KAMPALA INTERNATIONAL UNIVERSITY

FACULTY OF LAW

BACHELOR OF LAWS

SITUMA JONATHAN NYONGESA

(LLB/9731/61/DF)

RESEARCH PAPER

(LB 4211)

A REVIEW OF AMNESTY AS A SOLUTION FOR THE POST-2007 ELECTION VIOLENCE IN KENYA.

A Research Project submitted to the Faculty of Law, Kampala International University, as part of the Undergraduate Degree Programme.

DECLARATION

I, **SITUMA JONATHAN NYONGESA** declare that this project is my original work and has never been presented to any other university for award of any academic certificate or anything similar to such. I solemnly bear and stand to correct any inconsistence.

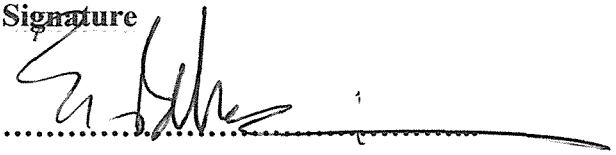
Signature: .....

Date: 18/6/2010

APPROVAL

This is to acknowledge that this research report has been done under my supervision as a university supervisor and is now ready for submission.

Signature **Date**



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DR. BITOK TITUS

Supervisor

DEDICATION

This work is affectionately dedicated to my parents Mr. Joseph Nyongesa and Mrs. Rose K. Nyongesa for their support patience and understanding during this period of study, not forgetting all those who constantly wished me success.

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the position of innocent persons. It includes more than pardon, in as much as it obliterates all legal remembrance of the offence. The word has the same root as amnesia.[3]

Amnesty may be extended when the authority decides that bringing citizens into compliance with a law is more important than punishing them for past offenses. The advantage of using amnesty may include avoiding expensive prosecutions, especially when massive numbers of violators are involved, prompting violators to come forward who might otherwise have eluded authorities, and promoting reconciliation between offenders and society. An example of the latter was the amnesty that was granted to conscientious objectors and draft dodgers in the wake of the Vietnam War in the 1970s, in an effort by U.S. President Carter to heal war wounds.[4]

Amnesty has been explained as an act of oblivion within the competence of national jurisdiction. It is an act that protects one from prosecution in the future for acts committed in the past. It is primarily intended to promote the possibility of reconciliation between warring parties during a period of transition.

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[3] *http://en.wikipedia.org/wiki/Amnesty*. Wikipedia, the online resource for general research, gives a brief historical evolution of the concept of amnesty in the following terms: Amnesty, which in the United Kingdom, may be granted by the crown alone, or by an Act of Parliament, formerly used on coronations and similar occasions, but are chiefly exercised towards associations of political criminals, and sometimes granted absolutely, though more frequently there are certain specified exceptions. Thus, in the case of the earliest recorded amnesty, that of Thrasybulus at Athens, the thirty tyrants and a few others were expressly excluded from its operation; and the amnesty proclaimed on the restoration of Charles II of England did not extend to those who had taken part in the execution of his father. Other famous amnesties include: Napoleon's amnesty of March 13, 1815 from which thirteen eminent persons, including Talleyrand, were exempt; the Prussian amnesty of August 10, 1840; the general amnesty proclaimed by the emperor Franz Josef I of Austria in 1857; the general amnesty granted by President of the United States, Andrew Johnson, after the American Civil War (1861-April 9, 1865), in 1868, and the French amnesty of 1905. Amnesty in U.S. politics in 1872 meant restoring the right to vote and hold office to ex-Confederates, which was achieved by an act of Congress. The last act of amnesty passed in Great Britain was that of 1747, which pardoned those who had taken part in the 1745 Jacobite Rising.

[4] Ibid, p. 3.

The grant of amnesty has been provided for under Article 6 (5) of Additional Protocol II[5] of the Geneva Convention,[6] which urges states to grant amnesty at the end of intra-state conflicts. Amnesty is normally granted to state officials, rebels, military leaders in exchange for giving up power.

The Lome Agreement of 7 July 1999, granted amnesty to the rebels from the Revolutionary United Front (RUF) and established the National Truth and Reconciliation Commission as part of the negotiation to bring conflict to an end.[7]

There is no format for granting of amnesty. Amnesties can be general or specific; they can be with respect to specific crimes or to general crimes; they can be conditional or unconditional; or can also come alive or as part of a package that leads to reconciliation. For instance, the South African Truth Reconciliation Commission, which provided for amnesty upon full disclosure.

In the case of *Furundzija*,[8] the International Criminal Tribunal for Rwanda (ICTR) stated that the issue of amnesty in national law shall not apply in the cases of crimes that arise from customary international law.

In the Prosecution vs. Kallon,[9] a case before the special court for Sierra Leone, the defense made a plea for amnesty. The Court stated that amnesty in the Lome Agreement was intended to obligate the national courts in Sierra Leone, but was not binding on international tribunals. Under the Lome Agreement, there was no mention of amnesty.

The principal justifications for amnesty are peace, justice and reconciliation for human rights violations during periods of transition. These justifications have been employed individually and in conjunction with each other. They intertwine into one coherent objective of lasting peaceful coexistence of human kind. In this sense, the goal of

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[5] 1125 UNTS 609.

[6] 75 UNTS 31.

[7] Article 10, of the Statute of the Special Court for Sierra Leone, UN Doc. S/2000/915 (2000).

[8] App. Ch. July 21 2000, (IT-95-17/1).

