THE LAW OF AMNESTY: CONTENTIOUS APPLICATION TO INTERNATIONAL CRIMES

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Abstract

Application of Amnesty is one of the most contentious contrivances in the recent international criminal law development. This offer of immunity to the perpetrators, who have non-arguably been aggressors of odious events or crimes, is pursued as a tool of peace-making by the state and other stakeholders. However, in the capacity of the Rule of Law, it emerges as an unwanted blot on the victims of such heinous crimes in the name of Justice. As one of the discretionary decisions of states, where conflict resolution relies entirely on the state interest, the Law of Amnesty faces the wrath of discriminatory application. This paper is attempt to find whether there is any discriminatory application of the Law of Amnesty in International Crimes from the narrow lens of international instruments, International Customary Law, and Judicial pronouncements.

Keywords: Amnesty, Immunity, International Criminal Law

Introduction

The Law of Amnesty's historical development suggests no strict definition of the term promulgated by any international instrument. While modern International Law relies significantly on International Conventions, Treaties, and other instruments as its source, the Law of Amnesty finds its provenance in International Customary Law. However, the lack of a specific definition leads to arbitrary application, and therefore, Amnesty, as a term, finds itself in the scope of contentious.

Recently, OHCHR provided a resolution to the issue by defining what constitutes an Amnesty: Legal measures that have the effect of (a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specific criminal conduct committed before the Amnesty's adoption; or (b) Retroactively nullifying legal liability previously established[1]. Amnesties do not prevent legal liability for

[1] OHCHR, Rule-of-Law Tools for Post-Conflict States, Amnesties, HR/PUB/09/1 (2009), p. 41.

conduct that has not yet occurred, which would be an invitation to violate the law[2]. Providing Amnesty policies by states can be traced back from the inception of such principle and is augmented on the grounds of being an essential ground of peacekeeping and providing holistic Justice. However, this argument has been the fulcrum of the controversy about whether applying such Amnesty Policies sabotages transitional Justice or enhances it.

Due to a lack of strict definition, state and non-state actors have formulated such amnesty policies to their advantage, leading to inconsistent and complex procedures across the globe.

Tracing the development of immunity policies and negotiations, domestic Amnesty has been the genesis of International Amnesty. Around the 1990s, international organizations like the United Nations[3], socio-political bodies, social organizations, and other non-state actors mentioned Amnesty policies to be responsible for reducing individual liability from heinous crimes under International Law.

Unlike Droit administrative, the Rule of Law extends the edifice of Justice, where Law stands supreme[4]. The founding basis of the Rule of Law stands on extending human rights to all while providing equal scope to all and punishing the wrong-doers. On such onset, individual liability is adjudicated on an equal footing. And those laws or policies that waive such individual liability and accountability for serious crimes violate the Rule of Law and extend its infringement on maintaining peace and security globally.

As mentioned above, Amnesty Principles not only exerts an influence on Human Rights but alleged has a staunch effect on International Peacekeeping and negotiations for its diverse practical application. The application of the Law of Amnesty has been the subject of debate since its inception. There are arguments and counterarguments with reference to its validity and application as to whether it would infringe or violate the state's international obligations or have added to the development of transition justice over time.

The school of thinkers who attribute a negative view on the Law of Amnesty believes the discriminatory application of this policy is due to the arbitrary factors on which Amnesty is given to the perpetrators. These factors, based on which eligibility is sought to receive Amnesty, vary from jurisdiction to jurisdiction, state to state, and case to case[5].

[2] Discussion paper on the legality of Amnesties, International Centre of Transitional Justice, 21st Feb 2010
[3] Supra *Note* 1
[4] M.N. Venkatachaliah , *Rule of Law : Contemporary Challenges* , Indian Journal of Public Administration (1999).
[5] Supra *Note* 1

On the other hand, the other contending school of thinkers moot for the application of such immunity-based policy on the sole contention that such policies expand the horizon of Justice and further cater to peace-making amongst nations, even though such application stands of unstable, rocky, and arbitrary factors. This, can be seen from reviewing and analyzing the various sources of Public International Law, namely Treaties and Conventions, International Customary Law, and International Cases. Amongst all three, the International cases are contemporary in their development and have been interpreted by the other two sources; therefore, its ratio dicendi needs to be addressed with a significant outlook when the Amnesty in International Law controversy is in question.

