genocide, crimes against humanity, war crimes and other grave human rights violations, and 23% exclude them). Most of the amnesties are related to political offences and less than half deal with international crimes.

The only notable difference is in the timing: amnesties generally do not cover international crimes during the pre-negotiation phase, while they tend to do so in the post-peace agreement phase. In other words, IHL rules rejecting any amnesty for the perpetrators of serious IHL or human rights violations are far from always applied at the national level. Thus, in Afghanistan in 2007, the Parliament adopted a general "self-amnesty" law for all warlords.<sup>15</sup> Some became ministers in the Karzai Government in spite

of the fact that they were suspected of serious international crimes. On 27 February 2006, the Algerian cabinet approved a "Presidential decree implementing a charter for peace and national reconciliation" following the civilian war in the nineties which resulted in countless massacres and 200,000 deaths. The decree ensured impunity for people responsible for crimes under international law and serious human rights infringements. It also included severe punishments for those who publicly recalled crimes committed in the past.<sup>16</sup>

Furthermore, national judicial systems are entitled to prosecute only a limited number of those who have committed crimes, thanks to the exercise of prosecutorial discretion. The case of Cambodia is emblematic of this situation where, to this day, the number of Khmer Rouge leaders prosecuted for the killing of two million of their compatriots can be counted on one hand.

## 2. The position of the ICRC, the UN and the ICC

### 2.1 Article 6.5 of the Second Additional Protocol to the Geneva Conventions

Article 6.5 of the second additional protocol to the Geneva Conventions adopted on 8 June 1977 stipulates: "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." The commentary to this article is clear: "The object of this paragraph is to encourage a reconciling gesture contributing to the re-establishment of the normal course of life among a population that has been divided."

From the ICRC's perspective, IHL has evolved to create customary international law rules through which states are required to investigate, prosecute and punish war crimes in non-international armed conflicts, as well as torture and other gross human rights violations; and to permit amnesty for such crimes would conflict with these prosecution obligations and thus amnesties are impermissible.

The ICRC observes that regional courts have dealt with the issue of amnesty in various decisions. The



Inter-American Court of Human Rights (IACHR) in a number of cases has gone further than other regional human rights systems, in concluding that the commission of crimes of arbitrary detention, torture, forced disappearances and extrajudicial executions violated *ius cogens* norms.<sup>17</sup> Hence, the state has the obligation to investigate such conduct and prosecute and punish those allegedly responsible, obligations which the Inter-American Court also views as *ius cogens* norms. The same Court 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.”<sup>18</sup>

Addressing the relationship between peace processes, transitional justice and amnesties, the ICRC underlines the need to ensure that “the right balance be struck between the purpose of peace and ensuring justice,” concluding: “The granting of partial or conditional amnesties may be considered as part of a negotiated settlement to end a non-international armed conflict, 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.”<sup>19</sup> Hence, in the ICRC’s interpretation, amnesty is limited to acts relating to participating in hostilities which do not constitute war crimes, crimes against humanity, genocide and gross human rights violations. However, state practice on amnesties relating to non-international armed conflict does not provide consistent and widespread support for the ICRC’s interpretation.

The debate is still open between those who consider that there is an *ius cogens* norm to investigate, prosecute and punish those responsible for war crimes, crimes against humanity and gross human rights violations and those who deny the existence of such an *ius cogens* norm.

## 2.2 The UN: the shift against impunity in the nineties

Since the end of the Cold War, the UN has been engaged in the struggle against impunity, be it through General Assembly or Security Council resolutions or through the Secretary-General’s reports. Thus, in his 2004 report on transitional justice, then UN Secretary-General Kofi Annan noted:

“It is possible to consolidate peace in the period immediately following the end of conflict, and to preserve it lastingly, provided the population is sure to obtain reparation through a legitimate system of disputes’ settlement and the administration of fair justice.”<sup>20</sup>

In the same report, Kofi Annan addresses the debate about the competition between peace and justice:

“Justice and peace are not antagonistic objectives; on the contrary, when properly implemented, they strengthen one another. The question is in no way whether it is appropriate to promote justice and to establish responsibilities, but really to decide when and how to do it.”