[9] SCSL, -2004-15-ar72 (E) and SCSL-2004-16-AR72 (E), Appeals Chamber 13, March 2004.

amnesty is the achievement of a state of affairs in a particular political context that reflects the ultimate goal of humanity. The underlying assumption is that in a particular context, amnesty is a more appropriate means of achieving this goal than punishment.[10]

Nonetheless, amnesty can also raise questions of justice. An example was the Ugandan government's offer not to prosecute alleged war criminal Joseph Kony, in the hope that further bloodshed would be avoided. However, the International Criminal Court (ICC) has indicted him with respect to conflicts in the Northern Uganda. The ICC is likely to follow existing jurisprudence that does not view amnesty as a bar to prosecution of individuals or groups are guilty of international crimes.

1.2 Background to the problem.

It is widely accepted that the crisis triggered by Kenya's 2007 disputed presidential election brought to the surface longstanding divisions within the Kenyan society. It served to remind Kenyans that there was a lot of unfinished business in the political and social fabric of the country. Kenyans, like the English never remember.[11] They had forgotten 1991 and 1997 tribal clashes too soon.

The introduction of multi party politics in 1991 gave Kenyans a chance to express themselves, and the end result was a serious set-back for the ruling Kenya African National Union (KANU) party. Politics had by then become polarized a long tribal lines.

Between 1991 and 1995, Kenya produced 250,000 internally displaced persons, as a result of tribal clashes in the Rift Valley and the Western provinces. This human displacement came about as a result of political events triggered by the multi-party system of government in 1991. The clashes are believed to have been generated with the full support of the Kenyan government, for the main perpetrators were the *Kalenjin* and

[10] Andreas O'Shea, Amnesty for Crime in International Law and Practice, (Kluwer Law International, The Hague, 2002), p. 23.

[11] Report of the Akiwumi Judicial Commission on the Land Clashes *www.nationmedia.com* accessed October 20, 2009.

Maasai communities. The clashes had an underlying political rationalization and were instigated with the sole aim of punishing those communities for their political position vis-à-vis the ruling tribes.[12]

The history of tribal clashes in Kenya can be traced to 1991.[13] These tribal clashes which led to human displacement started then as an attempt by the ruling party, the Kenya African National Union (KANU), to forestall the introduction of multi-party democracy. The policy behind the tribal clashes and displacement of persons in Kenya has its historic genesis in attempt by the KANU government to punish the tribes that supported the opposition parties and force them to leave the geographic regions where they were ethnic minorities.[14]

According to Gibson Kamau, tribal clashes continued further into 1997, just before the general elections, in Likoni, Changamwe and South Coast where *"watu wa bara"* (up-country people) were targeted for violent evictions on account of their political stance which favored the opposition at the time. Dozens were massacred and several thousands were displaced in other areas in the country. These tribal clashes in the 1990s were organized by the state; in fact, President Daniel arap Moi of Kenya had confidently predicted that the return of his country to multi-party democracy would result in an outbreak of tribal violence that would destroy the country.[15] Commentators had accurately predicted that tribal clashes were likely to continue with every election with the same or more serious consequences.[16]

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[12] . Gibson Kamau Kuria: Majimboism and Ethnic Clashes in Kenya Today: The Search for Multi Party Constitution, No. 47 Nairobi Law Monthly 18-23 (1993).

13 Gibson Kamau Kuria: Majimboism and Ethnic Clashes in Kenya Today: The Search for Multi Party Constitution, No. 47 Nairobi Law Monthly 18-23 (1993).

[14] Gibson Kamau Kuria: Majimboism and Ethnic Clashes in Kenya Today: The Search for Multi Party Constitution, No. 47 Nairobi Law Monthly 18-23 (1993).

[15] Africa Watch, Divide and Rule: State Sponsored Ethnic Violence In Kenya, p. 3 (1993).

[16] Ahmednasir M. Abdullahi, Ethnic Clashes, Displaced Persons and the Potential for Refugee Creation in Kenya: A Forbidding Forecast, 9 International Journal of Refugee Law 196 (1997).

There is a nuanced relationship between three words that have dominated public debate since January 2007, namely, truth, justice and reconciliation. To which end should the country incline? In other fora, the question is framed as a competing balance between punishment and reconciliation.[17] Yet in others, justice is offered as a precondition to reconciliation.[18] Yet, still, in others the grant of amnesty is viewed as being tantamount to sacrificing justice at the altar of peace.

While it cannot be gainsaid that the amnesty debate has been in vogue for some time now in Kenya, particularly in the aftermath of the recently experienced post election violence, there is need for legal and academic focus and insight on the issue of whether the grant or denial of amnesty to the alleged perpetrators of the post election violence can lead to sustainable peace and justice.

The concept of amnesty also encapsulates various relevant issues such as the conventional and other meanings of amnesty; definitions or conceptualizations of amnesty, the existing theories and rationalizations on the issue of grant or refusal of amnesty, the conceptual parameters of the debate and the contextualization within the Kenyan post election violence scenario. All these are novel areas of study and potential areas of controversy in the amnesty debate. There is need to re-establish confidence at two levels, that is, between the government and the citizens, and amongst the various ethnic communities affected by the unprecedented wave of violence and mayhem.

