International Law Summary

Amnesties in the Age of Human Rights Accountability

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INTRODUCTION

This is a summary of an event held at Chatham House on 31 October 2013.¹ The purpose of this meeting was to discuss the ongoing research project of the speakers, which focused on amnesty laws and the relationship that they have with accountability and impunity.

The panel provided a collective analysis of the research project which included an explanation of the methodology used, a summary of the findings and a discussion of the future policy implications of the study.

The meeting concluded with questions from the audience and was held on the record.

METHODOLOGY

Two key positions can be recognized in relation to amnesties. The first is that they act as a block to democracy, to the rule of law and to human rights as they perpetuate impunity and are not compliant with international human rights law. The opposing view is that amnesty laws are a necessary evil and act as a useful tool for fragile governments in countries emerging from a period of transition; they allow for negotiations and the advancement of democracy in difficult circumstances and aid peace processes.

The research project under discussion aimed to test these two positions and consider the relationship between amnesties and accountability as well as the impact that both have on democracy and human rights.

Earlier research² had highlighted that neither position was entirely correct or incorrect. When trials or amnesties were used alone they appeared to have a null effect on democracy and human rights; however, when the two were combined they appeared to have a positive and statistically significant effect.

The project had considered why combining these processes may work to overcome impunity, in what situations and where this had happened, and also whether the age of accountability was driving the capacity to overcome amnesty barriers. In addition the research had examined the policy implications of any trends that had been found as a result of the study.

¹ The summary of this meeting was prepared by Emma Beatty.
² This research was performed by Leigh Payne, Tricia Olsen and Andrew Reiter and can be found in Transitional Justice in Balance: Comparing Processes, Weighing Efficacy (Washington, DC: United States Institute of Peace Press, 2010).
The research combined two pre-existing databases, the transitional justice database\(^3\) and the amnesty law database\(^4\), to create a larger database of over 400 amnesty laws. From there the project employed a very specific definition of an amnesty law to be examined, i.e. a legislative, constitutional or executive provision that includes crimes committed during the authoritarian period, involving human rights violations, and carried out by state authorities or individuals/groups working on behalf of the state. This definition allowed the research to focus on just 63 amnesties from the larger database.

When analysing these amnesty laws the research was interested in considering the specific crimes that the amnesty laws were covering; the specific beneficiaries of the amnesty laws; the timeframe of the amnesty laws; and also whether, over time, the amnesty laws had become compliant with international human rights law.

The second stage of the analysis related to accountability and criminal prosecutions. This work focused on verdicts and trials in criminal prosecutions brought against perpetrators of human rights violations. The research looked primarily at trials that had been initiated after the democratic transition, against those accused of human rights violations, who were state agents or agents working with the state, and had resulted in a verdict, published by official national bodies.

The data collected from these two research stages was then tested against four different explanations in order to attempt to understand the persistence of amnesty laws. These explanations were: amnesty laws as a response to trials, amnesty laws as a response to transitions, amnesty laws as a response to accountability and amnesty laws as related to regional characteristics.

**SUMMARY OF FINDINGS**

Of the four explanations tested, the strongest trend emerged when considering amnesty laws in relation to political transition periods. The other explanations appeared to offer little in terms of trends. The research did not support the theory that where amnesties have persisted there has been a block to accountability, nor did it support the position that regions that have no amnesty laws, or at least have compliant amnesties, have higher accountability levels. Additionally there was little evidence to support the

\(^3\) The Transitional Justice Database was compiled by Leigh Payne, Tricia Olsen and Andrew Reiter and can be found at http://www.tjdbproject.com/

\(^4\) The Amnesty Law Database was compiled by Louise Mallinder and can be found at http://incore.incore.ulst.ac.uk/Amnesty/about.html
opinion that the age of accountability had impacted on amnesty laws; for example few of the existing non-compliant amnesties had been overturned following the beginning of the age of accountability, and the number of compliant and non-compliant amnesties that were adopted post-1998 was very similar (five versus four). The regional data was fairly complicated in terms of trend but it did highlight a key finding: while Africa has the highest level of compliant amnesties, it also has one of the lowest levels of guilty verdicts, meanwhile Latin America, which has the highest level of non-complaint amnesties (as well as the amount of amnesties in total) also has the highest level of guilty verdicts. Thus, the research found that the number of amnesties in a region does not correspond with the number of guilty verdicts in the same area.

On the basis of these findings the researchers questioned if amnesty laws should remain a focus of policies aimed at ending impunity or whether such policies should instead focus on other barriers to accountability.

