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# Transitional Justice in Post Conflict Societies: Underscoring the Debates on Amnesty versus Victims' Rights

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**ABSTRACT**
This research underscores the debates on amnesty versus victims' rights as confronted by States undergoing the process of transitional justice in the aftermath of armed conflicts. The incidences of non-international armed conflicts in recent decades have given rise to numerous strategies for attaining peace in fractured societies. The nature of the peace agreement adopted and the transitional justice institutions established vary according to a great number of factors, including the type of conflict conducted and its participants, perceptions of victimisation, as well as expectations of reconciliation among former opponents. Amnesty has been the most popular transitional justice mechanism for the past four decades, particularly in the context of civil war. States justify the use of amnesties by claiming that they are successful in enticing armed actors to demobilise, enter negotiations, and sign on to peace agreements, and are thus an important tool to secure peace. Many legal commentators, human rights activists and victims of violent conflicts on the other hand, have heavily criticised the grant of amnesty on legal, ethical, and moral grounds, maintaining that victims' rights to justice is a necessary precursor to peace, and without it, peace would merely be a brief interlude between conflicts. It has been observed that, there are moral and ethical considerations militating against prosecutions where they would likely lead to political instability and further loss of life, hence the dependency on amnesty. This work recommends that amnesty laws should provide for adequate reparation packages, and be enacted through democratic procedures in order to ensure that the victims' affected by the crimes have a role to play in determining the country's response in the aftermath of atrocities following violent conflict, hence promoting a sense of moral justification, and desire for the grant of amnesty by the victims.
**Keywords**: Transitional Justice, Amnesty, Victims, Post Conflict

## 1. INTRODUCTION

All over the world, conflicts and atrocities continue to tear States and human lives apart and have raged through centuries, and are up to this day still raging mainly due to struggle for power, poverty, difference in ethnicity or religion and resource control.[1] Currently today there are approximately 65 major conflicts around the world. Even so, well over 2 billion persons are resident of war-torn countries and are experiencing the immediate impact of armed hostilities as victims.[2] Although interstate struggles have seen recent decline, today the majority of conflicts are of a non-international character amongst non-state armed groups and other non-state actors against democratic States and group, hence compromising peace, security and development.

Presently, the civilian population makes up for the highest number of victims affected by violent conflicts in most war-torn African States notably Burundi, Mozambique and Somalia, enduring limitless suffering as well as trauma. As such, victims created by violent conflict varies, mostly they consist of those tortured, the dead, raped victims, captured victims, those amputated by vicious rebels and persons whose loved one's have been lost to the war. It is worthy to note that victims typically occupy a central position and place in all reconciliation processes for societies recovering from decades of armed conflict. It is worthy to note that the acts of victimization extends beyond mere physical or bodily harm to include the loss of self-worth, displacement from families and loved ones, extermination of one's community and destruction of property. Families of individual victims who have been wronged in violent conflicts have craved for what they believed would be satisfaction through justice.[3]

However, the interplay of divergent political interest in post-conflict settings presents difficult choices for peace building and restoration processes in failed States. Following the gradual recovery process by States in an aftermath of hostilities, dictatorship rule, and situations of ethnic cleansing, a central issue always comes to bear, which must be addressed that is, what ways would be most effective to address heinous crimes carried out

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[1] Isaksson, Josefine., *Preventing Future Human Rights Violations - Truth Commissions or Tribunals?* Lund university, Lund Sweden. October 2009.
[2] See, Wars In The World, list of ongoing conflicts, http://www.warsintheworld.com/?page=static1258254223, last visited 7th September, 2015
[3] Luc Huyse, *Reconciliation After Violent Conflict A Handbook,* Stockholm Sweden: Bulls Tryckeri Press, 2003 p. 54

by violators before the restoration of peace as well as democracy in a war-torn region. As noted by Kritz,[1] issues of accountability, on the events, happenings and experiences of victims in war-torn States are a central focus of core International Institutions, furthermore obtaining legal redress for the sufferings as well as enhancing harmonious reunion amongst all classes of persons affected during the conflict would be contributory factors towards the maintenance of lasting peace within the region. Nonetheless, the degree of political uncertainty that defines most African peace process is one of such that the upmost supporter of prosecution acknowledges the need to guard against an outbreak of renewed violence arising from initiation of legal proceedings against perpetrators.

