AMNESTY AND PEACE AGREEMENTS AS ALTERNATIVE MEANS TO PROSECUTION IN INTERNATIONAL LAW: A CRITICAL ANALYSIS OF AFRICAN EXPERIENCE

By

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A Dissertation Submitted in Partial Fulfillment of the Requirements for Award of the Degree of Master of Laws (LL.M, International Law) of Mzumbe University

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CERTIFICATION

We, the undersigned, certify that we have read and hereby recommend for acceptance by the Mzumbe University, a dissertation entitled Amnesties and Peace Agreements as Alternative Means to Extradition and Prosecution in International Law: A Critical Analysis of African Experience, in partial/fulfillment of the requirements for award of the degree of Master of Business Administration of Mzumbe University.

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DEDICATION

To my family and parents for continued sustenance and support

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DISCLAIMER

This document describes work undertaken as part of a programme for the Degree of Master of Laws (LL.M, International Law) at the Faculty of Law of the Mzumbe University. All views and opinions expressed therein remain the sole responsibility of the author, and do not necessarily represent those of the university.

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ABSTRACT

Since the mid 1970s, at least 14 states on four continents have declared amnesty, or enacted amnesty laws immunizing past regimes from accountability and liability.[1] Packaged into post-conflict peace agreements, amnesties are ceded by war-weary parties and often endorsed by an international community keen for peace. The aim of this dissertation was to explore African States' practice in introducing amnesty laws packaged into post-conflict peace agreements, to perpetrators of atrocities. In so doing, it starts by asking the following questions; are there certain general patterns that should be followed in making the choices that will guide the transitional justice process? And what condition should be followed? Can negotiations with the main perpetrators of large-scale human rights violations bring peace closer? The study found that a post-conflict society has a legal obligation to prosecute and punish the perpetrators, simply because retribution is exactly what most victims of past atrocities want. And indeed, it serves to heal their wounds and to restore their self-confidence because it publicly acknowledges who was right and who was wrong and, hence, clears the victims of any labels of 'criminal' that were placed on them by the authorities of the past or, indeed, by rebel groups or the new elites. However, it is prudence to consider whether punishment is the appropriate response in any and every context. In fact that at the end of a period of violent repression calls for rebuilding the political machinery and the civil service, security, disarming rebel movements, reorganizing the army, rebuilding infrastructure, establishing a non-partisan judiciary, healing the victims, repairing the damage inflicted on them. These cannot be achieved by prosecuting perpetrators because prosecutions are unlikely to further tasks of national forgiveness and, thus, future peace.

Therefore, having found that the researcher examining the possibility of employing Article 53, 17 and 16 of the Rome Statute that seems to allow amnesties to operate. Finally, the study recommends the application of multiple legal mechanisms to bring about accountability and reconciliation in post-conflict transitional societies.

[1] Burke-White, W. (2001) 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' in Harvard International Law Journal, 42, p. 467.

LIST OF CONVENTIONS AND PROTOCOLS

CONVENTIONS

The American Convention on Human Rights, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978)

The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78U.N.T.S. 277, 280

The Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, and entered into force Jan. 12, 1951

The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, pened for signature 10 January 1984, 1465 UNTS 85, arts 2, 4, 6 (entered into force 26 June 1987)

The European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953)

The 1949 Geneva Conventions I

The International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

The 2006 International Convention for the Protection of All Persons from Enforced Disappearance of the 2006

PROTOCOL

Protocol II of the 1949 Geneva Conventions I

LIST OF STATUTES

International Statutes

The Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 3

Local Statutes

The Constitution of the Republic of South Africa, Act 200 of 1993

The Promotion of National Unity and Reconciliation Act of 1995

The Uganda Amnesty Act of 2000

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LIST OF ABBREVIATIONS AND ACRONYMS

AJMA	Alternative Justice Mechanisms
ANC	African National Congress
APC	All People‘s Congress
AFRC	Armed Forces Revolutionary Council
AFDL	Democratic Forces for the Liberation of Congo
AC	Amnesty Commission
AU	African Union
CPA	Comprehensive Peace Agreement (CPA)
CNDP	National Congress for the Defense of the People
CIAT	International Committee in Support of the Transition
DRC	Democratic Republic of Congo
DRT	Demobilisation and Resettlement Teams (DRT)
EU	European Union
ECOWAS	Economic Community of West African States
FDLR	Democratic Forces for the Liberation of Rwanda
FARDC	Forces Armées de la République Démocratique du Congo
GoU	Government of Uganda
IMTFE	International Military Tribunal for the Far East (Tokyo)
ICTY	International Criminal Tribunal for Yugoslavia
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICC	International Criminal Court

IC	Interim Constitution
LRA	Lord's Resistance Army
LURD	Liberia, Liberians United for Reconciliation and Democracy
MODEL	Movement for Democracy in Liberia
M23	Movement on 23 March Movement
NPM	Non-Prosecutorial Mechanism
MLC	Movement for the Liberation of Congo
NP	National Party
NPRC	National Provisional Ruling Council
NIMT	Nuremberg International Military Tribunal
OTP	Office of the Prosecutor
RUF	Revolutionary United Front
SLPP	Sierra Leone People's Party
SL	Sierra Leone
SCSL	Special Court for Sierra Leone
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission
UN	United Nations
UNSC	United Nations Security Council
UDF	United Democratic Front
UPC	Uganda People's Congress
UPDF	Ugandan People's Defense Forces

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CHAPTER ONE

INTRODUCTION

1.1 Background to the problem

In this century, perhaps more than at any other time in the history of the modern world, armed conflict, between peoples has occurred within state borders, rather than between countries.[2] Thus, modern conflicts are increasingly intra-state struggles, rather than state versus state wars. The internal nature of these armed conflicts does not in any way mean that the world has become less violent. Internal conflicts, no less so than their international counterparts, imply that there will be civilian casualties, that there will be terror and torture, that there will be exceptional detention as well as attacks on prisons, and that food supplies and medical services will be disrupted.[3] And, therefore the civilian's populations become direct victims of terror and atrocities or indirect victims of displacement and deprivation. Rebel's militias and/or insurgencies use "hit and run" tactics and attacks against civilian's population to undermine the dominant power rather than attempt to hold territory. These tactics include abducting children and turning the girls into sex slaves and the boys into drug-addled child soldiers. Abductees are forced to mutilate, maim, rape, and kill under penalty of death. Over a million people have been displaced into overcrowded, squalid camps where they are still vulnerable to attacks because of insufficient protection by the government, whose forces are also accused of abusing civilians.[4] As a result, a military *(that is military intervention)* solution to such conflict is less likely[5] since no belligerent occupation.

Consequently, it is probable the armed conflicts of such nature will end not with unconditional surrender followed by prosecution, but rather with peace deals containing

[2] L.C. Green, 'The Man in the Field and the Maxim Ignorantia Juris Non Excusat' in Essays on the Modem Law of War (Dobbs Ferry, N.Y: Transnational, 1985) 27 at 36

[3] D. Forsythe, "Human Rights and Internal Conflicts: Trends and Recent Developments" (1982) 12 Cal. W. Int'l L.J. 287 at 290

[4] D. Forsythe, "Human Rights and Internal Conflicts: Trends and Recent Developments" (1982) 12 Cal. W. Int'l L.J. 287 at 290

[5] L.M. Keller, (2008), Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms, 23 CONN. J. INT' L L 702, 103

compromises over accountability for those perpetrators of atrocities.[6] These peace deals are commonly called Alternative Justice Mechanisms (AJM) or sometimes referred to as Non-Prosecutorial Mechanism (NPM). This among others includes a deferral to and for a negotiated amnesty and peace agreement, despite the international community's rejection of impunity in principle. The International legal community determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them via criminal prosecution. Thus, State duty to extradite or to prosecute (*aut dedere aut judicare)* perpetrators of atrocities.[7]

Amnesty is a practice that has its roots in the early history of mankind. From time immemorial amnesty has been employed as a means of promoting a political settlement and advancing reconciliation in societies that have emerged from repression.[8] From time immemorial successor regimes have sought to secure peace through the pardoning of their enemies. The exemption from criminal prosecution and, possibly, civil action achieved through amnesty is typically limited to conduct occurring during a specific period and/or involving a specified event or circumstance, such as a particular armed conflict.[9] Commonly amnesties specify a category or categories of beneficiaries, such as members of rebel forces, State agents or political exiles. Moreover, amnesties have been accorded pursuant to a peace deals/agreement or other negotiated accord, such as the case of Sierra Leone, Rwanda through *Gacaca's* courts and South Africa experience through Truth and Reconciliation Commission (TRC). In spite of enormous pressures upon it,[10] South Africa had the courage to choose and implement a model that embraced limited amnesties because in its opinion, it represented the best means to maintain peace and to

[6] L.M. Keller, (2008), Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms, 23 CONN. J. INT' L L 702, 103

[7] See the Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, and entered into force Jan. 12, 1951

[8] T. H. Clark, The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice", 4 WASH. U. GLOBAL STUD. L. R EV. 389 (2005)

[9] See a 1978 Chilean amnesty applied to; "all individuals who performed illegal acts… during the state of siege in force from 11 September 1973 to 10 March 1978, provided they are not currently subject to legal proceedings or have already been sentenced." Decree Law No. 2.191, art. 1 (18 April 1978)

[10] Motala, 'The Promotion of National Unity and Reconciliation Act, the Constitution and International Law' (1995) 28 Comparative and International Law Journal of South Africa 338

reconcile a deeply divided society.[11] There now exist, several initiatives for peace that can only hope to secure their mandates through an appropriate and effective model of transitional justice.[12] Judicial authorities have also expressed the view that international law permits amnesties as tools of transitional justice. In the ***Pinochet case***, Lord Lloyd held that:[13]

> "[f]urther light is shed on the practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971, India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government. […] It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.

The use of amnesties in Sierra Leone to end an almost decade-long war and the failure of Senegalese and South African authorities to prosecute Hissein Habre and Mengistu Haile Mariam respectively, give recent context to Lord Lloyd's claims. The usefulness of truth

[11] The Promotion of Unity and National Reconciliation Act of 1995 created a Truth and Reconciliation Commission.
[12] Report of the UN Secretary General to the UN Security Council: The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, April 16 1998.
[13] R v Bow Street Metropolitan Stipendiary Magistrate. Ex Parte Pinochet Ugarte [1998] 4 All ER 897 (HL).

commissions as an intermediate device between mass prosecutions and amnesties has long been recognized and even been endorsed by the UN.[14]

1.2 Statement of the problem

Since 1960's there has been a drastic increase in intrastate conflicts in Africa and since mid 1970s, at least 14 states on four continents have declared amnesty, or enacted amnesty laws immunizing past regimes from accountability and liability.[15] Despite of the international community intensive efforts to creating international mechanism for prosecuting and punishing individuals accused of particularly grave human rights violations; packaged into post-conflict peace agreements, amnesties are ceded by war-weary parties and often endorsed by an international community keen for peace. The International legal norms and their respective Institutional Mechanisms established by the international community keen for justice, oblige States' parties to respect and to ensure all individuals[16] within their territory and subject to their jurisdiction the rights recognised therein' and to provide 'an effective remedy'.[17] These principles underpin the states' affirmative obligations to prosecute, punish violations of rights, discover and reveal the truth about them, offer reparations to victims, and disqualify perpetrators from positions of power.[18]

However, it is not surprising to find that the armed conflicts of such nature will end not with unconditional surrender followed by prosecution, but rather with peace deals containing compromises over accountability for those perpetrators of atrocities.[19] This is due to the fact that in armed conflicts or past-conflict, the notion of retributive justice[20] for victims of war crimes often has to be balanced against the need of the territorial State to deal

[14] Sarkin 'Promoting Justice Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach in the New Millennium of Using Community Based Gacaca Tribunals to Deal with the Past' (2000) 2 International Law FORUM 112.
[15] Burke-White, W. (2001) 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' in Harvard International Law Journal, 42, p. 467.
[16] [16] See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field , opened for signature 12 August 1949, 75 UNTS 31, arts 49–50 (entered into force 21 October 1950)
[17] Opened for signature 9 December 1948, 78 UNTS 277, arts 1–3 (entered into force 12 January 1951) (' Genocide Convention')
[18] L. Henkin and J.L. Hargrove, eds., Human Rights: An Agenda for the Next Century, Studies in Transnational Legal Policy, vol. 26 (Washington, D.C.: American Society of International Law, 1994)
[19] L.M. Keller, (2008), Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms, 23 CONN. J. INT' L L 702, 103
[20] K. Avruch and B. Vejarano, "Truth and reconciliation commissions: A review essay and annotated bibliography", The Online Journal of Peace and Conflict Resolution , Vol. 4.2, 2002, pp. 34-76.

effectively and progressively with past atrocities and not to provoke or maintain further violence. In such circumstances a restorative justice approach incorporating limited amnesties, focusing on the normative rather than the punitive objectives of criminal law, is the more appropriate model.[21]

1.3 Objectives of the Research

1.3.1 General Objective

The general objective of this study is to examine legal approaches and circumstances towards the introduction and uses of amnesties and peace agreements in ongoing conflict and in post-conflict society in Africa rather than the use of retributive justice.

1.3.2 Specific Objectives

The study aims specifically to examine Articles authorizing Alternative Justice Mechanism within the Rome Statute.

Furthermore the study aims to examine the relevance of amnesties and peace agreements within the context of the Rome Statute.

Indeed, the researcher is going to analyze the State practice in offering amnesties and peace agreements and legal controversy surrounding the same.

1.4 Research Hypotheses

(i) That, the Rome Statute does not provide explicitly on the state's duty to prosecute the perpetrators of mass atrocities.

(ii) That, the Rome Statute focuses only on punishing perpetrators of mass atrocities rather than reintegrate perpetrators in the society.

(iii) That, the Rome Statute impliedly provide for the use of Non-Prosecutorial Models (i.e. Alternative Justice Mechanism).

[21] R. Teitel, "Transitional jurisprudence: The role of law in political transformation", Yale Law Journal, Vol. 106. No. 7, 1997, p. 2009, esp. p. 2037.

1.5 Significance of the Research

This study considerably adds knowledge to Governments and Institutions on the concept of Alternative Justice Mechanism and the duty to extradite or prosecute**.** The study reveals the legal status and relevance of amnesties and peace agreements as well as the duty to extradite or prosecute in international law.

The report develops a working knowledge and a synergistic relationship between prosecution and non-prosecutorial mechanism in the operations of the institutions in dealing with past atrocities.

It will further provide knowledge on the understanding of human rights implications (that is the right to justice and reparation) to the victims on gross violation of human rights during conflicts.

1.6 Literature Review

The focus point of this dissertation is on a critical analysis of African experience on the use of amnesties and peace agreement as alternative means to extradition and prosecution in International law as opposed to the principle *aut dedere aut judicare* - *extradite* or prosecute.[22] The principle is meant to ensure that those who commit crimes under international law are not granted safe haven anywhere in the world. The center will be on the alleged vagueness of the provisions of the Rome Statute[23] particularly on complementarity[24] and prosecutorial discretion based on prosecutorial deferrals in "the interests of justice"[25]. This dissertation considers various scholarly insights presented in writings and seek only to presents and urge for the view that non-Prosecutorial Methods or Alternative Justice Mechanism can be used to achieve both justice and peace depending upon the procedure to be adopted. As a starting point;

[22] See paragraph 4 of the Preamble of the Rome Statute of the International Criminal Court
[23] See the Rome Statute of International Criminal Court
[24] Rome Statute art. 17
[25] Rome Statute art. 53(1)(c)

Leila Nadya Sadat (2002) argues that the International Criminal Court (ICC) represents a "quantum-leap" in the enforcement of International Criminal Law and a monumental response to the most serious crimes of concern to the international community as a whole. To Leila Nadya Sadat the ICC stands as a determination that *de facto* impunity should no longer be enjoyed by those perpetrating genocide, war crimes and crimes against humanity by ensuring that cases are tried even when states are unwilling or unable to do so themselves. She emphasizes that it is conceivable, perhaps, that we have reached a stage during which a quantum leap in our thinking and behavior has become possible enabling us to transform the prohibitions on the commission of genocide, war crimes, and crimes against humanity and aggression into real tools to deter the cruel and powerful. The Court is one of last resort and is not intended to replace domestic legal systems.

Indeed, the aspirations of its drafters will be fulfilled just as surely if national systems carry out legitimate investigations and prosecutions on their own. Thus, while a creation of historic import, the Rome Statute of the International Criminal Court (Rome Statute) envisions a Court that "may never be employed." This perspective is reflected in two very significant ICC salutes to state sovereignty: complementarity[26] and prosecutorial deferrals in "the interests of justice".[27] These "salutes" are the product of one of the most difficult negotiation points of the Rome Conference: When should the ICC defer to national proceedings?[28] There was a battle of conflicting purposes at Rome. On the one hand, there was the international obligation of states to prosecute international crimes added to the practical impossibility of placing that burden solely upon international tribunals (ad hoc or permanent). Opposing this view were those who advocated state sovereignty and the need to retain flexibility with regard to truth and reconciliation efforts, especially amnesty, in the context of difficult regime change. The result: a system in which prosecutorial discretion will be exercised in the context of purposefully vague provisions that recognize that peace and justice are sometimes incompatible goals.[29]

[26] Rome Statute art. 17
[27] Rome Statute art. 53(1)(c)
[28] D. J. Scheffer, Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court , 167 MIL . L. R EV. 1,10–12 (2001).
[29] M. P. Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court, 32 CORNELL INT' L L.J. 507, 507 (1999)

Thus, amnesty-granting programs and alternative justice schemes remain possible, even in situations where there would otherwise appear to be an obligation on the ICC to prosecute criminally.

Despite the fact that, the statute's final draft created a compromise agreeable to the 120 countries that voted for it,[30] observers are left with some significant questions, first, when would the Court likely defer to a national prosecution, truth and reconciliation campaign, or amnesty? Second, what are the significant predictive factors? Generally, the Court may defer to the efforts of states party to the Rome Statute complementarity and prosecutorial deferrals "in the interests of justice." Put briefly, complementarity precludes ICC jurisdiction in scenarios in which a state with jurisdiction is willing or able to prosecute. The deferral power allows the ICC Prosecutor to defer to alternative justice mechanisms and amnesty-granting programs when it will be in the interest of justice, thus giving him broad discretion.

Ruti G. Teitel (2000), argues that until recently, immunity measures like amnesties were considered an acceptable part of promoting transitional justice in countries seeking to address past episodes of systematic violations of human rights. The politically sensitive need to broker peace between oppositional forces often outweighed the moral imperative of seeking to punish those responsible for perpetrating human rights atrocities. In the 1980s most of the world nations especially Latin America contributed greatly to this trend, with the use of immunity measures in negotiated transitions becoming an important bargaining chip in brokering political impasse. The consistent use of amnesties in the region contributed to the growing acceptance of amnesties in the 1980s.

By the end of the Cold War, the transitional justice discourse in Latin America centered largely on the *truth v. justice* debate, which put at issue whether a political transition could or should include criminal trials. Political leaders of these countries often justified the use of amnesty in the name of peace, an argument that went largely unquestioned and resulted in a sort of a political balancing test that more often tipped in favor of assuring

[30] Press Release, U.N. Diplom atic Conference Concludes in Rome with Decision to Establish Permanent International Court (July 17, 1998), U.N. Doc. L/ROM/22 (1998), http://www.un.org/ icc/pressrel/1rom22.htm (last visited Oct. 02, 2013).

political stability over criminal justice in post-conflict or post-authoritarian settings. Nevertheless, to assure accountability, these countries often formed truth commissions to conduct investigations and to provide a mechanism for truth telling for the benefit of victim-survivors and society at large. As a result, popularize the truth commission model, reliance upon which grew as a way to compensate for compromised justice schemes. While at first truth commissions were believed to be a "second-best" option,[31] they soon became complementary and necessary measures for confronting past repressive and violent regimes through restorative justice.

Roht-Arriaza[32] advocates that the principle *aut dedere aut judicare extradite* or prosecute-dates back to Grotius,[33] one of the earliest international legal scholars, and has been included in various regional, international and several conventions relating to war crimes. The purpose of the principle is to ensure that those who commit crimes under international law are not granted safe haven anywhere in the world.[34] International law requires investigation and prosecution, a state may not ignore its obligations by asserting an obligation to comply with conflicting domestic legislation or practice.[35] These conventions, whether addressing international or national crimes, show an increasing tendency in international law to require states to investigate and prosecute serious offenses.[36] Interest in the international community has progressed from acts directly affecting more than one state (war crimes) to more indirect concerns based on the enforcement of human rights norms even when the acts themselves affect only nationals of the offending state.

[31] D.F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime , 100 Y ALE L.J. 2537, 2546 n.32 (1991)
[32] Roht-Arriaza 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 45.
[33] H. Grotius, De Jure Belliet Pacis (The Right of War and Peace), ch. XXI, § IV (1), at 347 (V. Whewell trans. & ed. 1853).
[34] See 6 U.N. Comm'n on Hum. Rts. (195th mtg.), S24, U.N. Doc. E/CN.4/SR.195 (1950)
[35] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 3146, T.I.A.S. No. 3362,75 U.N.T.S. 31 62 [hereinafter Geneva Convention I];
[36] M. Janis, An Introduction to International Law 128 (1988)

On the other side Roht-Arriaza acknowledge the argument the provisions in these conventions apply only to crimes of an international character, and thus the growing use of such provisions does not reflect a broad obligation to extradite or prosecute. And, as a result, several states including Latin American countries have passed laws granting amnesty to members of the security forces.[37] These laws preclude criminal prosecution and civil remedies for grave human rights violations including torture, summary execution, and disappearances. These amnesties can only be legal under international law if the obligation to investigate and take action against gross violators of human rights is derogable that is, if it can be overcome by domestic considerations. He continued that, legally, an amnesty law must fit within an applicable exception to the normally binding nature of human rights treaty provisions in order to be derogable.

Roht-Arriaza concluded that in these entire situations, the successor regime is not responsible for the grave human rights violations of its predecessors. Yet letting the new government preclude, all possibility of civil suit or criminal prosecution leaves the victims with no redress and encourages a belief that future repressive tactics will be granted immunity. With no fear of retribution, each new regime can again give in to the same repressive behavior.

Bassiouni(1996)[38] argues that in transitional society justice is all too frequently bartered away for political settlements. In international, non-international, or purely internal conflicts the practice of impunity has become the political price paid to secure an end to the violence of ongoing conflicts or as a means to ensure tyrannical regime changes. In these bartered settlements, the victims' rights become the objects of political trade-offs, and justice becomes, depending upon one's perspective, the victim of the means of *Realpolitik.*[39]

[37] R.K. Goldman, Amnesty Laws, International Law and the American Convention on Human Rights, THE LAW GROUP DOCKET, Summer 1989, at 1, 3

[38] M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 Law and Contemporary Problems 9.

[39] L. Huyse, Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past, 20 L. & S OC. I NQUIRY 1, 51, 77-78 (1995)

Bassiouni further emphasize that bartering away justice for political results, albeit in the pursuit of peace is the goal of most political leaders who seek to end conflicts or facilitate transitions to non-tyrannical regimes. The ugly reality is that in order to obtain peace, negotiations must be held with the very leaders who frequently are the ones who committed, ordered, or allowed terrible crimes to be committed. Thus, the choice presented to negotiators is whether to have peace or justice. Bassiouni concluded that sometimes this dichotomy is presented along more sophisticated lines: peace now and justice some other time. The choice is, however, frequently fallacious and the dichotomy may be tragically deceptive.

Hayner (1994)[40] and Mark Osiel (1997)[41] from various perspectives, present a compelling view that legal institutions have played a central part in dealing with past atrocities in newly established democracies. They argued that in the aftermath of large-scale brutality, the need for public reckoning with past horrific events is more important to democratization than the criminal law's more traditional objectives of deterrence and retribution. Besides criminal trials, truth commissions have become a frequently used tool to investigate past human rights abuses. Hayner emphasized that although truth commissions are not standard institutions of law enforcement, most of them had quasi-judicial functions. Osiel stressed that criminal trials must be conducted with the pedagogic purpose in mind. They should stimulate public discourse about past atrocities and foster the liberal values of tolerance, moderation, and civil respect.

1.7 Research Methodology

The study predominantly deployed various sources to obtain and give the background of States duty to prosecute and/or extradite perpetrators of atrocities; the process of amnesties and peace agreement in selected African States. In the pursuit of the study various stages are generally adopted by the researcher in studying the researcher's problem along with the logic behind their adoption.

[40] H. Priscilla B. (1994), 15 Truth Commissions - 1974 to 1994: A Comparative Study. Human Rights Quarterly 16,4: 597-655

[41] O. Mark, (1997), Mass Atrocity, Collective Memory and the Law, New Brunswick, N.J.: Transaction Publishers

1.7.1 Research Design

This is the conceptual structure within which research is conducted; thus, is a blue print of the proposed research. The researcher intends to divulge the logical systematic process of planning and carrying out a research study, starting with structure, plan and techniques or methods of inquiry adopted in data collection. This enabled the researcher to indicate the various approaches to be used in solving the research problem, sources and information related to the problem and, time frame and the cost budget. Also, it helped the researcher to identify in advance the kind of data he requires, the means to collect them, the methods to be used for analysis and interpretation of the data, and presentation of his findings with more accuracy. Therefore, thus, helps him in minimizing the uncertainties, confusion and practical hazards associated with the research problem. It helps in enhancing efficiency and reliability of his findings.