1.3 Statement of the problem.

The issue of granting or denial of amnesty to the alleged perpetrators of the 2007 post election violence in Kenya has been very emotive. Is it merely a political issue or does it also have legal and constitutional ramifications? What are the attendant legal issues to be considered in the amnesty debate? Further, should circumstances of Kenya be an issue in

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[17] See Robert Post & Carla Hesse Introduction to Human Rights in Political Transitions; Gettsburg to Bosnia(1999)New York

[18] See Richard Goldstone, Exposing Human Rights Abuses- A Help or Hindrance? 22 Hastings Cons. Law Quarterly 607 (1995), at p. 615.

the grant or denial of amnesty and if so, shall the same lead to sustainable peace and justice?

Currently, Kenya lacks a legal, policy and institutional framework for the grant or denial of amnesty. There is no clear-cut law on amnesty for any offense in Kenya. The only provisions that come close to amnesty are Sections 82 and 87(A) of the Criminal Procedure Code (CPC),[19] which is a reserve of the Attorney General's constitutional powers of *nolle prosequi* and withdrawal of prosecution. The effect of a *nolle* is that it fully terminates the proceedings with no provision for re-prosecution over the offence in respect of which the accused person had been charged. Indeed, Section 87(A) of the CPC merely discharges someone leaving room for future re-arrest in-case new evidence is established.

In light of the foregoing, there is no legal, policy or institutional basis for grant of amnesty. Hence, the current political debate on the issue rages on in a legal, policy and institutional vacuum. The question that arises then is whether the grant or denial of amnesty for the alleged perpetrators of the 2007 post election violence should constitute a debate at all?

It is the researcher's considered view that the debate on amnesty must be premised on a sound and clear legal, policy and institutional framework. This study hence seeks to analyze the international law and practice on the concept of amnesty with a view to proposing a national legal, policy and institutional framework as a viable prescription for sustainable peace and justice.

1.4 Issues arising from the statement of the problem.

The concept of the grant or denial of amnesty raises several complex issues dealing with substance and procedure in the formulation and implementation of the policy; drafting and passing of the law and the commissioning and operations of the body whose mandate

[19] Chapter 75, Laws of Kenya (Revised edition, 1987).

it shall be to grant or deny amnesty. These, and other related issues, are presented in this study in the form of questions which the researcher shall seek to answer in the course of the study. They include:

- Whether there is need for a general understanding of the concept of amnesty through analysis of the definition and historical background of the concept;
- Whether the grant or denial of amnesty should be based on a policy document, legal promulgation and an institution deriving its mandate by virtue of constitutional entrenchment;
- Whether the grant or denial of amnesty should be enshrined in an *ad hoc* institution or it should be constitutionally entrenched;
- Whether there is need to have recourse to Kenya's circumstances and historical injustices in as far as the grant of amnesty is concerned; and
- Whether the grant or denial of amnesty to the alleged perpetrators of the post election violence shall give rise to sustainable peace and justice.

1.5 Hypothesis.

The statement of the problem and the issues raised in this study are based on the researcher's supposition that in order to secure sustainable peace and justice, in the context of the post election violence, the grant or denial of amnesty must be put in law, policy and institutional framework. That is to say, unless the grant or denial of amnesty draws its legitimacy from the constitution, it shall not be a viable prescription for sustainable peace and justice.

1.6 Theoretical framework

The study is premised on a comparative jurisprudential theory. This is based on the fact that for the purposes of sustainable peace and justice, a concoction of various conceptions of the rule of law and justice must be embraced.

Whereas the positivistic conception of amnesty would be to trash amnesty altogether and apply the law as it is, the naturalists argue for tempering of justice with mercy.[20] The positivist school of law argues that we should obey the law as it is.[21] Accordingly hence, law is an assemblage of signs, declarative of a volition, conceived or adopted by the sovereign in a state as commands[22], concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are, or are supposed to be, subject to his power[18] and hence law must punish all violations of human rights.[23] The naturalists would have regard to various moral[24] and social fact issues[25] and circumstances surrounding the human rights violations, and propose a proportionate punishment thereby granting amnesty for certain crimes. Under this school hence, justice shall be tempered with the need for reconciliation, hence the achievement of sustainable peace.

The study further compares the theory of retribution vis-à-vis restoration as concepts of justice arguing that for the purposes of sustainable peace, justice and national cohesion; retribution must only be resorted to in grave violations of human rights whereas restoration and reconciliation shall suffice for minor offences. That is, for the purposes of national cohesion, certain crimes must be forgiven whereas for the purposes of justice, certain crimes must be punished based on the degree of seriousness. Further, though the purpose of law is to ensure that justice is done, international law recognizes that in

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[20] H. Scott Hestlevold. Justice to Mercy, Philosophy and Phenomenological Research, VOL XLVI, No. 2 December, (1985).

[21] Wilfred E. Rumble, The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution London; Dover, N.H.: Athlone Press, (1985).

[22] John Austin., The Province of Jurisprudence Determined, (The law Book exchange Ltd, Union, New Jersey 1999)

[18] Dias R.W.M., Jurisprudence, 4th ed., (Butterworth's, London, 1976), pp. 458 – 459.

[23] Kelsen, H., Pure Theory of Law, (Knight trans., UC Berkeley Press, 1967)

[24] Hart, H.L.A., the Concept of Law, (Oxford University Press, Oxford, 1961), Chapter 3.

[25] Hans Kelsen, Peace Through Law (Chapel Hill, NC, 1944), quoted in Mark Mazower, Dark Continent (Vintage/Random House, 1998), p. 198

situations where implementing justice would lead to further conflict, then it is better to grant amnesty.[26]

Finally, the study compares and adopts the theories of reparation[27] and reconciliation[28] in the context of social engineering.[29] In light of the foregoing, the researcher argues that the grant or denial of amnesty to the alleged perpetrators of the post election violence must be premised on a concoction all the above theories of law so as to achieve sustainable peace, justice and reconciliation.

