Making Amnesty Work

Prospects of granting amnesty to the parties of the conflict in Eastern Ukraine

JANUARY 2016
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>2</td>
</tr>
<tr>
<td>The role of amnesties in international practice</td>
<td>3</td>
</tr>
<tr>
<td>The Draft Amnesty Law</td>
<td>6</td>
</tr>
<tr>
<td>Legal Compliance of the Draft Amnesty Law</td>
<td>7</td>
</tr>
<tr>
<td>- Compliance with the Laws of Ukraine</td>
<td>7</td>
</tr>
<tr>
<td>- Compliance with Ukraine's Other International Legal Obligations</td>
<td>7</td>
</tr>
<tr>
<td>Recommendations</td>
<td>9</td>
</tr>
</tbody>
</table>
Executive Summary

Although the reports on shelling and fighting in turbulent Eastern Ukraine are not as frequent as in early 2015, success in peace negotiations with separatists and in achieving a return to normal life has been limited over the last two years. Peace negotiations began in 2014 through a Tripartite Contact Group, which included representatives of Russia, Ukraine and the self-proclaimed Peoples’ Republics of Donetsk and Luhansk. To date, three ceasefire and conflict resolution agreements have been signed but none of them has been implemented in full.

One of the main disputes around the Minsk agreement¹ is the granting of amnesties to all the parties in the conflict. The main concern is the threat that granting amnesties will effectively mean impunity for participants in the hostilities in Eastern Ukraine. However, it should be noted that the Minsk agreement contains nothing precluding Ukraine from granting conditional amnesties and establishing accountability for war crimes. The policy outcomes of the granting of amnesties will depend primarily on the provisions of domestic law and the political will of the government of Ukraine.

According to international practice, laws on amnesties have played both constructive and destructive roles. Depending on the content of the particular law, it can lead to impunity, or else be a useful tool for peace-building. Laws on amnesties can serve as efficient mechanisms of transitional justice provided that: they are compliant with international law; set out clear conditions for the pardon of former combatants and are properly implemented.

The draft law ‘On the exemption from prosecution and punishment of persons taking part in events on the territory of the Donetsk and Luhansk Oblasts’ (‘Draft Amnesty Law’), which is currently being considered by the Ukrainian Parliament, contains positive elements but requires amendment to ensure it fully complies with Ukraine’s international obligations and also with national legislation.

¹ Tripartite Contact Group Agreements (‘Minsk Agreements’) signed in Minsk by representatives of Russia, Ukraine and the self-proclaimed Peoples’ Republics of Donetsk and Luhansk on 5 September 2014, 19 September 2014 and 12 February 2015
The role of amnesties in international practice

Granting amnesties is a legal and political tool, which exempts people from prosecutions related to specific crimes committed during a particular period of time. Amnesty laws can be instrumental in putting an end to hostilities and negotiating peace. Introducing exemption of certain people from prosecution, amnesty laws make it easier for insurgents and members of guerrilla groups to surrender. However the granting of amnesties is often opposed by many, including civil society groups and victims, as it can entail impunity for perpetrators. The most severe criticism is often directed to so-called blanket amnesties, when the prosecution of all types of crimes committed by all parties of a conflict is blocked. Blanket amnesties in Argentina, Uruguay and Uganda have led to decades of impunity and injustice.

However, initiating criminal prosecutions for each and every crime committed during the war period can be harmful for peace building and reconciliation processes. Many rebels or insurgents are involved in activities, which can be classified as crimes, but they do not constitute serious offenses and are committed by many members of political opposition during the conflict period. To this category belong so-called political crimes such as illegal possession of arms, disobedience, membership in banned organizations, anti-government propaganda, etc. Granting amnesty for such crimes enables disarmament and return of former fighters to normal life. It does not make sense to prosecute them and in many cases this is not even possible. For instance, after the Rwandan genocide no amnesty was granted, as the level of outrage was so high. In a year the judicial system was totally blocked by the thousands of cases opened against alleged perpetrators. During the four years after the cancellation of amnesty laws, less then 3 % of the genocide-related cases had been heard in the courts. As a result, policy makers understood that it is impossible to criminally prosecute all perpetrators and switched to a hybrid system, which included traditional informal hearings with an emphasis on truth and reconciliation instead of criminal punishment.