In the pursuit of the study, a factual, historical and descriptive method were used to give the background of States duty to prosecute and/or extradite perpetrators of atrocities; the process of amnesties and peace agreement in selected African States and the workings of the Truth Commission. International law, political theory, domestic legislation and the amnesty process are also analysed.

Descriptive research, the researcher used this type of the research because of the nature of the study itself. Since the research was on the use peace agreement and amnesties as alternative to prosecution and extradition, this type of research was helpful since it is concerning with the proposition of law, by the way of analyzing the existing international instruments such as conventions and international statutes, domestic legislations, by applying the reasoning power.[42]

1.7.2 Area of Study

Since the study is mainly concern with the use by African countries of amnesties and peace agreement as substitute or alternative to State's duty to prosecute and extradite perpetrators of atrocities the researcher will direct his mind into current situations of intra-state conflicts occurred and which are occurring in Africa; the modality adopted by

[42] A. Filipos, (2009), Legal Research Methods, Justice and Legal System Institute, Ethiopia

such States in resolving such conflicts including restorative (AJM) and retributive approach. Therefore, the research was conducted at the International Criminal Tribunal for Rwanda (ICTR) in Arusha. The reason behind such choice is that after the Rwanda massacre most of the perpetrators of the atrocities were prosecuted by the tribunal and some of them were dealt by alternative justice mechanism such as "*gacaca"* courts.

1.7.3 Methods of Data Collection

In the pursuit of the study, the researcher adopted various means for data collection including questionnaires, interview and documentary review. Through questionnaire the researcher employed both multiple choice questions and the open-end question. In the former the respondent selects one of the alternative possible answers put to him, whereas in the latter he has to supply the answer in his own words. In interview both structured and unstructured interviews under the personal interview was conducted to various experts and advocacy of international law with the view of extracting information relating to prosecution and extradition as well as the use of peace agreements and amnesties in conflict and post-conflict situations.

Also, a comprehensive review of literature of both primary and secondary sources were done to salvage important information regarding International Criminal Court (ICC), the National Courts and duty to prosecute or extradite and in particular justifications for amnesties and peace agreements. To smooth the progress domestic statutes, international treaties and case laws were used as primary sources, and as secondary sources, books, journal, articles and newspaper articles, conferences reports, the internet, unpublished materials, and other resources were consulted in order to scrutinize the justifications for amnesties and peace agreements and the duty to prosecute. In this aspect the libraries of Chinua Achebe Library of Mzumbe University, Dr. Chagula Library of the University of Dar es Salaam and, E-library and Legal and Human Rights Centre were visited regularly to accomplish the intended research project.

However, the research was not limited to document analysis; rather, the research also focused on firsthand data/information. This includes data collected by the researcher, by using primary sources, in opting for the most appropriate method(s) for collecting data.

This ultimately helped the researcher to determine the quality data to be collected and appropriateness and in turn, the consequential results to be yield.

1.7.4 Instruments of Data Collection

The researcher employed and made use of instruments such as Interviews schedules and Questionnaires. Using these techniques, the researcher developed research questions or hypotheses and collect data on events, or people that are measurable, observable, and replicable.

1.7.5 Sampling and Sampling Techniques

In the pursuit of the study, the researcher after considering some of the foreseeable and unforeseeable contingencies such as, nature of the study, costs, time and lack of enough resources; the researcher opt to adopt Simple Random sampling in conducting his research. This type of sampling is also known as chance sampling or probability sampling where each and every item in the population has an equal chance of inclusion in the sample and each one of the possible samples. This procedure gives each item an equal probability of being selected. Indeed, it enabled the researcher to gather information with a reduced minimum getting biased or unreliable information together with the prediction of the researcher.

1.7.6 Sample size

The nature of study was likely to influence data and/or information to be collected from selected persons and institutions depending on whether there are anti-prosecution or pro-prosecution or victims of atrocities. In the pursuit of the study the researcher selected 45 persons to be consulted. This included persons from public and private institutions, local and international organizations, civil societies and institutions experts in international criminal justice and Non-Prosecutorial Mechanisms who were consulted in a view to obtaining useful information regarding the study. Some of them are Prosecutors of National and International Courts, Judges of Hybrid Courts (Special Court for Sierra Leone), International Criminal Tribunal for Rwanda and witnesses.

1.7.7 Methods of Data Analysis

After the data had been collected, the researcher turned to the task of analyzing them; because most of data collected, in any form, are raw and neutral. Their direction and trend is generally highlighted and reflected with the help of analysis and interpretation. Therefore, after collection of data, the said data where processed and analyzed in accordance with the laid down research plan; at this juncture, data were organized, data were reduced through summarization and categorization, and patterns and themes in the data are identified and linked. This is to ensure that the researcher has all relevant data for making contemplated comparisons and analysis.

Both quantitative and qualitative approaches of data analysis were employed by the researcher in the due course of the study particularly in data analysis. Thus, includes *editing*; is a process of examining the collected raw data to detect errors and omissions and to correct these when possible. As a matter of fact, editing involves a careful scrutiny of the completed questionnaires and/or schedules. Editing is done to assure that the data are accurate, consistent with other facts gathered, uniformly entered, as completed as possible and have been well arranged to facilitate coding and tabulation. *Coding* involves the assigning of symbols or numerical to each of the category of responses so that raw data can be counted or tabulated, classification and tabulation of collected data so that they are amenable to analysis. *Classification or categorization* of data is the process of arranging data in groups or classes according to their resemblance or affinity. The researcher classified his data into required categories. The categorization was based on the problem under study or the hypothesis formulated. *Tabulation* is a means of recording classification in a compact form in such a way to facilitate comparisons and show the involved relations between two or more variables. It is a sort of arrangement of data in requisite rows and columns.

1.8 Scope of the Research

This study was confined in current situations of intra-state conflicts occurred and which are occurring in Africa and the modality adopted by such States in resolving such conflicts. Indeed, the study made a critical analysis of such modalities adopted by African States in the framework of the Rome Statutes.

CHAPTER TWO

THE CONCEPTUAL FRAMEWORK

2.1 Introduction

Chapter two is divided into six major parts. The first reviews an international crime from the Second World War followed by the Nuremberg International Military Tribunal (NIMT) and International Military Tribunal for the Far East (Tokyo) (IMTFE). The second part outlines the application of international criminal justice. This will trace the earlier development of the international humanitarian law in Geneva Convention of 1949 followed by its 1977 Protocols, the development of international human right law and lastly the crimes against humanity in the jurisprudence of NIMT and IMTFE. This leads onto the third part, which discusses the establishment of the Rome Statute and the International Criminal Court. The fourth part sets out State's obligation to prosecute and extradite under treaty law and international customary law. The fifth, sets out the rationale, provides an exposition of the law relied upon to support or mandate prosecutions, and ends with a critique of the model. The sixth part focuses on the Peace agreement and amnesty model. It further consist the rationale and critique of the model.

2.2 An International Crime

The term "international crime" does not have one, simple, universal meaning. On one view, an international crime could be defined as any offence that requires international cooperation for its prosecution and therefore involves more than one domestic jurisdiction, or which requires cross-border movements or transactions, such as money laundering or trafficking in narcotics. On the other hand, international crimes consist of violations of international customary rules or treaty provisions unquestionably binding on States and other entities, and are intended to protect values considered important by the whole international community, so that individual criminal responsibility arises for their breach.[43] In most cases, however, an international crime refers to conduct that violates international law, and is punishable as such with the imposition of individual criminal

[43] A. Cassese et al., International Criminal Law – Cases and Commentary (Oxford: OUP, 2011) 113-114.

liability rather than all crimes that have an international aspect. Generally, international crimes, includes crimes such as genocide, war crimes, crimes of aggression.

For a long time, the only international crimes, apart from piracy, were war crimes. It is only since World War II that new categories of crimes have been developed, while war crimes law has essentially been restated. In 1945 and1946, respectively, the Nuremberg (IMT) and Tokyo (IMTFE) Charter were adopted; the Charters enshrined the crimes against humanity and crimes against peace. In 1948 Genocide Convention[44] was adopted, the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.[45] The adoption of Genocide Convention was followed by the Statutes of the International Criminal Tribunal for Yugoslavia (ICTY),[46] International Criminal Tribunal for Rwanda (ICTR),[47] International Criminal Court (ICC),[48] and other international and internationalized tribunals. Besides being considered as crimes under international law genocide, crimes against humanity and war crimes as enumerated in Art.5(1)(a)-(c) of the Rome Statute[49] are most commonly labeled as 'international crimes' or as prominently laid down in the preamble of the same Statute as "the most serious crimes of concern to the international community as a whole".[50]

2.3 International Criminal Justice and its Application

In the wake of humanitarian atrocities in the past decades around the world and more specifically, the former Yugoslavia, Uganda, Rwanda, Sierra Leone, and Sudan, the international community felt the need to establish the permanent International Criminal Court to deal with the matter, hence, the establishment of the ICC in 2002. The basic frameworks of the ICC to deal with the prosecution of war crimes or war related offences

[44] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, 280 [Genocide Convention]
[45] See Genocide Convention art. 1
[46] See the Preamble and Article 1 of Statute of the International Tribunal for the Former Yugoslavia (Adopted 25 May 1993 by Resolution 827)
[47] See Paragraph 1 and and Article 1 of Statute of the International Tribunal for Rwanda
[48] Rome Statute of the International Criminal Court , 17 July 1998, 2187 U.N.T.S. 3
[49] Rome Statute of the International Criminal Court , 17 July 1998, 2187 U.N.T.S. 3
[50] See Art. 19 of the Draft Code of Crimes against the Peace and Security of Mankind ', text adopted by the International Law Commission in 1996, available at http://untreaty.un.org/ ilc/texts/instruments/English (last visited 21 December, 2013).

are international humanitarian law and international human rights law; both treaty and customary-based, and crimes against humanity jurisprudence.[51]

The Geneva Conventions of 1949 (Conventions) with their 1977 protocols require State Parties to hold perpetrators accountable for "grave breaches" of the Conventions which occur in international conflicts within their territories. Alternatively, these states are required to hand over perpetrators to any of the contracting parties for accountability.[52] The Geneva Convention I define "grave breaches" to include: "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" and which are meted out "against persons or property protected by the Convention".[53] Furthermore, the Protocol II of the Geneva Conventions provide for individual accountability for breaches which are committed during internal armed conflicts.[54]

Another international frameworks that deal with the prosecution of war crimes or war related offences is the increasingly demands that State Parties punish certain human rights abuses who contravene International human rights law. There are several national, regional and international instruments that place upon a state a duty to prosecute perpetrators and abusers of human rights. Among others includes, the International Covenant on Civil and Political Rights,[55] the American Convention on Human Rights[56] and the European Convention for the Protection of Human Rights and Fundamental Freedoms,[57] oblige States Parties 'to respect and to ensure all individuals within their territory and subject to their jurisdiction the rights recognised therein' and to provide 'an effective remedy'.[58] An explicit duty to prosecute violations of human rights pursuant to a treaty obligation arises in the Convention on the Prevention and Punishment of the

[51] C. Bell, (2000). Peace agreements and human rights. Great Claredon: Oxford University Press.
[52] K. Kittichaisaree, (2001). International Criminal Law, Oxford New York: Oxford University Press.
[53] See Article 50 of the Geneva Convention I of 1949
[54] See Article 3 of the Geneva Convention II of 1949
[55] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
[56] Opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978)
[57] Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('European Human Rights Convention ')
[58] See ICCPR, above n. 1, arts 2(1)–(3), 9(5), 14(6); ACHR, above n. 2, arts 1(1), 10, 25; European Human Rights Convention, above n. 3, arts 1, 5(5), 13.

Crime of Genocide,[59] and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment[60] and the Genocide Convention which imposes an absolute duty to extradite or prosecute those responsible for genocide.[61]

Moreover, it should be observed that some of the international conventions have assumed the status of customary international law due to their universal application; hence a nation's obligation to punish past abuses arises irrespective of the fact that it is not a party to such treaties.[62]

And lastly, the crimes against humanity which emerged through the Nuremberg trials followed by the Tokyo trials and subsequent sub-regional trials through their regional tribunals. The crimes against humanity was defined to mean and includes, "Murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population ….or persecutions on political, racial or religious grounds".[63] Indeed, the concept of crimes against humanity has found expression in the Statutes of the ICTR, ICTY and the Special Court for Sierra Leone.[64] It should be noted that in addition to the above, domestic criminal laws have been enforced by an international court.[65] Basically, these set of norms regulate how war related offences are to be dealt with by states.

2.4 The Rome Statute and the ICC

The most significant moment of the Twentieth Century in the development of international law in general, and the development of the ICC in particular, were the Nuremberg Trials[66] at the end of World War II.[67] For it was at this time individuals began

[59] Opened for signature 9 December 1948, 78 UNTS 277, arts 1–3 (entered into force 12 January 1951) (' Genocide Convention')

[60] Opened for signature 10 January 1984, 1465 UNTS 85, arts 2, 4, 6 (entered into force 26 June 1987) ('Torture Convention ')

[61] See Art. 2 of the Genocide Convention

[62] C. Bell, (2000). Peace agreements and human rights. Great Claredon: Oxford University Press.

[63] See Article 6(3) of the Nuremberg Charter, 1945

[64] L. Apori-Nkansah, (2008). Transitional Justice in Postconflict Contexts: The Case of Sierra Leone,s Dual Accountability Mechanisms: Published doctoral dissertation, Walden University, Minnesota, UMI, AAT 3291475

[65] See the Statute of the Special Court for Sierra Leone, 2002

[66] The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, August 8, 1945

[67] L. Nadya Sadat & Richard S. Carden, The New International Criminal Court: An Uneasy Revolution, 88 GEO. L.J. 381, 385 (2000)

to take on international legal personality and became subject to prosecution for their individual roles in the perpetration of international crimes. The Nuremburg Trials were accompanied by the International Military Tribunal for the Far East (Tokyo Tribunal), which was established by General MacArthur's Special Proclamation.[68]

In the 1990s, the U.N. Security Council, by it competition among its permanent members, made two significant contributions to the legacy of Nuremberg with the creation of the ad hoc tribunals for the former Yugoslavia and Rwanda.[69] The successes and shortcomings of these tribunals led in the evolution of international justice, and provided an impetus for the Rome Conference at which the ICC finally realized its creation. Under the provision of Article 1,[70] an International Criminal Court (ICC) was established. The ICC is a permanent international judicial institution designed to complement national judicial systems by prosecuting persons responsible for genocide, crimes against humanity and war crimes[71] where national judicial systems are unable or unwilling to do so. The ICC represents a great improvement in the enforcement of international criminal law and a very big response to, the most serious crimes of concern to the international community as a whole.

The ICC's jurisdiction is limited to the most serious crimes of concern to the international community as a whole. These crimes include genocide, crimes against humanity, and war crimes.[72] The Court's jurisdiction over these crimes is non-retroactive. The "*ratione temporis*"[73] of the Court is restricted to crimes committed after the coming into force of the Rome Statute on July 1, 2002, or after the time when a state that has territorial or national jurisdiction becomes a party to the Court. Thus, crimes committed before the treaty came into force, or before the ratification of the party-State with jurisdiction, are outside the jurisdiction of the Court.[74]

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[68] See Charter of an International Military Tribunal for the Far East, Jan. 19, 1946

[69] Statute of the International Tribunal for the Former Yugoslavia, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994)

[70] See Art. 1 of the Statute of the ICC

[71] See Art. 1 & Art. 17 of the Statute of ICC

[72] See Articles 5, 6-8 of the Statute of ICC

[73] See Articles 11 & 25 of the Statute of ICC

[74] See Article 12 of the Statute of ICC

2.5 State's Obligation to Prosecute and Extradite

After along battle of civil war within a particular state it's people rejoices when a new government takes the reins of power from a repressive regime. For the families and friends of those killed or disappeared during the conflicts by individual perpetrators or government agents, however, the new regime may bring no relief to the victims of such atrocities.[75] Due to widespread revulsion for the crimes committed immediately before and during the Second World War, the international community sees the need to call for affirmative action against perpetrators of massive atrocities; within their geographical locality and beyond their jurisdiction hence the establishment of the "*aut dedere aut judicare (extradite or prosecute) rule"*.

Under the *aut dedere aut judicare rule*, a state may not provide a safe haven for a person suspected of certain categories of crimes. Instead, it is required either to exercise jurisdiction over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.[76] Thus, practically, when the *aut dedere aut judicare rule* applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of geographic jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international criminal court. This brought a question of the State's ability to deal with the situation. Once the ability to act is established, the question becomes whether states are obliged to exercise that jurisdiction.[77] Therefore, the principle of *aut dedere aut judicare* forms the basis of a general obligation within international law which applies to universally condemnable crimes. This fact demonstrates that an obligation of the State to investigate, extradite and prosecute certain grave human rights violations exists in both conventional and customary international law.

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[75] By Alaide Foppa, Guatemalan poet, feminist, teacher, and mother Disappeared December 19, 1980, cited in Roht-Arriaza 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 45.

[76] Grotius in De Jure Belli ac Pacis, Bk. II, Ch. XXI, §§ IV-VI,

[77] International Law Commission, Preliminary report on the obligation to extradite or prosecute *(aut dedere aut judicare),* A/CN.4/571, para.31.

2.5.1 Treaty Law

The traditional place to start in ascertaining an international obligation's sources is article 38(1) of the ICJ Statute,[78] which identifies sources of international law as international conventions, international custom as evidence of a general practice accepted as law, the general principles of law recognised by civilized nations and as a subsidiary source, the teachings of the most highly qualified publicists of the various nations. In addition, Article 25[79] makes Security Council decisions made under Chapter VII of the Charter binding on States.

State's obligation to prosecute or extradite is contained in a number of conventions of different nature, covering both crimes under international as well as ordinary crimes of international concern and international private law. However, till the end of the last century most instruments just expressed the obligation in terms of a dual option; that is either extradite to another state or prosecute before the courts of the state where the suspect was located. Indeed, there are over 60 multilateral treaties combining extradition and prosecution as alternative courses of action in order to bring suspects to justice. These modem multilateral human rights treaties enshrine three different clauses which provide support for a state's obligation to investigate grave human rights violations and take action against the responsible parties. The clauses includes, criminal law treaties specify the obligation of states to prosecute and punish perpetrators of acts defined as crimes under international law; the "ensure and respect" provision common to many treaties has been interpreted, by at least one court, to impose affirmative obligations on states to investigate and prosecute; and lastly, the right to a remedy included in many human rights instruments provides a strong basis for inferring an obligation to investigate and prosecute basis for inferring an obligation to investigate and prosecute.[80]

This obligation finds its source; first, in Articles 55 and 56,[81] respectively, states that the United Nations has, as a mandate, the promotion of "the universal respect for, and observance of" human rights; and that all Members pledge themselves to take joint and

[78] See the Statute of the International Court of Justice
[79] UN Charter, 1945
[80] Roht-Arriaza 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 45.
[81] See UN Charter, 1945

separate action in co-operation with the Organization for the achievement of the purposes set forth in Art.55. Practically, efforts of this nature require States to act in a certain manner when confronted with violations of human rights norms. Since the establishment of the Nuremberg (IMT) and Tokyo (IMTFE) in 1945 and1946, respectively, the prosecutions of Nazi war criminals and the prosecutions of high-ranking Japanese officers after World War II confirmed that war crimes and crimes against humanity are offenses punishable under international law.[82]

An explicit duty to prosecute violations of human rights pursuant to a treaty obligation has been included in the Convention on the Prevention and Punishment of the Crime of Genocide,[83] and Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment[84] which imposes an absolute duty to extradite or prosecute those responsible for genocide.[85] The 1949 Geneva Conventions with their 1977 protocols require State Parties to hold perpetrators accountable for "grave breaches" of the Conventions which occur in international conflicts within their territories. Alternatively, these states are required to hand over perpetrators to any of the contracting parties for accountability.[86] The 2006 International Convention for the Protection of All Persons from Enforced Disappearance expressly provides for three alternatives for states; thus, extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution,[87] and several conventions relating to terror and human rights. This includes regional and international instruments that place upon a state a duty to prosecute perpetrators and abusers of human rights. Among others includes, as the

[82] Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946) [hereinafter Nuremberg Principles]. Also, Art. 6(c) of the Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945

[83] See the Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, and entered into force Jan. 12, 1951

[84] Opened for signature 10 January 1984, 1465 UNTS 85, arts 2, 4, 6 (entered into force 26 June 1987) ('Torture Convention ')

[85] See Art. 2 of the Genocide Convention

[86] K. Kittichaisaree, (2001). International Criminal Law, Oxford New York: Oxford University Press.

[87] Art. 11 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance

International Covenant on Civil and Political Rights,[88] the American Convention on Human Rights[89] and the European Convention for the Protection of Human Rights and Fundamental Freedoms,[90] oblige States Parties 'to respect and to ensure all individuals within their territory and subject to their jurisdiction the rights recognised therein' and to provide 'an effective remedy'.[91] The conventions use various formulations to describe the obligation to prosecute, including 'to try', 'to bring before their own courts' and 'to submit the case to its competent authorities for the purpose of prosecution.[92]

However, the obligation to prosecute does not necessarily imply that proceedings will be undertaken, and still less that the alleged offender will be punished.[93]The ICJ in ***Belgium v. Senegal,***[94] held that:-

> "The obligation 'to submit the case to the competent authorities' may or may not result in the institution of proceedings, depending on the evidence available against the suspect. Thus, if there is insufficient evidence, the state is not obliged to prosecute the alleged offender; nor, of course, does the obligation to prosecute entail an obligation to punish in the absence of a conviction".

A common feature of the different treaties embodying the obligation to extradite or prosecute is that they impose upon states an obligation to ensure the prosecution of the offender either by extraditing the individual to a state that will exercise criminal

[88] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
[89] Opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978)
[90] Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('European Human Rights Convention ')
[91] See ICCPR, above n. 1, arts 2(1)–(3), 9(5), 14(6); ACHR, above n. 2, arts 1(1), 10, 25; European Human Rights Convention, above n. 3, arts 1, 5(5), 13.
[92] Survey of multilateral conventions that may be of relevance for the work of the International Law Commission on the topic: 'The obligation to extradite or prosecute (aut dedere aut judicare)', Study by the Secretariat, 18 June 2010, UN Doc.A/CN.4/630. A list of the treaties included in the survey with the text of the relevant provisions is available in the Annex (Secretariat's Survey).
[93] See Secretariat's Survey, para. 146.
[94] Belgium v. Senegal, ICJ Reports 2012 , para. 94.

jurisdiction or by enabling their own judicial authorities to prosecute.[95] Therefore, the purpose of the principle is to ensure that those who commit crimes under international law are not granted safe haven anywhere in the world.

2.5.2 Customary Law

Customary international law is that aspect of international law which is taken from custom along with general principles of law and treaties. It is argued to be a source for the recognition of universal jurisdiction regarding international crimes.[96] Customary international law is generally accepted as a binding source of law governing the international community. Most treaties commonly labeled certain crimes as international crimes[97] this includes war crime, genocide and crimes against humanity. Consequently the Rome Statute prominently laid down in its preamble as "the most serious crimes of concern to the international community as a whole".[98] Moreover, it is argued that a general obligation to extradite or prosecute perpetrators of atrocities exists in respect of international crimes because these are offenses reprehended by the international community as a whole. They are offenses against the world public order. And, they are of concern to all states and all states ought therefore to cooperate in bringing those who commit such offenses to justice.[99]

Therefore, the principle could bind States regardless of whether the State in question is a party to the relevant treaty that includes the obligation, whether the relevant treaty includes such an obligation (such as the Genocide Convention) or whether or not there is in fact a relevant treaty. According to this argument for the customary status of an obligation to extradite or prosecute is the claim of an obligation owed by states to the international community as a whole (*erga omnes)* and *jus cogens* nature of these

[95] Survey of multilateral conventions that may be of relevance for the work of the International Law Commission on the topic: 'The obligation to extradite or prosecute (aut dedere aut judicare)', Study by the Secretariat, 18 June 2010, UN Doc.A/CN.4/630, para. 4. A list of the treaties included in the survey with the text of the relevant provisions is available in the Annex (Secretariat's Survey)

[96] Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law. Vol. 1: Rules, Cambridge University Press, Cambridge, 2005, p. 604.