The promotion of peace making, reparation as well as legal redress following violent clashes and hostilities in war-torn States could be a daunting and daring process, in most cases taking an age long period to attain. However, where States fail to effectively look into these cases of humanitarian wrongs, a resurgence of protests by affected victims or outburst of widespread violence are often experienced. It is as a result of the forgoing that upmost attention and resources are employed by States in a bid to achieve effective governance, amity and harmony within the country. Transitional justice generally entails or involves measures of acknowledgement, prosecution, compensation as well as forgiveness, all of which are vital for States reconstruction following violent hostilities.[2] Transitional Justice (TJ) remains the focal point of immerse concern for war-torn communities. As a discipline, the subject concerns itself more on legal redress either for States recovering from violent conflicts or undergoing violent conflict. The process of transitional justice involves a number of procedures which could be legal or of a non-legal approach. Close indicators of its achievement are marked by its ability to bestour true reconciliation and promotion of justice as well as democratic processes within divided societies. Instances abound to show that the pursuit of justice often inhibits lenient peace efforts.

Whilst transitional justice seeks to ensure peace and justice all together, forgoing criminal trials and acts of retribution would sometimes appear needful in order to promote a bloodless transition. Hence, the grant of amnesty to former rebel groups exists as an imperative tool of immunity from criminal trials. Regardless, whether the avoidance of criminal trials contributes to bringing back together divided societies would depend on the framework of this discipline and the peculiarity of each conflict.[3] In recent times, the discipline has played a central role in bringing back together war torn societies ravished by violent and heinous conflicts such as Uganda, South Africa, and Rwanda.

One of the intricate mechanisms of transitional justice that is so closely associated with the concept itself is the issue of amnesty. Generally, amnesty has been employed by a number of countries as a governmental instrument of reunion and compromise following past abuses or massive atrocities and civil war. It aids to guarantee peaceful and even governmental transitions in hostile conditions. Jon Elster,[4] dates the historical development of the concept of amnesty to the age-old Athenian States, where it was most employed to broker peace amongst warring parties. Indeed, politicians in many war torn countries often perceived amnesties a sacrifice that must be endured, a standpoint that has always been voiced by local community groups affected by the conflict and also by International peace activists engaged in peace making or restoring peaceful transition.[5]

On the other hand, advancement in International criminal law has triggered severe criticisms against the continuous use of amnesty by States. For instance, advocate of criminal trials vehemently maintain that peculiar categories of atrocities perpetuated in times of internal conflicts be excluded from an amnesty process; and that true peace cannot be achieved without recourse to justice as the award of amnesty emboldens impunity for the perpetrators and finally that the earnest desire of victims is criminal trials of aggressors who victimized them. The sad truth is that there exist no clearly defined or definite International law treaty that has categorically outlawed the grant, use or resort to amnesty, as a result States have repeatedly extended its applicability to a variety of crimes. A classic scenario is the South African amnesty granted during the apartheid transition, which covered heinous atrocities. Similarly, individuals championing the calls for amnesty elimination would agree that such calls are limited to cases of serious violations of humanitarian laws. More so, criminal trials should focus on only a certain category of persons such as rebel commanders under whose instructions and command the crimes were perpetrated. For instance, children are generally recognized to be precluded from prosecution. As

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[1] Neil Kritz., ‘‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’’ *Law and Contemporary Problems,* vol. 59 No. 4 (1996) 127-152.

[2] Report of the Secretary-General to the Security Council on *The rule of law and transitional justice in conflict and post-conflict societies*, 3 August 2004, New York: United Nations Doc. S/2004/616 (para. 8).

[3] Versen, Anne. *Transitional Justice in Northern Uganda: A Report on the Pursuit of Justice in Ongoing Conflict*. Roskilde University, Roskilde Denmark. 2009.

[4] Elster, Jon. ‘’A Case Study of Transitional Justice. Athens in 411 and 403 B.C,’’ In Lukas H. Meyer, (ed) Justice in Time: Responding to Historical Injustice; Baden-Baden: Nomos Verlagsgesellschaft Press, 2004. 223-238.

[5] L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Oxford: Hart Publishing, 2008.

such the emphasis here is that there is no common legal accord outlawing amnesty and offenders who committed lesser crimes will be granted amnesty.