1.7 Scope and limitation of the study

This study is limited to the concept of amnesty and various issues related to the grant or denial of the same to the alleged perpetrators of post election violence of 2007. The study shall further confine itself to the debate in regard to the criminal acts following the general elections of 2007. Finally, the experiences in other jurisdictions have informed the study, though these are limited to South Africa and Latin American Countries. .

However, it is important to note that the study is not an exhaustive survey of the topic presented but focuses on viability of amnesty within the context of the post election violence in Kenya.

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[26] Additional Protocol II, Art. 6(5)

[27] Ernesto Verdeja., A Normative Theory Of Reparations In Transitional Democracies, Department of Government, Wesleyan University, 238 Church Street, Middletown, CT 06459, USA, available at *http://www3.interscience.wiley.com/journal/118609403/abstract?CRETRY=1&SRETRY=0*, accessed on 13 November, 2009

[28] Jr., Everett L. Worthington., Forgiveness and Reconciliation: Theory and Application (Routledge, 2006)

[29] Karl Marx / Friedrich Engels., Works, Vol. V, Berlin 1971., available at *www.ohion.edu/~chastain/rz/reconcil.htm*, accessed on 13 November, 2009

1.8 Justification of the study

While the international community urged intervention in order to end the spiral of violence, no known comprehensive local study has specifically examined the issue of amnesty within the context of the 2007 post election violence in Kenya. Currently, amnesty remains a topical and contemporary, but emotive and divisive issue in Kenya. This study, therefore, addresses the legal, policy and institutional framework that is needed to address the issue of amnesty and its ramifications.

The study also draws tremendous inspiration from the National Accord and Reconciliation Agreement of the Kenyan Coalition Government which was presided over by former United Nations Secretary General Kofi Annan. Following the premise of this argument, the study discusses whether the grant or denial of amnesty is within the spirit of the said proclaimed "national accord and reconciliation."

There is now a national debate as to whether the alleged perpetrators of the post election violence of 2007 should be granted amnesty. That debate is not founded on any national policy or law. It is more informed by partisan interests of the main political protagonists, the Party of National Unity (PNU) and the Orange Democratic Movement (ODM), both wings of the Grand Coalition Government. To that extent, the debate is not looking at the issue of the grant of amnesty from an objective point of view that considers the pros and cons of granting or denial of amnesty.

To that extent, therefore, the study is driven by a desire not only to delve into legal and policy bases but also for purposes of stimulating, stirring and instigating academic discourse and public debate into legality or otherwise of the grant or denial of amnesty.

1.9 Literature review

In the light of the problems sought to be addressed, the particular issues under review and the theoretical framework, the study draws from various sources of literature. It is important though to note that there is no specific literature on the concept of amnesty in

Kenya with regard to the post elections violence, or a policy, legal or institutional framework that should be adopted in sustaining pace and justice.

The first report by Human Rights Watch titled Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance[30] chronicles the post election violence. This report is based on two research missions to Kenya during January and February 2008. Researchers conducted over 200 interviews with victims, witnesses, perpetrators, police, magistrates, diplomats, Kenyan and international NGO staff, journalists, lawyers, businessmen, local councilors, and members of parliament across the country, from all major ethnic groups, by phone and in person, the vast majority in person. Interviews were conducted in English and Swahili without translators. Human Rights Watch also examined court records in Naivasha. Researchers visited Nairobi, Kisumu, Kitale, Eldoret, Naivasha, Nakuru, and Molo.

The report notes that impunity is at the heart of Kenya's crisis of governance. On the one hand, impunity for incumbent politicians suspected of looting public resources, a national tradition in Kenya, creates a situation that raises the stakes for incumbents as they seek to avoid investigation or prosecution if they lose office. On the other hand, impunity for past episodes of electoral violence has contributed to continued use of violence as a political strategy. In 2002, politicians who had been publicly named for their role in political violence were appointed to Kibaki's cabinet.

While the report is based on empirical data collected from the areas affected by the post-election violence and does not address the question of amnesty, this study will offer insight into the issue of amnesty while drawing factual analytical trends from the Human Rights Watch Report.

The now famous report of the Kenya National Commission on Human Rights (KNCHR) titled On the Brink of Precipice: a Human Rights Account of Kenya's Post-2007 Election Violence, details how the violence was planned and executed. "During the course of the

[30] Available at *http://www.hrw.org/reports/2009/kenya0308/* (accessed *on 3 August, 2009).*

fighting, we would see vehicles, land cruisers, carrying food and water to our opponents," the report quotes one fighter. The raiders are said to have been paid between Shs.100 and Shs.3, 000 each, money sourced from businessmen, politicians and fund-raisers.[30]

According to the report, the attackers operated in groups of about 100. But before reaching their target they would split into groups of 20, each with a specific role – chasing away property owners, looting, torching houses and even killing. Members of Parliament, both sitting and former, are among 219 alleged perpetrators mentioned as having contributed to the chaos.[31]

The KNCHR boss Florence Jaoko was, however, categorical that being mentioned in the report did not necessarily amount to an accusation of involvement, but rather an indicator to the police and the Attorney General on where to focus their investigations. The report has been presented to the Waki Commission on post election violence.[32] The report which implicates the police and political leaders is intended to show that the violence was planned and further reveals the culture of impunity by our leaders. This will help in exposing the truth to the public and the international community. While the report is investigatory and seems chiefly bent on unearthing the circumstances and events of the violence, the issue of amnesty will be the primary focus in the research.