The conflict needs of peace building and accountability can be resolved by the introduction of so-called “conditional amnesty”. In such cases amnesties are granted for the members of military formations provided they comply with certain conditions, which usually include: surrender and disarmament; crimes committed during the conflict period; lustration or vetting if a person who committed crime is a public servant; reparations to victims; public renouncement of violent activities and expression of loyalty to current government. In addition, the crimes to be eligible for amnesty should not constitute grave criminal offences or international crimes. The implementation of such amnesties does not prevent the restoration of justice and can help to ensure accountability.

International practice shows several key factors, which ensure amnesty laws are instrumental for achieving

---

2 Braid Emily, Roht-Ariaiza Naomi, Creeks of Justice: Debating Post-Atrocity Accountability and Amnesty in Rwanda and Uganda in Amnesty in the Age of Human Rights Accountability Comparative and International Perspectives, Cambridge University press, p 210-238

peace and justice:

1. Compatibility with international law. Harmonization of domestic amnesty laws with the norms of international law ensures that amnesties may not apply to crimes which require prosecution under international law (e.g.: war crimes, crimes against humanity, genocide, torture...). International law also introduces the responsibility of the upper chain of command for crimes committed by soldiers. It also eliminates the statute of limitations typical for national criminal law is not applicable to grave crimes. One clear examples of impunity resulting from the non-compliance of national legislation with international law is the investigation of the torture committed by the French military during the Algerian war for independence. Amnesty provisions were included in the Evian Peace Accords of 1962. In 1968 the French National Assembly passed a separate law granting amnesty to all parties of the conflict in Algeria. The problem of impunity became particularly apparent when General Paul Aussaresses published a book where he openly admitted that torture had been used in Algeria and provided details of beatings, torture with electric shocks and summary executions conducted by French military. Due to the amnesty in force, the only way to hold Aussaresses accountable was to sue him for the publication, which was done by human rights activists. However, the courts ruled in favor of the General because the crimes described in the book were committed more then 10 years ago prior to publication and the statute of limitation was applied. Only in 1994 did France adopt a new Penal Code which eliminates that statute of limitation for crimes against humanity, thereby ensuring that similar problems will be avoided in the future

2. Efficient implementation mechanism and equal treatment of all parties of the conflict are necessary: Even if the adopted amnesty is conditional, state and law enforcement bodies should make sure that all parties to the conflict are treated equally. The amnesty will only have a positive effect (disarmament of guerrilla groups for instance) if their trust in the rule of law is established. An example of the serious problems, which can occur with the implementation of amnesty laws, is that of the Chechen Republic of Russian Federation. In 1999 the State Duma adopted a law on amnesty encouraging insurgents to disarm and granting them amnesty. The Law was not perfect from the standpoint of compliance with international law, but this was not the main problem. Human rights groups documented cases of summary executions of groups of insurgents who had surrendered, for example in March 2000 near the village Komsomolske of Urus-Martanovskiy rayon. Moreover, in 2001 there were numerous cases when former insurgents who had been pardoned and returned to peaceful life were abducted by the law enforcement bodies. Of course this led to increased grievances and the insurgency re-emerged. Another issue with the amnesty was related to the prosecution of criminal cases. Although the amnesty law did not cover grave crimes, in practice it strengthened the usual reluctance of the courts to prosecute crimes committed by federal forces in the Chechen Republic. As a result, many cases of disappearances and killings of civilians were impossible to prosecute in domestic courts and the only effective way of seeking justice for the

---

4 Economist, France and torture: An awkward case http://www.economist.com/node/886928
5 Dmitrievskiy Stanislav, Samchenko Stanislav, Russian amnesty in Chechnya and international law (available in Russian), access - https://www.kavkaz-uzel.ru/articles/38859/
victims was through the European Court of Human Rights.6

3. Ensuring the effective functioning of the judicial system: Having correctly worded laws is as important as its implementation. If the judicial system is not independent and is biased towards one party of the conflict, peace-building efforts may be distorted. In the post-conflict environment it is very likely that judges are dependent on political decisions and that court decisions are influenced by political considerations. The amnesty provisions should be equally applied to both parties to ensure justice and that perpetrators are held accountable.

