

Transitional Justice and Impunity

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In this international Conference focused on the evolutions of legal concepts in the light of the evolution of international tribunals, the specific topic of Transitional Justice (TJ) and Impunity appears well integrated and deserves some remarks.

The first remark is that during the last two decades the institutions of international criminal justice (ICTY, ICTR, ICC, and internationalized/hybrid criminal jurisdictions) have assumed a prominent role in the realm of international community and its law just in order to put an end to impunity for the perpetrators of the most serious crimes of concern of the international community as a whole (specifically war crimes, crimes against humanity, genocide, gross violations of human rights).

Further remark is that the duty to prosecute such most serious crimes of international law is contained in some very important international conventions: the Genocide Convention (1948), the four Geneva Conventions (1949), the UN Torture Convention (1984). But we are able to affirm that nowadays this duty to prosecute most serious crimes has acquired a status of customary international law.

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TRANSITIONAL JUSTICE AND IMPUNITY

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As to war crimes, the codification edited by the ICRC in 2005 (J.-M. Hencaerts and L. Doswald-Beck, *Customary International Humanitarian Law*) affirms that State practice establishes as a norm of customary international law applicable both in international and non-international armed conflicts the obligation of States “to investigate war crimes allegedly committed by their nationals or armed forces, or in their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects”.

Moreover, the Statute of the ICC recall “that it is the duty of *every* State to exercise its criminal jurisdiction over those responsible for international crimes”. It is interesting to observe that this recalling has been included by the negotiators in the Preamble of the Statute so that it is well clear that, according to the ICC legal system, the obligation to prosecute is an assumption of customary law at charge of *every* State both the 122 States parties and States not parties. The mission of ICC starts from that assumption.

From the above considerations it follows that amnesties are forbidden by IL as to most serious crimes of IL. States have the obligation to prosecute and they cannot avoid the obligation thorough the enactment of an amnesty (or similar annulment of individual responsibilities), whatever the justification they may advance in this regard: for example, supposed reasons of social reconciliation in a process of transition to a new and democratic social life after an armed conflict or after a period of hard dictatorship.

If we look at the problem from the perspective of the ICC, it is

true that the Statute does not contain rules specifically devoted to the relevance of amnesties as to its functioning: the amnesty issue was raised during the Rome conference, but deliberately it was evaded. Therefore, in case some national jurisdiction does not operate because the presence of an amnesty related to crimes included in the competence of the ICC, these crimes has to be treated according to the ordinary rules concerning the admissibility of cases to the jurisdiction of the ICC: in other words, the principle of complementarity works in favour of the jurisdiction of the ICC. Therefore, the amnesties related to crimes falling into the competence of the Court call the Prosecutor to act with preliminary investigations, then investigations, and eventually, finally, prosecutions.

Therefore, if I want now to reverse the previous remarks from the perspective of Transitional Justice tools (TJ is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation), I may say that it is well clear that TJ cannot accept amnesties which are related to core crimes of international Law.

This conclusion is further confirmed by some documents of the UN enacted just in the field of TJ. UN, in fact, has flanked his strong interest and sustain for international criminal justice with a parallel attention for TJ. I can recall, in this regard, the two Reports submitted by the Secretary General at the request of the Security Council on the item *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004 and 2011). In the two Reports we find a clear negative evaluation of amnesties if related to genocide, war crimes, crimes against humanity. So, in the conclusion and recommendations of the Report of 2011 it is pointed out the necessity to "ensure that peace agreements and Security Council resolutions and mandates: ... (c) reject any endorsement of amnesty for genocide, war crimes, or

crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, *ensure that no such amnesty previously granted is a bar to prosecution before the United Nations-created or assisted court*" (italics added).