In its 2012 Guidance for Effective Mediation, the UN made an attempt to reconcile punishment for the perpetrators of international crimes while, at the same time, underlining the importance of amnesties to put an end to a conflict:

“UN mediators cannot endorse peace agreements that provide for amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, including sexual and gender-based violence; amnesties for other crimes and for political offences, such as treason or rebellion, may be considered – are often encouraged – in situations of non-international armed conflict.”<sup>21</sup>

But the UN did not specify where to put the limits on the number of prosecutions when you have potentially thousands of authors of international crimes. The example of the Special Tribunal for Sierra Leone (explored in more detail later), which was a hybrid UN tribunal, demonstrated that the UN decided to focus prosecution on a very limited number of cases – only 13 indictments leading to 9 convictions – but amnesty remained part of the DDR process and thus most combatants received an amnesty.<sup>22</sup>

## 2.3 The ICC: The Security Council and the prosecutor have the final say

Articles 16 and 53 of the ICC Statute outline the actions which the UN Security Council or prosecutor

need to undertake in order to conduct the simultaneous search for peace and justice more effectively.<sup>23</sup> Article 16 puts legal proceedings on hold but does not end them, while Article 53 ends them in the name of the superior interests of peace. Article 16 states:

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

As a result, and much to the discontentment of NGOs, the Security Council is entitled to temporarily suspend ICC action, with the risk that pieces of evidence disappear or are destroyed. In 2009, the African Union demanded – without success – the application of Article 16 in order to suspend legal proceedings against the Sudanese President, whose alleged crimes included war crimes, crimes against humanity and genocide.<sup>24</sup>

Article 53 gives the prosecutor the ability to end legal proceedings and even trials, subject to confirmation by the Pre-Trial Chamber, “if, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution (. . .) because:

a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime . . .”<sup>25</sup>

This article implicitly acknowledges the tension between the search for justice and the search for peace. It leaves the prosecutor with a margin of discretion. The terminology used is deliberately blurred. What is meant by “the interests of justice”? And “taking into account all the circumstances”? How can “the interests of victims” be defined? Is it the fact that they are not threatened? What the authors of the ICC Statute had in mind was to empower the prosecutor and allow them to ensure the prosecution will not destroy any chances for a peace agreement.<sup>26</sup>

To this day, ICC prosecutors have followed a close interpretation of Article 53 in order to avoid becoming

the ‘hostages’ of the belligerents and the pseudo-peace process. The most complex issue in Article 53 is the definition of “the interests of the victims.” It aims to encourage consideration of whether legal proceedings may contribute to instability, or even renewed violence. This is why the first prosecutor of the ICC, Luis Moreno Ocampo, accepted the idea of introducing a political element in order to determine possible consequences linked to the opening of legal proceedings. In front of the Security Council, he declared: “I am required, by the Rome Statute, to consider whether legal proceedings are not in the interest of justice. In order to take this into account, I will follow various national and international efforts to endeavour to establish peace and security, as well as the opinion of witnesses and victims of crimes.”

Article 53 was used for the first time on 12 April 2019, when the Pre-Trial Chamber II of the ICC unanimously rejected the request of the Prosecutor to proceed with an investigation of alleged crimes against humanity and war crimes on the territory of the Islamic Republic of Afghanistan. The judges decided that “an investigation into the situation in Afghanistan at this stage would not serve the interests of justice.”<sup>27</sup>

Articles 16 and 53 abandon the idea that justice takes always precedent. A double brake system is in the hands of the Security Council and the ICC.

### 3. Transitional justice: moving beyond the debate of peace versus justice

#### 3.1 Redefining the terms

To move beyond the tension between justice and peace, the main thrust of transitional justice is to rethink and redefine these terms. Thus, from this perspective, justice is no longer reduced to its purpose of sanctioning criminals when conditions are impracticable for such justice to be done (due to the balance of power or the weakness of the national judicial system). Justice is understood as including both the right to truth (with the opening of archives, the creation of a truth or inquiry commission, the exhumation of people killed in massacres or extrajudicial executions, or commemoration processes) as well as the right to reparation in line with UN

standards (financial and/or non-financial, individual and/or communal reparation).