## 2. LITERATURE REVIEW

Critics of Transitional justice abounds, from both within and outside the discipline. Justice Goldstone Richard,[1] notes that "full justice consists of the trial of the, perpetrator and, if found guilty, adequate punishment." Hence justice as defined by Justice Goldstone Richard refers to justice as being retributive justice.[2] Mallinder, however argues that justice can in like manner take the form of restorative justice. It is paramount to note that denial of justice and its associated effect depends in large part on how justice is defined. Chief Justice Bart Katureebe,[3] a Ugandan jurist of remarkable intellectual prowess offers great insight into the amnesty versus victims' rights debate in the recent case of Uganda v. Thomas Kwoyelo, where he arrived at the conclusion that there is no uniform standard or practice in respect of amnesties and as such each country determines the approach it should take in its applicability to address its own unique conflict situation. Mani,[4] writing on beyond retribution suggests that peace building through amnesty cannot achieve or redress the actual needs of victims of conflict. Peace activists' have more often centred on the reconstruction of institutions of the state as against looking into questions of victims' rights to justice, which more often underscore conflicts in several countries. Mark Freeman's work on "*Necessary Evils: Amnesties and the Search for Justice",*[5] is a welcome addition to the academic field. What makes his argument so persuasive is that he effectively agrees with those who object to amnesty's use. He argues that the default position should always be to pursue justice. Freeman stresses further that history is full of bad models of amnesty. In his own words, "in extreme circumstances and only in such extreme circumstances, amnesty may be a necessary evil to achieve peace and security, and it should not be taken off the policy table." He contends that amnesty should be considered a "last recourse," and States should only pursue this strategy if specific criteria are met. Specifically, the situation must be urgent and grave, and all other options must have been exhausted, including other clemency options short of amnesty.

Kritz,[6] an American scholar also wrote on transitional Justice generally. A unique aspect of his work is that he views victims' rights to justice as a means of healing traumas and emotional wounds in order to promote community reconciliation and peace. The scholar stressed that this process is essential for both victims and perpetrators of past abuse to allow for a sense of justice and cleansing. Politically, the failure to ensure legal redress for victims in post-conflict societies may weaken the Supreme authority of the new government, inciting renewed conflict in a society emerging from violence and civil strife. Other scholars and commentators who have also made useful contributions to transitional justice jurisprudence generally include, Snyder and Vinjamuri[7] who cite the most recent international criminal tribunals as having "utterly failed to deter subsequent abuses in the former Yugoslavia and Central Africa," and instead draw on case studies in El Salvador and Mozambique, among others, to argue for the important effectiveness of amnesties. They argue that truth commissions are only successful in ending atrocities when combined with amnesties (South Africa experience), and contrary to proponents of justice, advance the view that de facto amnesties have been equally successful when accompanied by political reform strategies (Namibia experience).

Kofi Annan,[8] erstwhile UN Secretary-General stated thus:

> *"We should know that there cannot be real peace without justice, yet the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult or even impossible to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive. But equally, if we ignore the demands of justice simply to secure*

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[1] Erstwhile chief prosecutor of the ICTY and ICTR

[2] R. C. Slye., "The legitimacy of amnesties under international law and general principles of Anglo-American law: Is a legitimate amnesty possible?". *Virginia Journal of International Law, 43*(1) (2002) p. 173-247.

[3] See, Judgement of the Supreme Court of Uganda delivered on April 8, 2015 in the recent case of Uganda v. Thomas Kwoyelo, Constitutional Appeal No. 01 of 2012, http://www.right2info.org/resources/publications/uganda-v.-kwoyelo-judgment, last visited 17th September, 2015

[4] Rama *Mani.*, *Beyond Retribution*: Seeking Justice in the Shadows of War, Cambridge: Polity Press, 2002 p. *127*-133.

[5] Freeman, Mark., *Necessary Evils. Amnesties and the search for justice*. New York, Cambridge university press 2009. p. 29.

[6] Kritz*, Op. Cit*. p. 127-152.

[7] Snyder, Jack., Leslie Vinjamuri. "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." *International Security*, vol 28. No. 3 (2004) p. 5-44.

[8] Justice and the Rule of Law: the United Nations Role. United Nations Security Council 4833rd meeting agenda held on Wednesday, 24 September 2003, 9 a.m. New York S/PV.4833.

 

*agreement, the foundations of that agreement will be fragile, and we will set bad precedents."*

Mallinder, [1] acknowledges that amnesties could encourage distrust towards state institutions, nonetheless is convience that gains made through prosecution are attainable only when the much needed financial capital as well as testimony needed to convict perpetrators are available, and also in circumstances where criminal trials does not lead to resurgence of bloodshed. Freeman supports Mallinder stand, arguing further that not all amnesties are in opposition or excludes dissuasion, [2] thus amnesties with non-repetitive clauses as a criteria to obtaining its gains, would be in line with the goals of dissuasion.