**CHALLENGES**

The research moved on to consider what other factors may be contributing to significant levels of impunity. Here the panel suggested that legal challenges to amnesty laws were key in bringing about an end to impunity and the focus should be on those factors that resulted in such challenges. Having used numerous situations from the Latin American region as case studies, the researchers highlighted four key elements that, when collectively present, would result in challenges to amnesty laws and bring about full accountability. These factors were strong civil society demand, strong international pressure, strong judicial leadership and the absence of ‘veto players’. The level of accountability achieved would depend on how many of these factors were present as well as how strong they were.

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5 The year 1998 is defined by the research project as the beginning of the age of accountability as this was the year in which the Rome Statute of the International Criminal Court was adopted.
6 70 per cent of the total number of global compliant amnesties are found within Africa; however Africa is responsible for only 15 per cent of the total number of global guilty verdicts.
7 Latin America is responsible for 52 per cent of non-compliant amnesties (and 46 per cent of all amnesties) yet 42 per cent of guilty verdicts come from the region.
8 Two types of challenges were defined: domestic challenges – attempts to modify the legal scope of amnesty laws via courtroom, parliament, ballot box (e.g. excluding certain types of crimes, particular types of perpetrators, time period of the crimes); and to cancel the legal effects of amnesties retroactively, for the future, or both; and international challenges – decisions regarding the legal standing of amnesty laws by international-governmental organizations (e.g., Inter-American or UN system).
9 Veto players are those with positions of authority with the power to counter demands for accountability.
POLICY IMPLICATIONS

The research did not appear to support the position that amnesty laws were contributing significantly to accountability levels. However it had still produced useful information that enabled the panel to advocate two primary recommendations for overcoming impunity in the future. First, the factors discussed above – namely civil society demand, international pressure and judicial leadership – would need to be strengthened, while the power of ‘veto players’ would have to be weakened. Pro-accountability policies would need to target these factors and focus less on amnesty laws. Second, the researchers recommended a type of partial amnesty, one that is compliant with international standards but also allows for processes such as plea bargaining and state witnesses. This would then allow cases to be prioritized and democracy and human rights accountability to be pursued conjointly.

DISCUSSION

Age of accountability

One participant questioned the position that, based on the fact that the number of compliant amnesties was the same (five) in both the pre- and post-1998 period, the age of accountability appeared to have had little impact on amnesty laws. It was asked if the findings did not actually show that there were far fewer amnesty laws in total in the post-1998 period (nine) compared to the pre-1998 period (44), which could be viewed as a shift towards accountability. In response the panel commented that while it was true to say that post-1998 there had been a lower number of amnesties adopted it was important to note that those amnesty laws that had been adopted before that time continued to persist. Thus the majority of amnesties seen overall still included a significant number of non-compliant amnesty laws, with only eight being overturned in the post-1998 period.

As a follow-up, the participant asked if the lack of amnesties adopted post-1998 could be viewed as an international shift in behaviour. Here the panel commented that this apparent trend was instead evidence of the impact political transitions had on amnesties; the low number of amnesties seen post-1998 was proportional to the low number of transitions in the same period. In terms of a shift in behaviour it was noted that the fact that four non-compliant amnesties had been adopted post 1998 (compared to five compliant) had to be considered, as this suggested that little has changed in terms of behaviour.
Victims

The question was raised as to whether or not the panel had considered how granting an amnesty to perpetrators of war crimes and human rights violations resonates among the victim community. Were there any findings regarding whether victims feel betrayed and manipulated by an act of amnesty, in particular where they expect accountability to take place? Additionally had the project considered the relationship between amnesties on one hand and forgiveness on the other, in the context of the reconciliation process?

In response it was stated that victims had been considered as part of the civil society factor discussed and a considerable amount of the demand for accountability that stems from that source comes from victims’ groups. Turning to Latin America as an example, many of the early assumptions in relation to accountability were based on the situation in Argentina. In that case there had been a very strong demand from civil society for those responsible to be held accountable, alongside which the veto players were very weak as the outgoing regime had been discredited for various reasons. However, in comparison, in Chile the veto players within the outgoing regime were still very strong and were able to block accountability in spite of the fact that there was also a strong civil society movement involving victims’ groups and relatives of victims. These examples show that it is hard to generalize across cases about the impact of civil society demand because other factors are also important; but what the research does show is that strong demand from civil society acts as the key engine for ending impunity. Accountability is not going to happen without the demand at the civil society level.

Moving on, the issue of forgiveness is a difficult one to address and also varies across cases. For example in Latin America the notion of reconciliation is almost anathema, however in cases such as South Africa it was key to the Truth and Reconciliation Commission. So what the research has aimed to do in relation to these issues is to look at the variations around civil society demand and victims’ demand for accountability and, rather than assume it is always there, think about what the implications for accountability are when the demand is not there.

