AN APPRAISAL OF THE ROLE OF AMNESTY AS A TOOL FOR PEACE AND RECONCILIATION: NATIONAL AND INTERNATIONAL PERSPECTIVE

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Summary

Since ancient times, amnesties have been used as political tools to quell disputes and build a stable society in the purpose of peaceful goals. Amnesties have been developed particularly in the last three decades in societies after transition. During this time, many societies following mass violence have shifted from dictatorial regimes to democratic systems in the process of transitional justice. Countries like Chile, El Salvador, Guatemala, Honduras, Peru, South Africa, Argentina, and Hungary have resorted to amnesty laws as a part of “peace process” after periods of extreme violence or civil war. After enacting amnesty laws in these countries, victims, their relatives, many lawyers, and human rights defenders began challenging their illegality in constitutional laws and international law. In this matter, amnesties were opposed by international human rights activists or by victims with this claim that they can violate international law and ignore the rights of victims. Following this claim, many patterns were formed to uphold or strike down amnesty as a troubling issue of human rights.
The lower courts which struck down amnesty laws rely on some conventions to reject amnesty laws. These conventions include; the Geneva Conventions of 1949, the American Convention on Human Rights, the Convention Against Torture and Other Cruel, Inhuman, or degrading Treatment or Punishment (Convention against Torture), and the International Covenant on Civil and Political Rights (ICCPR) which imposes a duty on states to prosecute perpetrators of violations against human rights. In some cases the states involved are parties to these conventions when the underlying rights violations occur. In others, courts find these conventions binding to states because they provide judicial remedies and other reparations for victims post-ratification, or as customary international law. The lower courts have also commented that amnesties violate constitutions and they are in opposition to the doctrine of constitutional supremacy. Hence, they have restricted amnesties which can be observed in the courts decisions.

Some courts, on the other hand, found amnesties valid under international law. In some cases for example, they relied on Protocol II to the Geneva Conventions of 1949, which recommends broad amnesties in non-international armed conflicts.

Further, the exception of ‘public emergency’ in Article 4(1) of the International Covenant on Civil and Political Rights is a similar derogative provision against the obligation of states to prosecute international crimes in which States Parties can avoid prosecuting in the time of
public emergency which threatens the life of the nation. It is debatable that the emergency exception under the ICCPR is limited as far as the prosecution of crimes against humanity is concerned. Moreover, Article 6 (4) of the ICCPR provides that amnesty or pardon may be granted to anyone sentenced to death.

The courts upholding amnesties also found amnesties constitutional as laws permitted them are enacted by the legislative and executive branches in the exercise of powers granted to them by their constitutions. They saw amnesties as exercises of sovereign authority, which cannot be trumped by international law.

In the case challenging amnesties, many scholars recognize the use of amnesty as a key mechanism for dealing with past atrocities. In their view, amnesty laws have fundamental role particularly in transitional justice to secure democratic transitions and rule of law by appeasing potential spoilers. They can rebuild consequent difficulties in the process of political transition. This regard indicates that amnesties are necessary to end conflicts and political oppressions. But it is remarkable that amnesties can have a positive effect on democracy and human rights when the combination of mechanisms is served to achieve the desired objectives of transitional justice. In this matter, a justice balance approach was accepted to balance accountability (trials or trials and truth commissions) with amnesty. The findings indicate that the most successful transitional justice projects include a balance of both trials and amnesty with
the contribution of truth commissions as it might be proclaimed in Article 53 of the Rome Statute.

The "Interests of Justice" Provision in Article 53 of the Rome Statute waged a great debate over amnesty agreements and their role in the era of the new International Criminal Court. The Rome Statute of the International Criminal Court does not mention amnesty; however, Article 53 of this Statute gives the prosecutor this power to desist from acting either in relation to opening an investigation or in continuing with an investigation that has been opened if it appears to him that the prosecution would endanger the interests of justice. The provision of ‘interests of justice’ is arguably intentional. An interpretation of ‘the interests of justice’ is to accommodate truth commissions in conjunction with amnesties. It is undoubtedly said that the ICC, given its mandate, must insist on prosecution except in exceptional circumstances where it contrasts with the interests of justice. In these exceptional situations, the ICC interferes with a reconciliation mechanism, even though that mechanism falls short of prosecution of all offenders.

In some transitional societies where mass violations were committed, a program of truth commission and conditional amnesties for low-level offenders, coupled with prosecution of perpetrators of the most serious crimes, was likely a sufficient response, particularly when the numbers of offenders was prohibitive. Hence, the ICC may keep an open mind to traditional models of prosecution and takes steps
toward both prosecutorial and non-prosecutorial approach in order to achieve all objectives of justice and peace.

Till date, states have envisaged the dilemma of transitional justice in that whether to prosecute perpetrators and confront the danger of derailing the peace process, or to grant them amnesty and deal with the risk of response to victims of past atrocities and international community.

Societies after transition have resorted to various mechanisms in order to deal with past violation. In some cases, retributive justice has been chosen as an appropriate way of breaking with the past, whereas in others, non-prosecutorial mechanisms have been preferred as a proper way to address past atrocities. Following the last choice, a lot of governments set up Truth and Reconciliation Commissions to investigate past violations and, eventually, to grant amnesties to perpetrators.