Law of Amnesty: International Treaties and Convention

Considering all the sources of International Law, Treaties and Conventions provide the most contemporary and specific interpretation to any International Principle, Doctrine or Law. Therefore, to shed light on the legal validity of domestic amnesty policies for perpetrators of International Crimes, Treaties and Convention is the first and the most obvious quarter to analyse. To utter disappointment, there is no mention or prohibition on Domestic Amnesty in any realm of international Law, including International Human Rights Law, Humanitarian Law, Criminal Law, etc. On reviewing, not one specific treaty that prohibits explicitly or ceases any amnesty policies expressly could be considered. This glooms, the application with uncertainty and non-specificity, which is taken advantage of by various states to promote antagonism to amnesties for human rights crimes[6]

When the question is about applying such amnesty policies, the other parallel factors also need to be considered. Amnesty Policies are not only a toolkit to provide Justice by negotiating peace with the perpetrators but also a powerful expression of state sovereignty[7]. To elaborate further, Amnesty for any offense by a state under domestic Law is when the normal functioning of the domestic laws is ceased, which results in the question of the state's sovereignty. Scholar Carl Schmitt also said, "*The power to declare the exception to the law- is an integral and highly symbolically visible dimension of state sovereignty."* With the support of domestic laws, the states wouldn't want to curb their discretion and further the sovereignty, and therefore, if any

[6] Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," Yale Law Journal 100, no. 8 (1991): 2537-2618

[7] M. Pensky 'Amnesty on Trial : Impunity, accountability and the norms of international Law.' Ethics and Global Politics 1 (1-2) (2008)

such instrument which has implied to reduce the use or depend on amnesties has been primarily on the face and otherwise, been discouraged by the states, in practice.

However, this practice has yet to be witnessed in the case of those exceptional treaties speaking about Amnesties post-conflict, as it reduces the curb on sovereignty and increases the discretionary power in the hands of the state by virtue of domestic Law. The International Treaties have been silent about Amnesties, except one. The 1977 Protocol II to the Geneva Conventions says: "At the end of the hostilities, the authorities in power shall endeavour to grant the broadest possibility 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[8]" But, some scholars have argued that, depending on this provision, courts have upheld amnesty policies, as convicted for serious crimes, which is in direct conflict of the object and purpose of the Convention [9] This could be further elaborated by reference to a well prominent case of AZAPO[10]. In this case, the validity of the Promotion of Unity and Reconciliation Act,1955 of South Africa was in question in the South African Constitution Court, where the court had held that the provisions in this Act were in accordance with National and International laws.

Even though the problem persists due to continuous silence of the treaties and conventions with regard to Amnesty Provisions, significant scholars have advocated that the States have a duty to investigate, where needed and permitted, and prosecute those who are accused of serious crimes like Genocide, Torture, and Crime in general against humanity[11]. And, in cases where there is legal recognition, even punishing the offenders and not defending them under the ambit of Amnesty would lead to direct disrespect and violation of Human Rights.

On analysing other International instruments, that is: a) Certain International instruments, like treaties and conventions, make it a legal obligation and binding on the states to prohibit Amnesty and take steps to prosecute and punish the perpetrators[12]. b) Certain Treaties, as a legal remedy to victims of such crime, mention prosecution and punishment of such perpetrators, which the victims or their heirs can move as right. C) Further, certain treaties even prohibit any provision that would be an amnesty or be interpreted as one, as that would limit

[8] Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of Non- Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 6(5)
[9] *ibid*
[10] AZAPO V. President of Republic of South Africa and Others, CCT17/96 (July 25, 1996)
[11] Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," Yale Law Journal 100, no. 8 (1991): 2537-2618
[12] Supra Note 7

the prosecution and, in return, reduce the chances of Justice being met. d) Certain instruments make it obligatory for the state parties to recognize and respect certain non-negotiable principles, doctrines, and provisions on any ground for the gravity of such principles.

Despite varied forms of interpretation of the legal instruments primarily dealing with International crime, no analogous stage could be formulated, and the controversy remains. But, what could be inferred is that Amnesty policies are allowed with regard to post-conflict offenses, which are general and petty, as opposed to International crimes or any such offenses that can qualify as crimes against humanity.

Law of Amnesty: **International Customary Law**

International Customs play a significant role in international Law when it comes to understanding the validity or importance of certain principles and doctrines being practiced from time immemorial and have taken the stage of legal obligation. International Customary Law is only one such practice with both a. State practice and b. *Opinio Juris.* Though International Customary law provides a comprehensive, diverse answer to legal questions, especially with reference to rules like Amnesties, it also comes with its share of complexities.

The first question that needs to be answered is whether International Customary Law prohibits Amnesty policies. Secondly, if it doesn't, it shows the trend, which can be interpreted as ceasing amnesty policies.