As justice is redefined in a wider manner, the kind of peace which is being sought is similarly expanding. It is no longer a negative peace which is solely reduced to the cessation of hostilities, but a positive peace filled with positive content such as restoration of relationships, the creation of social systems that serve the needs of the whole population and the constructive resolution of conflict leading ultimately to reconciliation. By widening the definition of justice and peace, the political equation is no longer reduced to a zero-sum game. Mediators may be among the first to experience the effect of this widening of definitions. In order to advance a given peace process, they may have to deal with suspected war criminals. In doing so, mediators are in a position to advise leaders, and get them to introduce crucial elements to satisfy some of the victims' demands (for example, the location of mass graves), while, as soon as circumstances permit, competent jurisdictions will sanction the perpetrators of the most serious crimes.

From this perspective, justice is seen as a process which can be broken down into a sequence, the implementation of which allows for a step-by-step progression towards a more complete definition of justice. This would have been unthinkable in a binary situation like impunity versus criminal justice. This is, by the way, synchronous with "the unalienable right to [ . . . ] truth" for the victims as much as for their family and society, as specified in the revised principles relating to the struggle against impunity set out by the UN in 2005.<sup>28</sup>

This holistic approach to justice is even more relevant in societies undergoing a transition when courts lack independence from the political authority, the rule of law is weak, victims are isolated and the perpetrators of crimes have the capacity to intimidate. All these factors turn out to be obstacles to criminal justice. A group of international law experts, conflict resolution practitioners, and human rights advocates were inspired by these considerations and put together the Belfast Guidelines in order to establish general principles that take into account both the political realities in conflictual or post-conflict societies and the legal framework.<sup>29</sup> In substance, the Guidelines are based on the following observations:

- It is not possible to prosecute all the perpetrators of war crimes;
- All judicial systems, including those associated with international criminal law, provide for discretionary power to decide which suspects or incidents should be selected for legal proceedings;
- When massive atrocities are committed, prosecutors may prioritise the gravest crimes for prosecution and decide that other serious crimes won't be prosecuted;
- Carefully-designed amnesties combined with strategies of selective prosecution may promote a state's legitimate objectives in order to respond to mass violence.

### 3.2 Who is to be prosecuted in cases of mass violence? Past and current examples

In cases of mass violence, courts have sometimes only prosecuted "the persons carrying the biggest responsibility." This is how the Statute of the Special Court for Sierra Leone was mandated to pursue only those persons "who bear the greatest responsibility for serious violations of international humanitarian law and crimes."<sup>30</sup> In Cambodia, the Extraordinary Chambers was tasked with prosecuting "the senior leadership of Democratic Kampuchea and the main perpetrators of crimes and serious violations of Cambodian criminal law and IHL rules and customs."<sup>31</sup>

Likewise, in Rwanda, given the fact that hundreds of years would have been needed to judge the 130,000 people considered to have taken part in the genocide in 1994, only a tiny minority – the most important among them – were brought in front of national courts or the International Criminal Tribunal for Rwanda. After some ten years of detention, a huge majority of the 130,000 or so genocidaires benefited from non-criminal justice, namely the *gacaca*.<sup>32</sup> As for the ICC, functioning on the basis of the subsidiarity principle, Article 5 of the Rome Statute limits its action "to the most serious crimes of concern to the international community as a whole." Article 17(d) specifies that the the Court shall determine that a case is inadmissible where it "is not of sufficient gravity to justify further action by the Court."

These examples highlight the selectivity of legal proceedings in cases of mass violence. A global strategy with regard to transitional justice may include judicial prosecutions for cases deemed to be priority cases, the granting of amnesty for minor crimes and offences, as well as mechanisms for the search of truth, and reparation programmes for victims.<sup>33</sup> This holistic approach may contribute to a broader range of objectives for the transformation of society than if the emphasis is exclusively focused on legal proceedings.

Today, no-one knows whether the peace process which started in Colombia will succeed in putting an end to a war that has lasted over half a century. But from the perspective of the relation between the search for peace and the search for justice, it will remain one of the most pragmatic examples of the management of the tension between the two objectives. Thus, the law of 28 December 2016 grants amnesty to FARC fighters as well as state officials and civilians “condemned, sentenced or accused of reprehensible acts [. . .] in direct or indirect relation with the armed conflict.” However, perpetrators of crimes against humanity, massacres and/or rapes will not benefit from the law. They will have to submit to a special judicial process, also provided for by the peace agreement, which may condemn them to alternatives to prison sentences provided they tell the whole truth about the acts they are accused of carrying out. The peace process also provides for the establishment of a Truth and Reconciliation Commission and a reparation programme.