4. Amnesty legislation is most efficient when supplemented by other conflict resolution instruments. Studies demonstrate that successful transition to peace and the reconciliation of communities happens when multiple tools of transitional justice are used.7 The amnesty law might lead to the situation when not all perpetrators will be criminally prosecuted. The negative impact of this can be mitigated through the work of truth and reconciliation commissions and public truth-telling by perpetrators. The establishment of international tribunals or hybrid courts to prosecute international crimes and grave breaches of international human rights law can also serve as a useful additional mechanism. There are several cases of the creative use of transitional justice tools in relation to amnesties. For instance in post-apartheid South Africa there were limited possibilities for the criminal punishment of perpetrators and a need to inform the public about the crimes committed during apartheid. The Truth and Reconciliation Commission made telling the truth a condition for amnesty. People involved in the hostilities had to publicly testify to the Truth Commission about the crimes they had committed during the apartheid regime, and only then were they eligible for amnesty. In Argentina, while the blanket amnesty law was in force, human rights groups, with the support of courts, initiated so-called “Truth trials”. The courts, even though they were not able to convict the perpetrators, continued investigations and requested suspects to appear in court and publicly testify. This practice allowed for the comprehensive documentation of the evidence of crimes as well as helping to inform the public about the atrocities committed during junta period.8 Another solution was found in Rwanda, where criminal hearings were supplemented by the traditional conflict resolution tool Gacaca – a system of semi-formal community courts. In the Gacaca system, local communities elected judges to hear the trials of genocide suspects. The courts issued reduced sentences if the alleged perpetrator repented and sought reconciliation with the community. The Gacaca trials served to promote reconciliation by providing a means for victims to learn the truth and gave perpetrators the opportunity to confess their crimes, show remorse and ask for forgiveness in front of their community.9

6 See for example cases Ahmadov and others v. Russia, Aslahanova v Russia, Imakaeva v. Russia
8 Engstrom Par, Pereira Gabriel, From Amnesty to Accountability: The Ebb and Flow in the Search for Justice in Argentina, in Amnesty in the Age of Human Rights Accountability Comparative and International Perspectives, Cambridge University press, p 97-123
The Draft Amnesty Law

The draft law ‘On the exemption from prosecution and punishment of persons taking part in events on the territory of the Donetsk and Luhansk Oblasts’ (Draft Amnesty Law) was developed pursuant to the Minsk agreements.

The Draft Law defines the time period covered by the amnesty (between 22 February 2014 and the day the amnesty law entered into force), the applicable territory (Donetsk and Luhansk Oblasts where anti-terrorist operations were conducted) and the particular group of people (those who committed crimes and were members of armed groups or who were involved in acts by such groups and/or were involved in the acts of the self-proclaimed organs of Donetsk and Luhansk Oblasts, or those who obstructed anti-terrorist operations.)

Persons fulfilling the conditions of the proposed amnesty would be exempt from any form of punishment (custodial or otherwise). All pending investigations falling within the ambit of the proposed amnesty would be closed. The law would apply to proceedings at all stages, including preliminary investigations, pre-trial proceedings, trial proceedings and post-conviction.

To be eligible for the amnesty persons should comply with the following requirements:

- Release any hostages held by them;
- Voluntarily hand over to the government authorities all firearms, ammunition, explosive materials, explosive devices and military hardware in their possession;
- Cease the occupation of or obstruction of the functioning of any buildings or premises belonging to government authorities, local authorities, businesses and organisations in Donetsk and Luhansk Oblasts; and
- Inform the appropriate investigative body of having done so.

