



Dealing with the Past: Prosecutions and Amnesties

Louise Mallinder
6 November 2014

Background to the Presentation

- Presentation draws on a forthcoming report that will be published as part of a series by the Amnesties, Prosecutions and the Public Interest in the NI Transition
- Report analyses the legal status of amnesties under the ECHR
- Focus of the report was selected in part in response to debates over the past 18 months in Northern Ireland on nature and legality of amnesties



Extent of ECtHR Case Law on Amnesties

- The report and this presentation draw primarily on the case law of the European Court of Human Rights relating to amnesty
- Unlike other human rights bodies, the European Court of Human Rights has not developed a substantial case law on amnesties
- None of its amnesty case law relates directly to Northern Ireland



Overarching Approach to Interpreting the Case Law



- Reading the Court's pronouncements on amnesty together with the obligations the Court has pronounced for ECHR Articles 2 and 3
- The Court has not yet been asked to rule directly on the legality of amnesties.
- It has made **general comments** - significant for understanding states' obligations under the Convention, but their generality limits their influence
- The case law is inconsistent
- It seems to develop a bifurcated approach in which amnesties that prevent prosecutions for violations which can also be considered international crimes are subject to greater scrutiny than amnesties that cover only Convention violations
- As a result, analysis distinguishes Article 2 from Article 3

Amnesties and Article 2: *Dujardin v France (1991)*



- Case taken by the families of some unarmed *gendarmes* who were killed in a politically-motivated attack by rebels on the island of New Caledonia, a French overseas territory. Rebels granted amnesty
- Commission stated “as with any criminal offence, the crime of murder may be covered by an amnesty. That in itself does not contravene the Convention *unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes...*”
- “The Commission considers ... that the amnesty law, which is entirely exceptional in character, was adopted in the context of a process designed to resolve conflicts between the various communities of the islands. ...”
- “*The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law.*”

Tarbuk v Croatia (2012)

- The applicant, Tarbuk, was placed in pre-trial detention on suspicion of having committed espionage during the 1991-5 conflict in Croatia. 1996 amnesty ended the proceedings against him. Following his release, he launched civil proceedings for damages for his detention.
- The Court chose to reiterate the *Dujardin* position stating: “even in such fundamental areas of the protection of human rights as the right to life, the *State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.*”

Amnesties & Article 2

- Court may award states broad discretion in this area
- But *Tarbuk* suggests some criteria for amnesties to be permissible:
 - The amnesty should be *exceptional* in character
 - The amnesty should be *necessary* - French amnesty for New Caledonia suggests that amnesties enacted to contribute to the peaceful resolution of armed conflicts may fulfil this
 - *interests of individual members of the public are respected*, eg
 - having their right to life protected by the end of conflict
 - interests of victims and society to know the truth about the violations
 - amnesty must not impede the fulfilment of the state's duty to conduct effective investigations into Article 2 violations

Distinguishing Legal Status of Torture and Right to Life



- Unlike Article 2, which identifies instances in which it may be legally permissible for the state to use force leading to the taking of life, Article 3 has no qualifications
- Torture has a dual status as both
 - a human rights violation which triggers state responsibility
 - an international crime that triggers individual criminal responsibility
- This distinguishes Article 3 from Article 2, which only creates state responsibility.
- The European Court has been attentive to this distinction when approaching amnesties for torture (and massive violations, disappearances and war crimes)

Abdülsamet Yaman v Turkey (2004)



- Court reflected on a hypothetical amnesty in case relating to torture of a 12-year old boy by the Turkish police
- “where a state agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings and sentencing are not time-barred and that *the granting of an amnesty or pardon should not be permissible.*”
- Strong contrast to flexible approach in *Tarbuk*

Ould Dah v France (2009)

- related to a Mauritanian national, who was accused of torture whilst being a Mauritanian army officer before benefiting from a 1993 amnesty law enacted by the country's transitional government. He was arrested in France, and case challenged jurisdiction of French courts
- “Like the United Nations Human Rights Committee and the ICTY, the Court considers that an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts.” (emphasis added)
- “The obligation to prosecute criminals should not ... be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law”

Court's Justifications for Non-Permissibility of Amnesty for Torture



- Accepted that tensions can arise between justice and social reconciliation. However, it noted that 'no reconciliation process of this type has been put in place in Mauritania'.
- Referred to the universal prohibition of torture in international human rights law and the obligation to prosecute torturers contained in the Convention Against Torture.
- Noted that an amnesty law enacted in one state cannot prevent Courts in foreign states or international Courts from exercising jurisdiction

Uncertainties on Amnesties and Article 3



- Determinations of Article 3 violations may be made with respect to acts of torture or ill treatment committed by state actors or private individuals
- Convention Against Torture defines torture as only being committed by or at the instigation of state actors and the cases explored only refer to state agents
- It is unclear whether the Court would impose such rigid standards when faced with complaints of torture or ill treatment committed by private individuals due to less rigid standards in international criminal law
- Court has not considered amnesties that are introduced in order to promote conflict resolution, reconciliation or truth recovery

Amnesties and “Massive” Human Rights Violations: *Case of Association ‘21 Decembre 1989’ and Others v. Romania (2012)*

- Re draft amnesty law to exempt the Armed Forces from criminal liability for acts committed during 1989 Romanian revolution resulting in over 1,000 deaths
- “an amnesty is generally incompatible with the duty incumbent on the States to investigate acts of torture and to combat impunity for international crimes. This is also true in respect of pardon.”



Amnesties and War Crimes: *Margus v Croatia* [GC] 2014



- Croatian amnesty excluded war crimes. Applicant initially benefited from amnesty for crimes connected to conflict, but his actions later reinterpreted as war crimes and amnesty was removed
- “A growing tendency in international law is to see ... amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights.”
- “Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims...”

Amnesties and Disappearances



- Disappearances are international crime and can violate ECHR Arts 2 and 3
- *Gutierrez Dorado and Dorado Ortiz v Spain* (2012) related to disappearances in 1936-9 Spanish civil war and 1977 amnesty
- Court declined to pronounce on legality of amnesty and instead decided that applicants had waited too long to bring case to Strasbourg
- Suggests that even for the most serious offences, the Court may be unwilling to review national amnesties where a substantial period of time has elapsed since the amnesty was introduced

Conclusion: Determining Permissibility of Amnesty



- From case law:
 - Is the amnesty necessary and proportionate to the objectives being pursued?
 - Does the amnesty respect the interests of individual members of the public?
 - Does amnesty prevent investigations?
 - Does the amnesty cover international crimes?
 - Does the amnesty cover state agents?
 - Is the amnesty part of a reconciliation process?
 - Was the amnesty enacted decades ago?
- Other possible factors:
 - Does the amnesty complement prosecutions of “most responsible”?
 - Is amnesty conditional on non-recidivism or other measures to ensure non-repetition of crimes?