[97] the Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, and entered into force Jan. 12, 1951

[98] See Para. 4 of the Rome Statute of the International Criminal Court, available at http://untreaty.un.org/ ilc/texts/instruments/English (last visited 21 December, 2013)

[99] M.C. Bassiouni, and Wise, E., Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law, Dordrecht, Martinus Nijhoff Publishers, 1995 at 73,

prohibitions, because they follows from the common interest which all States have in the suppression of international offences, and is a duty owing to the international community as a whole.[100]

Traditionally, customary international law results from a general and consistent practice of states, encompassing States' material conduct and declarations followed by them from a sense of legal obligation.[101] Thus, to establish the existence of a rule of customary international law there has to be widespread state practice and a belief that such practice is required as a matter of law (*opinio juris*).[102] State practice refers to a general and consistent practice, while *opinio juris* indicates that a practice is adhered by states out of a sense of legal obligation to follow that practice. *Opinio Juris* as an element of customary international law denotes a subjective obligation, a sense on behalf of a state that is bound to the law. It, as a matter of fact, derives from believes of states not their real action in this sense that the practice of a state is due to a belief which is obliged to do a particular act.[103]

2.6 Peace Agreement

Although not all the continent is beset by conflicts, where they exist, conflicts have led to devastating effects, including: deaths to innocent civilians, refugees across borders, internal displacements, loss and destruction of property, disruption of socio-economic activities as well as costs relating to their management and resolution. These effects call for peace negotiation. The negotiation of peace settlements has old diplomatic roots. Since the 1990s, peace processes ending in peace agreements have increased mainly in response to internal conflicts. However, the post cold-war 1990s could be described as the decade of the peace agreement. In that period, over half of all civil wars have terminated in peace accords; more than in the previous two centuries put together.[104] The

[100] Prosecutor v. Furundžija , Case No. IT-95-17/1-T, Judgement, Trial Chamber, 10 December 1998, para. 156
[101] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(c) reporter's note 2 (1987)
[102] North Sea Continental Shelf (Federal Republic of Germany/Netherlands), ICJ Reports 1969, para. 73–74
[103] North Sea Continental Shelf (Federal Republic of Germany/Netherlands), ICJ Reports 1969, para. 73–74
[104] Human Rights Watch, (1996), Return to Violence: Refugees, Civil Patrollers and Impunity. New York: Human Rights Watch.

period was characterized by most of non-international character conflicts, internal conflicts, and tyrannical regime victimization. Most of the war-torn countries at this era preferred peace agreement to end the conflict more than prosecution of perpetrators of mass atrocities and human rights violation. Thus, the pursuit of peace is the goal of most political leaders who seek to end conflicts or facilitate transitions to non-tyrannical regimes. However, the ugly reality is that in order to obtain peace, negotiations must be held with the very leaders who frequently are the ones who committed, ordered, or allowed terrible crimes to be committed. [105]

Although there is no unique definition of the word peace, but different scholars attempt to define the same. The word peace is freely used in the context of ending conflicts or ensuring transition to non-tyrannical regimes but without being defined or, more particularly, without any identification of what the peace goal is or how long the purported peace is designed to last.[106] There is therefore a wide range to what peace can mean. In the political discourse of ending conflicts it ranges from the cessation or absence of hostilities to popular reconciliation and forgiveness between social groups previously in conflict with one another. It also includes the removal of a tyrannical regime or leader, and the effectuation of a regime change.[107] Other defined it to mean agreements reached in violent conflicts or conflicts with potential for violence, which documents the main areas of agreement between the military and political protagonists to a conflict, and/or third party international actors.[108] These post-conflict agreements are include peace agreements such as the Lomé Accord 1999 (Sierra Leone), the Comprehensive Peace Agreement 2005 (Sudan) and, Ugandan President Yoweri Museveni's offer of amnesty for peace to rebel leader Joseph Kony. These post-conflict agreements are ceded by war-weary parties and often endorsed by an international community keen for peace.

However, the processes of attaining peace vary in accordance with the type of conflict, its participants, the level of victimization, the manner in which the victimization occurred,

[105] Luc Huyse, Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past, 20 L. & S OC. I NQUIRY 1, 51, 77-78 (1995)

[106] "Forgiveness, Forgetfulness, or Intentional Overlooking," THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 67 (Lesley Brown ed. 1993).

[107] Ibid

[108] See Negotiating Justice?, (2006), Human Rights and Peace Agreements , International Council on Human Rights Policy, Versoix, Switzerland, at pg. 19

other destructive conduct by opposing groups,[109] and popular perceptions of what occurred, as well as the future expectations of popular reconciliation between, or co-existence among opposing groups.

2.7 Amnesties

Amnesty is a practice that has its roots in the early history of mankind. From time immemorial amnesty has been employed as a means of promoting a political settlement and advancing reconciliation in societies that have emerged from repression.[110] From time immemorial successor regimes have sought to secure peace through the pardoning of their enemies. The word amnesty derives from the Greek word *"amnestia"*, which is also the root of amnesia. The Greek root connotes oblivion and forgetfulness rather than forgiveness of a crime that has already been criminally condemned.[111] In the legal context the word amnesty refers to legal measures that have the effect of:-

(i) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or

(ii) Retroactively nullifying legal liability previously established.[112]

An amnesty for war crimes is a warrant granting release from punishment for an offence, legally expunging or exempting the crime from punishment or from even being criminal in retrospect, usually in the form of legislative acts or contained in treaties or political agreements.[113] Amnesty for war crimes can range from blanket amnesties, individual amnesties for specific leaders or amnesty for truth; granting impunity in exchange for full

[109] Priscilla B. Hayner, Fifteen Truth Commissions - 1974 to 1994: A Comparative Study , 16 HUM. R.T.S. Q. 597, 607 (1994)
[110] Thomas Hethe Clark, The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice", 4 WASH. U. GLOBAL STUD. L. R EV. 389 (2005)
[111] D.F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations Of a Prior Regime," Yale Law Journal, vol. 100, No. 8 (1991), p. 2537.
[112] Ibid
[113] Naqvi, Y. (2003) 'Amnesty for War Crimes: Defining the Limits of International Recognition' in International Review of the Red Cross 85, No. 851, p. 583

disclosure of past wrongs, as applied by South Africa's Truth and Reconciliation Commission in the 1990s.[114]

Generally, amnesties do not prevent legal liability for conduct that has not yet taken place, which would be an invitation to violate the law. The most prevailing feature of amnesties is the exemption from criminal prosecution and, possibly, civil action for those perpetrators of international crimes.[115] The exemption from criminal prosecution and, possibly, civil action achieved through amnesty is typically limited to conduct occurring during a specific period and/or involving a specified event or circumstance, such as a particular armed conflict.[116] Commonly amnesties specify a category or categories of beneficiaries, such as members of rebel forces, State agents or political exiles. Moreover, amnesties have been accorded pursuant to a peace deals/agreement or other negotiated accord, such as an agreement between the incumbent Government and opposition groups or rebel forces.[117]

2.8 Characteristics of Amnesty

Every transition is unique in terms of the nature of violations that occurred, the resources available, the balance of power between parties to the transition, the ability of their leaders, and the existence of a sense of national unity. The exemption from criminal prosecution and, possibly, civil action achieved through amnesty is typically limited to conduct occurring during a specific period and/or involving a specified event or circumstance, such as a particular armed conflict. Therefore, each amnesty should therefore be customized to address the specific needs of the transitional state.

[114] Amnesty International (AI) (2001) 'Renewed Commitment Needed to End Impunity' in AI-index : AFR 51/007/2001, available at <http://www.hri.ca/doccentre/docs/sierraleone_24sept01.shtml>,accessed on 25 Feb. 2014

[115] Naqvi, op cit no. 143

[116] See a 1978 Chilean amnesty applied to; "all individuals who performed illegal acts… during the state of siege in force from 11 September 1973 to 10 March 1978, provided they are not currently subject to legal proceedings or have already been sentenced." Decree Law No. 2.191, art. 1 (18 April 1978)

[117] See Article IX of the Lomé Peace Agreement of 7 July 1999 between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone.

2.8.1 Conditional Amnesties

The characteristics of amnesties can be shaped further by attaching conditions to the grant of amnesty.[118] These conditions, which can aim *inter alia* to disarm combatants, to reveal the truth about events and the suffering of victims, or to purify a state by removing individuals who are responsible for human rights violations, can, if properly applied, serve to make the amnesty more acceptable within the territorial state and internationally by seeking to fulfill the victims' rights to truth and reparations, whilst working to reestablish peace and stability.[119]

2.8.2 Unconditional Amnesty/ Blanket Amnesty

Although frequent, the phrase "blanket amnesties" is rarely defined and does not appear to be used consistently. Blanket amnesties exempt broad categories of serious human rights offenders from prosecution and/or civil liability without the beneficiaries' having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis.[120] The South African amnesty process was unique in that it provided not for blanket amnesty but for a conditional amnesty, requiring that offences and delicts related to gross human rights violations be publicly disclosed before amnesty could be granted.[121]

2.8.3 Amnesties that targeting a Specific Groups and Crimes

This customizing is commonly done by designing amnesties to target specific groups or levels of offenders, who can be identified by their organizational membership and their position within the organizational hierarchy.[122] Therefore, amnesties commonly specify a category or categories of beneficiaries, such as members of rebel forces, State agents or political exiles. Such targeting is significant for any analysis of the legality of amnesty

[118] Lawrence Weschler, A Miracle, A Universe: Settling Accounts with Torturers (University of Chicago Press, Chicago, Ill. 1998)
[119] Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale L. J. 2537
[120] Louise Mallinder, Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide (Oxford, Hart Publishing, 2008), p. 30.
[121] Truth and Reconciliation Commission of South Africa, Report of the Amnesty Committee, vol. 6, sect. 1, chap. 5, para. 1
[122] Kristin Henrard, 'The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law' (1999) 8

under international and domestic law. Understandably, the criminality of similar actions may depend on the status of the perpetrator, with the actions of non-state actors more frequently being criminalized under domestic law.[123] Similarly, amnesties can be targeted to certain groups of offenders by granting immunity to specific categories of crimes. Thus, amnesties often and increasingly specify particular crimes or circumstances for which criminal prosecution and/or civil actions are barred.

2.8.4 Amnesty that do not Conflict with International Law

Less contentiously, amnesty laws can also be introduced that do not conflict with international law, where their scope extends only to less serious or purely political crimes.

2.9 Conclusion

The choice of criminal prosecution for gross abuses of human rights and as a means to curb impunity is mostly considered and advocated by the majority human rights advocates. Prosecutions form one of the central elements in international criminal justice strategy that is aimed at moving a society away from a culture of impunity and a legacy of human rights abuse. Preferably, prosecutions for human rights violations and international crimes should be carried out within the local or domestic justice systems. For a society recovering from a legacy of human rights abuses perpetrated by an authoritarian regime and its opponents, or combatants in an internal conflict and its horrific past ignoring the trauma suffered by the members of that society is not an option. Such societies shattered by the perpetration of atrocities need to adapt or design mechanisms to confront their demons, to reckon with these past abuses. Otherwise, for nations, as for individuals, the past will haunt and infect the present and future in unpredictable ways.

On the other hand, despite the merits of prosecution, retributive punishment of the perpetrators of mass atrocities has it flaws. Retributive punishment is seen as insufficient for reestablishing a peaceful social coexistence, for it does not give primary importance to the victim's suffering and needs, nor does it allow for the adequate reincorporation of

[123] Ibid

the delinquent in the community. In contrast, in amnesty model, societies are able to heal deep wounds left by atrocities committed in the former regime through dialogue between victims and perpetrators, and especially through the concession of pardons by the former to the latter. That healing process allows for a stable and lasting peaceful social order to be attained. Ultimately, there is no single formula for dealing with a past marked by massive and systematic abuse. Each society should, indeed must, choose its own path.

CHAPTER THREE

DEALING WITH PAST ATROCITIES: AMNESTY LAWS AND PEACE AGREEMENT IN TRANSITIONAL JUSTICE

3.1 Introduction

The following chapter is subdivided into five parts. The first reviews the context of transitional justice basing on different literatures. The second part outlines the models of transitional justice which includes: prosecution, peace agreements and amnesties. This leads onto the third part, which discusses the peace agreements and amnesties models under International law. It sets out and provides an exposition of the law relied upon to support or mandate amnesties and peace agreement on ongoing conflicts and on post-conflict societies. And, the fourth part mirrors the divisions of the third but focuses on the amnesty model as a tool to transitional justice. The fifth and final subdivision concludes the chapter on amnesties as a tool to transitional justice.

3.2 Transitional Justice

Transitional justice is a contested and evolving process which emerged in the 1990s. The term "transitional justice" does not have unique definition, simple, universal meaning; but different scholars attempt to define the same. On one view, transitional justice can be defined as the "conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes".[124] In the other hand, it is defined as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[125]

In essence, the concept of transitional justice coalesces the notions of ''transition'' and ''justice''. The former aspect is commonly seen as the transition societies make towards a more legitimate form of governance and/or peace in the wake of repressive rule and/or

[124] Ruti Teitel, Transitional Justice Geneology, 16 Harvard Human Rights J., Spring 2003

[125] Abrams, J S,Priscilla Hayner, B (2002). "Documenting, Acknowledging and Publicizing the Truth" in Post-conflict Justice, edited by M C Bassiouni. Ardsley, NY Transnational Publishers.

mayhem.[126] Transitional justice mechanisms processes designed to address past human rights violations have proliferated around the world. While traditionally states used them in the context of political transitions from authoritarian rule to democracy,[127] states are increasingly relying on these mechanisms in post-civil war contexts. Most notably, transitional justice has played a key role following conflicts in Rwanda, Sierra Leone, Liberia, among dozens of other conflicts. The objective of transitional justice, through its various mechanisms, is to end the culture of impunity and establish the rule of law in a context of democratic governance.[128] Transitional justice processes also reconcile people and communities, by providing them with a sense that justice is being done and will continue to be done, as well as renew the citizens' trust in the institutions of governance and public service. Therefore, transitional justice, concerns the whole range of mechanisms or approaches applied by states or societies that seek to reform heal and transit from illegitimate and repressive rule or situations of conflict to national reconstruction and good governance.[129]

In the aftermath of conflict or tyranny regime, victims of mass atrocities are often demanding justice and not to compromise justice with peace. Hence, the notion that there cannot be peace without justice emerges forcefully in many war-torn communities. But justice can be based on both punishment and corrective action for wrongdoings or on emphasising the construction of relationships between the individuals and communities (restorative justice).[130] Punishment and corrective action for wrongdoings is based on the principle that perpetrators of mass human rights violations, or ordered others to do so, should be punished in courts of law or, at a minimum, must publicly confess and ask forgiveness. While, restorative is a process through which all victims of mass atrocities, perpetrators and by-standing communities collectively deal with the consequences.

[126] Mark Freeman,Truth Commissions and Procedural Fairness , Cambridge University Press, New York, 2006, p. 5
[127] Teitel, Ruti (2003), "Transitional Justice Genealogy," Harvard Human Rights Journal, Vol. 16, pp. 69-94.
[128] Ibid
[129] Andrews, M. "Grand National Narratives and the Project of Truth Commissions: A Comparative Analysis", in Media, Culture and Society, London, Thousand Oaks and New Delhi Publications, Vol 25: 45 – 46
[130] Ibid

Therefore, it is a systematic means of addressing wrongdoings and emphasises the healing of wounds and rebuilding of relationships. Restorative justice does not focus on punishment for crimes, but on repairing the damage done and offering restitution. The main objectives of Transitional Justice (TJ) are; addressing, and attempting to heal, divisions in society that arise as a result of human rights violations, bringing closure and healing the wounds of individuals and society, particularly through "truth telling",[131] providing justice to victims and accountability for perpetrators, creating an accurate historical record for society, restoring the rule of law, reforming institutions to promote democratization and human rights, ensuring that human rights violations are not repeated and promoting co-existence and sustainable peace.[132]

3.3 Models of Transitional Justice

Generally, transformation of a society can be either from repressive rule to the democratic order or from armed conflict to peace. And, this led to a question of how to transit or how to deal with the past atrocities during transition. Understandably, there is strong debate among scholars and divergence of opinion comes to exist on the most effective ways of achieving justice, peace and reconciliation.[133] Others suggesting a dichotomy between judicial approaches (what some authors call retributive justice) and non- judicial approaches (what some authors call reconciliatory justice or restorative justice).[134] On the other hand, others advocate the combination of the two mechanisms by reconstructing the truth, reconciling the parties and prosecuting those responsible for committing massive breaches of human rights.

However, most prominent jurists[135] and different reports and recommendations[136] suggest Truth commissions, Criminal prosecutions, Memorialization efforts, Reparations

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[131] Anderlini, Conaway and Kays, n.d Transitioanl Justice and reconciliation Available at http://www.huntalternatives.org/download/49_transitional_justice.pdf, (Accessed on 3rd April, 2014)

[132] International Centre for Transitional Justice: What is Transitional Justice? Conditions of Service, Internet WWW page at URL: http://www.ictj.org/en/ Accessed 3/04/14

[133] Yolanda Gamarra Chopo, Peace with Justice: the Role of Prosecution in Peace Making and Reconciliation, a paper, (2007), p.2.

[134] Zachary Kaufman, The Future of Transitional Justice, Stair 1, No.1, (2005), p.66.

[135] See McEvoy and Mc Gregor, eds., (2008), Transitional Justice from Below: Grassroots activism and the struggle for change, Hart Publishing, USA;

programs and Security system reforms as approaches that have generally been adopted by post conflict governments that have become the basic approaches to Transitional Justices but they acknowledge that although these initiatives have been widely affiliated to TJ, yet, they are not exclusive. Traditionally, conceptions of Justice tend to be grounded in models that are either retributive or restorative.[137] Understandably, TJ have centered on the "need for justice 'to be seen to be done' in order to promote peace and reconciliation. Thus, implying, a need for domestic populations to feel that the injustices that they have suffered have been acknowledged and that a break with abusive and unaccountable governance has occurred.[138] Although, various transitional societies have attempted one or both of these approaches to discover the truth about the past human rights wrongs, to attain some form of accountability, and thereby to create stable future.[139]

3.3.1 Retributive Justice Model

In *Velasquez Rodriguez vs. Honduras,*[140] the Inter-American Court of Human Rights came to the finding that "all states have four fundamental obligations in the area of Human Rights. That is; to take reasonable steps to prevent Human rights violations, to conduct a serious investigation of violations when they occur, to impose suitable sanctions on those responsible for the violations and to ensure reparation for the victims of the violations." The finding of the Inter-American Court of Human Rights is cemented by the Rome Statute which provides *inter alia* that:

> "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, determined to put an end to

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[136] International Center for Transitional Justice & the Human Rights Center, (2005) Forgotten Voices: A Population-Base d Survey on Attitudes about Peace and Justice in Northern Uganda, University of California, Berkeley.
[137] Harvey, B., (2006), Breaking Eggs / Re-Building Societies: Traditional Justice as a Tool for Transitional Justice in northern Uganda.
[138] Ibid
[139] Kobina Daniel, Amnesty as a Tool of Transitiona l Justice: the South African Truth and Reconciliation Commission in Profile, Dissertation, Law Faculty of Pretoria University, South Africa, (2001) p.1
[140] Ibid

impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[141]

Transition to democratic order is usually linked with prosecution and punishment of the old regimes. It is probably the most common type of transitional justice used in post conflict societies. Retributive justice on one hand is a theory of justice that emphasizes punishing offenders for what they have done.[142] It is a theory of justice that considers that punishment, if proportionate, is a morally acceptable response to crime, with an eye to the satisfaction and psychological benefits it can bestow to the aggrieved party, its intimates and society.[143] Retributive justice is punitive; it concentrates its efforts in punishing past crimes and sees dealing with the past and reconciliation as passing through the reinstatement of the rule of law and the moral order that were unbalanced by those crimes.[144] The direct aim of retributive justice is to concentrate on holding individual perpetrators, making them accountable for their actions, and redress their wrongdoing by ascribing to them a punishment commensurate to the crime committed.[145] Nevertheless, important indirect positive impacts of retributive justice are also crucial and conducive to long-term societal benefits. The use of judicial prosecutions is ranging from entirely domestic prosecution by national courts to international intervention through hybrid courts, ad hoc tribunals and permanent court. Firstly, judicial proceedings may be held before domestic or international courts, which, according to their mandate, prosecute perpetrators of war crimes, crimes against humanity, genocide and/or human rights violations. Recently, internationalized tribunals, as in the aftermath of conflicts in Sierra - Leone and Rwanda, have also been established to punish the perpetrators of certain crimes.[146]

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[141] Rome Statute of the International Criminal Court, July 17, 1998, pmbl., 2187 U.N.T.S. 90, U.N. Doc. A/CONF. 183/9 (1998)
[142] Cahill, Michael 2007, Retributive Justice in the real world. Washington Law review, Volume 85, 4
[143] Found at http://en.wikipedia.org/wiki/Retributive_justice, (Accessed on 1st April 2014)
[144] Raymond,
Greg 2005. "Retributive Justice in Statecraft: International Punishment in the Context of the Emerging Society of States" and Harvey, 2006
[145] Barton, Charles: "Empowerment and Retribution in Criminal and Restorative Justice", Journal of Professional Ethics, vol. 7, nº. 3&4 (1999), pp. 111 – 135
[146] TEITEL, R., Transitional Justice , Oxford, Oxford University Press Inc., 2000, at pp. 27 -211

Proponents for Retributive Justice argue that punishment is crucial to make perpetrators accountable for their past actions; to deter future crime; to counter a culture of impunity; and create an environment in which perpetrators and victims can realistically be expected to live next to one another.[147] Prosecution, they argue, through the operation of retributive justice post-conflict societies get educated in the rule of law and judicial procedures, which is a prerequisite for the good functioning of a democratic state. In addition, for them, failure to prosecute such crimes and that non-prosecution of gross human rights violations of prior regimes constitutes a subjugation of justice to political compromise.[148] And hence failure to prosecute and punish offenders of human rights abuses in times of transition is detrimental to the rule of law and reconciliation at the interpersonal level and to the society at large in its quest for future accountable democratic order.[149]

Hence, in line of their argument, prosecution helps legitimate the new government and demonstrates its commitment to address the past and to respect human rights and the publicity that war crimes trials acquire assists in rendering widely known the abuses of human rights and their public prosecution enhances the legitimacy and the prospects of establishment of the rule of law.[150] Therefore, states should include criminal investigation and prosecution as a means to provide justice for the victims and their survivors.