### 3.3 Amnesties and international prosecution obligations

In this complex and nuanced legal landscape, peacemakers can play a crucial role in dealing with one of the most difficult challenges in any peace negotiation: making the parties understand that they are not confronted with a binary choice between prosecution versus amnesty, and consequently helping them develop their positions. Hence, while respecting IHL and IHRL, peacemakers can facilitate a process in mastering the tools of amnesty and transitional justice and in adapting them to the specific needs of each society. They do possess a margin of manoeuvre, which enables them to ease the tension between peace and justice objectives and help them to move forward the peace process.

As mentioned above, states have an obligation to prosecute and punish international crimes such as genocide, grave breaches of the Geneva Conventions, torture and enforced disappearances. But ultimately, it is up to the state authorities to decide whether or not to engage in legal proceedings according to the principle of prosecutorial discretion.

As the Belfast Guidelines stress: “States will not necessarily be violating their obligations if, due to the exercise of prosecutorial discretion, they do not prosecute all perpetrators or instances of these crimes (. . .).” Carefully designed amnesties combined with selective prosecution strategies can be consistent with a state’s international obligations and can further the legitimate objectives of a state responding to widespread criminal acts.”<sup>34</sup>

Moreover, in the current state of the law, there is no rule that explicitly forbids a state from granting an amnesty to presumed perpetrators of war crimes.<sup>35</sup> This being said, nothing prevents state, hybrid and international courts from exercising their ability to prosecute perpetrators of serious violations, if they wish to do so. Courts have always been consistent on this issue and the Special Court for Sierra Leone strongly reaffirmed this in 2004:

“Since competency is universal, a State cannot prevent another State from exercising its jurisdiction to prosecute a criminal, on the pretext that the latter benefits from an amnesty. For this reason, it is unrealistic to consider the granting of amnesty by a State as being universally accepted, when it comes to international crimes where competency is universal. A State may not dispatch a crime into oblivion if it is a crime against international law, for other States may have the right to remember it.”

National, international and hybrid courts may decide under their own jurisdiction whether to recognise an amnesty or not. They are entitled to condemn individuals, but cannot declare a national amnesty law to be unconstitutional or order a state to annul its amnesty law.<sup>36</sup> There is no current norm that formally forbids a state to grant amnesty to presumed perpetrators of serious IHL violations. Therefore, even when these courts declare that an individual amnesty is inoperative at the international level, it can still be effective at the national level. In practice,

this may mean that the majority of criminals will continue to benefit from an amnesty within the state that granted it.

### 3.4 Amnesty: legitimacy under what conditions?

Generally, selective prosecutions combined with the granting of an amnesty appear all the more legitimate when they are both based on transparent and objective criteria. The legitimacy of an amnesty is strengthened when it is linked to the fulfillment of a certain number of conditions. The Belfast Guidelines state some conditions prior to the granting of an amnesty. They may include:

- Submission of individual applications for amnesty;
- Surrender and participation in DDR programmes;
- Participation in transitional or restorative justice processes;
- Complete disclosure of any personal implication in the violations, and sanctions for false testimonies;
- Disclosure of information on the implication of third parties in the violations;
- Testimony (public or private) in front of a Truth Commission, a public investigation or another truth re-establishment process;
- Testimony during the trial of people who have not benefited from an amnesty or who are not eligible;
- Restitution of property acquired illegally;
- Material and/or symbolic contribution to reparations.

In order to supervise the respecting of these conditions in terms of future conduct, a formal independent procedure has to be put in place to re-evaluate or examine conformity to these conditions.

Therefore, when we are confronted with situations where a government wants to promulgate an amnesty, it is necessary to determine the following points:

- What is the objective of the amnesty? Will it contribute to consolidating the impunity of criminals or will it contribute to a global strategy to re-establish the rule of law and transitional justice?
- Will the amnesty be perceived as legitimate by populations affected by the crimes of the past? How can they be involved in the development of the amnesty's conditions so it is not perceived as a reward for violence?
- Is the amnesty conditional? If so, on what terms?
- Who is granting the amnesty? The Parliament or the central authority?
- For which crimes? For which perpetrators? In which areas of the national territory?
- Is it an individual or a collective amnesty? If it is collective, which precise group does it concern?
- What is the appeal authority?