To answer the first question, reliance needs to be made on the principles of *Jus Cogens* and *Erga Omnes. If any offense is under the ambit of Jus Cogens,* they are universally declared illegal and are not dependent on any treaty, Convention, or bilateral agreement. It is to be maintained throughout by states, irrespective of whether the state is party to any convention. Such acts are few, which are brought to the stage and recognized as essential as *Jus Cogens*. Similarly, recognizing any action of utmost significance doesn't serve any purpose until the states' obligation is maintained. Here, the role of *Erga Omnes* comes where it is the duty and an obligation of states universally or as referred to individually to maintain the same. Jus Cogens has referred certain offenses, which, irrespective of jurisdiction, geographical and social barriers are offenses and are universal, for example – High Sea Piracy. The ambit of *Jus Cogens* crimes has increased to Torture, Rape, Genocide, and any such crimes against humanity, etc. Therefore, to refer to the question in hand, whether International Customary Law prohibits Amnesty policies, it's answered in the ambit of *Jus Cogens*, where the offenses are already under the wrap of *Jus Cogens.* Anyone committing such a crime is brought under

the shield of defense from prosecution. It would lead to gross injustice and human rights infringement and violate the universally declared *Jus Cogens* crimes. Further, the *Erga Omnes,* or in other words, the duty that is obligated on the states to prosecute and further punish, would be grossly infringed by such actions of Amnesty Principles. The contentious application of Law of Amnesty acts like a double-edged sword, where both ways it may be offensive to the established international norms. However, the brunt of this double-aged sword maybe much more on infringing the existing international human rights, international customary law as compared to it's objective of being a step towards peace-making amongst nations, through immunity to the perpetrators.

The possibility of where the states can contend that treaties which make prosecution of International Crimes, or punishing the same as a legal remedy of the victim or survivor, are not binding on such states, for it not being a signatory or not having ratified the same. Such possibility is reduced to null, by the principles of *Jus Cogens*, where the option of not being a signatory doesn't form a crutch. Instead, it is universal and needs to be respected in all accounts. And such principles which provide Amnesty to the entire prosecution are violative.

The obligation to prosecute doesn't derive its source from treaties per se, irrespective of their duty as a party to any treaty or Convention. International Customary Law, by virtue of its expressed practice over time, entails a commitment from states to move universal jurisdiction, where the experiments of such have happened before, where a state prosecutes a national of another country in another third state. One of the significant examples being of Augusto Pinochet, who was a Chilean Dictator, arrested in the United Kingdom under a Spanish Warrant[13]. This was done to meet each state's duties to fulfill the commitment and obligations to prosecute crimes under the ambit of *Jus Cogens.*

Irrespective of the International Customary law expressly addressing the issue of the Amnesty Policies, there has not been a reduction on the state's part with reference to its formulation of amnesty principles. UN Human Rights Council, in its periodic Review, has vehemently criticized states bringing forward amnesty principles and policies to safeguard perpetrators of International Human Rights crimes[14].

Resorting to another medium, Lousie Mallinder's database, which speaks about amnesty policies formulated around the globe by receiving data employing empirical research, states

[13] Mallinder , Amnesties, Human Rights and Political Transformations, Chapter 3
[14] Leyla Sadat, Exile, Amnesty and International Law

that the number of Amnesties has increased by many folds in the recent years[15]. To look for the reasons, Mallinder addresses Realism in International Law as one of the reasons, also stating the explanation provided Ronald Style, which is polar opposite to one another. The latter resolution states that Amnesty policies have increased due to the proportionate increase of Internal Criminal Law, as Amnesty is resorted to when the perpetrators are persecuted and punished. Therefore, domestic amnestic policies are brought to reduce such prosecutions, which was unlikely even a few years back due to unawareness and lack of power in the realms of Law. On the same ground, the dependency on International Customary Law is also dependable and is rustic for its crystallization.

Law of Amnesty: **Judicial Pronouncements**

Due to the diverse development of Jurisprudence, the court interpretations of various realms of Law have been widely diverse, which has been criticized by several scholars. But, with reference to Amnesty, the contemporary cases have been influential in providing light to the confused state of affairs. The following three cases of three different jurisdictions give a specific picture of the validity of Amnesty in such states.