3.3.2 Restorative Justice Model

Unlike a classical, retributive notion of justice, transitional justice seeks a holistic sense of justice for fledgling, transitional societies. The statement is cemented by the Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict societies which states that:

> "The international community must see transitional justice in a way that extends well beyond courts and tribunals. The

[147] Cahill, Michael 2007, Retributive Justice in the real world. Washington Law review, Volume 85, 4
[148] Kobina Daniel, Amnesty as a Tool of Transitional Justice: the South African Truth and Reconciliation Commission in Profile, Dissertation, Law Faculty of Pretoria University, South Africa, (2001) p. 1
[149] Ibid
[150] Yacoubian, George: "Sanctioning Alternatives in International Criminal Law: Recommendations for the International Criminal Tribunals for Rwanda and Yugoslavia" World Affairs, vol. 161 (1998), p. 51

> challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law."[151]

It is also supported by the statement from Tutu stating as follows:

> "Western-style Justice does not fit with traditional African jurisprudence. It is too impersonal. The African view of Justice is aimed at the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence."[152]

Restorative justice is proposed as a concept to cover the dynamic and holistic nature of transitional justice which addresses the past with a view to building peaceful relationships in the future, and which incorporates psychosocial, socioeconomic and political as well as legal aspects of justice. Restorative justice claims to restore communal identities and relations broken by the conflict; it claims that because of this objective it is more effective than the short-term gains of punitive measures.[153] Restorative Justice is a community-based approach to dealing with crime, the effects of crime, and the prevention of crime. Most people who move through the current system of criminal justice do not find it a healing or satisfying experience. A Restorative Justice process operates from a belief that the path to justice lies in problem solving and healing rather

[151] The Rule of Law and Transitional Justice in Conflict and Post - Conflict Societies, Report of the Secretary- General, UN Doc. S/2004/616, 23 August 2004

[152] Huyse, L. & Salter, M., (2008), Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences. Stockholm: International Institute for Democracy and Electoral Assistance, pp.135-142

[153] Cohen, Stanley: "State crimes of previous regimes: knowledge, accountability and the policing of the past", Law and social Inquiry, vol. 20, no. 1 (1995), pp. 7-50

than punitive isolation. Some of these restorative models of justice include but are not limited to the establishment of Truth and Reconciliation Commissions, adoption of traditional justice mechanisms et cetera.[154]

Proponents for Restorative justice argue that it collects all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.[155] In addition, restorative justice is about correcting imbalances, restoring broken relationships with healing, harmony and reconciliation. Such justice focuses on the experience of victims; hence the importance of reparation. It is the model that gathers victims, survivors, perpetrators, and the community if it has been affected by the harm. The restorative justice has a clear objective of reconciling people and to repair the social fabric in the case of a community. For individuals, its aim is to repair the relationships between them through dialogue. It focuses on the needs of the victims and survivors.[156] Also, it involves processes that include victim-offender mediation, conferencing and circles; restorative outcomes include apology, amends to the victim and amends to the community. Restorative justice on the one hand, is a theory of justice that emphasizes healing, restoration and reparation. Restorative justice views crime as a violation of more than the law.[157]

3.4 The Nexus between Peace Accords and Amnesties

The post cold-war 1990s could be described as the decade of the peace agreement. In that period, over half of all civil wars have terminated in peace accords; more than in the previous two centuries put together.[158] Most of the war-torn countries at this era preferred peace agreement to end the conflict more than prosecution of perpetrators of mass

[154] http://www.cscsb.org/restorative_justice/what_is_restorative_justice.html, (Accessed on 1st April 2014)
[155] Marshall, T. F., (1996), The evolution of restorative justice in Britain. European Journal on Criminal Policy and Research 4(4): 21-43. Retrieved April 11, 2014, from http://www.restorativejustice.org/articlesdb/articles/1228
[156] Huyse, L. & Salter, M., (2008), Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences. Stockholm: International Institute for Democracy and Electoral Assistance, pp. 135-142
[157] Mclaughlin, et. al. (eds) 2003 Restorative Justice: Critical issues, Sage Publications, Beck and Britto, 2006 "Using restorative Justice in Capital cases"
[158] Human Rights Watch, (1996), Return to Violence: Refugees, Civil Patrollers and Impunity. New York: Human Rights Watch.

atrocities and human rights violation. Thought not the solely explanation of the meaning for the term peace; but is taken to mean and include agreements reached in violent conflicts or conflicts with potential for violence, which documents the main areas of agreement between the military and political protagonists to a conflict, and/or third party international actors.[159] There are a number of peace agreements entered for the sole purpose of ending ongoing conflict to mention the few includes; on 7 July 1999, in Lomé, Togo, the Government of Sierra Leone and the armed opposition Revolutionary United Front (RUF) signed an agreement[160] to end the armed conflict that began in 1991; the Accra Peace Agreement, Liberia, 2003, signed between the government of Liberia, Liberians United for Reconciliation and Democracy (LURD), Movement for Democracy in Liberia (MODEL), political parties and civil society representatives; and of the Comprehensive Peace Agreement (CPA) signed in Nairobi on 9 January 2005 which was hailed by leaders from around the world as the dawn of a new era for Sudan. Most of these accords contain therein provision for amnesties, reconciliation and establishment of truth commissions. Consequently, the vast majority of amnesties emanating from peace agreements are the result of internal conflicts, although representatives of the international community mediated many of the agreements. Peace agreements can grant amnesty, either in response to demands from insurgents who require safeguards from prosecution before surrendering their weapons, or when the leaders of both state and non-state actors wish to immunize themselves from prosecution.[161]

Packaged into post-conflict peace agreements, amnesties are ceded by war-weary parties and often endorsed by an international community keen for peace. Amnesties have also been accorded pursuant to a peace agreement or other negotiated accord, such as an agreement between the incumbent Government and opposition groups or rebel forces. Provisions of this kind have, however, often been implemented through national legislation or executive action. For example, the Lomé Peace Agreement of 7 July 1999 between the Government of Sierra Leone and the Revolutionary United Front of Sierra

[159] See Negotiating Justice?, (2006), Human Rights and Peace Agreements , International Council on Human Rights Policy, Versoix, Switzerland, at pg. 19

[160] Peace agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, UN Doc. S/1977, 12 July 1999,

[161] Lawrence Weschler, A Miracle, A Universe: Settling Accounts with Torturers (University of Chicago Press, Chicago, Ill. 1998)

Leone included a provision pursuant to which the Government undertook to "grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives" and to "ensure that no official or judicial action is taken against any member" of specified forces.[162] The Comprehensive Peace Agreement 2005 (Sudan) and, currently, Ugandan President Yoweri Museveni's offer of amnesty for peace to rebel leader Joseph Kony, highlights the presence of amnesty in such instruments.[163] Amnesties contained in peace treaties resulting from wars of decolonization include the 1962 Evian Accord between France and Algeria; the 1974 Alvor agreement between Angola and Portugal; and the 1979 Lancaster House Agreement that provided independence for Zimbabwe.

Generally peace agreements offer a unique window to resolve past issues and lock in a framework for human rights, this opportunity to be enjoyed is frequently accompanied by amnesty provisions in the said accord; or peace on condition of impunity to be provided therein.

3.5 The Legality of Amnesties Packaged into Peace Accords

Generally speaking there is no customary or treaty rule prohibiting amnesties.[164] However, a number of jurists and practitioners promoting transitional justice around the world have argued that amnesty is incompatible with the international accountability norm. They contend that legal, moral, and political obligations compel governments emerging from authoritarian rule to hold perpetrators of human rights violence accountable.[165] Beginning with the post-World War II Nuremberg Trials and continuing to the creation of the International Criminal Court, the international human rights system has attempted to replace amnesty with justice for past human rights violations. Treaties

[162] See Art. IX of the Lomé Peace Agreement, 1999
[163] Naqvi, Y. (2003) 'Amnesty for War Crimes: Defining the Limits of International Recognition' in International Review of the Red Cross 85, No. 851, p. 58
[164] W. Burke-White, "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation" (2001)42 Harvard International Law Journal 467
[165] Orentlicher, Diane F., (1991), "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime." Yale Law Journal 100, no. 8

and legal theory consider prosecutions the only effective remedy for victims of past human rights violations.[166]

However, not all scholarship concurs with these assumptions regarding prosecutorial duty or practice. Recently, studies suggest that international law does not compel states to prosecute, providing legitimacy for some types of amnesties.[167]Others have argued that a moral duty to stop the killing may trump the desire for trials. They doubt the deterrent effect of trials, contending that trials can actually lead to more violence and instability.[168]Quoting the words from international instrument, it indicates some level of amnesty would seem to be allowed by international law and even required. Article 6(5) of Protocol II of the Geneva Conventions provides; at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible 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."[169] Generally, the Rome Statute is silent regarding amnesty or other alternative justice mechanisms such as truth commissions.[170] Nonetheless, the Court or the Office of the Prosecutor (OTP) could interpret the statute to implicitly allow deferral to Amnesties or other reconciliatory measures. There is significant dispute over the interpretation of relevant provisions of the statute, and the ICC has yet to render any decisions on this issue. The text of the Statute beyond the preamble is even more nuanced. Several provisions conceivably provide the scope for an appropriate amnesty programme to exempt those given amnesties from criminal prosecution under the Rome Statute.[171]

[166] Roht-Arriaza, Naomi, (1990), "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law." California Law Review 78, no. 2
[167] Pensky, Max, (2008), "Amnesty on Trial: Impunity, Accountability, and the Norms of International Law." Ethics & Global Politics 1, no. 1-2
[168] Osiel, Mark J., (2000), "Why Prosecute? Critics of Punishment for Mass Atrocity:" Human Rights Quarterly 22, no.1
[169] Additional Protocol II to the 1949 Geneva Conventions
[170] John Dugard, Possible Conflicts of Jurisdiction with Truth Commissions, in 1 T HE R OME STATUTE OF THE INTERNATIONAL C RIMINAL C OURT : A C OMMENTARY 693, 700
[171]Mahnoush H. Arsanjani, The International Criminal Court and National Amnesty Laws, 93 AM. SOC'Y INT'L L. PROC. 65, 65 (1999)

3.5.1 The Conundrum posed by text of the Preamble of the Rome Statute

The preamble of the Rome Statute provides as follows:-

> "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[172]

The above preamble of the Rome Statute speaks eloquently of an end to impunity. Thus, one interpretation of the preamble is the creation of a new order of international criminal responsibility. Such an order would see the international legal order fill the gaps left by imperfect domestic orders, thus assuring an end to impunity for those who commit gross abuses of human rights.[173] This aspirational text, however, is unclear about whether this end to impunity is because of the nature of the crimes, implicitly prohibiting exceptions, or for the more consequentialist purpose of discouraging such crimes. The latter potentially allows for some exceptions where impunity might be permitted as the lesser of evils.[174]

3.5.2 Prosecutorial Discretionary

Black's Law Dictionary holds that ''when applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others''.[175] The concept serves, among other things, to secure the Prosecutor's independence by removing extraneous factors in

[172] Rome Statute of the International Criminal Court, July 17, 1998, pmbl., 2187 U.N.T.S. 90, U.N. Doc. A/CONF. 183/9 (1998)
[173] WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 93-95 2d ed. 2004)
[174] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 18-20 (2003)
[175] Henry Campbell Black, Black's Law Dictionary: Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 6th edn, West Publishing Co., St. Paul, Minn., 1990, p. 466.

the prosecutorial decision-making process.[176] This may become especially important in international criminal proceedings as the international Prosecutor exerts his or her discretionary powers in a politically charged judicial arena.

According to the 2007 Policy Paper interpreting Article 53 of the Rome Statute the Prosecutor may decline to investigate or prosecute an accused when doing so is not "in the interests of justice."[177] The announced policy precludes any consideration under Article 53 of the potential impact of prosecutorial decisions on peace-making efforts. Instead, the Policy Paper indicates that the Prosecutor should be exclusively concerned with the pursuit of justice, narrowly conceived as the enforcement of law.[178] The Policy Paper then goes on to suggest that under the Rome Statute generally, the possible impact a prosecution may have upon ongoing peace processes is irrelevant, and that broader issues of morality, politics, and peace-making are not to be taken into account when deciding whether to initiate an investigation or begin a prosecution. The reason being that the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.[179]

Many scholars and commentators urge that, prosecutorial discretion is the most plausible avenue to accommodate amnesty for past atrocities.[180] Under Article 53, the OTP can exercise discretion at the investigative or prosecution stage. First, it can decline to initiate an investigation in the interests of justice; even if there is a reasonable basis on the law and facts, and the case is admissible.[181] Second, it can decline to prosecute in the interests of justice after investigating a situation. Article 53 of the Rome Statute explicitly provides that the Prosecutor may decline to investigate or prosecute crimes squarely within the ICC's jurisdiction because he believes pursuing the crime does not serve

[176] Matthew Brubacher, ‘‘Prosecutorial discretion within the International Criminal Court’’, Journal of International Criminal Justice , Vol. 2 (2004), pp. 75–7
[177] Int'l Criminal Court [ICC], Policy Paper on the Interests of Justice, at 1 (Sept. 2007), available at http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPI
[178] Int'l Criminal Court [ICC], Policy Paper on the Interests of Justice, at 1 (Sept. 2007), available at http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPI
[179] Ibid
[180] Alexander K.A. Greenawalt, Justice without Politics? Prosecutorial Discretion and the International Criminal Court, 39 N.Y.U. J. INT' L L. & POL. 583, 660 (2007
[181] Rome Statute, art. 53(1)(c).

"the interests of justice." The Prosecutor may decline to investigate a crime if, "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice".[182]

The language with respect to a decision not to prosecute is more open ended: in determining the "interests of justice" the Prosecutor may "take into account all the circumstances," including not only "the gravity of the crime and the interests of victims," but also "the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.[183] The words of Article 53 are hardly self-defining. On the one hand, there is no reference to peacemaking or reconciliation. On the other hand, considerations of peacemaking might be included in the "interests" of justice, or "all the circumstances." Article 53 might be read broadly enough to permit the Prosecutor to defer an investigation or prosecution that might obstruct peace and reconciliation efforts and lead to "many more civilian deaths.[184] If a prosecution is likely to stall settlement efforts and thereby result in many more future civilian deaths, then justice' may not be served in this larger sense, even if it is served by reference to a narrow concept of criminal justice focusing only on the gravity of the particular past crime being charged.

3.5.3 Security Council Deferral

Generally, a state that wishes to gain international recognition for a peace deal that replaces ICC prosecution with peace accords and amnesties may seek an Article 16 deferral. Under the ICC statute, the Security Council can request that the Court refrain from, or suspend, an investigation or prosecution for twelve months.[185] Thus, the request may be renewed by the Council under the same conditions of threats to peace and security. The inclusion of Article 16 in the Rome Statute of the International Court,[186] which gives the Security Council the power to defer proceedings before the Court for

[182] Rome Statute article 53(1)(c)
[183] Rome Statute article 53(2)
[184] Brian D. Lepard, How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles, 43 J. MARSHALL L. REV. 553, 566 (2009-2010)
[185] Rome Statute, art. 16.
[186] Art. 16 of the Rome Statute

twelve months by passing a resolution (which may be renewed) under Chapter VII of the UN Charter, is a clear acknowledgement by States that unlimited prosecution for international crimes may amount to a threat to peace and security.[187]

This provision signals that peace and justice do not always coincide and that where they appear to be in conflict, the objective of securing or maintaining peace will prevail.[188] However, there would have to be evidence that going ahead with prosecution would undermine the peace agreement and ultimately threaten international peace and security. That the threat to the peace and security would not provide a UN Security Council with justification to avoid its referral to ICC, unless it could show that prosecution would entail a grave and imminent peril for the State and that the State's sole means to safeguard an essential interest is by UN Security Council deferral and not to prosecute. The Security Council's recent renewal[189] of its resolution requesting the ICC to refrain from exercising jurisdiction over nationals of non-party States gives some insight into the scope of the Security Council's power of deferral under Article 16. The wide interpretation by the Security Council of its obligation to identify a "threat to the peace"[190] and its rather liberal and repeated use of Article 16 indicate that political pressure may well compel the ICC to refrain from exercising jurisdiction over war crimes cases. Since the ICC assumes jurisdiction under the complementarity principle only when States are unable or unwilling to prosecute perpetrators which could arguably include situations where States have given amnesties for war crimes this type of Security Council action under Article 16 would in such circumstances give effect to amnesties for war crimes for as long as the deferral lasted.

However, the drafting history of Article 16 suggests that the provision was not meant to be applied prospectively to groups of people, nor to provide for permanent deferral.

[187] J. Gavron, "Amnesties in the light of developments in international law and the establish-ment of the International Criminal Court", International and Comparative Law Quarterly , Vol. 51, Pt. 1, Jan. 2002, p. 110

[188] L. Boisson de Chazournes and V. Gowlland-Debbas (eds), The International Legal System in Quest of Equity and Universality , Liber-Americorum Georges Abi-Saab, Martinus Nijhoff Publishers, Kluwer Law International, 2001, pp. 629-650.

[189] Security Council Res. 1487 (2003), preambular para. 7

[190] Security Council Res. 1487 (2003), preambular para. 7.

Rather, it was intended to be applied on a case-by-by basis to specific situations where proceedings before the Court might hamper efforts to restore or maintain peace.[191]

3.5.4 Article 17 of the Rome Statute

The relationship between national legal orders and the ICC can be seen as mutually exclusive and somewhat antagonistic. Barring the scenario of a sham trial the exercise of state jurisdiction will preclude the ICC from acting.[192] The two systems function in opposition and to some extent hostility with respect to each other.

Under the Rome Statute states are given the first opportunity to prosecute, and a case will be inadmissible before the ICC if a state with jurisdiction is or has investigated and prosecuted the matter[193] or the sates conduct an investigation and choose to halt of amnesty holds that the provision allows amnesty to be recognized indirectly. This is argued that Article 17(1)(b) of the Rome Statute contemplates recognition of amnesty. It provides that ICC will declare that a case is inadmissible where:-

> "The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute".

However, there might be an issue as to the definition of the following term as stipulated in the article; the issue as to the meaning of investigation, prosecution and decision not to prosecute. In regard to investigation, some scholars suggest that it is clear that the Statute's provisions on complementarity are intended to refer to criminal investigations. A truth commission and the amnesties it provides may not meet the test of a criminal

[191] K. Ambos, "International criminal law has lost its innocence", German Law Journal, Vol. 3, No. 10, 1 October 2002

[192] William Schabas, Introduction to the International Criminal Court, (Cambridge: Cambridge University Press, 2001) at vii

[193] Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes', 59 Law and Contemporary Problems (1996) 41

investigation.[194] On the other hand, suggest that the Court could determine that the term 'investigation' also comprises a diligent, methodical effort to gather the evidence and ascertain the facts relating to the conduct in question, in order to make an objective determination in accordance with pertinent criteria (example sufficiency of evidence, seriousness of the conduct, role of the perpetrator). These criteria are consistent with typical criminal investigations but might also be satisfied by other forms of investigation, such as those carried out in fulfillment of the 'right to know'.[195]

Secondly, it is the issue regarding the decision not to prosecute. It is suggested here that the term 'decision' can only have meaning where there is more than one option available to the purported decision-maker. Thus, there must at least be a possibility of prosecution. Where a body cannot choose prosecution because prosecution is already barred by legislation, or where prosecution will escalate gross human violation occasioning threat to the peace and breach of peace; it would be disingenuous to refer to a 'decision' not to prosecute. And, lastly, a decision resulted from an unwillingness or inability to carry out a genuine prosecution.

The Court has on several occasions stated that the determination of admissibility must rely on a two-fold test whereby any assessment of unwillingness or inability can only take place if it has first been established that there is actual investigatory or prosecutorial activity in the state concerned.[196] This view was most clearly stated by the Appeals Chamber in *Prosecutor vs. Katanga*:[197]

> "…in considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute , the initial questions

[194] R. S. Lee (ed.), The International Criminal Court: The Making of the Rome Statute (1999), at 77
[195] Cassel, 'Lessons from the Americas: Guidelines for the International Response to Amnesties for Atrocities', 59 Law and Contemporary Problems (1996) 197
[196] Prosecutor v Chui (Decision on the Evidence and Information provided by the Prosecution for the Issuance of a Warrant of Arrest) (ICC, Pre-Trial Chamber I, Case No. ICC-01/04-01/07-262, 6 July 2007) [21] ('Chui Arrest Warrant ')
[197] Prosecutor v Katanga (Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) (ICC, Appeals Chamber, Case No ICC-01/04-01/07-1497, 25 September 2009)

> to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1) (d) of the Statute."[198]

However, the provision also allows the State Party choosing to prosecute domestically certain flexibility in affording its nationals specific constitutional guarantees, which may not be included in the Statute, most notably with regards to criminal procedure and sentences.[199] Understandably, the Statute does not provide for trial by jury, which is explicitly enshrined in many national constitutions. The State choosing to prosecute and individual within the domestic legal order would therefore theoretically be able to grant that individual such a trial whereas ICC would not.[200]

3.6 Amnesties and Peace Accords as Tools of Transitional Justice

To end an ongoing armed conflict or to prevent reoccurrence of violence in a post-conflict society, painful choices must be made in a context of fear and uncertainty.[201]

[198] Prosecutor v Katanga (Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) (ICC, Appeals Chamber, Case No ICC-01/04-01/07-1497, 25 September 2009)
[199] Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", (1999) 10 E.J.I.L. 159
[200] Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", (1999) 10 E.J.I.L. 159
[201] John Dugard, Possible Conflicts of Jurisdiction with Truth Commissions, in 1 T HE R OME

This can be clearly seen when States are going through periods of transition, often from war to peace, and of extreme political upheaval. Understandably, this can be evidenced by for the handing over of power from military regimes to democratic civilian governments. During such turbulent and politically sensitive times, international law needs to be able to reconcile the competing needs of the territorial State to move on from the past and not to upset the delicate political process towards peace or democratic consolidation and those of the international community to prosecute those accused of international crimes.[202]

> "Self-government would have a thin meaning if it did not include the right of political communities to debate and determine the code of lawful behavior within their territorial jurisdiction, as well as the consequences that may attach to breaches […] Whether a country tries to bury past depredations in a grave of silence and denial, examine and condemn them through the work of an officially sanctioned truth commission, purge from public office those determined to have been culpable for their roles in systemic repression, provide reparations to victims or punish the perpetrators, the path it chooses is constitutive of its political community."[203]

Understandably, the manner in which a successor government chooses to deal with those who have committed gross violations of human rights, during the tenure of a previous repressive regime is profoundly influenced by the balance of power between the old and new orders at the time of transition.[204] Decisions by elites of new democratic governments on whether to offer some form of amnesty for perpetrators of heinous

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[202] D. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", The Yale Law Journal , Vol. 100, No. 8. 1991, p. 2537

[203] Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," Yale Law Journal, vol. 100, No. 8 (1991), p. 2537

[204] Gitta Sereny, Albert Speer: His Battle with Truth (New York: Knopf, 1995)

crimes are generally framed in terms of a tough choice between peace and security; that is, between retributive justice for former perpetrators and the securing of an acceptable degree of political stability.[205]

Amnesty laws are political tools used since ancient times by states wishing to quell dissent, introduce reforms, or achieve peaceful relationships with their enemies. Thus, being merciful to former enemies whilst attempting to address the root causes of the conflict could reduce the justification for further violence, promote the development of the conditions for reconciliation and strengthen the establishment of human rights institutions.[206] Generally, nature and complexity of conflicts differ from states to state so their political triggers; and therefore, the objects that amnesties are designed to achieve vary including facilitating a smooth transition, promoting peace and reconciliation, encouraging exiles to return to their homeland and repairing the harm done to the victims or victims relatives.

3.6.1 Facilitating a Smooth Transition

One of the primary goals of transitional justice, at the level of national recovery, is the reconstruction of national solidarity. National solidarity certainly has strongly functionalist dimensions, and can be analyzed largely in terms of the efficiency of political institutions to integrate new members and contribute to social stability.[207] Some 420 amnesty processes have been instituted worldwide since the Second World War, 66 of them between 2001 and 2005.[208] Amnesty is necessary to end a conflict. The issue of amnesty is a key element of peace negotiations. Such processes often play a part in peace negotiations; amnesty is then the price paid for lasting peace, or at least stability. When settling a conflict through negotiations, parties will only make a deal if their own security

[205] L. Huyse, "Justice after Transitio n: On the Choices Successor Elites Make in Dealing with the Past", Law and Social Inquiry , vol. 20, no. 1 Winter 1995

[206] Dr. Louise Mallinder, "Exploring the Practice of States in Introducing Amnesties": Building a Future on Peace and Justice, International Conference, Nuremberg 25-27 June 2007

[207] D. Gairdner, Truth in Transition: the Role of Truth Commissions in Political Transition in Chile and El Salvador, Chr. Michelsen Institute Development Studies and Human Rights, 1999.

[208] Mallinder, L. (2007), 'Can Amnesties and International Justice be Reconciled?', in The International Journal of Transitional Justice , Vol. 1, No. 1, pp. 208-219.

is guaranteed.[209] It is unlikely for the former government or out-going regime and its security forces would have allowed the transition to a democratic order had its members, supporters or operatives been exposed to arrest, prosecution and imprisonment.

In South Africa, the outgoing regime, in both the National Party and the South African Defense Forces, had made it crystal clear to the ANC that a constitutional guarantee of amnesty was necessary for them to abide by any peaceful deal to transition of power. In effect they declared themselves prepared to take on the role o f democratic spoilers unless they were offered some form of immunity from prosecution.[210] Therefore, in SA without an amnesty agreement, the negotiations would collapse and the mass mobilization and politics of confrontation would return. Dullah Omar, a key ANC negotiator and current Minister of Justice, stated publicly that without an amnesty agreement there would have been no elections.[211] The ANC also concluded that hostility and opposition from the security forces would have made it impossible to hold successful elections. The only way to make the democratic election and transition of power possible was to grant amnesty to government officials and members of defence force. Consequently, the former government and its security forces were reassured that if they handed over power, they would not be automatically prosecuted.[212]

The threat of indictment and prosecution can harden rebels or leaders grip on power, seemingly with the effect of protracting human rights violations indefinitely.[213] Surprisingly, it may be possible for a rebel leader to be ready to relinquish power, but his likely fears of retribution may contribute to his ongoing desire to remain in power. However, through amnesty such fear can be removed and loosen leaders' clench on

[209] Kiza, E., Rathgeber, C. and Holger-Rohne, C. (2006), Victims of War: An Empirical Study on War Victimization and Victims' Attitudes towards Addressing Atrocities. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht, pp. 106-108

[210] Gibson, J. (2007), 'The Truth About Truth and Reconciliation in South Africa', in International Political Science Review, Vol. 26, No. 4, pp. 341-361.

[211] Dullah Omar, Informal remarks prior to speech, Justice and Impunity: Germany and South Africa Compared conference, Community Law Center (Cape Town:
October 1994).

[212] Gibson, J. (2007), 'The Truth About Truth and Reconciliation in South Africa', in International Political Science Review, Vol. 26, No. 4, pp. 341-361.

[213] Rothchild, D.S., Stedman, J.S. and Cousens, E.M. (eds.) Ending Civil Wars: The Implementation of Peace Agreements, Boulder, CO: Lynne Rienner Publishers.

power, speeding up the peace process.[214] This seems to have been the case in Benin in 1990, where, following a wave of internal political protests, the president amnestied all his political opponents in exile and convened a national conference to discuss establishing democratic rule. Their reason for doing this could perhaps be a genuine desire to transfer power peacefully from a dictatorial regime to a democratically-elected one.