Slye,[3] worries that the repetitive grant of amnesty to perpetrators would definitely lead to an expectant culture, by futuristic violators, hence reduce preclusion over forthcoming and subsequent atrocities.

Ndifon,[4] acknowledges that the grant of amnesty takes place in some cases, following violent atrocities in war-torn States. The scholar considers it to be a potent tool for effective reconstruction process in divided societies and states further that it would be misleading to associate the concept with legal rules. In his view, States give priority to the political goal of peace-making, through formal gestures involving "forgetting" which they consider to be crucial, thus paving the way for a renewed society. He emphasised that the concept should not be equated with the necessary evil doctrine but rather it should be perceived as one which promotes impunity within war-torn States recovering from conflict. In addition, the scholar stressed that the concept though globally recognized, comes with serious repercussions. More so, the continuous application of the concept by war-torn States is in breach of the cardinal Rule of law tenets, hence obstructing democratic principles and values. He concludes his remarkable work by advocating for the just punishment of offenders.

Eberechi,[5] states that in some cultures, amnesties are a normal response to crimes: "at the heart of the jurisprudence of most African conflict resolution mechanisms is the power to grant amnesty to perpetrators of crimes, in exchange for their confessions and repentance" In these societies, amnesties might be more beneficial for victims than international criminal justice because international criminal justice "evidences a predominance of Western-generated theories and absence of non-Western discourse." Trumbull,[6] agrees with Eberechi and States further that, in these societies, "refusing to recognize amnesties may actually deny victims the opportunity to use traditional methods of reconciliation and forgiveness to deal with crimes". As maintained by the Acholi people in Northern Uganda, justice is meant to be restorative and not vindictive. The apprehension between 'western' and 'traditional' models of justice comes from the diverse intent of both, hinged on the criterion of punitive justice as against the resolve for restorative justice.[7]

## 3. AMNESTY VERSUS VICTIMS RIGHTS: CAN A BALANCE BE ACHIEVED

The amnesty debate is about balancing the political realities needed to achieve peace with the demands of victims for justice. However, the absence of an effective framework for the attainment of a balance between prosecutions and amnesties is generally the most contentious facet of any transitional justice process. The difficulty is often portrayed as an either choice between peace and justice. Activist clamoring for peace maintain that it should be obtained no matter what and at any price, conversely, divergent human rights groups, institutions and advocates of justice contend that the cannot be lasting peace without recourse to judicial measures or pursuit of justice. Advocates of human rights basically circumscribe for justice in situations where abuses of human rights have been perpetuated and hold that the strongest starting point for lasting peace is securing justice. At variance with this argument are the peace practitioners who perceive justice from the perspective of reconciliation, by that, the place more focus and necessity on peace accord between the fractions involved in the conflict, in a bid to ending the conflict and preventing renewed violence.

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[1] Mallinder, *Op. Cit*. p. 16-17.
[2] Freeman, *Op Cit*. p..21.
[3] Slye, Ronald C., "Amnesty, truth, an reconciliation: reflections on the South African amnesty process"" in *Truth v. Justice.The Morality of Truth Commissions*. Rotberg, Robert I. and Thompson, Dennis (ed) Princeton, New Jersey: Princeton University Press (2000). p. 183.
[4] *C. Osim Ndifon., "*Amnesty And The *Obligatio Erga Omnes* To Repress Humanitarian Law Violations: Lessons From The Sierra Leone Conflict." *European Scientific Journal,* vol. 8, No.14 (2012) p. 18
[5] Eberechi, I. "Who will save these endangered species? Evaluating the implications of the principle of complementarity on the traditional African conflict resolution mechanisms." *African Journal of International and Comparative Law,* 20(1) (2012) p.22-41.
[6] C.P. Trumbull., "Giving amnesties a second chance." *Berkeley Journal of International Law, vol. 25*, (2007) p. 283-345.
[7] P Hoening., "The dilemma of peace and justice in Northern Uganda." *East African Journal of Peace and Human Rights, vol.* 338 (2008)