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# Endnotes

- 1 “[. . .] Amnesty, pardons or equivalent benefits shall not be granted for crimes against humanity, genocide, serious war crimes (violations of international humanitarian law committed in a systematic manner) kidnapping and other severe deprivations of liberty, torture, extrajudicial executions, enforced disappearances, rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of child soldiers, as established in the Rome Statute.” Colombia Peace Agreement, 28 December 2016, <https://casebook.icrc.org/case-study/colombia-peace-agreement>
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- 3 Following a request for expertise from the authorities, HD suggested two options for the release of Boko Haram members who surrendered voluntarily: (i) an amnesty law project; and (ii) an extension of the definition of “repentant” in the Nigerian criminal code. The authorities of Niger chose the second option. HD’s efforts were part of its mediation work between populations in the Diffa region and authorities, linked to the management of the Boko Haram crisis.
- 4 HD contributed to the February 2019 Peace and Reconciliation Plan with inputs on the justice and reconciliation issues (the role of the Truth and Reconciliation Commission, the right to pardon) and by training the governmental team on transitional justice processes and solutions.
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- 9 The turning-point was in 1999 when the Office of the UN Secretary-General issued a confidential cable to all UN representatives named: “Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution.” This called on all representatives not to support amnesty agreements for war crimes, crimes against humanity or genocide. See Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2009): 89. This position became official with the publication of the 2004 *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies*. UN Doc. S/2004/616 (2004), <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PCS%20S%202004%20616.pdf>
- 10 Report of the Secretary-General on UNAMSIL. UN Doc. S/1999/836. 30 July 1999, 2.
- 11 *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies*. UN Doc. S/2004/616 (2004), 91. This approach was reinforced with the UN General Assembly Resolution 60/147 of 16 December 2005, which established 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”, <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>
- 12 Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2009), 6.
- 13 Freeman, *Necessary Evils*, 5.
- 14 The figures in this section are drawn from an article by Louise Mallinder entitled “Amnesties and Inclusive Political Settlements,” University of Edinburgh (2018), [http://www.politicalsettlements.org/wp-content/uploads/2018/12/2018\\_Mallinder\\_Amnesties-Report.pdf](http://www.politicalsettlements.org/wp-content/uploads/2018/12/2018_Mallinder_Amnesties-Report.pdf)
- 15 The National Stability and Reconciliation Law states that all those who were engaged in armed conflict before the formation of the Interim Administration in Afghanistan in December 2001 shall “enjoy all their legal rights and shall not be prosecuted.”

- 16 Article 46 states: anyone who declares in writing or otherwise, who uses or exploits the wounds of the national tragedy in order to undermine the institutions of the Algerian Republic, to fragilise the State, to harm the honour of State officials who served it with dignity or to tarnish Algeria's image internationally, will be punished with three to five years imprisonment and with a fine of 250,000 to 500,000 dinars.
- 17 *ius cogens* is a latin phrase that literally means "compelling law." It designates norms from which no derogation is permitted by way of particular agreements.
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- 25 Once the Office of the Prosecutor (OTP) has sufficient evidence against an individual, it submits a request to the Pre-Trial judges to issue a warrant of arrest or summons to appear. The judges of the Pre-Trial Chamber will issue a warrant of arrest if there are reasonable grounds to believe that the person has committed a crime within the Court's jurisdiction, see Pre-Trial Stage, ICC, <https://www.icc-cpi.int/Pages/Pre-Trial.aspx>
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- 32 *Gacaca* is the Rwandan name for communal village courts. They were reactivated by the Kagame Government in order to accelerate the consideration of some 130,000 people accused of participating in the Tutsis' genocide in 1994.
- 33 In line with 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 consensus by the Human Rights Commission, Resolution 60/147 on 16 December 2005.
- 34 Belfast Guidelines, *ibid.*



- 35 However, there have been different interpretations of the legal situation which are worth noting. Some human rights organizations interpret the law in a broader manner and consider that the state has a duty to investigate and prosecute, hence amnesties that would prevent a state fulfilling these obligations are impermissible. However, as outlined earlier, there is no applicable norm today to support this claim.
- 36 It's worth noting that the Inter-American Court of Human Rights has ordered several states to annul their amnesty laws, but a number of states have not complied with these rulings.



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