3.6.2 Promotion of Peace and Reconciliation

Amnesties as a mechanism to transitional justice promote and ensure peace and reconciliation in post-conflict or ongoing conflict society. This objective particularly characterizes amnesties in conflict situations, where the amnesty is part of a wide-ranging package of reforms to address the root causes of the violence and establish representative government. It helps a war-torn society to reconstruct the communities for sustaining peace.[215]Therefore, it involves mutual acknowledgement of past suffering and the changing of destructive attitudes and behavior into constructive relationships towards sustainable peace.[216]

Mostly amnesty is and was used as part of a peace process to encourage insurgents to stop fighting. The 2003 amnesty in DRC was part of an overall peace settlement and was designed to inter alia encourage insurgent participation in the future unity government. Such amnesties can be the starting point to enable other aspects of the agreement to occur, such as demobilization, integration of combatants into the armed forces, or the transformation of insurgent groups into political parties that could perhaps participate in governments of national unity.[217] In these instances, the amnesty could be a tool for trust building between the parties and creating a climate in which the leaders can focus on the redevelopment of the country and the promotion of reconciliation. Amnesty can thus

[214] Putnam, T.L. (2002) 'Human Rights and Sustainable Peace' in Rothchild, D.S., Stedman, J.S. and Cousens, E.M. (eds.) Ending Civil Wars: The Implementation of Peace Agreements, Boulder, CO: Lynne Rienner Publishers

[215] Hayner, P. B., (2002), Unspeakable Truths: Facing the Challenge of Truth Commissions. New York: Routledge, pp.154-169

[216] Clark, N. J. 2008. The three Rs: retributive justice, restorative justice, and reconciliation, Contemporary Justice Review, Vol. 11, No 4, 331-350

[217] John J. Moore Jr., Note, 'Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador' (1991) 43 Stan. L. Rev. 733.

"mark a clear turning point between the conflict-ridden and impunity-plagued climate of the past and a new, much more peaceable social climate".[218] The failure to use amnesties, in contrast, could prolong violence and forestall peace and stability.[219]

3.6.3 Encouraging Exiles to Return Home

It is common practice to encourage refugees to return home after a conflict and this is encouraged by the international community.[220] Amnesties that are granted to exiles can benefit refugees who escaped violent conflict or dissidents who escaped tyranny and oppression. They could also cover individuals whose political or religious beliefs inspired them to become 'conscientious objectors' and to flee across borders to evade military service.[221] Finally, amnesties for exiles could also include members of insurgency groups that organize or have facilities outside the borders of their state.[222]

However, amnesties to encourage dissidents to return, if introduced by the dictatorial regime from which they fled, can represent an effort by the government to bolster its position domestically by introducing a populist policy.[223] A good example is from Art 1 of 1990 Law on General Amnesty and National Reconciliation in Nicaragua was applicable to 'all Nicaraguans, whether or not currently residing in the country, who committed crimes against the public order and the internal and extern al security of the State, and other related acts'. Followed by the 1993 Malawian amnesty enabled Malawian exiles to return home to participate in the political process, including the formation of new political parties prior to the holding of general elections; and the 1977 Ethiopian amnesty benefited government opponents who had fled into exile. Also the Lome Peace Accord of 1999 contains amnesty provision for exile.[224]

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[218] Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 Colum. Hum. Rts. L. Rev. 661, 689

[219] Cobban, Helena. (2007). Amnesty After Atrocity? Healing Nations After Genocide and War Crimes, Boulder: Paradigm Publishers.

[220] Karen Gallagher, 'No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone' (2000) 23 T. Jefferson L. Rev. 149, 163.

[221] Wilmot Godfrey James and Linda van de Vijver (eds), After the TRC: Reflections on Truth and Reconciliation (Ohio University Press, Athens, OH 2001)

[222] Chigara, Ben, Amnesty in International Law: The Legality under International Law of National Amnesty Laws (Longman, Harlow, UK 2002

[223] Charles T. and Stanley, William, 'Protecting the People: Public Security Choices after Civil Wars' (2001) 7 Global Governance 151

[224] See Article IX (1-3) of the Lome Peace Accord, 1999

3.6.4 Repairing the Harm Done

Sometimes in a transitional society amnesty introduced to repair the harm inflicted upon those who are deemed opponents of the state due to their ethnicity, or supposed religious or political views. These prisoners are often known as 'prisoners of conscience' and are generally associated with non-violent opposition to repression.[225]However, as many amnesties for political prisoners, particularly those following the collapse of an oppressive regime, aim to rehabilitate the prisoners and declare their innocence, thereby eliminating the conviction from their record.[226] Such amnesties can imply that the criminal proceedings by which the accused was sentenced were unfair and can rehabilitate those individuals who lost their jobs, pensions, property or political rights due to their political views. In this context, amnesty is a reparative instrument that can contribute positively to national reconciliation, whilst restoring the dignity and status of those who have been oppressed.[227]

3.7 Conclusion

Prosecution and punishment are important components of justice, but they are only post hoc interventions. Far from handing down clear-cut judgments about guilt or innocence regarding complex conflicts, restorative justice via amnesty and peace accord force people to think critically about the past, and in so doing, make it impossible for them to glibly dismiss the suffering of victims. Restorative model allow governments to pursue proactive strategies aimed at promoting reconciliation along ethnic, racial, linguistic or religious lines in societies in which the conflict occurred. By promoting tolerance, cooperation and integration, truth which help to bridge divisions that constantly threaten unity and peace. Courts are crucially important in combating impunity, but its not safe to confine the struggle for human rights to one set of institutions or one approach to deal with the past.

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[225] Kieran McEvoy, Kirsten McConnachie and Ruth Jamies on, 'Political Imprisonment and the "War on Terror"' in Yvonne Jewkes (ed), Handbook on Prisons (Willan Publishing, Cullompton, Devon 2007).
[226] Mallinder, L. (2007), 'Can Amnesties and International Justice be Reconciled?', in The International Journal of Transitional Justice, Vol. 1, No. 1, pp. 208-219.
[227] Mallinder, L. (2007), 'Can Amnesties and International Justice be Reconciled?', in The International Journal of Transitional Justice, Vol. 1, No. 1, pp. 208-219.

CHAPTER FOUR

AFRICAN STATES' PRACTICE IN INTRODUCING AMNESTY LAWS AND PEACE AGREEMENTS

4.1 Introduction

This chapter examines African States practice and use of amnesties packaged in peace accords. In particular, this chapter provides a brief historical perspective of internal conflicts from four different African States which includes South Africa, Sierra Leone, Uganda and lastly the Democratic Republic of Congo (DRC). To this end, the chapter will provide in details why and how amnesties packaged in peace accord were introduced by these war-torn-African states. Then, followed by the successful and downfall of such tools in dealing with heinous past crimes and violation of human rights in each particular state. The relevance of this chapter lies in the state's practice and use of amnesty packaged in peace accords as alternative means to retributive measures as a bargaining chip to long-lasting peace within the region.

4.2 African States and Amnesties packaged in Peace Accords

4.3 South Africa Case Study

South Africa, officially the Republic of South Africa, is a country situated at the southern tip of the continent of Africa. Total land borders measure 4,750 kilometers (2,952 miles); and it has 2,798 kilometers (1,739 miles) of coastline that stretches along the South Atlantic and Indian oceans.[228] On the north lies the neighbouring countries of Namibia, Botswana and Zimbabwe; to the east are Mozambique and Swaziland; and within it lies Lesotho, an enclave surrounded by South African territory.[229] South Africa is a multiethnic society encompassing a wide variety of cultures, languages, and religions. Its pluralistic makeup is reflected in the constitution's recognition of 11 official languages, which is among the highest number of any country in the world.[230] Two of these

[228] South African Maritime Safety Authority", South African Maritime Safety Authority. Retrieved 21 May 2014

[229] Guy Arnold, "Lesotho: Year in Review 1996 – Britannica Online Encyclopedia", *Encyclopædia Britannica*. Retrieved 30 October 2011

[230] "South Africa Fast Facts", SouthAfrica.info. April 2007. Retrieved 21 May 2014

languages are of European origin: English and Afrikaans, the latter originating from Dutch and serving as the first language of most white and coloured South Africans.

About 80 percent of South Africans are of black African ancestry,[231] divided among a variety of ethnic groups speaking different Bantu languages, nine of which have official status. The remaining population consists of Africa's largest communities of European, Asian, and multiracial ancestry. All ethnic and linguistic groups have political representation in the country's constitutional democracy, which comprises a parliamentary republic and nine provinces. Since the end of apartheid, South Africa's unique multicultural character has become integral to its national identity, as signified by the Rainbow Nation concept.[232]

4.3.1 The Conflict Historical Perspective

Before it became a self-governance jurisdiction, South Africa was tainted by segregation policies. In-fact these segregation policies arose from a history of settler rule and Dutch and British colonialism, which became policies of separation after South Africa gained self-governance as a dominion within the British Empire.[233] In 1948, the National Party won an election that was limited only to whites exercising a franchise. Immediately after the 1948 election, the government began removing the remaining symbols of the historic British ascendancy and began institutionalising their policies of segregation.[234] Malan the South African prime minister based his policy on a system which became known as apartheid by institutionalizing the already existing segregation policy. It represented an oppressive system of laws and regulations that kept Africans inferior to Whites. The government separated and divided the races by instituting segregated schools, buses, and work reservation.[235] This escalates the hatred of the blacks and people of colour against the white minority. The agitation of the blacks and people of colour against the white

[231] *Census 2011: Census in brief*. Pretoria: Statistics South Africa. 2012. ISBN 9780621413885. Retrieved 21 May 2014
[232] Ibid
[233] Reader's Digest, (1988) *Illustrated History of South Africa: the real story, New York: Reader's Digest Association*, pg 367.
[234] Muller, C.F.J. (ed) (1981) Five Hundred years: a history of South Africa; 3rd rev. ed. Pretoria: Academica, p. 462, 467.
[235] Ibid

minority led to the brutal suppression of black political activity, the banning of black political parties such as the African National Congress (ANC) and the imprisonment or the exiling of several black leaders.[236]

On the morning of 16 June 1976, students from numerous Sowetan schools began to protest in the streets of Soweto in response to the introduction of Afrikaans as the medium of instruction in local schools. The Soweto uprising was the result of Soweto protest against the Afrikaans Medium Decree of 1974, which forced all black schools to use Afrikaans and English in a 50–50 mix as languages of instruction.[237]An estimated 20,000 students took part in the protests. The number of people who died is usually given as 176, with estimates of up to 700. The emergence of Black Power as a mass slogan signaled a fundamental turning point in the South Africa political landscape and represented one of the focal points for black political agitation of the 1980s.[238] From a numerous of points of local opposition to apartheid grew the United Democratic Front (UDF), which in its own words had the mission of making South Africa ungovernable.[239]This policy escalated violence in the region.

Nonetheless, apartheid was dismantled in a series of negotiations from the late 1980s to 1993, culminating in the first South African democratic elections of 1994. This year, 2008, marks the 60th year since apartheid was institutionalized in South Africa.[240]

4.3.2 The Introduction of Amnesty

By the late 1980s and the early 1990s, liberation movements commanded the support of the overwhelming majority of South African citizens as hundreds of thousands of supporters mobilized to defy the government. This mobilization, though costly and disruptive, was unlikely to overthrow the government as it could be contained, for the

[236] Asmal 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 Modern Law Review 1

[237] Muller, C.F.J. (ed) (1981) Five Hundred years: a history of South Africa; 3rd rev. ed. Pretoria: Academica, p. 462, 467.

[238] Sarkin 'The Development of a Human Rights Culture in South Africa' (1998) 20 Human Rights Quarterly 629

[239] Asmal 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 Modern Law Review 1

[240] Muller, C.F.J. (ed) (1981) Five Hundred years: a history of South Africa; 3rd rev. ed. Pretoria: Academica, p. 462, 467.

most part, by security forces.[241]Indeed, the South African liberation movements did not succeed in removing the apartheid government from office by military means. Furthermore, the liberation movements recognized that even if they continued their military campaign against the former government, they were unlikely to win. And, by the late 1980s, the major parties to the South African conflict realized that matters had reached an impasse that only negotiations could resolve.[242]

The transition from the former apartheid government into a new democratic government was possible only through a democratic election. At that juncture the ANC was not capable to conduct a democratic election just because the former non-democratic government retained control over a formidable military and police force.[243] Hardly, the former government and its security forces never would have allowed the transition to a democratic order had its members, supporters or operatives been exposed to arrest, prosecution and imprisonment.[244] Likewise it was impossible for the ANC in particular to accept the protection of the security services throughout the negotiating process and then say to them, 'Once the election is over we are going to prosecute you.' If they had done so there would have been no peaceful election. The generals of the old apartheid regime had made that abundantly clear.[245] Therefore in a series of negotiations from the late 1980s to 1993 the National Party (NP) and ANC lastly agreed to include in its constitution the provision for amnesty to those who were involved in gross violation of human rights during apartheid era.

4.3.2.1 The Constitution of the Republic of South Africa, Act 200 of 1993 (The Interim Constitution of 1993)

During a series of negotiation between the outgoing white South Africa government under the umbrella of the NP and the ANC, the former government declared themselves

[241] Dullah Omar, Informal remarks prior to speech, Justice and Impunity: Germany and South Africa Compared conference, Community Law Center (Cape Town: October 1994).
[242] Gitta Sereny, Albert Speer: His Battle with Truth (New York: Knopf, 1995).
[243] Asmal 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 Modern Law Review 1
[244] Dullah Omar, Informal remarks prior to speech, Justice and Impunity: Germany and South Africa Compared conference, Community Law Center (Cape Town: October 1994).
[245] Mervyn Bennun, Charles Villa- Vicencio and Erik Doxtader, editors, The Provocations of Amnesty: Memory, Justice and Impunity, Trenton, nj: Africa Wolrd Press, 2003, p 99

prepared to take on the role of democratic spoilers unless they were offered some form of immunity from prosecution.[246] For the purpose of securing democratic constitution and to prevent the country from further deteriorating into a state of siege with many more deaths and further destruction of property carried out by white-sponsored or self-sponsored blacks against blacks, by blacks against whites and by whites against blacks the ANC agreed to the provision of amnesty in the Interim Constitution (IC). The IC in its "post-amble"[247] provided for a legally unspecified amnesty. It stated that:-

> "...gross violations of human rights, the transgression of humanitarian principles in violent conflicts and the legacy of hatred, fear, guilt and revenge...can now be addressed on the basis that there is a need for understanding but not vengeance, a need for reparation but not for retaliation....In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past."[248]

The Post-amble constituted a legally binding promise made at the negotiating table by those expected to win South Africa's first democratic election to grant amnesty to those who had committed political crimes. However, the former government wanted general amnesties but the ANC insisted on an amnesty process that tested the atrocities committed against a proportionate political objective[249]but at the end both the former government and the ANC accepted the amnesty deal. The former government and its security forces were reassured that if they handed over power, they would not be automatically prosecuted.[250]

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[246] J Klaaren and H Varney 'A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues Around Legislation for a Second Amnesty' (2000) 117 South African Law Journal572-593
[247] The Postamble can be found after section 251 of the interim Constitution.
[248] The Post-amble can be found after section 251 of the interim Constitution.
[249] Sarkin 'The Trials and Tribulations of South Africa's Truth and Reconciliation Commission' (1997) 12 South African Journal on Human Rights 617.
[250] Ibid

4.3.2.2 The Promotion of National Unity and Reconciliation Act of 1995 (TRC Act)

On 19 July 1995, President Nelson Mandela signed the Truth Commission Bill into law. And, therefore, the Promotion of National Unity and Reconciliation Act of 1995 (TRC Act) came to force.[251] The TRC act under its long title states that:-

> "To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered…"[252]

The TRC Act specifies several categories of people who may apply for amnesty including members of political organizations, liberation movements and members of state security forces.[253] Also the TRC Act provides qualifications for persons to be eligible for granted amnesty. The qualifications are the person's crime had to meet the definition of acts associated with a political objective as contained in the TRC Act, and the person had to provide full disclosure of the act for which amnesty was sought.[254] To meet its objectives, the TRC Act established three committees within the Truth and Reconciliation Commission (TRC).[255] This includes; the Committee on Human Rights Violations, the

[251] See South Africa Office of The President No. 1111 26 July 1995, No. 34 of 1995: Promotion of National Unity and Reconciliation Act, 1995, http://www.fas.org/irp/world/rsa/act95_034.htm, last visited on 05.06.2014
[252] See the Long-title of the Promotion of National Unity and Reconciliation Act of 1995, which is substituted by s. 19 of Act 87 of 1995
[253] Ibid s. 20(2)(d)
[254] Ibid s. 20(1)(c)
[255] Ibid s. 2-11

Committee on Amnesty and the Committee on Reparation and Rehabilitation. The Human Rights Violation Committee, responsible for taking testimony from victims and submissions from political parties. It had also to ascertain human rights violations that had been kept from becoming public,[256]and determine which violators had already been given reprieve in the interests of reconciliation.[257] The Rehabilitation and Reparation Committee adopted a development centered approach, capacity development promoting healing and reconciliation. It engaged in the giving of grants and instituting legal and administrative mechanisms.[258]

The Amnesty Committee granted amnesty and freedom from prosecution to persons whose conducts had to meet the definition of acts associated with a political objective as contained in the TRC Act, and the person had to provide full disclosure of the act for which amnesty was sought.[259] It was further required that these protagonists were engaged in a struggle against the state or a former state or countered such acts of resistance. Once a person was eligible for amnesty, the committee had to consider the person's motive as well as the nature and context of the act.[260] The TRC Act specifies that any person who acted for personal gain[261] would not qualify for amnesty, except if that person received money or anything of value for being an informer. Furthermore, a person who had committed a crime motivated by personal malice, ill will or spite[262] was not granted amnesty. If the crime was a gross violation of human rights, the Amnesty Committee had to conduct a public hearing before granting amnesty.[263] According to section 33 of the TRC Act, all hearings of the commission shall be open to the public. However, if it is in the interests of justice, or if there is a likelihood that a person may be harmed if proceedings are held in public, then the commission may direct that its hearings be held behind closed doors.

[256] Ibid s.14(1)(a)(iii) and 4(d)
[257] Ibid s. 14(1)(a)(iv).
[258] Ibid s. 25(2).
[259] ibid. sec. 20(1)(c).
[260] TRC Act, sec. 20(3)
[261] ibid., sec. 20(3)(i)
[262] ibid., sec. 20(3)(ii)
[263] ibid., sec. 19(3)(b)(iii)

Once amnesty was granted, any entry or record of the conviction for the crime for which amnesty had been granted was expunged and that conviction was deemed not to have taken place.[264]

4.3.3 The Success and Downfall

Unlike the blanket amnesties of the past, the TRC Act through TRC and the three committees individualized the amnesty procedure, offering relief from both criminal and civil prosecution to individuals only if fairly demanding requirements were met. The IC did not provide unspecified and general amnesties but rather amnesties based on atrocities committed against a proportionate political objective.[265] This TRC is often hailed as the most successful of all TRCs because it managed to facilitate a trade off and a de facto power share. That is to say amnesties deal for peace and democracy. The TRC was seen as a vehicle for achieving accountability and national reconciliation.

However, most amnesty applicants revealed only those details already in the hands of investigators and prosecutors. Evidence supplied to the Commission could not be used against the person supplying the information. The state could only attempt to investigate and prosecute perpetrators in respect of the other offences that were not disclosed.[266] Most perpetrators, particularly those who operated within the organs of the former regime, were aware of the limited capacity to investigate and prosecute. Where they were confident that investigators had no knowledge of other offences, applicants invariably did not disclose further details.[267]

4.4 Sierra Leone Case Study

Sierra Leone officially the Republic of Sierra Leone, is located on the west coast of Africa, between the 7th and 10th parallels north of the equator. Sierra Leone is a country in West Africa that is bordered by Guinea to the northeast, Liberia to the southeast, and the Atlantic Ocean to the southwest. Sierra Leone is a constitutional republic with a directly

[264] ibid., sec. 20(10).
[265]Ibid s. s. 3(1)(b); Also Sarkin 'The Trials and Tribulations of South Africa's Truth and Reconciliation Commission' (1997) 12 South African Journal on Human Rights 617
[266] J Klaaren and H Varney 'A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues Around Legislation for a Second Amnesty' (2000) 117 South African Law Journal572-593
[267] J Dugard 'Dealing With Crimes of a Past Regime: Is Amnesty Still an Option?' (2000)12 Leiden Journal of International Law 1001-1015

elected president and a unicameral legislature.[268] The country has a total area of 71,740 km^2 (27,699 sq mi), divided into a land area of 71,620 km^2 (27,653 sq mi) and water of 120 km^2 (46 sq mi) and with an estimated population of 6 million.[269]

Sierra Leone is divided into four administrative regions: the Northern Province, Eastern Province, Southern Province and the Western Area; which are subdivided into fourteen districts. Each district has its own directly elected local government known as district council, headed by a council chairman, in whom local executive authority is vested.[270] About sixteen ethnic groups inhabit Sierra Leone, each with its own language and custom. The two largest and most influential are the Temne and the Mende.[271] The Temne are predominantly found in the north of the country, while the Mende are predominant in the south-east. Sierra Leone is a predominantly Muslim country, though with an influential Christian minority. Sierra Leone is regarded as one of the most religiously tolerant countries in the world. Muslims and Christians collaborate and interact with each other peacefully in the country.[272]

4.4.1 The Conflict Historical Perspective

When Sierra Leone gained independence in 1961, the British left behind a country that it had ruled officially as a Crown Colony since 1808. Sierra Leone attained political independence in April 1961, through a relatively peaceful process under the leadership of Milton Margai and his Sierra Leone People's Party (SLPP).[273] In 1968, the All People's Congress (hereinafter "APC") became the ruling party after the general election won by Siaka Stevens and remained in power until 1992. The APC regime was known for its

[268] Official projection (medium variant) for the year 2013 based on the population and housing census held in Sierra Leone on 4 December 2004. statistics.sl. page 13
[269] African Development Bank, OECD – Organisation for Economic Co-operation and Development (2009). African Economic Outlook 2009: Country Notes: Volumes 1 and 2. OECD Publishing. p.562. ISBN 978-92-64-07618-1
[270] de Bruyn, Chanel (27 August 2010), "Sierra Leone grants Tonkolili iron-ore licence", Mining Weekly. Retrieved 21May 2014
[271] The World Guide, "Sierra Leone Geography", Archived from the original on 12 January 2009; Retrieved 21 May 2014
[272] Renner-Thomas, Ade (2010). Land Tenure in Sierra Leone: The Law, Dualism and the Making of a Land Policy. AuthorHouse. p. 5. ISBN 978-1-4490-5866-1
[273] Murphy, Willian P. (2003) 'Military Patrimonialism and Child Soldier Clientalism in the Liberian and Sierra Leonean Civil Wars' in African Studies Review, Vol. 1 46 (2), pp. 61-87.

rampant corruption, false imprisonments, and bad one-party governance.[274] Stevens was, however, prevented from forming the government, through a coup led by Brigadier David Lansana. This marked the beginning of many coups and counter-coups in Sierra Leone including 18 April 1968 that restored Stevens.[275] The 1987 coup attempt by Stevens' associates to overthrow Major General Joseph Momoh, the very hand-selected, northern-born successor that Stevens handed power in 1985 simply because knowing he was loyal but not highly effective as a politician, a combination that enabled Stevens' significant political and economic influence to continue.[276]

The Sierra Leonean civil war officially began when forces of the organized armed group known as the Revolutionary United Front (RUF), a small rebel group led by Corporal Foday Sankoh, invaded eastern Sierra Leone from Liberia on 23 March 1991. RUF launched a devastating attack on Sierra Leone from Liberia in May 1991, with the support of the then Liberian leader, Charles Taylor.[277] Consequently, General Momoh was overthrown by a rebel force under the leadership of Captain Valentine Strasser, who established the National Provisional Ruling Council (NPRC) as the ruling organ.[278] On 26 February 1996, Ahmad Tejan Kabbah of the Sierra Leone People's Party (SLPP) was elected President in democratic elections. However, on 25 May 1997, army elements calling themselves the Armed Forces Revolutionary Council (AFRC) overthrew the government.[279] The AFRC was led by Johnny Paul Koroma, who immediately after the coup invited the RUF to join the government. Since then, civil war in Sierra Leone has escalated significantly[280] leading to the deaths of tens of thousands of Sierra Leoneans,

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[274] Ibrahim Abdullah (ed.), Between Democracy and Terror: The Sierra Leone Civil War, Dakar: Council for the Development of Social Science Research in Africa, 199-219.
[275] Ibrahim, Jibrin (2003) Democratic Transition in Anglophone West Africa, Dakar, Senegal: CODESRIA, pp. 43-48.
[276] Human Rights Watch, *The Jury is Still Out: A Human Rights Watch Briefing Paper on Sierra Leone*, July 2002
[277] Reno, William (1995) Corruption and State Politics in Sierra Leone, Cambridge: Cambridge University Press.
[278] Human Rights Watch, _Getting Away With Murder, Mutilation, And Rape: New Testimony From Sierra Leone' (24 June 1999) http://www.hrw.org/en/reports/1999/06/24/getting-away-murder-mutilation-and-rape, accessed 29 May 2014
[279] Shaw, Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone (Washington, DC: United States Institute of Peace, 2005), 5.
[280] Murphy, Willian P. (2003) 'Military Patrimonialism and Child Soldier Clientalism in the Liberian and Sierra Leonean Civil Wars' in African Studies Review, Vol. 1 46 (2), pp. 61-87.

with at least a quarter of the population being displaced from their homes during the conflict. The widespread practices of amputating limbs of civilians, brutal killings, and the conscription of child soldiers into armed forces undertaken by the RUF, the Armed Forces Revolutionary Council, the Sierra Leonean Army, and the Kamajors.[281]

4.4.2 The Introduction of Amnesty

Sierra Leone's decade-long civil war, a conflict marked by extreme acts of systematic violence committed by both the government-sponsored CDF and by the two main rebel groups, the RUF and the AFRC. Acts of violence were carried against defenceless civilians and an estimated 50,000 were killed and hundreds of thousands of others had their arms, legs, ears, noses or lips hacked off. Women and girls were raped or forced into sexual slavery, and thousands were abducted.[282] As a result of such atrocities the Sierra Leonean people, became bore by the brunt of the rebel violence, therefore put forth pressure upon their government for the war to be brought to an end by whatever means necessary. And, thus, because the rebels made it clear to the people that without amnesty there would be no peace. Also, the public believed that the war was the product of decades of bad governance, which reduced hatred of the rebels. The public support to rebel's demands and the military weakness of the government, and the real threat of prosecution and punishment push the government into negotiation with the rebels in order to secure peace and to end a decade of civil war in the country.