The Draft Amnesty Law stipulates that the following categories of crimes would not be covered by the proposed amnesty: Attempts to kill a government official or social worker; sabotage; pre-mediated murder; pre-mediated grievous bodily harm; hostage-taking; human trafficking (Article 149 of the Criminal Code of Ukraine); rape (Article 152 of CC); forced satisfaction of sexual desire through unnatural means (Article 153 of CC); robbery (Article 187 of CC); smuggling (Article 201 of CC); acts of terrorism (Article 258); desecration of a grave (Article 297 of CC); attempted murder of a representative of law enforcement forces, border forces or armed forces (Article 348 of CC); taking hostage a representative of public authority or law enforcement (Article 349 of CC); attempted murder of a judge or juror in connection with the administration of justice.

10 Article 2 and Article 4 of the Draft Amnesty Law.
11 Article 3 of the Draft Amnesty Law.
(Article 379 of CC); attempted murder of a defense lawyer or representative in connection with the provision of legal services (Article 400 of CC); genocide (Article 442 of CC); attempted murder of a representative of a foreign State (Article 443 of CC); crimes against persons and organizations who benefit from international protection - diplomats (Article 444 of CC). In addition, Article 5 of the Draft Amnesty Law excludes the application of the proposed amnesty to any proceedings in relation to the shooting down of Malaysia Airlines flight MH17 and/or the obstruction of investigations into this event.

**Legal Compliance of the Draft Amnesty Law**

**Compliance with the Laws of Ukraine**

According to Ukrainian Constitution amnesties must be enacted by a law in order to be valid\(^{12}\). The Law regulating amnesties in Ukraine is the 1996 ‘Law on the application of amnesty in Ukraine’ (Amnesty Application Law). It excludes the following categories of persons from domestic amnesties: persons sentenced to death or life sentences; persons who have two or more convictions for premeditated serious or very serious offences; persons found guilty of premeditated serious or very serious offences who have served less than 2/3 of their sentence; persons found guilty of crime(s) which resulted in the deaths of two or more people; persons who have not provided compensation to their victims for their losses\(^{13}\).

Article 4(2) of the Amnesty Application Law also excludes persons who have been convicted of the following crimes: intentional homicide; torture; forced organ donation; unlawful confinement or abduction resulting in death or grievous bodily harm resulting in death (as well as other categories of persons defined by the Amnesty Law).

The current text of the Draft Amnesty Law does not refer to Article 4 of the Amnesty Application Law and does not incorporate the exclusions provided in the Amnesty Application Law. This may lead to illegality. The Amnesty Law is inferior to the Amnesty Application Law, so any incompatibility with the Amnesty Application Law should render the Amnesty Law, or parts of it, null and void. Therefore a reference to the Amnesty Application Law should be made in Draft Amnesty Law.

**Compliance with Ukraine’s Other International Legal Obligations**

Ukraine is a party to a number of international treaties (Convention Against Torture,\(^{14}\) the four Geneva

---

\(^{12}\) Article 92 of the Constitution of Ukraine  
\(^{13}\) Article 4 of the Amnesty Application Law  
\(^{14}\) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Article 7, available at: [http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx) (last accessed: 12.12.2015).
Conventions,\textsuperscript{15} the Genocide Convention,\textsuperscript{16} the Apartheid Convention,\textsuperscript{17} and the Convention on Enforced Disappearances,\textsuperscript{18}, which oblige the Government of Ukraine to prosecute grave international crimes.