As regards the resonance of amnesties on victims, the panel made it clear that the project is not advocating blanket amnesties but partial and conditional amnesty processes that are compliant with international law and will, when paired with key policies, reduce the barriers to accountability. It was stated that the research has shown that sometimes the strategic use of amnesties by pro-accountability actors may be beneficial in ending impunity. To look to
Argentina, where the amnesty laws were overturned, there was still a de facto amnesty used in this case because at some point after the annulment of the law prosecutors, victims and legal representatives realized that it would be necessary to prioritize prosecutions to avoid the so-called biological amnesty (where perpetrators die before prosecution).

Argentina demonstrates clearly that the conditions have to be right to achieve accountability and that partial amnesties can play a role in that. For example, President Carlos Menem made an agreement with the military that, if they did not mount a coup, they would be granted immunity and the president would carry out military reforms to increase their political power. In other words President Menem used a partial amnesty to ensure that the process continued to work.

It was asked whether there were any benefits of granting amnesties from the point of view of the victims and for the purpose of stability and co-existence? This is what the research aimed to argue; there are some benefits to amnesties and there could be more if the type of amnesty was thought through better; better used to weaken vetoes against any kind of accountability at all; and better used to ensure compliance with international standards.

One participant asked if it makes it more difficult for human rights advocates if there is a system that allows an amnesty for murder but not for crimes against humanity as, in reality, it is quite difficult for the victims to see the difference between the two. Here the panel stated that victims rarely get what they want in any case in court and, in truth, there is no way to compensate them for what they have been through. They want justice but the harms committed are irreparable. The point of the research is accountability and, in terms of policy, how a country can avoid any repetition of the cycles of impunity and violence. The research suggested that it is possible to amnesty certain things in order to increase the level of accountability. Most prosecutions of the type in question are selective as it is not possible to put everyone on trial. Some victims will not get justice but by employing the processes advocated by the research it is argued that more will.

**Research methods**

It was asked if a qualitative analysis would be useful rather than simply quantitative. In response the panel commented on the difficulties of considering statistics and quantitative data as opposed to qualitative material. As an example of this, the data that comes from the situation in Guatemala...
was highlighted. In this case there was a compliant amnesty but there were also 19 cases of guilty verdicts. When considered in more detail it became apparent that people had been put on trial and guilty verdicts had been issued in 19 cases but that in some trials, when particular perpetrators had appeared before the court, the judges had decided to interpret their acts as common crimes to circumvent the amnesty. This shows that evidence coming from statistical analysis can be a problem and that often it is necessary to consider both quantitative and qualitative data.

Another participant asked why has there been so much amnesties data from Latin America. It was stated that part of the answer was that some of the earliest transitions took place in Central and Latin America. Another factor, with reference to but not limited to the case of Argentina, is that there is a tradition of civil society mobilization from human rights activists and victims’ groups in the region that dates back to the time of political repression and violence, so from the moment that violence was taking place civil society was already mobilizing to get a process of accountability going. Finally, in the Latin American countries, there was also an existing judiciary, which made the process of accountability easier when compared with cases like Rwanda where, in the aftermath of the genocide, the vast majority of judges and prosecutors had fled the country or been murdered and the system had to start again from scratch. Latin American countries were lucky in that they had a functioning system that could be strengthened in the aftermath of the transition to challenge the amnesties and to get accountability.

Case studies

It was asked if there was a difference in terms of how amnesties work in countries where there has been conflict or in countries where there has been political repression. For example if there was any difference between somewhere like Argentina and a situation like Sierra Leone. These situations are distinct in some ways and very similar in others. They are distinct in the sense that amnesties granted in situations concerning civil war and conflict have more legitimacy because of the Additional Protocol 2 to the Geneva Conventions,\(^\text{10}\) which allows for some amnesties to be granted in certain cases. However, during the research the kinds of transitions that were considered included civil conflict transitions, transitions from authoritarian rule that also involved conflict, and political transitions where it could be said that

\(^{10}\) Article 6 of Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts, (Protocol II), 8 June 1977.
there was no civil conflict at all. In this respect, for the purpose of research, the situations were very similar. In addition, while amnesties do have a utility, they can also potentially block accountability but non-amnesties can also do the same. What amnesties do appear to do well is provide additional tools for fragile governments to try and negotiate with veto players. That is what the research aimed to assess: whether it would be possible to have an amnesty that complies with international human rights standards and gives the flexibility to negotiate with veto players, bringing stability and accountability.

Finally the question was raised as to whether, on the basis of the research, there was reason to be hopeful about the situation regarding amnesties or not? Here the panel stated that the situation was interesting but not simple. On the positive side it was stated that there has been a lot of progress on accountability and the research was evidence of that. However, while the fact that accountability is happening suggests there is reason to be hopeful, the research also shows that accountability has stalled in many cases and been blocked in others. The panel does believe that there is a way to bring about more accountability, even while protecting the stability of transitional countries by employing the methods advocated by the research.