Chapter 10  Puzzling over Amnesties: Defragmenting the Debate for International Criminal Tribunals

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“Pluralitas non est ponenda sine necesitate”

William of Occam (1288-1348)

“Un homme qui sait se rendre heureux avec une simple illusion est infiniment plus malin que celui qui se désespère avec la réalité.”

Alphonse Allais, posthumous works

1. Introduction: From the dangers of fragmentation...

Amnesties have been dated back to the second millennium before Christ, and have been used with persistent continuity throughout history. The increased recourse to them in past decades, combined with a growing international movement against impunity, which led to the signature of the Rome Statute for the International Criminal Court in 1998, has brought about an amplification of debates on the issue in recent years. This debate has been transversal, involving political, sociological, historical and, of course, legal considerations.

Discussions on amnesties have always been heated and often lead to a never-ending opposition between those who support them and those who oppose them. The reasons put forward are often the same ones (peace, social stability, smooth democratic transition) and sometimes not, thus creating dichotomies which have regularly shaped the field (peace vs. justice, truth vs. forgetfulness, impunity vs. accountability). Faced with this well laid-out minefield, one can be tempted to renounce any conceptual analysis and just conclude that it is all a matter of opinion. And at the end of the day, it will be just that. What this article aims at achieving is that this opinion be informed. Indeed, an analysis of the current state of research on the question shows that there is not one accepted conceptual framework on which the parties to the debate agree upon.

Before we set out to achieve this goal, however, it is necessary to make some general introductory remarks on the context and scope of our study. First of all, our angle is that of international law and more specifically international criminal law. We will consider national legislation and transversal pluridisciplinary issues,

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but the analysis of these aspects will be done from the point of view of international criminal law.

In this context, a point should be made that is sometimes lost in the vast literature on the topic in international legal discussions: there is virtually no mention of amnesties in international documents. As we will see, in the dense web of human rights and international humanitarian law treaties, there is an explicit mention of amnesties in only one provision: an additional protocol to the Geneva Conventions relating to non-international armed conflict. This is also mostly true of international criminal law. Even if some international(ized) tribunals include provisions on amnesties, justified by a particular local situation, the Statute of the International Criminal Court makes no mention of them. This leads to the somewhat peculiar situation that entire theories are constructed on the place of a concept in a legal order that makes hardly any reference to that concept in its constitutive documents.

Despite this, or maybe because of this, amnesties have come up in relation to various fields of international law (human rights, international humanitarian law and international criminal law) and in relation to various concepts of international law (most notably the duty to prosecute). This has created a risk of fragmentation that might threaten the unity of the concept.

To take stock of this fragmented situation, we have chosen not to embark on a general theory on amnesties. Rather, we will try to answer a simple question: how must international criminal tribunals deal with amnesties for international crimes? The advantage of such a specific question is that it will focus the discussion while still allowing us to draw a picture of the fragmented debate on amnesties in international law.

Also, one consequence of this focus is that the study does not aim per se at establishing the legality of amnesties under general international law or their political legitimacy. It will focus on their recognition in international criminal law and more specifically by international tribunals, most notably the International Criminal Court, but also any hybrid institution that might be created in the future to deal with a specific situation. Without foreshadowing some considerations that will be made in the course of our argumentation, we believe this distinction to be an important one because issues of legality and legitimacy have in fact made more complicated a situation that will be shown to be in fact quite simple.

This leads us to our final introductory remark, which is of a methodological nature. In a lot of legal debates, the issues are often made more inextricable by the inclusion of often sound, but mostly irrelevant considerations. We have chosen the methodological parti pris of Occam’s Razor, quoted above in its Latin form and roughly translated as ‘entities must not be multiplied beyond necessity’. Simply put, it means that one should adopt the simplest solution that adequately explains a phenomenon.

It is this principle that will guide us when we try to answer the proposed question on how international criminal tribunals should deal with amnesties (Section