I can quote again the *Guidance Note* prepared by the Secretary-General on the *United Nations Approach to Transitional Justice* where, as a first element of transitional justice components, the prosecution activities are indicated: "Prosecution initiatives aim to ensure that those responsible for committing crimes, including serious violations of IHL and gross violations of international human rights law, are tried in accordance with international standards of fair trial and, where appropriate, punished. ...". Therefore, as a way to further strengthen UN transitional justice activities, the *Guidance Note* points out: "insisting that peace agreements not grant amnesties for war crimes, crimes against humanity, genocide, and gross violations of human rights".

Consequently, I may conclude that the evolution of legal concepts in light of Evolution of international tribunals does not find contradiction with the approach taken by Transitional Justice in case in both such circles the evaluation of amnesties as to genocide, crimes against humanity, war crimes come to the attention.

A brief remark I want to add now about the Truth (and Reconciliation) Commissions (TRCs) which are one part of a comprehensive Transitional Justice strategy. TRCs do not aim to replace the need for prosecution, but they do offer some form of accounting of the past, and have thus been of special interest in situations where prosecutions for massive crimes are impossible or unlikely because either a lack of capacity of the judicial system or a *de facto* or *de jure* amnesty. TRCs have traditionally focused their investigations on serious human rights abuses (torture, disappearances, extrajudicial killings, crimes against humanity,

genocide ...) with a focus for the rights of the victims, and sometimes with special attention for some categories of victims (women, children, victims of sexual abuses).

I observe, as pointed out by the Office of the UN High Commissioner for Human Right in its Report of 2006 (*Rule-of-Law Tools for Post-Conflict States - Truth Commissions*), that most TRCs do not have the power to grant amnesty to perpetrators. The great majority, in fact, recommend in their final report that there be judicial investigations leading to possible prosecution for events that they have documented, and they often turn over any evidence they have collected to the prosecuting authorities.

Only one fully functioning truth commission to date, namely the Truth and Reconciliation Commission in South Africa, has had clear powers to give individually, not just an amnesty (which is unmindful of committed crimes and usually operates with a long range personal application), but other forms of accountability and reparation to perpetrators, instead of imprisonment. That was possible only for those crimes that were shown to be politically motivated and after and if the individual applicant fully and publicly disclosed, in para-judicial procedure, details of the crimes, in cross-examination, with victims involved.

So, I may say (and I agree with a conclusion of Office of the UN High Commissioner for Human Rights in the before mentioned Report) that TRCs should be generally viewed as complementary to judicial action: even where prosecutions are not immediately expected, it is important to keep this option open, and to act accordingly. Possibilities for prosecution may open up later and the commission's report and its other records might then be important as background materials and to provide leads to witnesses.

I could say that International Criminal Court and its Prosecutor inevitably have a special interest and attention for a proper and

reinforced role of TRCs in situations which are under preliminary examination or investigation. From the point of view of the Prosecutor, to sustain the TRCs role means at the same time to reinforce the complementarity principle, and that is of special importance, much more in a period which is characterized, unfortunately, by limited resources (human and budgetary) at disposal of the ICC. So, under this logic, we are able to well understand the Prosecutor's politics of so called "positive approach to complementarity", *i.e.* a proactive policy of cooperation aimed at promoting national proceedings.

In this vein, if we look to the *Strategic Plan (2012 – 2015)* of the Office of the Prosecutor, we find there underlined that the demand of the Office of the Prosecutor remains very high and is not expected to decrease in the foreseeable future as to "close monitoring and frequent interaction with countries where situations are under preliminary examination" because this monitoring "result in an increased ability and willingness of those countries to conduct genuine investigations and prosecutions". Unfortunately – it is a note of the Strategic Plan - "the Office is presently not able to sustain such high intensity efforts due to lack of resources".

However, coming back to the title of this conference and of my specific presentation, I may conclude – all elements considered - that the evolution of legal concepts in light of Evolution of international tribunals does not find contradiction with the approach taken by Transitional Justice and Truth Commissions in case in both circles the evaluation of amnesties as to genocide, crimes against humanity, war crimes come to attention: though from different perspective, they all are instruments to oppose impunity as to core crimes of international law.