



Transitional justice: Are amnesties the answer?

Chair:

Dr. John Githongo, Executive Director, Transparency International Kenya

Panellists/Discussants:

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Dr. John Makumbe, Transparency International Zimbabwe

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Jan Urban, journalist, the Czech Republic

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Introductory remarks - Mark Freeman

What is an amnesty? A grant through law given to a class of persons for a particular set of actions or events. These are not pardons. Amnesties shield people from prosecution. Amnesties have recently been used to protect people from prosecution for human rights abuses. And amnesties is a "dirty" word, and rightfully so, in the context of human rights crimes.

There is a diversity among amnesties, and this must be considered when establishing best practices.

Conditions of the execution of amnesties:

This is a region of creativity for negotiators. Should they be conditional on appearance at a special hearing? On full disclosure of wrong-doing? Inclusion or exclusion?

Negotiating amnesties - three recommendations:

1. Read about past amnesties.
2. Consult experts in the field for advice.
3. Always seek to integrate amnesties with other truth and justice seeking alternatives.

General criteria:

1. Conditions for a proper amnesty:
2. An amnesty must be invoked or accepted only as a last resort, after considering prosecution, etc.
3. An amnesty must be democratic in its creation.
4. It must not apply to those responsible for the worst crimes.
5. It should be given only to individuals for some considerations.
6. It must involve procedure.
7. It must be reversible if violations or comparable crimes occur.
8. It must provide an opportunity for any identifiable victims to question and challenge.
9. It must provide concrete benefit to victims, usually in the form of reparations.

Contribution 1 - The Case of Peru

The Fujimori case: After two years in power, there was a coup d'etat. There is no possibility of checks and balances. There are plans to stay in power for a long period. Peru is concerned with security and drug traffic. Montesino was expelled from the military for drug trafficking and his arms trade.

He tried to force a third election, after having been refused; people did not accept this as two terms of office as president are the legal limit in Peru. Columbia discovered he bought and sold 10,000 AK47s. Other incidents reported, such as the paying of large bribes to the opposition. Fujimori called for new elections and said he would file charges against Montesino. Montesino fled to Panama and resigned his post by FAX.

Fujimori and Montesino installed a corrupt system, a criminal organisation, hundreds of people appointed at the highest levels. After ten months, Peru has frozen many assets, recovered some monies, and has many people under investigation, imprisoned ministers, generals, congressman, a Supreme Ct magistrate, an attorney general, and others. This begs this question: Should a government banish or pursue criminals in flight, or should it go on with the business at hand? The new President decided that an amnesty was not the right decision. The climate of corruption in the world lends credibility to this; amnesty lends itself to becoming condonement.

Those who think crimes should be pardoned believe the crimes were committed under ideological misconceptions. Young organisations need democracy.

Political argument has no value in this debate. "The military is not corrupt due to its nature," one of the panellists said. Military holds public functions and therefore is adhering to a cultural model. "If they do it, why not me?"

One of the speakers said the elite takes power by force and then benefits from an authoritarian regime, but cannot stay in power for long. He believed amnesty cannot be an answer. If we want a way out for development, we cannot forgive crimes such as those committed by Fujimori and Montesino. People must be aware that crimes cannot be committed with impunity. The mentioned cases do not resemble cases of change of political will of the administration.

Amnesty and forgiveness can lead to new policies, but those granting amnesty must realise the risks, especially the expectation of future amnesties for crimes. Amnesty, the speaker stressed, for the corrupt cannot be a solution in the transition process, and will corrupt any forthcoming new order. An amnesty cannot be considered a breakpoint with the past, as it makes the statement that crimes cannot be committed with impunity. This is not the message we wish to send. Amnesty for corruption can be considered when there has been a change and a move to a new order. One amnesty must be a breakpoint, with NO future amnesties.

Contribution 2 by Sergei Zlotnikov -The Case of Kazakhstan

According to the office of the Majlis, the draft law contradicts current international law. Kazakhstan has a low (bad) reputation with regard to corruption. The Minister of Majlis is strongly against keeping money in bank deposits; wants to work for benefit of the economic condition of the country. Government receives support of majority of members of government, Senate and Parliament.

Majlis has great conciliatory power. Government conducts active propaganda and advertising campaign.

Amendments for calculation of payment of income taxes: government differs on this issue. Foiled an attempt to set a new rate in several years, latest in 2000. Subject to criticism dealing with several aspects:

- Amnesty is a departure from the legal procedure and punishment.
- It is a violation of principle. Granting amnesty may lead to receiving funds by illegal methods:
 1. It is an attribute of totalitarian state.
 2. It suggests tax amnesty to citizens, amounting to a tax cut.
 3. It is necessary to fix amnesty as "an articulated asset".
 4. Government may use to advance its own interests.
 5. Issues of income and property: who benefits, etc.

Businessmen and civil servants are below this level, citizens don't really NEED government intervention. Above may be reasons for capital fleeing from the Republic. High cost of production, marketing to competition. Must consider cost of legislation, criminals receiving criminal protections.

6. The only category of persons, according to experts, in need of amnesty, are e.g. people who possess considerable funds. The mechanism of elimination allows most people to be dismissed from consideration.