A report by International Crisis Group, Kenya in Crisis,[33] reviews clearly the events leading to the post election violence. The report traces the factors that have led to the Kenyan crisis to historical injustices, land grievances, inequalities and uneven distribution of national resources. It succinctly posits that the flawed election was just a trigger to the chaos that was bound to erupt without structured institutional intervention. It heavily blames the tensions to leadership negligence on local leaders.

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[30] *http://www.nation.co.ke/News/politics/-/1064/454804/-/yy3jqsz/-/index.html* (accessed on 1 September, 2009).

[31] Ibid.

[32] Ibid.

[33] International Crisis Group, *Kenya in Crisis* (Africa Report No. 137, Nairobi, 2009).

Andreas O'Shea's book places the growing domestic practice[34] of adopting amnesty laws within the context of the developing international legal framework. It pursues a path towards defining the legitimate parameters of amnesty in terms of international law and reconciling the national practice with the initiatives of the international community of states. The international community has been funding reconstruction and/or rebuilding the destroyed homes and resettlement of internally displaced persons (IDPs) after the violence through programmes like '*operation rudi nyumbani'*, the youth mission peace programmes in the Rift Valley and Central provinces which is intended to encourage peaceful co-existence of diverse ethnic communities. Further, the establishment of a National Cohesion department within the Ministry of Justice and Constitutional Affairs (MOJC) was funded by the donor community to facilitate national cohesion and reconciliation.[36] While O'Shea's book is instructive for comparative studies, it omits Kenya and its recent post election experience.

Yasmin Naqvi[37] examines the main international legal rules and principles which determine or affect a foreign or international court's ability to recognize an amnesty for war crimes. Amnesties for war crimes and other international crimes come into being mainly when states are going through periods of transition, often from war to peace, and of extreme political upheaval, for example, the handing over of power from military regimes to democratic civilian governments. During such politically sensitive times, international law needs to be able to reconcile the competing needs of the territorial state to consolidate peace and democracy and those of the international community to prosecute those accused of international crimes. She concludes by stating that what the international community rejects is the culture of impunity, which may be an impediment to peace, and the antithesis of justice. Otherwise, amnesties covering war crimes may be recognized by the international community in those circumstances where their are non-recognition may amount to a threat to peace and security by, for instance, undermining a peace agreement or provoking the overthrow of a newly established civilian government.

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[34] The author reviews the practices of Uganda, South Africa and some Latin American countries.

[36] Supra, note 28.

[37] Yasmin Naqvi, Amnesty for War Crimes: Defining the Limits of International Recognition, 85 International Review of the Red Cross 583 (2003).

In the light of political upheaval that Kenya went through early 2008 and the delicate peace accord that was adeptly brokered by former UN Secretary-General, Kofi Annan, the current debate on amnesty must be cautiously handled lest the consequences thereof upset the fragile peace and territorial unity that was agreed upon.

Simon M. Meisenberg[38] discusses the decision of the Special Court for Sierra Leone in which it ruled that amnesties granted to persons of the warring factions in Sierra Leone civil war were no bar to prosecutions before it.[39] The decisions represent the first ruling of an international criminal tribunal unequivocally stating that amnesties do not bar the prosecution of international crimes before international or foreign courts. He states that this is a significant but controversial, decision for the development of international humanitarian law. For our purpose, however, the significance of the decision lies in the fact that it shows the apparent lack of consensus on the issue of amnesties and the nature of crimes in which it ought to be granted.

Patrick L.O. Lumumba discusses the legal and institutional framework for the South African Truth and Reconciliation Commission, which was established in 1995 to promote national unity and to bring reconciliation to all people of South Africa.[40] He "faults" the South African commission for recommending amnesty against the perpetrators of apartheid and other crimes against humanity contrary to the principles and practice of the United Nations. Though the South African experience is different from Kenya's, the constitution and practice of the South African commission provides valuable lessons for Kenya.

The literature considered above is only a sampling of the writings on the subject of the study. Most studies have not considered the legal and policy foundations of amnesty in

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38 Simon M. Meisenberg "Legality of Amnesties in International Humanitarian Law: The Lome Amnesty Decision of the Special Court for Sierra Leone," 86 *International Review of the Red Cross* 837 (2004).

39 The Prosecutor v. Morris Kallon & Brima Buzzy Kamara, Special Court for Sierra Leone, SCSL- 2004-15-AR 72 (E) and SCCL-2004-16-AR 72 (E).

40 Patrick L. O. Lumumba, Jurisprudence of Good Hope? The South African Truth and Reconciliation Commission and the Case against Amnesty for Crimes against Humanity, 2 *East African Law Journal* 110 (2005).

addressing the 2007 post election violence in Kenya. The study seeks to address this missing link.

At a different level, the study, for purposes of illustration, refers to government reports especially by the Kenya National Commission on Human Rights (KNCHR), the statutory body charged with the responsibility of serving as the official human rights watchdog in Kenya, plus print and mass media accounts, reports on studies already carried out and law reports on previous prosecutions arising out of election violence in Kenya.