Presently, no scholarly findings have proposed a comprehensive and balanced approached between amnesties and victims' rights to justice following massive humanitarian violations and human rights abuses in post conflict societies. However, scholars of international law widely admit on the recognition that the aftermath of systematic violations and grave breaches creates a duty on the State to the victims. But in practice, States torn by conflict are unwilling or sometimes due to certain cricumstances unable to discharge this duty. They dread that simply putting up a case for justice will endanger the unstable and precarious peace process. As a result thereof, a State can chose to engage in or turndown prosecution by balancing the rights of victims against other paramount concerns, to include peace, reconmcilation and acts in the general interest of the public. One of the method that has existed for a long period of time, structured to deal with the past, following authoritarian and violent conflict is amnesty. Lisa[1] opined that although a number of reasons exist for States to enact amnesty laws, Heads of State more often than not are confronted with the burden of placing on a balance scale, peace deals through the grant of amnesty on the one hand, and justice obtainable by means of criminal procedures. Undoubtedly, few national rulers had legitimated the grant of amnesty as a vital tool for the maintenance of peace; in these cases, the want of stability simply takes precedence over culpability. This process clearly shows that most States believe that a bargain between justice and peace must be made and that the non-prosecutorial model which is the crux of amnesty is a tolerable sacrifice that must be made in order to remove authoritarian government or end armed conflicts. As asserted by Bassiouni,[2] "the price for peace is often justice or a trade off between peace and justice". An evaluation of the legal status of amnesty laws under International law does not disclose any universal consensus for its prohibition, and as such, States continue to resort to the use of amnesty as a means of resolving dire conflict situations when the need arises. From the perspective of civil right activists including sufferer from heinous crimes, use of amnesty in transitional societies is viewed as "having dealings with the devil".[3]

## 4. DEBATES ON AMNESTY VERSUS VICTIMS' RIGHTS IN POST CONFLICT SOCIETIES

### 4.1 Arguments for Prosecution.

Advocates of criminal prosecutions, mark out a number of morally acceptable and policy rationale to champion their stands that transitional societies should conduct criminal trials in an effort to redress the aftermath as well as cases of humanitarian abuses. Most outstanding argument of all, in support of the prosecutorial model is that it is of great necessity in order to nurture a society founded upon the tenets of the Rule of law. The adverse effects of a failure to conduct criminal trials may be the development of a community wherein the three tiers of government are grossly undervalued.

Diane Orentlicher[4] aligns himself with this position when he asserted thus: "If the law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter forbidden conduct." He further stated that some moderate degree of tolerance may be granted where the offence is not of wide scale or less severe but not in circumstances where violations were endemic and on a massive scale.

In the absence of justice, impunity reigns. The chances of vigilante justice also greatly increase: but if people see that the courts are dealing with perpetrators, they are less likely to take matters into their own hands.[5] Thus the faith of the citizenry can be reinvigorated through prosecution of rebel leaders in that a new paradigms shift can be created in these societies and bring to bear recognition of accountability for aggressors and violators of human rights.[6]

Secondly, because an integral part of a democratic process involves reverence for the law as opposed to arbitrary administration of States, some advocates maintain that criminal trials are essential in order to muster popular support for the newly established government and strengthen the fragile democratic state.[7] The

[1] Lisa Laplante., "Outlawing Amnesty: The Return of Criminal Justice in Transitional justice Schemes." *Journal of International law*, Vol. 49, (2009) p. 915-917.

[2] M. C. Bassiouni., "Searching for Peace and Achieving Justice: The Need for Accountability." *Law and Contemporary Problems,* Vol. 59, No. 9 (1996) p. 18.

[3] L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide,* Oxford and Portland, Oregon: Hart Publishing, 2008 p. 11.

[4] Diane Orentlicher., "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" *Yale Law Journal,* Vol. 100 (1991).

[5] E. Mobekk, 'Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation' in Ebnother, A. and Fluri, P. (eds), *After Intervention: Public Security Management in Post-Conflict Societies – From Intervention to Sustainable Local Ownership.* Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva. (2005).

[6]. Kritz, *Op. Cit*. p. 127-152.

