PREPARING FOR POST-CONFLICT RECONCILIATION: THE CASE OF AMNESTIES IN LIGHT OF ARTICLE 17 (1)(C) OF THE ROME STATUTE

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Abstract. The present article discusses the case of transitional amnesties before the International Criminal Court. Transitional Amnesties are a tool used by States facing transitional periods in order to ease the change into a new system at the end of a conflict, aiming at establishing peace and reconciliation. It is discussed how could these amnesties be read in light of article 17.1.c of the Rome Statute. According to this article, a case is inadmissible when the person concerned has already been tried for conduct that is the subject of the complaint. Under the present text, a legal analysis is developed both with regard to the elements of article 17.1.c and the matter of the legality of granting amnesties in the event of grave crimes against humanity. It is concluded that, even though international law seems to point out in the direction that this type of amnesty is outlawed, the International Criminal Court is still reluctant to issue a final conclusion on the matter.

Keywords. Amnesties; International Criminal Court; Transitional Justice; Ne bis in idem.

1. Introduction

After the end of a conflict and before the establishment of peace and reconciliation, there is an important step called transition. As regards the law, the most relevant aspect of this period is transitional justice, which has the objective of facing the crimes committed by past oppressor regimes[1]. The punishment of those is frequently advocated as necessary in the transitional period.[2] Hence, the direction that the transition will lead a nation will depend on, essentially, the strategy adopted by its main political agents.[3][4] This strategy ought to consider whether or not, and to what extent, amnesties shall be granted to those that committed crimes during the past regime. Granting or not someone amnesty may imply avoiding or not that person's trial. Nevertheless, under the Rome Statute, the most serious crimes are prescribed, and amnesties may be ineffective, or even irrelevant. The most important rule in this regard lies in article 17.1.c. It is this article's goal, to analyze the article in light of domestic transitional amnesties, and to further comprehend what is at stake at the moment of planning and preparing post-conflict transitions.

2. Article 17.1.C

The The ICC shall be complementary to national criminal jurisdictions.[5] Hence, according to Art. 17(1)(c), a case is regarded inadmissible when the person concerned has already been tried for conduct that is the subject of the complaint. Together with Art. 20(3), these are the key provisions relevant to the admissibility challenge sub judice and must be read together.[6] Accordingly, no one shall be liable to be tried or punished again for an offence that they have already been finally convicted or acquitted in accordance with the law of each country[7], which would harm the *ne bis in idem* principle.[8] To that end, the four-element methodology lies in the core of determining whether an admissibility challenge based on the principle of *ne bis in idem* is to be upheld[9], and, moreover, the ICC has already affirmed that the provisions in Art. 20(3) are intended to have the same meaning as those in Art. 17(2).[10]

Insofar as the first element, it is required a decision that resulted in a final conviction or acquittal of the Accused.[11] A decision is to be considered final if it has acquired the force of *res judicata*[12], a general principle of law that protects, at the same time, the judicial function of a court or tribunal and the parties

to a case that has led to a judgment that is final and without appeal, establishing the finality of the decision adopted in a particular case.[13] A question may arise regarding whether this final decision must be a final decision on the merits of a case, or a decision on a certain preliminary issue would suffice to trigger the present exception. To support this, there are a couple of cases that do not use the word "merits" when discussing the final decision element, as the Nzabirinda case before the International Criminal Tribunal for Rwanda[14] and the Oric case before the International Residual Mechanism for Criminal Tribunals[15]. Conversely, other cases seem to demonstrate that *res judicata* would not be satisfied by a mere termination of criminal proceedings[16]

With respect to the second element, the assessment is not on the conduct's legal characterization[17], but rather, on whether the Accused was trialed for substantially the same conduct as alleged in the proceedings before the Court.[18] Even a domestic investigation or prosecution for 'ordinary crimes', to the extent that the case covers the same conduct, shall be considered sufficient.[19] Moreover, the question of whether domestic investigations are carried out with a view to prosecuting 'international crimes' is not determinative of an admissibility challenge.[20] The assessment must compare the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect.[21]