The Commission of Inquiry into Post Election Violence (CIPEV) chaired by Justice Philip Waki, Judge of Court of Appeal, released a report stating that the government failed to act on repeated warnings of post election violence from the National Security Intelligence Services (NSIS). The report blames the violence on tribalism, culture of impunity and poor police conduct. Further, it blames heavily the politicians, top government officials and state agents for organizing the post-poll chaos. The report proposes that there should be no blanket amnesty for the crimes committed in relation to post election violence and if any amnesty is to be granted, then it should be to petty offenders who could give information leading to possible arrest of those who masterminded the violence. Apart from the aforesaid, it recommends that there be an independent international tribunal to try all those indicted for criminal acts. It further lists ten prominent politicians and businessmen that it recommends should face prosecution.[42]

1.10 Objectives and purpose of the study

This study aims at comprehensively analyzing the concept of amnesty in Kenya within the context of the 2007 post election violence and interrogating whether amnesty is a prescription for sustainable peace and justice. The specific objectives include:-

(i) To establish whether there is a legal or policy basis for grant or refusal of amnesty for the perpetrators of the recent post election violence in Kenya;

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[42] Daily Nation, (Nairobi), Thursday, October 16, 2008, pp. 1-18. See also The Standard, (Nairobi), Thursday, October 16, 2008, pp. 1, 4, 6-11.

(ii) To determine whether the grant or denial of amnesty should be codified in law, published in a policy document and entrenched in the constitution; and

(iii) To proffer recommendations for a normative legal and institutional framework

1.11 Research methodology.

This study utilized data obtained from reports by both national and international non-governmental organizations. These were studied in the context of their exposition of the various crimes alleged to have been committed and the recommendations on the question of the grant or denial of amnesty. A further source of data was books by international and local authors on the subject of amnesties and related concepts of Truth and Justice Commissions. These books were also analyzed for the purposes of multi-jurisdictional comparison of the application of the concept of amnesty in South Africa and Latin American Countries.

A global wealth of information is also available on the internet. The internet provides soft copies of materials that would otherwise be difficult to obtain. Internet sources will constitute a broader base of the research. This is in terms of what has been written on the topic and diverse and various recommendations made. Such data will build upon the foundation of the study as well as expose gaps that the study will seek to fill. The study will be both descriptive and towards the end analytical.

1.12 Chapter breakdown.

Chapter One: Introduction.

This will be the introductory part which will contain the background information, statement of the research problem, broad argument layout, justification for the study, theoretical and conceptual framework, select literature review, specific research questions, the research objectives, the research methodology, the hypotheses and the broad chapter breakdown of the entire study.

Chapter two: International practice on amnesty.

This chapter discusses international legal regime as enshrined in various international legal documents and the practice on amnesty as applied in other jurisdictions. This is premised on the fact that international law recognizes amnesty as a viable concept in states undergoing periods of transition, often from war to peace and extreme political upheaval.

Chapter three: The policy and legal bases for amnesty.

This chapter discusses the policy and legal bases for grant or denial of amnesty. The discussion shall be informed by the fact that in as much as amnesty is primarily a political act, thus an act of a sovereign power officially forgiving an individual or groups of individuals, it must be founded not only on political consensus but also on sound policy and legal bases for the purposes of clarity, certainty and predictability. Given the fact that the issue of amnesty is controversial and emotive, there is need for clarity on which crimes qualify for amnesty and which ones do not. Further, the codification of amnesty in law must be in line with age old principles of predictability and certainty of laws, especially when the said laws are apportioning rights and duties.

Chapter four: Amnesty under Kenyan law.

Whereas this chapter is primarily concerned with the legal and policy prescriptions for amnesty and the frameworks needed to be established for a viable national regime on grant of amnesty to crimes, it does also discuss the Truth, Justice and Reconciliation Commission (TJRC) Act.

Chapter five: Conclusion and recommendations.

CHAPTER TWO

INTERNATIONAL PRACTICE ON AMNESTY

2.1 Introduction

This chapter discusses international legal regime as enshrined in various international legal documents and the practice on amnesty as applied in other jurisdictions. This is premised on the fact that international law recognizes amnesty as a viable concept in states undergoing periods of transition, often from war to peace and extreme political upheaval. During such periods, international law needs to reconcile the competing needs of territorial state to consolidate peace and democracy and those of international community to prosecute those accused of international crimes.[31]

However, whereas international law states exactly crimes whose commission there shall be no grant of amnesty[32], it does not state in which circumstances and for which crimes there should be grant of amnesty. International law only states the need to grant amnesty without giving specific procedures and characterized crimes.[33] The international applicable law on amnesties has hence been characterized by a lack of coherence and clarity for domestic policy makers. At the same time, significant normative and institutional developments have taken place in the field of international criminal law that have a profound impact on the legitimacy and effectiveness of national amnesties.[34]

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[31] Yasmin Naqvi, Amnesty for War Crimes: Defining the Limits of International Recognition, 85, International Review of the Red Cross, 583 (2003)

[32] Rome Statute

[33] Additional Protocol II, Art. 6(5)

[34] Andreas O' Shea, Amnesty for Crime in International Law and Practice, Kluwer Law International, The Hague, 2002, p.1.