According to a Kazakhstan source in July 2000, businessmen have released new figures. There are some negative suggestions, not all of them about corruption.

Contribution 3 by Danijel Pantic - The Case of Serbia

Representation has a lot of analogies. Citizens of a particular country have been facing a situation for a long time. There are decisions made as to how to deal with the situation. Pantic reminded those present

that it is one year since Slobodan Milosevic left office. There were elections but not regular elections, creating a perfect climate for another class. This was one period of resistance.

Something like 2,000 people had to move from their homes. Many people would not survive and would take their own lives. One-line taxation, involving villages.

Funds to fight corruption should be taken from those who have, to those who need funds. Shifts, concern with technology right now isn't backing up speakers assertion that the current situation is not acceptable. In the period of 1 January 1989-6 January 1991 came the force of the first change in this law - the law on bankruptcy. If they trained more, they would have a great deal of time to fill their pockets.

Mechanisms:

Receiving loans

Central bank is delivering funds in the making offline. A good deal of hot current introduced.

Cigarette smuggling

Lowest price is .29 sold for resale. Smuggled into country and assumed to be tax.

Tax rates

Up to 100K Deutschmarks, and the amount preceding. Really progressive. Good attempt to prevent croneys from coming in. Most of the money goes back into the state budget.

Discussion

Commentator talked about elements of corruption tied to social privilege. How do we go about changing it? Do companies decide to take power without fearing reactions or consequences?

One of the speakers said the second part of paper was on social responsibility. Only during this phase can we make evaluative judgments.

Mark Freeman said corruption is very close to theft, and asked for opinions and who is the person who decides the definition.

A person from Mexico said it may be possible to set up a transparency commission process. Corruption victims are not so easy to identify as the victims of human rights crimes. Discussion helps to inform and categorize a public debate. Mexico seems to be thinking seriously about a truth commission process.

Was US government aware of what Montesino's group was doing?

Audience: No.

A student said he had believed the CIA backed Montesino for several years. Part of the government was aware of what Montesino was doing. He said that "everybody knew" Montesino was linked to drug traffickers. He said receiving a lot of co-operation from the American Embassy, the FBI, that they have received \$1M, Florida was helping them, etc.

A participant answered the question, saying part of this is self-explanatory. Some civil society groups were trying to find out what was going on. He gave an example of the first released study results in the Ukraine. Security officers were at the conference; called them traders in foreign security deals. He said one should take a risk, but within limitations.

Another participant asked where was society, and that it was just where it is. He said the reason is the lack of power to change things. He said this is the justification for why amnesty is needed sometimes, so you can get at someone later, even years after they have left office. Relating this to Africa, says if they don't have this, this will keep Africa from developing, and make it impossible to develop.

Question from Ghana: *What about amnesty for crimes against humanity? What about the burden of proof being on the accused? If so, then nothing can be in violation of the law. If the law does this it will violate a human rights rule. To resolve this is to keep a burden on the state to say that the state has produced certain minimum evidence.*

Question from Kenya: *In times of transition, should national governments be content with trying to deal with these issues on their own, or should they look to the international community for help: to human rights commissions, etc.?*

Question from Jessica Burns, TI-Secretariat: *Was the tax law you describe used to replace other measures, and was it used in connection with other measures? If a country goes ahead with amnesty, how can it avoid disillusionment?*

Speaker's answer: Described what will be happening with regard to development in the near future. Discussed making changes in the condition of the poor.

Continuation of the panel: Mark Freeman

Amnesties for crimes against humanity do violate current law. It is possible to define some corruption crimes as war crimes but not as a matter of course. In terms of questions of due process, the entitlements that apply differ based on the consequences (gravity, severity) of the crime. Many times these types of proceedings may violate the Universal Declaration of Human Rights. Economic consequences can be used by the International Community as leverage to manage and control power. Some things that can be used are funding and training, e.g. to rebuild a judicial system.

Rwanda is a good example of how the international community can get involved in rebuilding a whole process. With regard to disillusionment, there is a need of:

- discussing accountability
- public platform for victim
- some kinds of mechanisms for an accurate historical record
- some kind of reparations with legal reforms to prevent recurrence
- mechanisms geared toward reconciliation
- past enemies may be able to reconcile and work together in the future

Contribution by a speaker from Peru

Attending to the atrocities that crimes against humanities imply - disappearances, torture, etc. - must not be the recipients of amnesties. There is a program in Peru now to give benefits to whistleblowers, from reduced sanctions, to no sanctions, to recover some money. In human rights, is this possible? See Fujimori and Montecino, having organized a paramilitary group that killed innocent children.

Some people involved in those crimes are asking for benefits in exchange for information. It IS possible to give these benefits in limited application, to people only at the lowest levels of sanctions and at a regulated level. The benefit is conditioned on the quality of the information given; for really good information, the benefit proposed is one-third of the penalty. The idea is to be able to establish responsibility for the heads of these groups.

You can't assign reverse burden of proof. Once the precedent is established, this will open the door for great abuse. A dictator, for example, would use this to accuse the innocent.

International co-operation is very important, and so is observation by international observers. Peru is receiving such supervision "at this moment". It receives backup from Interpol and through police support. It does not have good judges and prosecutors, and the international community can be of great help to Peru in the process of rebuilding.