4.4.2.1 The Abidjan Agreement of 1996

After the 1996 election the government and the RUF negotiated on and off for six months before a peace agreement was finally signed in Abidjan, Côte d'Ivoire. On November 30, 1996, both the RUF led by Corporal Foday Sankoh and the government of Sierra Leone led by President Tejan Kabbah, signed the Abidjan Peace Agreement in Côte d'Ivoire. Essentially, the agreement provided for the immediate end of armed conflict between the warring parties, and contained important provisions vital for consolidation of peace. The

[281] Shah, Anup (2001) 'Conflict in Africa; Sierra Leone', available at www.globalissues.org/Geopolitics/Afrca/Sierraleone.asp, accessed on 29 May 2014

[282] Micaela Frulli, 'A turning point in international e'orts to apprehend war criminals: the UN mandates Taylor's arrest in Liberia', Journal of International Criminal Justice 4: 2, May 2006, pp. 351-61.

peace accord included provisions for disarmament, amnesties[283], reintegration of RUF combatants into society, and the departure of foreign troops, but a proposed Neutral Monitoring Group proved ineffectual and little of the Abidjan agreement was implemented.

The Abidjan Peace Accord, signed by the Government of Sierra Leone and the rebel fighting forces, mandated that the Government of Sierra Leone "ensure that no judicial or official action be taken against any member of the RUF/SL (rebel forces) in respect of anything done by them in pursuit of their objectives" before the signing of that accord in 1996.[284] Furthermore, legislative and other measures will be taken to ensure that RUF combatants and political exiles will be able to enjoy their full civil and political rights within the framework of the law.[285] Article 14 gives the RUF absolute immunity from any prosecution for its war activities. However, the Abidjan Accord, for which the OAU, Côte d'Ivoire, and ECOWAS served as guarantors, suffered from a lack of close follow-up and implementation. The accord did not reach a proper implementation stage, in part because RUF leader Sankoh refused to allow UN peacekeepers or monitors to be deployed after the expulsion of Executive Outcomes;[286] also the rebel leader Corporal Sankoh was unable to get his forces to abide by the agreement.[287] Two months after the accord was signed fighting broke out once again leading to a military coup overthrew the government, which was forced into exile in neighbouring Guinea in 1977.

4.4.2.2 The Conakry Accord of 1997

In 1997 following the coup by junior military officers of the Armed Forces Revolutionary Council (AFRC), the new military government installed Major Paul Koroma, a failed coup plotter released from prison, to head the AFRC. The quest for sustainable peace, however, heralded the birth of another peace agreement between the Economic

[283] See Article 14 of the Abidjan Peace Accord, 1996
[284] Article 14 Peace Agreement between the Government of the Republ ic of Sierra Leone and the Revolutionary United Front of Sierra Leone (Abidjan Accord) (30 November 1996)
[285] Ibid
[286] Lansana Gberie, 'First stages on the road to peace: the Abidjan Process (1995–96)' in Accord: Paying the Price: The Sierra Leone Peace Process, Conciliation Resources, September 2000 ; also available at www.c-r.org, last visited 02.06.2014
[287] Abdullah, Ibrahim (1997a) 'Lumpen Youth Culture and Political Violence: Sierra Leoneans Debate the RUF and the Civil War' in African Development , Vol. XII (3&4)

Community of West African States (ECOWAS) Ministerial Committee of Five on Sierra Leone and delegation representing Major Johnny Paul Koromah. The peace agreement was followed by the Economic Community of West African States (ECOWAS) six months Peace Plan for Sierra Leone of 23rd October1997.

Among other provision in the peace agreement and the ECOWAS six months peace plan is the provision of immunities and guarantees from any form prosecution. The explanation in the peace plan provides that:-

> "It is considered essential that unconditional immunities and guarantees from prosecution be extended to all involved in the unfortunate events of 25 May, 1997 with effect from 22 May 1998."

The peace accord and its ECOWAS six months peace plan both provide unconditional immunities to the leaders and combatants involved in a coup d'état of 25 May 1997; a coup which President Kabbah was forced to flee to Guinea.

4.4.2.3 The Lomé Peace Agreement of 1999

After the 23 October 1997 Economic Community of West African States (ECOWAS) Peace Plan, which sought to end hostilities and restore stability to Sierra Leone, on 7 July 1999, in Lomé, Togo, the Government of Sierra Leone and the armed opposition Revolutionary United Front (RUF) signed an agreement to end the armed conflict that began in 1991. The signing of the agreement was preceded by a large three days consultative conference brought together the political leadership, traditional leaders and representatives of civil society to debate the terms of a peace agreement. In its consensus statement the conference concluded that 'In the interest of peace, national reconciliation and unity there should be an amnesty for all combatants, but cases of serious human rights violations should go through the proposed Truth and Reconciliation Commission.'[288] Moreover, the agreement reaffirmed in its preamble the imperative to

[288] Michael O'Flaherty, 'Sierra Leone's Peace Process: The Role of the Human Rights Community,' Human Rights Quarterly 26 (2004), pp. 32–33.

end hostilities as a basis for transition to sustainable peace, democracy and development.[289] Article IX (1-3)[290] under political issues, granted complete pardon and amnesty to Corporal Foday Sankoh,[291] all combatants and collaborators[292] and ensured that "no official or judicial action[293] is taken against any member of the opposition and rebel groups in respect of anything done by them in pursuit of their objectives as a member of those organisations, since March 1991, up to the time of the signing of the present agreement. Thus, the agreement granted "an absolute and free pardon and reprieve to all combatants and collaborators" involved in the Sierra Leone civil war and prohibited the Government of Sierra Leone from instituting proceedings against members of the various fighting forces for any actions done in pursuit of their objectives from 1991 until the signing of the Lomé Agreement in 1999.[294]

The agreement also established a Commission for the Consolidation of Peace that would include representatives of civil society and political parties; which shall have the overall goal and responsibility for supervising and monitoring the implementation of and compliance with the provisions of the present Agreement relative to the promotion of national reconciliation and the consolidation of peace.[295] Subsequently, the Lomé Agreement and its amnesty provisions were subsequently incorporated into national legislation.[296] The establishment of a Truth and Reconciliation Commission; mandating a procedure "to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation."[297] The TRC was the

[289] See Preambular of Lomé Peace Agreement of 1999
[290] Lomé Peace Agreement of 1999
[291] Article IX(1) of Lomé Peace Agreement of 1999
[292] Article IX(2) of Lomé Peace Agreement of 1999
[293] Article IX(3) of Lomé Peace Agreement of 1999
[294] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra
Leone (Lomé Peace Agreement) (7 July 1999)
[295] See Article VI of Lomé Peace Agreement of 1999
[296] The Lomé Peace Agreement (Ratification) Act, 1999 (Act No. 3 of 1999), Sched. 1, Art. IX.
[297] National Legislative Bodies, Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999.

only accountability component of the Accord, which otherwise provided perpetrators unconditional blanket amnesty for all crimes committed since 1991.[298]

However, unlike amnesty contained in the previous two peace accords, amnesty contained in the Lomé Agreement received much criticism from different groups. For example, at the signing of the Lomé Agreement, the Special Representative of the UN Secretary-General attached a reservation that the amnesty provisions of the accord would not apply to crimes under international law including genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.[299] In addition, the UN Secretary-General, the UN Security Council, the UN High Commissioner for Human Rights, and the UN Commission on Human Rights all recognized that the amnesty provision did not apply to crimes under international law.[300] Likewise, the statute establishing the Special Court for Sierra Leone overrides this provision.[301]

4.4.2.4 The Special Court of Sierra Leone

Nevertheless, the amnesty provisions of the Lomé peace agreement did not prevent the recommencement of the armed conflict less than a year later. As a result of the request by the President of Sierra Leone to addressed the UN Secretary-General on 12 June 2000, the Security Council decided in Resolution 1315 (2000) of 14 August 2000 to create an independent special court to prosecute those bearing the greatest responsibility for crimes against humanity, war crimes and other serious violations of international law, as well as certain crimes under relevant Sierra Leonean law. An agreement establishing the Special Court was signed by the UN and the Government of Sierra Leone on 16 January 2002.[302] The SCSL was established with the full support of the Sierra Leonean government.

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[298] Abdul Tejan-Cole, "Sierra Leone's 'not-so' Special Court," in eds. Chandra Lekha Sriram and Suren Pillay, Peace Versus Justice? the Dilemma of Transitional Justice in Africa (University of KwaZulu-Natal Press: James Currey, 2009), 224.
[299] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915, 4 October 2000, para. 22
[300] Amnesty International, SCSL: Right to appeal and prohibition of amnesties, pp. 12 - 15
[301] Article 10 of Statute of the Special Court for Sierra Leone
[302] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915, 4 October 2000, para. 22

Under the terms of article 1(1) of its statute,[303] the Special Court has the power to prosecute 'persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone'. The objective of the court is to prosecute individuals who were in leadership or command positions rather than the simple foot-soldiers and rank-and-file combatants who carried out the atrocities.[304] The Special Court for Sierra Leone has a higher standard of indictment than either the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Tribunal for the former Yugoslavia (ICTY).

4.5 Uganda Case Study

Uganda, officially the Republic of Uganda, is a landlocked country in East Africa. It is bordered on the east by Kenya, on the north by South Sudan, on the west by the Democratic Republic of the Congo, on the southwest by Rwanda, and on the south by Tanzania. Uganda is the second most populous landlocked country. The southern part of the country includes a substantial portion of Lake Victoria, shared with Kenya and Tanzania, situating the country in the African Great Lakes region. Uganda also lies within the Nile basin, and has a varied but generally equatorial climate.[305]

Uganda takes its name from the Buganda kingdom, which encompasses a large portion of the south of the country including the capital Kampala. The people of Uganda were hunter-gatherers until 1,700 to 2,300 years ago, when Bantu-speaking populations migrated to the southern parts of the country.[306]

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[303] See the Statute of the Special Court of Sierra Leone, 2002

[304] Micaela Frulli, 'A turning point in international efforts to apprehend war criminals: the UN mandates Taylor's arrest in Liberia', Journal of International Criminal Justice, 4: 2, May 2006, pp. 351-61

[305] Martin, Phyllis and O'Meara, Patrick, (1995), *Africa*, 3rd edition: Indiana University Press, ISBN 0253209846

[306] The 2013 Human Development Report – "The Rise of the South: Human Progress in a Diverse World"". HDRO (Human Development Report Office) United Nations Development Programme, pp. 144–147. Retrieved 22 May 2014

Beginning in the late 1800s, the area was ruled as a colony by the British, who established administrative law across the territory. Uganda gained independence from Britain on 9 October 1962. The period since then has been marked by intermittent conflicts, most recently a lengthy civil war against the Lord's Resistance Army, which has caused tens of thousands of casualties and displaced more than a million people.[307]

4.5.1 The Conflict Historical Perspective

Uganda's postcolonial history has not been a happy one is characterized by division and conflict. Freed from British colonial rule in 1962, Uganda was then led by a coalition government formed when northerner Milton Obote joined his Uganda People's Congress party with the Buganda traditionalists' KY party.[308] Since independence, the governments have also contributed to the country's ethnic divisions. During Obote's first regime from 1962 to 1971, the Acholi and Langi were the majority in the armed forces as well as in political offices, and Obote relied upon them to stay in power[309] and playing upon ethnic tensions to try to consolidate power. In 1971, Amin Obote's ally and army Chief of Staff with his Sudanic and West Nile ethnic kinsmen took power while Obote was out of the country. Due to the ethnic division and mistrust created by the colonial rulers and Obote the Acholi and Langi who were the majority in the armed forces as well as in political offices became a target of mass killings after Idi Amin Dada took over from Obote in a coup d'état. As well as military personnel, civilians, politicians and intellectuals were all targeted. Thousands of Acholi were killed and many fled the country.[310]

In 1986, the National Resistance Army of a minor politician, Yoweri Museveni, launched a civil war with the aim of radically reforming Uganda's system of governance and seized power by means of military force. As with Amin and Obote, Museveni has faced considerable opposition from many of the 56 different ethnic groups throughout the

[307] 'New-Breed' Leadership, Conflict, and Reconstruction in the Great Lakes Region of Africa: A Sociopolitical Biography of Uganda's Yoweri Kaguta Museveni, Joseph Oloka-Onyango," *Africa Today* – Volume 50, Number 3, Spring 2004, p. 29

[308] Human Rights Watch, 1999, Hostile to Democracy: The Movement System and Political Repression in Uganda. New York: Human Rights Watch.

[309] Ginyera-Pincywa, A.G., Northern Uganda in National Politics (Kampala: Fountain Publishers, 1992)

[310] Ibid

country.[311] Ethnic tension among the government forces worsen; and between 1986 and 2008, Museveni faced more than 27 armed insurgencies. However, one of the most violent and protracted of the conflicts is the 22 year war in northern Uganda waged by the LRA.[312] Uganda's northern region has been engulfed in a violent conflict for 22 years. On one side is the Lord's Resistance Army (LRA),[313] a rebel group led by messiah who led the brutal, mystical LRA movement in its rebellion against the Ugandan government for over two decades, which seeks to overthrow the government. On the other side is the Ugandan government of President Yoweri Museveni and his army, the Ugandan People's Defense Forces (UPDF).[314] Through over 20 years of civil war, the brutal insurgency has created a humanitarian crisis that has displaced over 1.5 million people and resulted in the abduction of over 20,000 children over the past decade for forced conscription and sexual exploitation.[315]According to the United Nations;[316] the most disturbing aspect of this humanitarian crisis is the fact that this is a war fought by children on children; minors make up almost 90% of the LRA's soldiers. Some recruits are as young as eight and are inducted through raids on villages. They are brutalized and forced to commit atrocities on fellow abductees and even siblings. Those who attempt to escape are killed. For those living in a state of constant fear, violence becomes a way of life and the psychological trauma is incalculable.[317]

4.5.2 The Introduction of Amnesty

Northern Uganda like any other post-conflict societies in the Central Africa experienced and continuing experiencing holocaust of war, suffering and pain as a result of the ongoing conflict. In the light of the suffering and pain of the people of northern Uganda

[311] Kayunga, Sallie Simba. 2000. The Impact of Armed Opposition on the Movement System in Uganda, in No-Party Democracy in Uganda: Myths and Realities. Mugaju, Justus, and J. Oloka-Onyango, eds. Kampala: Fountain Publishers.
[312] Lucy Hovil and Zachary Lomo, Working Paper 15: Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation (Kampala: Refugee Law Project, Feb. 2005), 6.
[313] Refugee Law Project, 2004, Behind the Violence: Causes, Consequences, and the Search for Solutions to the War in Northern Uganda. Kampala: Faculty of Law of Makerere University.
[314] Refugee Law Project, Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda (Kampala, Refugee Law Project Working Paper No. 11, 2004
[315] Uganda Complex Emergency, U.S. Agency for International Development (USAID), July 2003
[316] See http://www.un.org/events/tenstories/06/story.asp?storyID=100, visited on 28.05.2014
[317] Ibid

the Ugandan government made a number of attempts in the past to negotiate settlement with the LRA. The Government of Uganda (GoU) and the Lord's Resistance Army have met several times in a series of failed peace talks including the Pece Stadium Accord (1988) the Addis Ababa Accord (1990) a series of peace talks (1994)[318] and another set negotiated by Betty Bigombe (2005).

4.5.2.1 The Amnesty Act of 2000

In 2000, in order to encourage a peace agreement with the LRA, the Ugandan Parliament passed the Amnesty Act. Thus, amnesty laws were created in order to promote national reconciliation and to ensure stable and sustained peace. An act passed by the Government of Uganda that allows for rebels to abandon violence and be granted amnesty, without risk of criminal prosecution or punishment for offenses related to the insurgency.[319] In fact, this Act confers immunity from prosecution on all Ugandans engaged or engaging in war or armed rebellion against the Ugandan government since January 26, 1986,[320] offering a blanket amnesty to all combatants who surrendered. Those granted amnesty under the act receive "a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State."[321] Under the Act, applicants must have actually participated in combat, collaborated with the perpetrators of the war or armed rebellion, committed a crime in the furtherance of the war or armed rebellion, or assisted or aided the conduct or prosecution of the war or armed rebellion.[322] To benefit from amnesty, those engaged in acts of rebellion must report to a local authority, renounce and abandon the rebellion and surrender all weapons in their possession.

In addition, an Amnesty Commission (AC) was established by parliament to oversee the implementation of the act's provisions, while Demobilisation and Resettlement Teams (DRTs) were charged with implementing the decommissioning of arms, demobilising, resettlement and reintegration of ex-combatants who opt for amnesty (or 'reporters') at the sub-regional level, with offices in Gulu, Kitgum, Arua, Kasese, Mbale and

[318] Listen to the People: Peace and Reconciliation in Northern Uganda (Kampala: HURIPEC, 03 May 2004), 92-93.
[319] See Part II, Declaration of Amnesty, Art. 3(2) of the Amnesty Act, 2000
[320] See Part II, Declaration of Amnesty, Art. 3(1) of the Amnesty Act, 2000
[321] Amnesty Act 2000, art. 2.
[322] *Id*. at 3(1).

Kampala.[323] Accordingly, the Act has encouraged many LRA combatants to escape and surrender. As of 2005, some 15,000 combatants, belonging to the LRA and other rebel groups, have been granted amnesties.[324]

4.5.2.2 Juba Peace Talks, 2006

After a series of failed peace efforts, the government of South Sudan appears to have made some significant strides in brokering the conflict. On July 14, 2006 the Vice President of Southern Sudan, Dr. Reik Machar, organized and mediated the talks between a delegation from the LRA comprised mostly of ethnic Acholi and the government of Uganda.[325] Since then, a series of peace negotiations between the Ugandan government and the LRA began in Juba, Southern Sudan. The talks established a roadmap for ending the conflict between the Ugandan government and the LRA and addressing the root causes of the war.[326] Despite hostile rhetoric, the GoU and LRA were able to come to some agreement on 5 part framework: cessation of hostilities; comprehensive solutions to the conflict, reconciliation and accountability, formal/permanent ceasefire, and disarmament, demobilization and reintegration.[327]

While the negotiations progressed haltingly at first, on 4 August 2006 both delegates agreed to achieve an "Agreement on Cessation of Hostilities," on 26 August 2006. Under the terms of the agreement, LRA forces were required to leave Uganda and gather in two assembly areas, where the Ugandan government promised they would not attack and the government of Southern Sudan guaranteed their safety.[328] Once this is accomplished, talks on a comprehensive peace agreement would begin. On 2nd May 2007 the "Agreement on Comprehensive Solutions," was signed by GoU and LRA. A breakthrough in negotiations was reached on 3 February 2008 regarding accountability

[323] Refugee Law Project, Whose Justice? Perceptions Of Uganda's Amnesty Act 2000: The Potential For Conflict Resolution And Long-Term Reconciliation, Working Paper no. 15, February 2005
[324] International Center for Transitional Justice, *Forgotten Voices: A Population-Based Survey of Attitudes About Peace and Justice in Northern Uganda*, 15, July 2005
[325] International Crisis Group, 2007, Northern Uganda: Seizing the Opportunity for Peace, April 26. International Crisis Group
[326] Refugees International, Bulletin: Uganda: Challenges of Peace and Justice (Washington: Refugees International, 19 Feb. 2008), 1
[327] International Crisis Group, 2007, Northern Uganda: Seizing the Opportunity for Peace, April 26. International Crisis Group
[328] Refugee Law Project. 2004. Behind the Violence: Causes, Consequences, and the Search for Solutions to the War in Northern Uganda. Kampala: Faculty of Law of Makerere University.

and reconciliation, the Agreement was signed on 27th June, 2007[329] and subsequently, the parties signed the "Annexure to the Agreement on Accountability and Reconciliation" on 19 February 2008 provide an overview of the future of "justice" for northern Uganda.[330] The LRA and government agreed that both formal justice procedures which decided that the war crimes would be tried in a special section of the High Court of Uganda and the traditional Mato Oput ceremony of reconciliation would play a role, thus bypassing the International Criminal Court and also removing one of the last obstacles to a final peace deal.[331]

However, more problems appeared on 28 February 2008; rebels demand a retraction of the ICC indictments, but the Ugandan government only wants to ask the UN to do that after the rebels have demobilized.[332] An accord on Disarmament, Demobilisation and Reintegration was signed late on 29 February 2008, leaving the signing of the peace treaty itself as the last missing action when the final peace talks continue on 12 March 2008.[333] The ICC prosecutor-general Luis Moreno-Ocampo on 5 March 2008 rejected demands by the rebels for a meeting, stating that "arrest warrants issued by the court remain in effect and have to be executed".[334] It was reported that rebel leader Kony would nonetheless come out of the bush to sign the peace agreement on 28 March 2008, with the implicit agreement that he will not be apprehended and transferred to the ICC while out in the open; such an action was also thought to likely see a remobilization of his rebel army.[335]

4.5.3 The Success and Downfall

From its creation in 2000, a temporary lapse in May 2012 and eventual reinstatement on May 24th 2013, the Amnesty Act has already facilitated the return of over 26,288 former

[329] International Crisis Group. 2006. Peace in Northern Uganda? September 13. Nairobi: International Crisis Group.
[330] Chandra Lekha Sriram, ""The ICC Africa Experime nt: The Central African Republic, Darfur, Northern Uganda, and the Democratic Republic of the Congo," a paper presented at the International Studies Association Annual Meeting, San Francisco, CA: March 26, 2008, 5.
[331] Africa | Ugandans reach war crimes accord". BBC News. 2008-02-19. Retrieved 2014-05-28
[332] A Hard Homing Lesson Learnt from the Reception Center process in Northern Uganda, An independent Study for Management systems International Corporate offices. By Tim Allen and Mareike Schomerus.
[333] Ibid
[334] Africa | ICC rejects Uganda rebel overture". BBC News. 2008-03-05. Retrieved 2014-05-28
[335] Africa | Ugandan rebels 'will sign deal'". BBC News. 2008-03-05. Retrieved 2014-05-28.

combatants fighting against the Government of Uganda.[336] There is a great recognition of the role of the Amnesty Act as a peace-building and reintegration tool which is still needed to bring an end to the currently 'displaced' LRA conflict, and to build confidence across the North.[337]

Though the implementation of the 2000 Amnesty Act did facilitate an end to hostilities, and in some cases enabled communities to take forward their own local reconciliation processes, it has not supported a broader process of reconciliation and reparations. The manner in which the amnesty was implemented was cited as a significant conflict driver in some communities. Observers noted that it has also fuelled conflicts at the local level by failing to adequately compensate and integrate former combatants, while neglecting the needs of victims.[338]

Indeed, the Act was accused for interfering with victims' right to an effective remedy, including reparations as well as the right to truth, hampering prospects for reconciliation. The UN argues that by stipulating that no form of punishment can be imposed by the state against reporters, it prevents victims from seeking a civil remedy for acts committed against them. Moreover, the Act compromises the victims' right to truth since it does not impose any requirements on the reporters for full disclosure on their participation in the conflict.[339]

4.6 Democratic of Congo Case Study

The Democratic Republic of Congo (DRC), formerly known as the Republic of Zaire, is geographically the largest state in Southern and Central Africa. It is a country located in the African Great Lakes region of Central Africa. It is bordered by the Central African Republic and South Sudan to the north; Uganda, Rwanda, and Burundi in the east; Zambia and Angola to the south; the Republic of the Congo, the Angolan exclave of Cabinda, and the Atlantic Ocean to the west; and is separated from Tanzania by Lake

[336] Enough Project, 'The End of Amnesty in Uganda: Implication for LRA Defection', August 2012, www.enoughproject.org/fi les/GuluDispatch.pdf, visited on 28.05.2014

[337] Refugee Law Project (RLP), forthcoming: National Reconciliation and Transitional Justice Audit-Compendium of Conflicts in Uganda 1962–2012

[338] Refugee Law Project, Whose Justice? Perceptions Of Uganda's Amnesty Act 2000: The Potential For Conflict Resolution And Long-Term Reconciliation, Working Paper no. 15, February 2005.