Regarding the exceptions from article 20(3), which compose the two last elements, it is the Court's interpretation that these provisions are intended to have the same meaning as those in Art. 17(2), as explained above.[22] The first exception from Art. 20(3) establishes that a case is admissible when the national proceedings were for the purpose of shielding the accused from criminal responsibility for crimes within the jurisdiction of the Court. This has been defined as an unwillingness, by the State, motivated by the desire to obstruct the course of justice.[23] Pursuant to the second exception from Art. 20(3), proceedings are considered to lack independence or impartiality when incapable of providing genuine justice. For a case to be admissible under this provision, the OTP must demonstrate that two elements were met.[24] It must show that the proceedings were not conducted independently, or impartially, leading to evasion of justice[25] and that they were carried out in a manner inconsistent with an intent to bring the person concerned to justice[26], including where egregious violations of the due process took place, disregarding any genuine form of justice to the accused.[27]

3. Transitional Amnesties In Light Of The Icc

When discussing these two exceptions in the context of post-conflict planning and preparedness, the controversial topic of amnesties becomes unavoidable. The United Nations upholds the position that amnesty cannot be granted in respect of international crimes, such as crimes against humanity.[28] Nonetheless, the UN itself has on other instances pushed for or endorsed the granting of amnesty as a means of restoring peace and democratic government.[29] Additionally, one may recall that under International Law, there is not a single explicit prohibition of amnesty in any human rights, humanitarian or criminal law treaty.[30] In fact, on every occasion where an explicit amnesty prohibition or discouragement has been mooted in the context of multilateral treaty negotiation, including the ICC Statute[31], states have demonstrated a resolute reluctance to agree to even the mildest discouragement kind of amnesty.[32]

Nevertheless, In *Gaddafi*, the Pre-Trial Chamber held that "there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law".[33] To support this, the Court referenced findings from other judicial bodies, including the Inter-American Court of Human Rights, which has ruled on the non-compatibility of amnesty laws with conventional obligations of States when dealing with serious human rights violations.[34] The IACHR understands that amnesties have been an obstacle to compliance with the obligation to investigate, prosecute and punish, as appropriate, those responsible for grave human rights violations, which has a direct connection with post-conflict preparation and planning.[35]

Notwithstanding that, the ICC Pre-Trial Chamber's holdings were remarked as *obiter dicta* by the Appeals Chamber, which concluded that "international law is still in the developmental stage on the question of the acceptability of amnesties."[36] In light of this statement, one may argue that under Customary International Law at the end of non-international hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict.[37] As per the ICRC commentary to the Additional Protocol II to the 1949 Geneva Conventions, gestures of reconciliation, that can contribute to re-establishing normal relations in the life of a nation that is divided, are encouraged.[38] Further, following the CIL argument, there could be state practice that supports the granting of amnesty after internal conflict[39] and its compatibility with International Law.[40]

In opposition to this argument, the IACHR reminds us that States also have an obligation to investigate and prosecute war crimes, as per ICRC's Customary IHL database rule 159:

"At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of

their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes."[41]

In that regard, the Human Rights Committee has also manifested its concern with amnesties granted to civilian and military personnel for human rights violations that may have been committed against civilians.[42] It has held that amnesties could "prevent the appropriate investigation and punishment of the perpetrators of [...] human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy."[43] This statement, together with the other sources introduced in the present article are sufficient to show the uncertainty – or alleged fragmentation – of current criminal international law position towards transitional amnesties before the ICC.

4. Conclusion

When studying amnesties, there can be several perspectives. This article has dealt with the legal question regarding amnesties before the International Criminal Court. It is submitted that if an accused before the ICC has been granted amnesty at the domestic level, the situation may fall under article 17.1.c of the Rome Statute. Nevertheless, the development of international law towards a rejection of the legality of granting amnesties to perpetrators of crimes against humanity may call for a deeper discussion. When faced with the issue, the trial chamber of the Court has recalled the illegality of amnesties to crimes of such nature. Nonetheless, the Appeals Chamber has referred to these findings as obiter dicta, meaning that they did not compose the ratio decidendi of that decision. It will be interesting to note how will the Court deal with the matter in the future, as international law continues to develop its position against the legality of these amnesties.

5. References

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[8] Rome Statute, Art. 20.

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