2.2 Definition of amnesty

One may define amnesty as immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed in the past in a political context.[35] The immunity is in law because it has the force of law. This may derive from an amnesty law or from an exercise of power that is founded in law. One may distinguish the concept of impunity, which is a broader notion that incorporates and does not necessarily depend on legal authority.[36] The reference is to legal consequences rather than liability because in a sense amnesty depends on the presumption of criminal or civil liability, although not necessarily conviction or judgment.[37]

According to Wolf, amnesty is defined as a complete and lasting forgetfulness of wrongs and offences previously committed. Therefore, when an amnesty is given, since all deeds are consigned to perpetual oblivion and everlasting silence, no one can be accused or punished for acts before committed. [38] This was a laudable definition in its time, but it is no longer appropriate in the light of modern practice. Amnesty has become integrated into the general project of obtaining and preserving the truth for future generations, so that forgetfulness and oblivion have become antiquated factors in the perceptions of the role of amnesty.

North defined amnesty as, "A law that no man should be called in question nor troubled for things past."[39] This definition reflects the tendency of early amnesty laws to incorporate a prohibition on persons seeking retribution for past deeds. This prominent

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[35] Cf. The Oxford English Dictionary, 7 ed. "An act of oblivion, a general overlooking or pardon of past offences, by the ruling authority," Oxford University Press, Oxford, 2005, at p. 45.

[36] Thus Steiner and Alston list impunity and amnesty as distinct issues: see Henry J Steiner and Philip Alston, International Human Rights in Context Law, Politics, Morals. Oxford University Press, Oxford, 1996, p. 102.

[37] Black's Law Dictionary defines liable as "bound or obliged in law or equity; responsible; chargeable; legally obligated; answerable; compellable to make satisfaction, compensation or restitution;" Bryan A. Garner (Ed. in-Chief) Black's Law Dictionary, 8 ed. West: Thomson, St. Paul, Minn., 2004, p. 934.

[38] Wolf, Jus Gentium Methodo Scientifica Pertracratum, vol. II, p. 1764, para.989.

[39] North, Plutarch, 1676, at p. 1020.

dimension of the early provisions fell away with time and modern amnesties have concentrated on the effects of the law.

Amnesty is considered to be an accepted legal concept and a gesture of peace and reconciliation at the end of civil war or internal conflict, but not one which can be granted in respect of international crimes such as genocide, crimes against humanity or other serious violations of international humanitarian law.[40]

The political context is an important element in the definition of amnesty from pardon, although in the broad sense, amnesty is a form of pardon. Amnesty and pardon share the same consequences in law. Both these devices result in a person obtaining immunity under the law from criminal or civil legal consequences.[41] Both may take their effect from any stage of legal proceedings. Finally, both 'do not affect the legality of the act done,' but merely release the accused from trial or a guilty person from the legal consequences of his admittedly illegal act.[42] They also share the same religious element of forgiveness, for those who choose to speak of amnesty and pardon in those terms.[43] However, they have a different purpose and origin. Amnesty promotes peace and reconciliation. Pardon provides a discretionary mechanism for side stepping the courts. This may acknowledge the absolute power of a head of state or serve some undefined public purpose.[44] It usually involves obtaining something useful from the beneficiary of the pardon, or preventing or correcting a mistake in the conviction of an innocent person.[45]

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[40] UN Secretary-General's Report of October 4, 2000, on establishment of the Special Court of Sierra Leone, UN Doc. S/2000/915.

[41] Gutto, S.B. O., Some Legal Comments on Hon. Waruru Kanja's Petition for Executive Clemency, 15 *Verfassung und Recht in Ubersee: Law and Politics in Africa, Asia and Latin America* p. 289 (1982).

[42] Heuston R. F.V., Essays in Constitutional Law, 2 ed., Stevens & Sons, London, 1964.

[43] Van Leeuwen's Commentaries on Roman-Dutch Law, 1678 1780 edition, 1881 translation by Chief Justice Kotze, at p.350.

[44] Grotius, Hugo, Introduction to the Jurisprudence of Holland, at p. 1631, 1903 Translation by Maasdrop.

[45] Rolph, C.H., the Queen's Pardon, Cassel, London 1978.

2.3 Historical background to the concept of amnesty.

One can trace the legal use of mercy for past offences as far back as the second millennium before Christ. In 1286 B.C. the Pharaoh Rameses II of Egypt fought the battle of Kadesh with the Hittites. This was followed by the conclusion of one of the oldest peace treaties.[46] Archaeologists have interpreted one of the inscriptions as follows: "But as for the man who shall be brought to the great ruler of Egypt, do not cause that his crime be raised against him; do not cause that his wife or his house or his children be destroyed; do not cause that he be slain; do not cause that injury be done to his eyes, ears, arms, mouth or legs."[47]

This sub-clause seems to have formed part of a clause for the repatriation of refugees. The context may indicate that the provision was intended to apply only to the political offences of the war, thereby bringing it within the purview of amnesty as defined above, but this is not entirely clear.

The word 'amnesty' has its origin in the Greek word *amnestia* meaning oblivion. In 404 B.C., after the Spartans had defeated the Athenians in the Peloponnesian War, they established an oligarchic provisional government in Athens. It consisted of thirty men who came to be known as the 'Thirty Tyrants' owing to the oppressive nature of their rule. Within eight months approximately they executed 1,500 and banished 5,000. A revolt led by Thrasybulus led to the defeat of the 'Thirty'. After the civil war Athens had been on the brink of chaos owing to resulting divisions. An agreement was brokered, the principles of which included the prosecution of criminal acts, such as murder, and amnesty for all other acts associated with the war. Following a proposal by Thrasybulus to the Athenians, an amnesty law was passed. According to Cicero, this was called the law of forgetfulness. It stated that no one should be accused or punished after oblivion

[46] Mertz, B., Temples, Tombs and Hieroglyphs: A popular History of Ancient Egypt, Gallanez, London 1999, at p. 272.

