Amnesty

Pubblicato in A.Cassese et al. (eds.), **The Oxford Companion to International Criminal Justice,** Oxford University Press, uscito nel febbraio 2009 (pp.243-244), accettato per la pubblicazione e in corso di stampa al momento del bando

AMNESTY

Amnesty may be defined, in simple terms, as a sovereign act of forgiveness for past offences, most often granted to a group of persons as a whole. This definition excludes acts of forgiveness for offenders who have already been convicted, which are termed as pardon.

There is no pre-definite scheme for amnesties. They are most commonly granted through a national law or a governmental decree, but they may also be included in peace agreements between States or amongst internal factions at the end of a civil war.

Amnesties have been granted for centuries, often at the end of an armed conflict. Just to give a very ancient example, according to Art. II of the Treaty of Westphalia (1648): "there shall be on one side and on the other a perpetual oblivion, amnesty, or pardon of all that has been committed since the beginning of these troubles…" .

Only recently though, international humanitarian law made an explicit reference to amnesty. Art. 6(5) of the 1977 Additional Protocol II to the 1949 Geneva Conventions, provides: "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."

No other international law instrument exhort States to grant amnesties, and, generally speaking, international law must be regarded as neutral towards their use.

However, there is a crucial question: are international bodies, such as courts an tribunals, bound by amnesties? Surely, there is a trend towards considering amnesties incompatible with international crimes, which emerges from a number of relevant decisions by international criminal tribunals, human rights courts and domestic courts.

Amongst the first bodies to pronounce on the incompatibility between amnesty and international crimes (more specifically on the crime of torture) was the United Nations Human Rights Committee which stated the following: "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally

incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future." (General Comment No. 20 on Art. 7 of the ICCPR, 1994).

In its landmark judgement delivered in *Prosecutor v. Furundzja* (TC, Judgment No. IT-95-17/1-T), 10 December 1998, § 155), the ICTY held that the fact that torture is prohibited by a peremptory norm of international law has the effect to internationally de-legitimise any legislative, administrative or judicial act authorising torture. Therefore, a State cannot take national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If this were the case, other States are bound not to recognize such an act.

The concern not to allow amnesty for serious international crimes was evident during the negotiation between the United Nations and Sierra Leone for the establishment of the Special Court for Sierra Leone. Art. 10 of the Statute of the Special Court (2000), reads: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute [crimes against humanity and serious violations of international humanitarian law] shall not be a bar to prosecution".

In a decision delivered in 2004 (*Prosecutor* v. *Kallon, Norman and Kamara,* AC, Decision, 13 March 2004, SCSL-2004-15-16-17 AR 72*)*, the Special Court ruled that amnesties granted to persons belonging to the warring factions in the civil war by the Lomé Peace Agreement (concluded in 1999) are no bar to prosecution before it. This decision was affirmed in *Prosecutor* v. *Kondewa* (AC, Decision, 25 May 2004, SCSL-2004-14 AR 72). As noted by Professor Cassese, the Special Court reached the right decision, although in a rather convoluted manner.

One should also mention the agreement between the UN and Cambodia on the establishment of the Extraordinary Chambers for Cambodia, which provides that there should be no amnesty for the crimes committed in Cambodia by the Khmer rouges between 1975 and 1979 (Article 11).

On the contrary, there are uncertainties as to what extent an amnesty may bar criminal prosecutions in front of the ICC, since the issue was not resolved during the negotiations of the Rome Statute.

Finally, it is worth mentioning the decision of the Supreme Court of Chile in *Sandoval* (Supreme Court, causa 517/2004, Resolución n. 22267, available in Spanish at http://www.derechos.org/nizkor/chile/doc/krassnoff.html) affirming that amnesty can be

no bar to the prosecution of enforced disappearances and the decision of the Supreme Court of Argentina, in *Simón, Julio Hector y otros* (Supreme Court, causa 17.768, 14 June 2005, available in Spanish at www.derechos.org/nizkor/arg/doc/nulidad.html) that declared unconstitutional and void two amnesty laws adopted in the 1980s to protect the authors of serious crimes such as enforced disappearances. Both rulings both followed the conclusions reached in *Barrios Altos* by the Inter-American Court of Human Rights (Judgment, 14 March 2001, available at http://www.corteidh.or.cr/docs/casos/articulos/ Seriec_75_esp.pdf)

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