[7] Luc Huyse, 'To Punish or Pardon: A Devil's Choice' in Christopher Joyner and M Cherif Bassiouni (eds), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa*

consequences of non-prosecution would consist of a resort to frontier justice, a sense of skepticism in the new administration and its governmental system. Thirdly, advocates of criminal trials assert that prosecution can act as a public stage for truth seeking and fact finding. Here the victims can uncover the truth behind the conflicts, and individual roles in order to prevent a resurgence of violence. Lastly, proponents of criminal trials argue that holding perpetuators criminally accountable for their actions can provide the families and victims of heinous crimes with a feeling of closure and solace from suppressed or inhibited emotions since their plight has been dealt with and can conceivably be laid to rest, as against smoldering in apprehension of the next cycle of violence.[1]

4.2 Criticisms of the Prosecutorial Model

Opponent of the prosecutorial model of criminal trials for humanitarian atrocities committed within war torn States contends that these method would endanger the foundation of the newly established democratic State. In States where military forces hold onto considerable power after letting go of the political office, attempts to prosecute past abuses could arouse insurgency or internal disturbances that may weaken the powers of the democratic government.[2]

In addition, criminal trials can impede upon the process of State reconciliation as defenders of past government may be forced into political and social segregation thus creating a sect opposed to the new found democracy.[3] Similarly, the impracticability much less unrealistic nature of prosecution should be considered because war torn States may not have the much needed resources or capacity to trial the perpetrators of these heinous crimes. Another impeding factor is the high costs associated with the investigation, and prosecution, which can cripple the economy of a transitional States recovering from violent conflict.

Another impeding criticism of criminal trials is based on its proponents believe that uncovering the truth about past crimes and punishment of perpetrators through court room proceedings will help the victims start the healing process.[4] In reality, the only truth possibly obtainable through the adversarial English common law judicial system and trial is that which establishes an accused person's innocence of the crime or culpability.[5] In line with this view, opponents of prosecution maintain that the harsh nature of cross-examining the victims' and their testifier could occasion a relapse of physiological trauma and pains with the likelihood of conflicting testimony thus damaging their case.[6]

Furthermore, prosecutions could lead to a vindication of the past government, hence risking the new transitional government's fragile democracy. Yet another criticism is based on claims that huge financial resources are required in order to have any legitimate trials, as ensuring due process rights of an accused person is a very expensive process. The consequence of any selective prosecution under this situation may ultimately lead to societal disregards for the tenets of the rule of law. Furthermore, instead of expending huge resources on criminal trials, critics argue that these resources be better channeled towards the development of social amenities, correction of social inequality and provision of basic healthcare and housing. The liberal view that criminal trials foster the superiority of Civil and Political Rights as above Economic and Social Rights could be principally based upon States engrossment with prosecution.

Opponents of prosecution have further denounced the Africanisation of criminal trials, maintaining that prosecutors of the International Criminal Court has restricted their investigation to the African continent as a result of global pressures from world powers and a desperate bid to avoid confrontation with them, thus making Africa a soft target. The court has also been questioned why it has failed to investigate and prosecute perpetrators of heinous crimes anywhere else in the world notably Syria where grave breaches have been perpetuated by the parties to the conflicts.[7] There is a risk that retributive justice in a post-conflict situation can become 'victor's justice', in other words be more concerned with vengeance than justice. In the long-run, this can fuel a cycle of ongoing violence. There is also the danger that going after perpetrators will destabilise fragile peace settlements, undermine democracy and endanger reconciliation.[8]

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*Conference*, 17–21 September 1997 (1998) 79 -81.

[1] Lambourne, Wendy., "The Pursuit of Justice and Reconciliation: Responding to Genocide in Cambodia and Rwanda." I*nternational Studies Association,* 40th Annual Convention, Washington, DC, 16-20 February 1999

[2] Orentlicher, *Op. Cit*. p. 2537.

[3] Kristin Henrard., "The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law." *DCL Journal of International Law,* Vol. 8 (1999) 8 p. 595, 635.

[4] Payam Akhavan. "Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal." *Human Rights Quarterly* Vol. 20, No.4 (1998) p. 737-816.

[5] Jennifer J. Llewellyn., Robert Howse. "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission" *University of Toronto Law Journal* vol. 49, No. 3 (1999) p. 355-363.

[6] *Ibid.*

[7] D. Bosco, "Why Is the International Criminal Court Picking Only on Africa?" Washington Post, March 29, 2013.

[8] Bloomfield, D. et al. (eds) Reconciliation after Violent Conflict: Policy Summary. IDEA, Stockholm, 2003

However, the degree of political uncertainty that marks most African reconciliation processes is of a grave disposition and as such, even the most ardent supporter of criminal trials acknowledges the necessity to ensure that juridical actions against aggressors does not reinstate armed conflicts in the country. The investigative powers of the ICC can be suspended whilst a duration of one year elapse, such suspension as approved by the UN SC.[1] This procedure of deferment of prosecution is closely adopted or followed by the UN Securtiy Council in conflict situations where the maintenance of peace and stability is foremost and of utmost priority as against prosecution. Furthermore, the interest of justice is a determining factor to guide a prosecutor as he is duty bound,[2] to discontinue investigations or suspend prosecution where there is likelihood of such investigations jeopardizing or impeding a fragile peace process.