[339] 'UN Position on Uganda's Amnesty Act', UN Office of the High Commissioner for Human Rights in collaboration with UN Women, May 2012, footnote to p. 3

Tanganyika in the east.[340] It is situated at the heart of Africa, and lies on the Equator, covering an area of 2,345,095 km². With a population of over 75 million,[341] the Democratic Republic of the Congo is the nineteenth most populous nation in the world, the fourth most populous nation in Africa, as well as the most populous officially Francophone country.[342]

The DRC has 37 kilometers of coastline and a geography characterized by a vast central basin low-lying plateau rising to volcanoes and mountains in the east. More than half the country is covered by dense tropical rainforest. The country is traversed by numerous rivers with the Congo River being the largest.

Congo became independent on 30 June, 1960. However, during the period between independence and 1999, the DRC suffered two civil wars, erupting and dying off at different times. In addition to the capital city of Kinsasha, other major population centres include Lubumbashi, Kisangani, Matadi and Goma.[343]

4.6.1 The Conflict Historical Perspective

The conflict in the Democratic Republic of the Congo (DRC) seems to have started only several years ago. However, the instability in this region finds its origins much earlier. Before independence in 1885, King Leopold II announced the establishment of the Congo Free State, of which he declared himself the ruler.[344] At the Brussels Round Table Conference of 1960, Congo was granted its independence from Belgium. After years of colonial oppression, Congo became an independent state. Unfortunately, Belgium's abrupt departure left Congolese citizens with no government or economic rights.[345] After several years of unorganized government, a glimmer of hope for the first five years of

[340] Central Intelligence Agency, (2014), "Congo, Democratic Republic of the", *The World Factbook*, Langley, Virginia: Central Intelligence Agency. Retrieved 22 May 2014
[341] Ibid
[342] Starbird, Caroline; Deboer, Dale, Pettit, Jenny, (2004), Teaching International Economics and Trade, Center for Teaching International Relations: University of Denver. p.78. ISBN 9780943804927
[343] Thom, William G. "Congo-Zaïre's 1996–97 civil war in the context of evolving patterns of military conflict in Africa in the era of independence", Conflict Studies Journal at the University of New Brunswick, Vol. XIX No. 2, Fall 1999
[344] Encyclopedia J. Africa: Belgian Colonies – "HISTORY OF BELGIAN COLONIZATION, THE ADMINISTRATION OF CONGO BY THE BELGIANS" (1908–1960) http://encyclopedia.jrank.org/articles/pages/5918/Africa-Belgian-Colonies.html, last visited 23.05.2014
[345] Ibid

independence Congo, it underwent 3 name changes and was riddled with instability. Europeans fled, opening the way for the Congolese elite to take over the spots formerly held by British administration and military. The two political leaders of the time, Patrice Lumumba-Prime Minister and Joseph Kasavubu-President, were elected per parliamentary vote.[346] From opposing parties, they struggled for power, resulting in Kasavubu dismissing Lumumba from office. Citing the power struggle as an opening, the head of the Congolese Army Joseph Mobutu gathered his troops and lead a mutiny against the government.

In 1965, Colonel Joseph Mobutu, who had been involved in the mutiny against Lumumba, seized power in a coup, gradually instituting a more centralized and authoritarian form of government. Joseph Mobutu appointed himself President of the DRC, occasionally holding one party election of which he was the only candidate.[347] Mobutu's reign is marred by human rights violations and corruption. Under his rule, people and infrastructure suffered, as he grew wealthy. Indeed, Mobutu was a corrupt leader.[348] The weakening of Mobutu's regime encouraged the emergence of a rebellion in eastern Congo. The first rebellion to oust the late President Mobutu Sese Seko began in the city of Goma in the mid-1990s. The movement was led by Laurent Kabila, a longtime leftist opponent of Mobutu and leader of the Alliance of Democratic Forces for the Liberation of Congo (AFDL). The second rebellion in the late 1990s began also in eastern Congo. A "war of liberation" followed in 1996–97 when a regional alliance, spearheaded by Rwanda and Uganda, sent thousands of soldiers to support the AFDL.[349] In May 1997, the Alliance of the Democratic Forces for the Liberation of Congo-Zaire (AFDL), with the support of Rwanda and Uganda, marched into Kinshasa and ousted longtime dictator Mobutu Sese Seko.[350]

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[346] British Broadcasting Company News "Democratic Republic of Congo Country Profile" by BBC News; 10 February 2010; http://news.bbc.co.uk/2/hi/africa/country_profiles/1076399.stm, last visited 23.05.2014
[347] Thomas Turner, Congo Wars: Conflict, Myth, Reality (London: Zed Books, 2007), 124.
[348] Steve Askin and Carole Collins, "External Collusion with Kleptocracy: Can Zaïre Recapture Its Stolen Wealth?" Review of African Political Economy , 57 (1993). For further analysis of the Mobutu era, see Library of Congress, Federal Research Division, Zaire: A Country Study, 1994, at http://lcweb2.loc.gov/frd/cs/zrtoc.html, last visited 23.05.2014
[349] Reyntjens F., "Briefing: the second Congo War: more than a remake," African Affairs 98 (1999).
[350] Jason Stearns, "Next Challenge for Congo: International Terrorism," Christian Science Monitor/Africa Monitor , July 28, 2010.

The AFDL and Laurent-Désiré Kabila were successful in their attempt to overthrow Mobutu's government and in 1997 Laurent Kabila became President of the Democratic Republic of the Congo. Despite his newfound leadership, Kabila was in fear of a Coup d'etat by his former allies and foreign forces, the Rwandan and Ugandan troops. Once in power, President Laurent Kabila attempted to curb the influence of his Rwandan and Ugandan allies. As a result of this fear, he asked the troops to leave, spawning widespread anger and rebel groups to arise.[351] In response, Rwanda threw its support to the rebel Congolese Rally for Democracy (RCD), from eastern Congo which was fighting to topple Kabila's government; and the Movement for the Liberation of Congo (MLC) made up of Ugandan rebels and led by Jean-Pierre Bemba; play a larger role in the overall conflict. Between the years of 1996 and 2001 there was widespread conflict between ethnic groups and rival governments for control over land and resources led to the assassination of Laurent Kabila in January 2001 and the ascendance of his son Joseph Kabila to the presidency.[352] In 2002, during his interim Presidency, Joseph Kabila there was more outbreak of conflict over the control of resources, especially diamonds, copper, zinc and coltan, in the Northeastern border provinces.[353] In 2006, the CNDP, initially led by dissident military officer Laurent Nkunda, was found. In 2012, a new rebel group known as the M23 emerged as a mutiny of soldiers who had been integrated into the FARDC as the result of a 2009 peace accord with a reportedly Rwandan-backed rebel group known as the National Congress for the Defense of the People (CNDP).[354]

4.6.2 The Introduction of Amnesty

The conflict in the Congo includes a number of countries, all of which have hefty demands for peace. Over the past few decades, Congo has received an enormous amount of aid and several attempts at peace have been made. In the struggle to end war and ethnic conflicts in Congo, the government of Congo took various measures to ensure

[351]René Lemarchand, The Dynamics of Violence in Central Africa , University of Pennsylvania Press: 2009
[352] Gettleman, Jeffery, "For Congo's Leader, Middling Reviews" New York Times, 4 April 2009. http://www.nytimes.com/2009/04/04/world/africa/04kabila.html?, last visited 23.05.2014
[353] Ibid
[354] Thomas Turner, The Congo Wars: Confli ct, Myth and Reality, Zed Books: 2007; Gérard Prunier, Africa's World War: Congo, The Rwandan Genocide, and the Making of a Continental Catastrophe, Oxford University Press: 2008

security and stability in the country. Among several steps undertaken by the government in the quest to end war and ethnic conflict are as follows:-

4.6.2.1 The Lusaka Peace Accord of 1999

One of the first and longest lasting, the Lusaka accord, was signed in July 10, 1999. Under Article III, principle 22[355] provides *inter alia* that:

> "There shall be a mechanism for disarming militias and armed groups, including the genocidal forces. In this context, all Parties commit themselves to the process of locating, identifying, disarming and assembling all members of armed groups in the DRC. Countries of origin of members of the armed groups, commit themselves to taking all the necessary measures to facilitate their repatriation. Such measures may include the granting of amnesty in countries where such a measure has been deemed beneficial. It shall, however, not apply in the case of suspects of the crime of genocide…"

The agreement focuses attention on the "neutral facilitator" who "will organize the internal dialogue" and the UN which is supposed to deploy peacekeeping forces to ensure safety in the region, as well as the implementation of the agreement. The accord was supported by the UN, the African Union and later by the EU.[356]

The plan rests on several elements including, immediate cessation of hostilities; establish a new political order because one of the causes of the upheaval in the area is severe political instability in the Congo. Indeed, riots in the DRC began when Laurent Kabila took over the government in 1997; and continues worse after he was assassinated by rebels; the establishment of a Joint Military Commission to work out mechanisms to

[355] See the Lusaka Peace Accord of 1999

[356] Weiss, Herbert, War and Peace in the Democratic Republic of the Congo, American Diplomacy: Vol. V, No. 3 (2000). http://www.unc.edu/depts/diplomat/ AD_Issues/amdipl_16/weiss/weiss_print1.html, last visited 22.05.2014

disarm the identified militias because the main sources of conflict stems from rebel and militia groups threatening the government and killing civilians; disarming the armed groups, collecting weapons from civilians could significantly reduce the violence currently taking place.[357]

4.6.2.2 Pretoria Peace Agreement of 2002

In DRC effort to bring about an end to the Second Congo War, in July 2002 the Pretoria Peace Accord was made. Elements and entities involved in Inter-Congolese Dialogue agreed to establish the Transition Government in the Democratic Republic of the Congo for the purpose of the reunification and reconstruction of the country, the re-establishment of peace and the restoration of territorial integrity and State authority in the whole of the national territory;[358] national reconciliation;[359] the creation of a restructured, integrated national army;[360] the organization of free and transparent elections at all levels allowing a constitutional and democratic government to be put in place;[361] and the setting up of structures that will lead to a new political order.[362]

Undeniably, the Pretoria Peace Agreement of 2002 under Section III, point 8, provide for amnesty. The section states as follows:-

> "To achieve national reconciliation, amnesty shall be granted for acts of war, political and opinion breaches of the law, with the exception of war crimes, genocide and crimes against humanity."[363]

However, for the purpose of effect the grant of amnesty the accord imposes an obligation upon the transitional national assembly to adopt an amnesty law in accordance with

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[357] Weiss, Herbert, War and Peace in the Democratic Republic of the Congo, American Diplomacy: Vol. V, No. 3 (2000). http://www.unc.edu/depts/diplomat/ AD_Issues/amdipl_16/weiss/weiss_print1.html, last visited 22.05.2014

[358] See the Pretoria Peace Agreement of 2002, Section II, point 1

[359] Ibid, point 2

[360] Ibid, point 3

[361] Ibid, point 4

[362] Ibid, point 5

[363] Ibid, point 8

universal principles and international law. Furthermore, the amnesty that is granted by the provision of the accord is on a temporary basis, and until the amnesty law is adopted and promulgated, amnesty shall be promulgated by presidential decree-law. Understandably the accord requires the principle of amnesty to be established in the transitional constitution.[364] To address past atrocities, the Pretoria Peace Agreement called for a Truth and Reconciliation Commission (TRC).[365] The TRC was indeed established and operated in the DRC during the transition period until the 2006 national elections. The Pretoria Peace Agreement also recommended that an ad hoc international tribunal for the DRC be established by the international community, but no such measure was adopted.[366]

4.6.2.3 The Sun City Peace Agreement (2003)

The subsequent Sun City peace agreement (2003) established a transitional government, under international supervision in the form of the International Committee in Support of the Transition (CIAT) that guaranteed former belligerents full control of the state and its resources while leaving representatives of civil society and other constituencies with little influence. The skewed power-sharing arrangement meant that the transitional partners had little incentive to begin the difficult tasks of resolving the root causes of Congo's recurrent conflicts, ending impunity, and instituting the rule of law and the enforcement of basic human rights.[367]

4.6.2.4 The Presidential Decree No. 03-001

The two peace accords[368] was followed by the Presidential Decree No.03-001 of April 15, 2003, that granted amnesty by temporary executive order as per the 2002 Global and All-Inclusive Agreement; amnesty covered acts of war, political breaches of the law, and

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[364] Ibid
[365] See the Pretoria Peace Agreement of 2002, Section V, point 4 (a)
[366] AfriMAP and The Open Society Initiative for Southern Africa, 'The Democratic Republic of Congo, Military Justice and Human Rights – An Urgent Need to Complete Reforms' (2009); Available at: www.afrimap.org/english/images/report/AfriMAP-DRC-MilitaryJustice-DD-EN.pdf, accessed on 22.05.2014
[367] Thomas Turner, The Congo Wars: Confli ct, Myth and Reality, Zed Books: 2007; Gérard Prunier, Africa's World War: Congo, The Rwandan Genocide, and the Making of a Continental Catastrophe, Oxford University Press: 2008
[368] The Lusaka Peace Accord (1999) and Sun City Peace Agreement (2003)

crimes of opinion for the period of August 2, 1998 to April 4, 2003 but excluded genocide, war crimes, and crimes against humanity from its reach.

4.6.2.5 Law No. 05/023

And, Law No. 05/023 of December 19, 2005, passed by the Congolese transitional parliament to abrogate the 2003 Presidential Decree; it codified an amnesty over the crimes enumerated in that Decree, but altered the timeframe to include acts committed from August 20, 1996 to June 20, 2003; this law allowed for the retroactive pardon and commutation of convictions for the acts falling under the amnesty law.[369]

4.6.2.6 A Letter from Congolese Minister of Justice February 9, 2009

In this letter, the Congolese Minister of Justice ordered all investigations and prosecutions against armed groups and CNDP members in North and South Kivu to be suspended. However, the introduction of Amnesty Law though Goma Peace Agreement renders these instructions inoperative.

4.6.2.7 The Goma Peace Agreement of 2008

The January 2008 Goma peace agreements called for an amnesty law, and the Congolese National Assembly adopted a bill on July 12, 2008. On May 7, 2009, President Joseph Kabila of the Democratic Republic of Congo (DRC) signed and thereby put into effect an Amnesty Law. It applies to Congolese living in the DRC or abroad and covers acts of war and insurrection committed in the eastern provinces of North and South Kivu[370] from June 2003 to the date of signing. But, however, the amnesty is of limited temporal and geographic scope, explicitly excludes genocide, war crimes, and crimes against humanity from its reach,[371] and does not preclude reparations.[372]

[369] Available at www.ictj.org, visited on 24.05.2014
[370] See article 1 of the Goma Peace Agreement of 2008
[371] article 3 of the Goma Peace Agreement of 2008
[372] article 4 of the Goma Peace Agreement of 2008

4.6.2.8 Kampala Peace Talks of 2013 (The Kampala Declaration of 2013)

The dialogue was between the Government of the Democratic Republic of the Congo and the 23 March Movement (M23). At the said dialogue M23 renounced the rebellion and was preparing its former combatants for the process of disarmament, demobilization and confirms that it has placed its fighters at the disposal of the Government of the Democratic Republic of the Congo for demobilization and reintegration. The former rebels agree that amnesty will be granted individually, on a case-by-case basis, to those who submit a written commitment to refrain from taking part in any insurgency movement, and that any violation of that commitment would render the amnesty null and void.[373] However, amnesty granted by the government covering the period from 1 April 2012 to the present day, does not cover war crimes, crimes of genocide and crimes against humanity, including sexual violence, recruitment of child soldiers and other massive violations of human rights.[374]

In practice, however, it perpetuates Congo's pattern of rewarding violence and creates a blanket amnesty for scores of crimes perpetrated by rebel groups, Congolese armed forces (FARDC), militias, and police alike.[375]

4.6.3 The Success and Downfall

The DRC faces serious challenges to stabilize the country from insecurity as the result of ongoing-war within the region. Some progress has been made over the past several years in moving the DRC from political instability and civil war to relative stability and limited democratic rule; although eastern Congo remains a region marred by civil strife[376] continues to pose a serious threat to political stability in Congo and the Great Lakes region at large.[377] This can be evidenced by the July 30, 2006 the first presidential and parliamentary multi-party elections in almost four decades; whereby more than 19 million Congolese were registered to vote in the 2006 elections; followed by the 2011 presidential election.

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[373] See Declaration of the Government of the Democratic Republic of the Congo at the conclusion of the Kampala Dialogue, 2013
[374] Ibid
[375] www.ictj.org
[376] Tom Maliti, "African Leaders Chide Peacekeepers," Chicago Tribune, November 9, 2008.
[377] Gettleman, Jeffery, "For Congo's Leader, Middling Reviews" New York Times, 4 April 2009; http://www.nytimes.com/2009/04/04/world/africa/04kabila.html, visited on 27.05.2014

However, the current state of the Democratic Republic of the Congo is again steeped in violence. Despite Peace Accords and attempts by the government, the Eastern Provinces have seen little decrease in violence of the resource rich lands that comprise them.[378] Currently, in the Kivu province, the Democratic Forces for the Liberation of Rwanda (FDLR) are battling the Forces Armées de la République Démocratique du Congo (FARDC) for control of the territories that border Rwanda to the east. Both claiming they are protecting the refugees that still reside in the region following the civil war and genocide in Rwanda; but seems like some sort of a convenient excuse to keep forces in the mineral rich area, as they are the rebel groups that allegedly control some of the mines and are guilty of atrocious human rights violations.[379]

Understandably, peace, social reconstruction, justice, and reconciliation remain distant dreams in Congo. The military and other government security forces continue to be among the worst perpetrators of daily human rights violations against the population and the source of instability.[380] Civilians remain targets of the indiscriminate violence, including killing, torture, displacement, abduction, and epidemic levels of rape and other forms of sexual violence. A state of fear prevails to this day in large swaths of the DRC.[381]

Internally displaced persons remained a major problem, and the integration of ex-combatants and members of rebel and militia groups (RMGs) into state security forces and governance institutions was slow and uneven. State security forces retained and recruited child soldiers and compelled forced labor by civilians.[382]

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[378] Polgreen, Lydia. "Congo's Riches Are Plundered By Renegade Army Brigade" International Herald Tribune; Nov 15 2008 , available at http://www.globalpolicy.org/component/content/article/181/33686.html, visited on 27.05.2014

[379] Anderson, Ken "Imperial Clash on the Congo Resource Front" Hungry of Truth; 2 Feb 2009, available at http://www.globalpolicy.org/component/content/article/198/40133.html, visited on 27.05.2014

[380] Thomas Turner, Congo Wars: Conflict, Myth, Reality (London: Zed Books, 2007), 124.

[381] Ibid

[382] Human Rights Watch, "Democratic Republic of the Congo, What Kabila Is Hiding: Civilian Killings and Impunity in Congo," 9/5(A) (October 1997), available at http://www.hrw.org/reports97/congo/, visited on 27.05.2014

4.7 Conclusion

Literally, one can come to the conclusion that most of peace agreement entered between the incumbent governments and rebels or outgoing governments and the new governments contained provisions which offers total immunity to judicial prosecution for perpetrators of atrocities. Practically, most of agreement does not contain therein blanket amnesties but rather conditional amnesties. Taking a good look at the wording of the provisions you will find that the wording does not imply blanket amnesties but conditional amnesties. A good example is the wording in the IC and the TRC Act of South Africa, amnesty is limited only to the atrocities committed against a proportionate political objective[383] and also amnesty premised on full disclosure.[384] Also the Lome Agreement of the Sierra Leone amnesties was only offered to the RUF combatants for acts of mutiny and not for acts that were the results of mutiny.

[383] Sarkin 'The Trials and Tribulations of South Africa's Truth and Reconciliation Commission' (1997) 12 South African Journal on Human Rights 617.
[384] Ibid s. 3(1)(c)

CHAPTER FIVE

FINDINGS AND ANALYSIS

5.1 Introduction

In this chapter the researcher is going to discuss and present findings and their analysis obtained from library research as well as field research. The whole study based on findings from both library research and field research. In field research the researcher main base was at ICTR in Arusha Tanzania. However, the researcher managed to visit and made personal interviews with peoples, victims, relatives of the victims, NGO's and government officials in Kigali Rwanda and Gulu district in Northern Uganda. Therefore, findings discussed and presented hereinafter are the result of library research and field research through personal interviews and questionnaires.

5.2 Findings and Analysis of Library Research

At this juncture the researcher is going to discuss and presents findings and analysis on the introduction and the use of peace agreement and amnesty laws obtained from library research through literature review of various statutes, books, journal, articles and newspaper articles, conferences reports, the internet and unpublished materials. The researcher documentary review revealed that difference state had different reasons or justifications for granting amnesties to perpetrators of mass atrocities. And this depended on the situation that state was in or was faced with. This is to say that some of the states were still in war or conflict, others were at the transitional stage and others were in post conflict stage.

5.2.1 In Transition

For those states who were at the transitional stage they were forced and obligated to grant amnesties for the purpose of facilitating and ensure a smooth change in the political machinery of the state from a repressive regime to a democratic regime. A good example is South Africa. By the late 1980s and the early 1990s, liberation movements commanded the support of the overwhelming majority of South African citizens as hundreds of

thousands of supporters mobilized to defy the government. This mobilization, though costly and disruptive, was unlikely to overthrow the government as it could be contained, for the most part, by security forces.[385] Therefore, the South African liberation movements did not succeed in removing the apartheid government from office by military means.[386]

The apartheid regime was still maintaining considerable power during the regime change and the apartheid government and its security forces would never have allowed the transition to a democratic order and had its members, supporters or operatives been exposed to arrest, prosecution and imprisonment.[387] Vividly, few months before the scheduled general democratic elections, generals in command of the South African police delivered a veiled warning to the ANC that they would not support or safeguard the electoral process if it led to the establishment of a government that intended to prosecute and imprison members of the police force.[388] Therefore amnesty became the final obstacle to transition to democracy. Indeed, the South African amnesty occurred at the point of collision of two radically different forces: from one side, the dynamic within the African National Congress to extend an internal truth commission model to the entire nation in the wake of a peaceful and democratic transition of power, and on the other, the decision to bow under threats and pressure from the National Party to use political violence to disrupt the first democratic election unless the negotiated transition included amnesty, and very preferably blanket amnesty, for National Party officials and members of the South African police and defense forces.[389]

Therefore ANC came to the conclusion that without an amnesty agreement, there going to be mass mobilization and politics of confrontation would return and hostility and opposition from the security forces would have made it impossible to hold successful

[385] Sarkin 'The Development of a Human Rights Culture in South Africa' (1998) 20 Human Rights Quarterly 629

[386] Muller, C.F.J. (ed) (1981) Five Hundred years: a history of South Africa; 3rd rev. ed. Pretoria: Academica, p. 462, 467.

[387] Dullah Omar, Informal remarks prior to speech, Justice and Impunity: Germany and South Africa Compared conference, Community Law Center (Cape Town: October 1994).

[388] Ibid

[389] Asmal 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 Modern Law Review 1

elections.[390] As a result the ANC bow to the threat and incorporate amnesty provision in the post-amble of the South Africa Interim Constitution of 1993 and later incorporated the same into the Promotion of National Unity and Reconciliation Act of 1995 (TRC Act).[391] In this regard I can say that the manner in which a successor government chooses to deal with those who have committed gross violations of human rights, during the tenure of a previous repressive regime is profoundly influenced by the balance of power between the old and new orders at the time of transition.[392]

5.2.2 In Post Conflict

In unstable post-conflict states; in unstable post-conflict state, the notion of retributive justice[393] for victims of mass atrocities often has to be balanced against the need of the territorial State to deal effectively and progressively with past atrocities and not to provoke or maintain further violence. In such circumstances a restorative justice approach incorporating limited amnesties, focusing on the normative rather than the punitive objectives of criminal law, is the more appropriate model.[394] This is due to the fact that at the end of a period of violent repression calls for rebuilding the political machinery and the civil service, guaranteeing a minimum of physical security, disarming rebel movements, reorganizing the army, rebuilding infrastructure, establishing a non-partisan judiciary, healing the victims, repairing the damage inflicted on them. And all that cannot only be achieved by prosecuting perpetrators of past atrocities because criminal prosecutions are unlikely to further tasks of national forgiveness and, thus, future peace.[395]

In unstable post-conflict states prosecution of any alleged perpetrators in such societies may create rancour. It should be known that in a civil conflict the people have fought

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[390] J Klaaren and H Varney 'A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues Around Legislation for a Second Amnesty' (2000) 117 South African Law Journal572-593

[391] See South Africa Office of The President No. 1111 26 July 1995, No. 34 of 1995: Promotion of National Unity and Reconciliation Act, 1995, http://www.fas.org/irp/world/rsa/act95_034.htm, last visited on 05.06.2014

[392] See Gitta Sereny, Albert Speer: His Battle with Truth (New York: Knopf, 1995)

[393] K. Avruch and B. Vejarano, "Truth and reconciliation commissions: A review essay and annotated bibliography", The Online Journal of Peace and Conflict Resolution , Vol. 4.2, 2002, pp. 34-76.