Firstly, in the case of *Gomes Lund v. Brazil*[16], a group of Students and workers had disappeared, factually later found to be tortured and murdered, and the bodies were thrown in the nearby water by the Army and the police of the state during 19070s. The 1979 Amnesty policies promulgated by the state prohibited any dissemination of information regarding such "Disappearing" individuals, nor did it allow any investigation or prosecution of those alleged to be responsible for such offense. The state, by its wings, had tried to show that they had tried to look for the disappeared people, to which the court had stated "Not Enough" to meet the obligations of the international instruments, as the state had denied its citizens the fundamental right, i.e., right to move to court and get a free and fair trial, for its basic human rights and fundamental rights have been infringed. Adding to this, the court held that, due to the Amnesty Laws in place, it is impossible to bring those responsible for such gross injustice to court and prosecute them, as they are defended under the shield of "Amnesty Laws." Such laws, further, are gross injustice and violation of Human Rights and the state's international obligations.

The second case is *Prosecutor v. Furundzija*[17]. This is a judgment of the Trial Chamber of International Criminal Tribunal for the former Yugoslavia , where the charges for ‘Torture’

[15] November 24, 2010
[16] IT95-17/1-T,para 155
[17] SCSL 2004-15-AR72(E)

were alleged against the perpetrators.The court held that the act of 'torture' is a *jus cogens* violation, which in return obligates the state to prosecute and punish where needed. And any such amnesty Laws which defend such actions shall be held violative and incompatible with the International obligations and duties of the state to prosecute and investigate crimes of torture. The court dissolved the issue with regard to Amnesty Laws, stating it doesn't even stand a chance to be referred to as an issue, but does form the fulcrum of the case is the Obiter Dictum, which is the state's duty to investigate, prosecute such perpetrators of crimes like torture.

Another significant case regarding this subject is *Prosecutor v. Kallon & Kamra*[18]. This case is from the special court of Leone that was formed, primarily dealing with cases of Amnesties granted to Sankoh and his group of rebels in the 1999 Lome Accord, which is referred to as the Peace Accord of 1999 by some scholars for it had ceased the Sierra Leones Civil war, for a temporary basis. This was signed between the United Nation Representatives and the stakeholders of this civil war, where the UN Representatives had given their reservations to the amnesty provisions that included crimes like war crimes, crimes against humanity, etc. Such reservations were also explained in the eleventh hour before signing, as the international organization shall not recognize such defense mechanism of amnesties for grave crimes, as mentioned. Hence, the special court also recognized such reservations as illegal and violative. Therefore, the statute of this court also said such reservations and was challenged because it violates the Lome Accord of 1999.

On the other hand,, the court concluded that it does not recognize amnesty provisions of the Lome Accord of 1999, as it violates any International Customary Law. It added that with reference to International Law and practice, a state cannot provide Amnesty to perpetrators of serious crimes recognized under International Law. Further, the court has added that such norms or laws are in the developmental stage and are still far from mentioning anything in specificity.

On the other hand, The International Court, the universal court that deals with International Crimes, in the Rome Statute, the governing legislation, like other International treaties, doesn't mention prohibition to Amnesty. This shows the clear demarcation of the state parties being negligent or reluctant to be exploited by some states in using Amnesties to their advantage. The statute further doesn't mention Amnesties altogether. This brings forward the most complex

[18] SCSL 2004-15-AR 72(E)

concern where the most contemporary court dealing with the world issues of International crime has no mention of the vital concern that is perpetrators defended under the shield of Amnesty, leading to unclear and lacunas. To add to this contention, the arrest warrant of Joseph Kony[19], is one of the primary examples.

Conclusion

Analyzing the recent development in the sphere of International Criminal Law, it is pertinent to mention that, the regime has taken rudimentary step in providing legal status to the law of amnesty. Contemporary International Criminal Law has not provided any clear specific agenda regarding Domestic Amnesties in International Law regarding its validity and application. Interpreting the language of the objects and purposes of the tries, on the silence of it with reference to amnesties, can be referred to as prohibitory in nature to uphold the primary founding reasons for its existence. With reference to International Customary Law, it doesn't expressly mention the prohibition of domestic Amnesties, though depending on *Jus Cogens* and *Erga Omnes,* it clears that air if the crime falls under the ambit of *Jus Cogens.* Yet, lack of state practice cannot be univocally proved. While, there is direct conflict with the foundation of fundamental human rights, yet, prohibition on application of amnesty cannot be universally applied.

Lastly, the judicial pronouncements provide a ray of hope, but the absence of its mention in the Rome Statute further leaves us in an ambiguous state. The norm development, or with the help of any international instrument, such ambiguous state can be reduced and curtailed till then; the interpretation suggests that domestic Amnesty for any grave, serious crime is violative of the international obligations of any state.

[19] Supra Note 5