4.3 Rationale for Amnesties

Mallinder,[3] puts forward the argument that the challenges of unraveling the whole truth through the instrument of courts present itself as a cardinal rationale behind amnesty legislations. This stands is based upon the fact that it is practically impossible to put up all perpetrators of heinous crimes in the dock, thus resort is had to amnesty, which are designed in ways that are legal and lawful, using mutually agreed peace accord, rather than unlawfully as a result of the collapse of a countries judicial system as well as protective institutions namely the army as well as police, responsible to secure lives, as well as property and sustaining peace and stability within the country. Boraine,[4] is trouble by the lengthy duration associated with the dispensation of legal justice within the court's system, as well as the legal technicalities encountered during document tendering and cross examination processes, hindering the securement of a guilty verdict. Due to the forgoing trend, many war-torn States would be compelled to forgo trials, as a result of which a great number of perpetrators would be "left off the hock" which is relatively worrisome to the victims clamoring for legal redress. The issue of dilapidated or destroyed court infrastructures, as well as the monetary capital required to set up a special court, and cost implications associated with the payment of sitting allowances to judicial officers is another issue for upmost concern in post-conflict settings. Freeman,[5] claims that focusing on peace either through amnesty during the early post-reconstruction stages in the life of a divided society should in no way be taken to depict victims' rights to legal redress as second placed. Justifying his position, the erudite scholar lays hold to the works of Moses Okello[6] who maintains that,

> "The rationale for a peace first, justice later position is quite simple; it is a matter of sequencing. And, sequencing should be distinguished from prioritisation. If the preferred sequencing is peace followed by justice, this in no way signals that justice is a lower priority than peace, quite the opposite. In fact whichever way you look at it, trying to ensure that the environment is conducive for a comprehensive pursuit of justice (i.e., that a peace deal has been struck, civilian authorities are back in place, clan structures responsible for traditional justice have re-grouped after decades of forcible dispersal, people are no longer living hand to mouth and are therefore better able to pursue justice for themselves) is definitive proof that you want real justice to be done."

For instance, Kofi Annan the erstwhile Secretary-General[7] noted on this subject of discus that: "If we insist, at all times and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult or even impossible to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive*."*

Kofi Annan concludes thus, "*But if we ignore the demands of justice simply to secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents."*[8]

The forgoing stands demonstrates the dilemma on the issue of amnesty, which as such no tentative agreement has been brought to bear, hence the debates linger on between criminal trial advocating prosecution and persons emphasizing reconciliations with the instrumentality of amnesty. This argument was employed by the Courts in South Africa, hence legitimizing broad spectrum amnesty awarded through the 1995 Act.[9] [10] The

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http://www.idea.int/publications/reconciliation/upload/policy_summary.pdf

[1] This is provided for under Art. 16 of the Rome Statute.

[2] See. Art. 53 (1) of the Statute

[3] Mallinder. *Op. Cit*. p.41-68.

[4] Boraine. *Op. Cit*. p.24.

[5] Freeman. *Op. Cit* p.19.

[6] Moses Chrispus Okello., "The False Polarisation of Peace and Justice" in *Uganda Expert paper Justice in Situations of Ongoing Conflict,* International Conference on Peace and Justice, 25th -27th June, (2007) Nuremberg, Germany

[7] UN Doc. S/PV.4833 (2003): p.3.

[8] *Ibid*.

[9] Promotion of national unity and reconciliation Act 34 of 1995.

[10] Judge Mahomed found that "but for a mechanism for amnesty, the 'historic bridge' [the negotiated

 

decision however, has been condemned by many for failing to adhere with customary law rules that prescribe criminal trials of humanitarian crimes, more so proofs exist to show that amnesty in exchange for truth as employed during the transitional defunct Apartheid, to the Nelson Mandella led democratic administration of 1994, averted outburst of a full scale internal armed conflict in South Africa. In recent times, a desperate bid to end rebel insurgency has prompted the UN to show solidarity towards amnesty grants for grave breaches.[1]