[394] R. Teitel, "Transitional jurisprudence: The role of law in political transformation", Yale Law Journal, Vol. 106. No. 7, 1997, p. 2009, esp. p. 2037.

[395] Burke-White, W. (2001) 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' in Harvard International Law Journal, 42, p. 467.

each other and the societies concerned are polarized[396], any prosecution is viewed by either side with suspicion when it goes against them. Furthermore, the application of prosecutorial justice could give rise to undesirable complexities to the people in whose interest and for whose welfare justice was being invoked. It may lead to the question of who will be given the authority to judge the members of the outgoing regime or members of the reign regime. Thus, as observed by Orentlicher[397], that prosecution can threaten the stability of a newly democratic society. Furthermore, it was observed that, in countries where the military retains substantial power after relinquishing office, efforts to prosecute past violations may provoke rebellions or other confrontations that could weaken the authority of the civilian government.

A good example is the safe heaven given to President Charles Taylor by Nigeria helped in the resolution of Liberia's seemingly intractable war.[398] Therefore, the threat of indictment and prosecution can harden rebels' or leaders' grip on power, seemingly with the effect of protracting human rights violations indefinitely.[399] Therefore, in such situation prosecutions is likely to hinder the national reconciliation process as supporters of the previous regime may be driven into social or political isolation and create 'subcultures hostile to democracy.[400] Understandably, the need of war-torn countries for security and stability, in the short-term form of a ceasefire, sanctions the adoption of amnesties at the expense of justice.

5.2.3 In Armed Conflict

In ongoing conflicts; in a situation where the conflict is on-going, indictments followed by prosecution can eliminate the full range of negotiated options for dealing with tyrants,

[396] Apori-Nkansah, L. (2008), Transitional Justice in Post-conflict Contexts: The Case of Sierra Leone,s Dual Accountability Mechanisms: Published doctoral dissertation, Walden University, Minnesota, UMI, AAT 3291475

[397] Kristin Henrard, 'The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law' (1999) 8 Michigan State University - DCL Journal of International Law 595, 635.

[398] Burke-White, W. (2001) 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' in Harvard International Law Journal, 42, p. 467

[399] Rothchild, D.S., Stedman, J.S. and Cousens, E.M. (eds.) Ending Civil Wars: The Implementation of Peace Agreements, Boulder, CO: Lynne Rienner Publishers.

[400] Kristin Henrard, 'The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law' (1999) 8 Michigan State University — DCL Journal of International Law 595, 635

thereby stalling or completely derailing any previous peace process talks[401]. Indeed, in a situation where the conflict is ongoing and neither of the parties was able to subdue the other the indictments and arrests of either side to the conflict aggravated the situation and in some cases created and distorted efforts to peacefully end the conflict.[402] In Northern Uganda and Darfur-Sudan, indictment of some members of the LRA and the indictment of Al-Bashir, the Sudanese president worsened the peace process in that part of the country. The response to the indictment was to brutally increase their attacks on civilians and aid workers and the continuing blood shed in both countries. Hence, a set-back and block to the peace process in the area.[403]

On 5 March 2009, shortly after the ICC's decision, the AU Peace and Security Council (PSC) issued a communiqué lamenting that this decision came at a critical juncture in the ongoing process to promote lasting peace in Sudan.[404] In this same communiqué, the PSC asked the UN Security Council to exercise its powers under Article 16 of the Rome Statute to defer the indictment and arrest of Al-Bashir. The Security Council to date has chosen not to accede to the AU's request for a deferral of the Sudan investigation. Consequently, On 3 July 2009 in Sirte, Libya, at the Thirteenth Annual Summit of the Assembly of Heads of State and Government, the AU resolved not to cooperate with the ICC in facilitating the arrest of Al-Bashir. It, however, emphasized that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace,[405] thereby pointing to the "wrong timing" of the Prosecutor's application for a Bashir arrest warrant.[406]

However, the documentary review also revealed that, in the aftermath of conflict or tyranny regime, victims of mass atrocities are often demanding justice and not to

[401] Cobban, H. (2006), International Courts. Foreign Policy, 153, 22-28.
[402] Allen,T. (2005). War and justice in Northern Uganda: An assessment of the International Criminal Court's intervention, An Independent Report.
[403] Apori-Nkansah, L. (2008), Transitional Justice in Post-conflict Contexts: The Case of Sierra Leone,s Dual Accountability Mechanisms: Published doctoral dissertation, Walden University, Minnesota, UMI, AAT 3291475
[404] Women's Initiative for Gender Justice, "Gender Report Card on the International Criminal Court", 2009, p. 51, <http://www.iccnow.org/documents/GRC09_web_version.pdf>
[405] See "World Reaction-Bashir Arrest" (4th March 2009) BBC, available at: http://news.bbc.co.uk/2/hi/africa/7923797.stm (last accessed on 20th April 2014)
[406] Mary Kimani, "Pursuit of Justice or Western Plot: International Indictments stir angry debate in Africa" (October 2009) at Page 12

compromise justice with peace. Hence, the notion that there cannot be peace without justice emerges forcefully in many war-torn communities. For them, punishment and corrective action for wrongdoings is based on the principle that perpetrators of mass human rights violations, or ordered others to do so, should be punished in courts of law. [407] Simply because retribution is exactly what most victims of past atrocities want and indeed, it serves to heal their wounds and to restore their self-confidence because it publicly acknowledges who was right and who was wrong and, hence, clears the victims of any labels of 'criminal' that were placed on them by the authorities of the past or, indeed, by rebel groups or the new elites.[408] Furthermore, the prosecution for gross violation human rights deters the occurrence of such crimes in future. The Preamble of the Rome Statute also states that the parties to the treaty are determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.[409] Prosecution is justified because it has the effect or consequence of preventing future crimes. Deterrence can be specific preventing re-offending by the accused or general preventing offenses by others. Prosecution main goal is general deterrence.[410] Indeed, it sends a clear message, that violation of human rights will have serious repercussions. Such a message is important not only because it promotes the respect for human rights, but also and especially because it guarantees non-recurrence, which is crucial for the success of a transitional process.[411]

5.3 Findings and Analysis of Field Study

At this juncture the researcher is going to discuss and analyse views from different groups of people, institutions and victims regarding amnesty laws and peace agreements offered to perpetrators of past or ongoing atrocities. The researcher managed to speak and interview a number of respondents with gender and age difference including local

[407] Teitel, Ruti (2003), "Transitional Justice Genealogy," Harvard Human Rights Journal, Vol. 16, pp. 69-94.
[408] Burke-White, W. (2001) 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' in Harvard International Law Journal, 42, p. 467
[409] See the Preamble of the Rome Statute
[410] MARK A. DRUMBL, A TROCITY, PUNISHMENT, AND INTERNATIONAL LAW 136 (2007) (citing Jeffrey Gettleman, Uganda Peace Hinges on Amnesty for Brutality, N.Y. TIMES , Sept. 15, 2006, at A1).
[411] Crocker, D.A. (2002). "Democracy and Pun-ishment: Punishment, Reconciliation, and Democratic Deliberation," Buffalo Criminal Law Review , No.5, pp. 509-49.

leaders, religious leaders, victims, formerly-abducted persons, and other community members in Gulu district Uganda and Kigali capital Rwanda.

At the time of this research, the security situation in Northern Uganda and Kivu in DRC Congo was yet unstable except at least for Sierra Leone and South Africa. Most of the post-conflict and ongoing conflict societies like those in South Africa, Sierra Leone northern Uganda and in the Democratic Republic of Congo (DRC) are all faced with the conundrum of sustainable peace and justice.[412] While some of them seeking for justice at all costs to avoid encouraging impunity, other segments of society would rather forget about the horrific and traumatic past and move on with hope and confidence, in fear that the continued quest for justice could slide society back to conflict.

5.3.1 Peace Agreements

In northern Uganda, a region marked by eighteen years of insurgency, first, it was a struggle between the government and the LRA, thereafter, it was a conflict between the predominantly Acholi LRA and the wider Acholi population, who bore the brunt of violence that included indiscriminate killings and the abduction of children to become fighters, auxiliaries and sex slaves.[413] Until to-date in Northern Uganda about 40% reported abduction, 45% reported the killing of a family member, and 23% reported being mutilated. Although, abductees, victims of violence and relatives of murder victims blames and hold the whole LRA, Kony, his commanders as well as Museveni and his government responsible for most of the harms inflicted on them; including displaced them into camps, looted their properties and even abducted their children and relatives and depriving them of their rights to a decent life but the majority of the same were and still are supportive to the of Peace Talks resulting into peace agreement to end war.

Local leaders, victims and formerly-abducted persons, stressed that peace dialogue encourages the parties at war to express their opinions; and therefore, the Government should do everything possible for the peace talks to succeed so that people can reconcile their broken relations. They further suggested that the Government together with Kony's

[412] See Oxfam, "The Building Blocks of Sustainable Peace: The Views of Internally Displaced People in Northern Uganda", Oxfam Briefing Paper, September, 2007

[413] Afako, Barney 2010. Negotiating in the Shadow of Justice, in: Accord Update: Initiatives to End the Violence in Northern Uganda 2002-2009 and the Juba Peace Process. London

people should allow the peace process to end successfully, so that they can also have peace and enjoy the country that the Lord has given them. Also, they demand the international community should help in mediating the peace talks, because Museveni cannot even listen to them, the grassroots people. And, if, it is possible, issues being discussed in peace talks need to be brought down to them to discuss them as well and be part of the process aimed at bringing peace back to their region; because they need a better tomorrow. The analysis revealed that they believe that reconciliation should start with the peace talks.

5.3.2 Amnesties and Amnesty Laws

On the amnesties and amnesty laws aspect, this study also found that Uganda Amnesty Act 2000, was created in order to promote national reconciliation and to ensure stable and sustained peace; under the Act, rebels must genuinely abandon and renounce their crimes.

A good number of the people of northern Uganda I have spoken to and answered the questionnaires, they were against the indictment of the LRA leaders because they believe that this might thwart the peace process. Most of the Acholi prefer amnesty laws or amnesties packaged in post-conflict peace agreement because they believe it would bring a speedy end to the war and facilitate quick reintegration for the former combatants. Most of ex-combatants and child soldiers elaborated that they would never have come out of the bush if not for the Amnesty deal. That they knew the things they had done, even if under duress, were terrible and if a pardon was not on the table they would never have returned because they would have had to be killed or tortured. And others admitted that they have all done bad things, not only the rebels or them alone but even their fellow village people. They insist on forgiveness from each other and to move on with their lives because they have suffered long enough. One of the victims said "though the LRA inflicted suffering on our people and region, they did so because of grave government marginalization, and my family's blood was not shed in vain. It's now time to put this nightmare behind us and move on, and this can only be done through reconciliation and not retribution.

Generally, the analysis discovered that twenty three (23) persons out of the sample group which was 45 persons, in percentage was about 51% of those interviewed still strongly support amnesty and consider it as vitally important for sustainability of the prevailing peace, reconciliation and rehabilitation.

5.3.3 Prosecution

On contrast, the rest of the respondents interviewed and those filled the questionnaires who were eleven (11) persons in number out of the sample group which was 45 persons, which is about 24% felt extremely embittered about amnesty for perpetrators, stating that they would not be reconciled unless justice was done, founded on the basis that there can be no durable peace without justice which to some extent satisfies victims that wrongs have been addressed. For them, a peace agreement that allows power-sharing with criminals and amnesties for their crimes is perceived by the victims or survivors as an "unjust peace" and therefore detrimental to postwar stability and reconciliation.

According to Rwandan Government Officials, the government sees legal accountability as an integral part of the reconciliation process: "there can be no reconciliation without justice".[414] This view was also reflected by Rwandans respondents interviewed in Kigali capital and at ICTR Arusha, Tanzania that it is crucial to make perpetrators accountable for their past actions; to deter future crime; to counter a culture of impunity; and create an environment in which perpetrators and victims can realistically be expected to live next to one another. They also urge that its helps avoid break the cycle of revenge and it ensures that the perpetrators do not rise to power again.

According to Rwandans Tutsi survivors, justice is also important for reconciliation because someone will feel lighter if the man who killed her husband is punished. Also, justice will resolve problems; it is a condition for reconciliation. Thus, they need justice before forgiveness; and forgiveness is not possible without justice. About 7% of respondents which is 3 persons out of the sample group said that those responsible for abuses should be held accountable and face punishment accordingly. However, few of them also want rebel leaders and those still in the rebellion to be brought to justice as

[414] Rwandan government website (http://www.rwanda1.com/government/justice.htm), visited on 26.07.2014.

they suggested that rebels leaders ought to be brought to justice while amnesty and traditional justice can be applied for the rest involved or forced into the war**.** In principle, prosecutions is regarded, in particular by respondents as a viable course of action, specifically with respect to perpetrators who were considered the most accountable in terms of seniority and gravity of harm, as they would lead to punishment. For the respondents who favoured criminal trials often identified both preventing impunity and preventing further harm as the added-value of prosecution. Generally for them courts are not something bad because they make someone to reap what they have sown. The use of courts enables people to make right decisions; and if neglect the use of courts, society will be anarchical.

5.3.4 Other AJM

However, some of the respondents in fact oppose both amnesty and indictment, and favour instead traditional justice mechanisms like *Mato oput* and *Gacaca*, which promotes community reconciliation and reasserts lost dignity. *Mato oput*,[415] which literally means "drinking the bitter root", is a detailed ceremony meant to reconcile conflicting parties. It is an authoritative nonviolent measure to repair damaged relations. *Gacaca*[416] courts was introduced by the Rwandan government in order to speed up trials and sentencing, as well as revealing the truth about the genocide and fostering reconciliation based on traditional community justice to try those accused of all but the most serious crimes. Physical presence is required so as to be part of the healing process.

According to the study, the minority of about 18% which is 8 persons out of sample group favoured and were in support of the use of traditional collective justice mechanisms that focus is on repairing not only the harm but also the relationships between offenders, victims and the community at large especially amongst people where relatives and friends were on opposing sides of the war in-order to further forgiveness, reconciliation and reintegration.

[415] See also "The Mato Oput Project" on Collaborative Transitions Africa at: www.ctafrica.org/default.asp?contentID=581, last visited 12.05.2014
[416] Peter E. Harrell, Rwanda's Gamble: Gacaca and a New Model of Transitional Justice (New York: Writers Club Press, 2003)

However, most of the ordinary respondents showed little or no knowledge about the research dissertation title. The responses given with regard to the amnesty and peace agreement offered to perpetrators of mass atrocities expressed the grassroots unawareness of the mechanisms or approaches to be used in post-conflict societies as well as transitional societies. The respondents in the northern Uganda, Kigali capital and Arusha in Tanzania attributed more power to the Government of Uganda to deal with rebels either by offering them immunity or capturing them and prosecute them in order to bring about sustainable peace to the region.

5.4 Conclusion

The analysis hereinabove shows that most of the amnesties granted by various states in Africa as an incentive to rebels and other liberation or revolutionary movements are blanket amnesty. That amnesty which are not conditional and above all they are granted to a group of rebels or combatants and not amnesty that is based on a case-to-case basis. In other words we can say that they are collective and general in nature. In Sierra Leone, the Abidjan Peace Accord gives the RUF absolute immunity from any prosecution for its war activities. Also its successor, the Conakry Accord of 1997 granted collective and blanket amnesty to rebels whom combatants involved in a coup d'état of 25 May 1997. Additionally, a national amnesty law was passed providing a free pardon to all combatants for any of their actions committed in pursuit of their objectives since March 1991.[417] Also in Uganda, the Ugandan Amnesty Act of 2000 declared amnesty in respect of any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by[418] either actual participation in combat;[419] collaborating with the perpetrators of the war or armed rebellion;[420] committing any other crime in the furtherance of the war or armed rebellion;[421] or assisting or aiding the conduct or prosecution of the war or armed rebellion.[422]

[417] Lomé Accord, Article IX, 'Pardon and amnesty'.
[418] Uganda Amnesty Act 2000, art. 3(1)
[419] Uganda Amnesty Act 2000, art. 3(1)a
[420] Uganda Amnesty Act 2000, art. 3(1)b
[421] Uganda Amnesty Act 2000, art. 3(1)c
[422] Uganda Amnesty Act 2000, art. 3(1)d

However, there are some of the agreements that granted amnesties which were not collective or blanket amnesty; but rather conditional amnesty. In South Africa under the Promotion of National Unity and Reconciliation Act, 1995, in-order for a person to make an application for amnesty then the person's crime had to meet the definition of acts associated with a political objective as contained in the TRC Act, and the person had to provide full disclosure of the act for which amnesty was sought.[423] In this regard amnesty in South Africa was individualized and not granted in general to a group of persons or liberation movements. Also other Acts and Agreements contain amnesty provision granted amnesty only to particular class of crimes and exempted others from amnesty. In Congo, the Pretoria Peace Agreement of 2002; the Presidential Decree No.03-001 of April 15, 2003; Law No. 05/023 of December 19, 2005, passed by the Congolese transitional parliament and the Goma Peace Agreement of 2008 both of them contained amnesty provision but such amnesty exclude war crimes, genocide and crimes against humanity.[424]

[423] Ibid s. 20(1)(c)
[424] Pretoria Peace Agreement of 2002, Section III, point 8

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

Although under international law there existing a number of instruments that imposes a duty to States to prosecute perpetrators of heinous crimes but understandably, the existence of such instruments does no automatically take-away the right of political communities to debate and determine the code of lawful behavior within their territorial jurisdiction, as well as the consequences that may attach to breaches of such codes.[425] That is to say if international law will only limit states to prosecutorial justice then the principle of Self-governance of states would have a thin meaning. In-fact there is wide-ranging options available, to the transitional governments in the quest for stability and sustainable peace as well as justice in transitional societies. The analysis reveals that most of the agreements in Africa entered between the incumbent government and the rebels or liberation movement(s) represents an important step forward in the search for peace, democracy and development. However, their efficiency were, hampered by limitations such as the reservation by Rome Statute which requires a state party to locally prosecute or extradite to international courts or tribunals rebels or combatants who committed heinous crimes against humanity, contrary to international humanitarian law. Certainly, peace agreements contained amnesty provisions are therefore perceived as rewarding violence, instead of punishing it. For all their limitations, however, the signing of these peace agreements in the first instance provided a rough framework for the fragile transition from violence to peace in the country.

Most of Statutes and peace agreements in states discussed in this research contained blanket amnesty provisions. However, there were few of them which contained conditional amnesty provisions. And, furthermore, such statutes and peace agreements called for the establishment of truth and reconciliation commissions whose mandate is to investigate and report on the causes, nature, and extent of the violations, and work to

[425] Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," Yale Law Journal, vol. 100, No. 8 (1991), p. 2537

restore the human dignity of victims and promote reconciliation through truth telling.[426] However, these TRC does not have a punitive, prosecutorial role, but rather allows perpetrators and victims of human rights violations to come forward and account for their actions in the spirit of promoting national peace and reconciliation.[427] The truth telling process will not only help to shield the perpetrators of heinous crimes from possible individual acts of revenge but also innocent victims will at least get an opportunity to face public those who have violated their bodies and property and killed or maimed their relatives.[428] And, such painstaking effort at establishing the truth about what happened will help to prevent a recurrent of the kinds of atrocities that have shocked our public and the world at large. Additionally, some of them were vested with extensive investigative powers, including the issuance of summons and subpoenas, which do not fall short of the powers of judicial authorities;[429] as well as entitled to make recommendations to governments suggesting reforms needed to achieve the non-repetition of the violations, addressing impunity, and promoting healing and reconciliation.

6.2 Recommendations

It is recommended that promoting justice, compensation, and reconciliation after conflict are very challenging task and if not adequately addressed may be a source of social unrest hence contribute to renewal of violence. However, it is crucial to note and acknowledge that each post-conflict situation is unique, and requires different measures to address past wrongs and not necessarily concentrate on a single approach or mechanism in addressing past atrocities. Understandably, in armed conflicts where serious violations of the laws of war have been committed on a massive scale, the notion of remedial or retributive justice for victims of war crimes often has to be balanced against the need of the territorial State to deal effectively and progressively with past atrocities and not to provoke or maintain further violence.

[426] Article 6 (1) of the TRC Act, 2000
[427] Abdul Tejan-Cole, Human Rights under the Armed Forces Revolutionary Council (AFRC) in Sierra Leone, in: 10 African Journal on International & Comparative Law (1998), 481.
[428] Elizabeth M. Evenson, "Truth and Justice in Sierra Leone: Coordination between Commission and Court," Columbia Law Review 104, no. 3 (2004): 745.
[429] See Clause 8 TRC Act, 2000

Furthermore, since transitional justice has to a great extent mostly concentrated on formal, legal, retributive measures to deal with past wrongs; there is a need of legal pluralism to come to play. This is to say ongoing conflicts in Africa necessitated the application of the application of a number of different efforts at different levels including granting amnesty, using domestic courts, applying traditional justice and the ICC. Thus, judicial measures like trials and legal reforms, and non-judicial measures like truth commissions and compensation schemes and traditional mechanisms work best if they are combined in a comprehensive strategy; since they are parallel and complementary to each other rather than mutually exclusive but especially if their objective is the same; in this case to ensure peace and justice after conflict.

Similarly, the study found that the people's immediate need in ongoing conflict or post-conflict society is for peace, reconciliation and social reconstruction; it is therefore commended that amnesties granted as part of an amnesty and truth commission process should merit and be afforded international recognition. This is recommended because the African view of justice is aimed at the healing of breaches, the redressing of imbalances, and the restoration of broken relationships. Generally, this kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence.

Additionally, for such an amnesty and truth commission process to be afforded international recognition would need to satisfy the following minimum requirements; the Commission should be established by the legislature or executive of a democratically elected regime; the Commission should be a representative and independent body; the Commission should have a broad mandate to enable it to make a thorough investigation. It should not, however, be restricted to deaths and disappearances but should be permitted instead to investigate all forms of gross human rights violations; the Commission should hold public hearings at which victims of human rights abuses are permitted to testify; the perpetrators of gross human rights violations should be named, provided adequate opportunity is given to them to challenge their accusers before the Commission; the Commission should be required to submit a comprehensive report and recommendations

within a reasonable time; the Commission should be empowered to recommend reparations for victims of gross human rights violations; and amnesty should be denied to perpetrators of gross human rights abuses who refuse to co-operate with the Commission or who refuse to make a full disclosure of their crimes.

On top of that, the amnesty applicant(s) shall have to admit responsibility for the act for which amnesty is being sought; and the application must be dealt with in a public hearing where the applicant(s) must make his admissions in the full glare of publicity the atrocities they have committed while prosecuting war. Therefore, this approach will help to protect the applicant(s) from possible individual acts of revenge and also innocent victims, applicant's family and community learn that an apparently decent man was a heartless torturer or a member of a ruthless death squad who have violated their bodies and property and killed or maimed their relatives. Thus dealing with the matter of impunity and there is, therefore, a price to be paid.

On the same token, as official investigative bodies, Truth Commissions require significant political will to implement, and generally are not effective unless the commissioners are truly independent of the parties to the conflict or abuse. Therefore, to attract public confidence, TRC that is empowered to grant amnesties must be operationally and politically independent. Thus, its operation until the end of its stated mandate must not be capable of being subjected to financial blackmail. Furthermore, TRC must also have absolute power to determine who gets amnesties and the award of such amnesties must be immune from political manipulation.

Similarly, the study found that the OTP and UNSC should not defer solely on the ground that deferral would be just and in the interest of the victims or would further peace; but rather evaluate first to see if the AJM meets the threshold requirement of necessity and legitimacy, and second, if at all the AJM furthers the goals of international criminal justice. And, if AJM is not required by the circumstances or is adopted in bad faith like a blanket self-amnesty, then the OTP and UNSC should not defer. However, it should not

defer to non-prosecutorial methods that undercut its raison d'etre unless the alternative methods can achieve similar aims.

Additionally, in the interests of reaching a settlement, alleged perpetrators of gloss violation of human rights should not be included in the negotiations tables and even in the new governments unless otherwise it is the only viable and valid way for resolving the crisis in ongoing war. This is because the culture of including them in negotiations tables only perpetuates a culture of impunity that fails to deter future war criminals, it also fails to produce a just peace and it is perceived by the victims or survivors as an "unjust peace" and therefore "detrimental to postwar stability and reconciliation.

Lastly, post-conflict Governments must shoulder the responsibility for bringing various aspects of the system of accountability and reconciliation to fruition. These include the enactment of required legislation to provide for the institutions to be created, the adaptation of the existing legal framework to incorporate the terms of the agreements, the designation of an investigations unit, the provision of fair, speedy, and public hearings. On top of these, these Governments must guarantee that it will make arrangements for reparations, and determine the appropriate roles of traditional mechanisms and "promote" them.

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