International crimes are acts, which by virtue of their nature and gravity, have been recognized as an affront to international peace and security and a concern of the international community as a whole.\textsuperscript{19} Some of these crimes, namely genocide, crimes against humanity, war crimes, and the crimes of aggression, slavery, piracy and torture, are regarded as transcending the interests of any particular State, granting all nations the jurisdiction to prosecute their perpetrators (universal jurisdiction).\textsuperscript{20} There is a growing international consensus, evidenced by the enactment of international treaties and state practice,\textsuperscript{21} as to the existence of a peremptory (\textit{jus cogens}) obligation on all States (\textit{erga omnes}) to prosecute perpetrators of international crimes within their jurisdictions.\textsuperscript{22}

Furthermore, under the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{23} and the European Convention on Human Rights (ECHR)\textsuperscript{24} Ukraine is obliged to provide an effective remedy for the violation of

\begin{itemize}
\item \textsuperscript{18} International Convention for the Protection of All Persons from Enforced Disappearance (2006), Article 3, available at: http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx (last accessed: 12.12.2015). N.B: Ukraine acceded to this Convention on 14 August 2015, therefore all obligations arising from this Convention commence from this date and do not apply retroactively.
\item \textsuperscript{21} E.g.: ICC Statute, International Convention for the Protection of All Persons from Enforced Disappearance (2006); Establishment of and jurisprudence emanating from international(ised) criminal tribunals for Rwanda, the Former Yugoslavia, Sierra Leone, Cambodia, East Timor, the Lebanon, Chad.
\item \textsuperscript{22} LoMé Decision, para. 71; See also: Ould Dah v. France, Application No. 13113/03, ECHR, 17 March 2009, p. 16-17, available at: http://hudoc.echr.coe.int/eng?i=001-91980#{"itemid":["001-91980"]}; (last accessed: 12.12.2015).
\end{itemize}
fundamental rights, such as the right to life, the right to protection from torture, cruel, inhuman and degrading treatment, and the right to be protected from slavery and forced labor. A domestic amnesty law that exempts from prosecution suspected perpetrators of these violations of human rights would be incompatible with the right to an effective remedy.26

It should also be noted that domestic amnesty laws cannot prevent investigations and prosecutions at the International Criminal Court (ICC).26 As Ukraine extended the ICC jurisdiction over crimes perpetrated on its territory from the beginning of the conflict in February 2014, if the ICC initiates an investigation, perpetrators will be prosecuted regardless of any domestic provisions for amnesty.

Accordingly, a domestic amnesty law may not apply to offences which Ukraine is legally bound to prosecute under international law, either by virtue of an international treaty (genocide, grave breaches of the Geneva Conventions, torture, slavery and enforced disappearance) or as a result of their universal nature (crimes against humanity, piracy, certain violations of laws and customs of war in non-international armed conflicts).

The most problematic aspect of the Draft Amnesty Law, as far as Ukraine’s international legal obligations are concerned, is that it appears to bar the prosecution and punishment of certain international crimes. In the context of the events in Donetsk and Luhansk Oblasts, the most notable international crimes that could fall under the current draft amnesty are crimes against humanity, war crimes and the crimes of torture and enforced disappearances. However, there is no legal impediment under national and international law to extending the exclusions to other international crimes for the purpose of full compliance with international law.

**Recommendations**

The Draft Amnesty Law and national legislation of Ukraine should be brought into compliance with the international customary laws and treaties ratified by Ukraine to exclude international crimes from the amnesty. The Draft Amnesty Law should also be compliant with the Amnesty Application Law to eliminate the possibility of a contradiction between these two documents. The following amendments are required:

1. Amend Article 5 of the Draft Amnesty Law to exclude the most serious international crimes from falling under the proposed amnesty. A new sub-section (4) should be added which unequivocally excludes all those suspected, accused or convicted of serious international crimes, namely crimes

---


26 Articles 86-102 of the ICC Statute.
against humanity, war crimes, torture and enforced disappearances (as defined by international treaties and customary international law which is binding on Ukraine) from the scope of the amnesty;

2. Amend Article 5(2) to include references to Article 438 (violations of rules of warfare), Article 439 (use of weapons of mass destruction) and Article 127 (torture) of the Criminal Code of Ukraine in the list of offences excluded from the scope of the proposed amnesty.

3. Add a reference to Article 4 of the Amnesty Application Law in the Draft Amnesty Law, to ensure its compliance with the law of Ukraine.

27 As defined in the ICC Statute.