4.4 Criticisms of the amnesty model

The critics of the amnesty model based their criticisms upon the stands that courtroom trials exist as best models towards achieving criminal responsibility and fairness for the crimes of perpetrators. The deterrence theory presents itself as another rationale upon which amnesty should not be granted, in order to reinforce and secure reverence for the rule of law, as lack of punishment promotes skepticism as well as further doubts on governmental systems. On the whole, this argument reveals social and legal constraints as precautionary in nature and thus measures of securing responsibility. Bassiouni, [2] declared thus "accountability mechanisms appear to be solely punitive, but they are also preventive through enhancing commonly shared values and through deterrence as establishing respect for the rule of law is fundamental to achieving a durable peace in the aftermath of conflict, and to the effective protection of human rights." The last argument against amnesty laws is that holding perpetrators accountable are crucial to create a "human rights culture" thus building the platform towards unending reconciliation. The reason as stated by Bassiouni being thus "a society is not reconciled with its violent past unless it works toward the creation of a culture of respect for fundamental human rights."

## 5. RECOMMENDATIONS

The steps needed firstly in the desire for the attainment of a balanced framework between the grant of amnesties and preservation of victims' rights within war-torn societies, undergoing the process of reconstruction as a result of violent hostilities, would primarily entail the enactment of amnesty laws by way of an elective process. Through this process, an injured as well as traumatized victims, would partake in the early deliberation phase, that seeks to determine what possible best approach to be followed by war-torn States following violent conflict and unwholesome atrocities, hence promoting a sense of moral justification, and desire for the grant of amnesty by the victims. Secondly, victims should be facilitated with unrestricted accessibility to unbiased facts, reports and opinions surrounding the proposed amnesties, which on the one hand aid them measure satisfactory opportunity costs including plausible gains to be derived through amnesty laws. Thirdly, peculiarity of each conflict situation should be carefully considered and the needs of victims' wants should favour grant of amnesty. In countries in which the hostilities are widespread, victims' may chose to concede to non-prosecution of violators, thus accepting amnesties as a result of the value they place on peace over justice. Here, victims' may very well be better off if stability of prioritized over retributive justice, if that justice might ignite a new outburst of violence. Amnesty that does not receive the support of the victims' should not be recognized as legitimate.

Fourthly, the amnesty laws should be tailored to hold the perpetrators for which it was created to cover, answerable to the victims in respect of the heinous acts they committed. This is feasible through the inclusion of non-legal approach of accountability, to include truth commission, as well as non criminal penalties. Thus encouraging the practice of criminal responsibilities and at the same time strengthening and preventing arbitrary abuse of powers by government officials. These commissions in most cases would ordinarily assist war victims in gathering information's and answers to questions most desired by the sufferer to include: the present status of family members befallen by the conflict, possibilities of rescue or in other instances, the revelation of individual identify of perpetrators holding their love ones to ransom including their demands. On a precautionary basis, they could expound upon the root cause of the violent crimes, and also work out modalities to avert future resurgence of similar conflicts.

In essence, those seeking amnesty must publicly admit of his or her acts whilst asking for clemency through the victims. Accountability measures such as these would afford certain benefit generally affiliated to criminal trial. Fifthly, amnesty legislations or rules should incorporate measures to ensure that perpetrators receiving amnesty will not commit future human rights abuses through the dismantling of rebel groups, demanding a return of arms by the rebels, compelling them to divulge private or sensitive knowledge surrounding the mode and style of operations, command structures and leadership rankings and on the whole ensuring and enforcing criminal sanctions against any rebel found to violate the stipulated amnesty conditions.

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transition to democratic rule] itself might never have been erected."

[1] For example, in 1993 the United Nations gave its full support to the Governors Island Agreement which granted full amnesty to members of General Cedras' and Brigadier General Biamby's military regime accused of committing crimes against humanity in Haiti from 1990-1994. The Security Council described the Agreement as "the only valid framework for resolving the crisis in Haiti". Statement of the President of the Security Council, UN SCOR, 48th Sess., 329th metg., at 26, UN Doc. S/INF/49 (1993).

[2] Bassiouni. *Op. Cit* p.51.

The gains to be derived by these actions could be increased through the support of Ecowas peacekeeping forces, engage solely for purposes of monitoring and enforcing criminal exoneration under the amnesty package.

Sixthly, perpetrators whose atrocities amount to severe acts of grave breaches under humanitarian law rules, must where feasible be excluded from peace accords, but for the majority of combatants who were basically acting under the command and instructions of a superior and as such not bearing any specific criminal liability for the most serious humanitarian offence, can lawfully be amnestied and reintegrated into the community.

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