[47] Ibid.

had been decreed of wrongs and offences committed on either side.[48] According to Robinson the Thirty and their worst agents were exempted.[49] The citizens of Athens were all made to take an oath to respect the amnesty and the first man to violate the terms of the amnesty was executed. The Athenian Constitution records that after this man's execution the amnesty was never again violated. It adds that: "On the contrary, the Athenians seem both in public and in private, to have behaved in the most unprecedentedly admirable and public-spirited way with reference to the preceding troubles. Not only did they blot out all memory of former offences, but they even repaid to the Lacedaemonians, out of the public purse, the money which the Thirty had borrowed for the war, although the treaty required each party, the party of the city and the party of the Piraeus, to pay its own debts separately." [50]

Grotius notes that, "Pompey finished the war with the Pirates in great part by means of treaties, promising to them their lives, and plans in which they might live without plundering."[51] Caesar apparently wrote in the third book of The Civil War that the Roman commanders made an agreement with the brigands and deserters who were in the Pyrenees Mountains.[52] Julius Caesar, as dictator of the Roman Republic, often granted amnesty to his former political enemies,[53] possibly to his peril.[54] His successors were more wary of the practice. The strategy, however, thrived as a means of maintaining peace between former warring states. It became a strong feature of peace settlements. Wolff notes that when parties conclude a peace treaty, amnesty is provided

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[48] *Ibid.*

[49] Robinson, Cyril E., Apollo History of Greece, 9th ed., Thomas Y. Cromwell Co., New York, 1957, at pp. 294-5.

[50] Athenian Constitution, Part 4, Section 40 (http: 7www.ya1e.edu /lawweb ava1on "athe4. html31*)* accessed on October 3, 2009.

[51] Grotius, Hugo, De Jure Belli ac Pacis Llibri Tres, 1652, at p. 794.

[52] Caesar, The Civil War III, cited by Grotius *ibid.*

[53] Grant, Michael, The Twelve Caesars, Charles Schribner's Son, New York, 1975, at p. 45.

[54] Grant, Michael, Caesar, Weidenfeld & Nicolson, London, 1974, at pp. 227-8.

for in the first article of the treaty and, even where not expressly mentioned, is tacitly agreed to.[55]

Amnesty has its origins in early attempts to promote peace between warring states or the state and rebels, and to ensure lasting victory over conquered territory. Pardon, on the other hand, originates from the absolute power of the sovereign.

It should be noted that, achieving a better society may involve a process of transition from a state of war to a state of peace, or from one type of government to another. To facilitate such a transition, it is often necessary to obtain cooperation of the key figures in the maintenance of the former state of affairs, be it government officials, military personnel or agitators. Amnesty provides an incentive to such role players to cooperate in the process of transition. Peace or the establishment of a new government may only be possible with the consent of the former players. Hannibal is reported as exclaiming that, "it is part of him who grants peace not of him who sues for it to lay down the conditions".[56]

In South Africa, whatever point one might raise about truth, reconciliation and forgiveness, the reality remains that the principal reason for amnesty was to facilitate the initial transition from the old regime to a new democratic government.[57] Therefore, whatever incidental functions the amnesty provision may serve, it was a component in a political settlement for the handing over of the reigns of power, which some would perceive as a necessary evil to ensure transition to democracy. Similar claims can be made with respect to the amnesties in Argentina, Chile and El Salvador.

Even when amnesty was not politically an absolute necessity, it has been used to ensure lasting peace. This has been the main underlying rationale of amnesty clauses in peace

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[55] Wolff, C., Jus Gentium Methodo Scienlifica Pertractatum, vol. II, 1764, (1934 translation).

[56] Gentili, Alberico, De Jure Belli Libri Tres, *1598 at p. 576.*

[57] Marais, H., The Skeletons Come out of the Cupboard: the Amnesty Debate Goes on Trial 91 *Work in Progress* 10 (1993).

treaties.[58] Grotius explains this rationale in the following way, "The same principle does not apply to the right to inflict punishment. For this right in so far as it concerns Kings or papals, ought to be considered as held in abeyance, from fear that the peace will not be perfect peace if it leaves the old cause of war".

Where amnesty is perceived as a political necessity, it carries with it this incidental benefit. In South Africa there were political parties other than the Africa National Conference (hereinafter ANC) and the National Party (NP) that required reassurance. Their inclusion in the process of political change was necessary, if peace was to last.

It has long been recognized that lasting peace can only be achieved by quelling the need for vengeance of those who were conquered before peace was established. Wars ended by compromise and forgiveness may be said to foster peace more effectively than those followed by recounting scores and revenge. After a war, the victors have a primary role in establishing the conditions for peace

The victors of the First World War imposed such conditions of indignity to Germany through the Treaty of Versailles that were re-ignited only 21 years later. The tempered approach of the Greeks and Romans to their vanquished populations surely contributed to the success of these respective empires. The Romans strove for lasting and not ephemeral peace with their vanquished foes. Gentili cites Dionysius of Halicaranassus VI in recording the declaration, 'let there be peace between the Romans and the people of the Latins as long as heaven and earth keep the same position.[59]

In answering the question as to what ensures lasting peace, St. Augustine says that by punishing past offences we glut our anger; by being compassionate we ensure the future.[60] In the old African setting, justice was a community affair and the society set a high score by social harmony and peace. There is abundant wealth of wisdom in the old

[58] This is clear from the emphasis on eternal oblivion in the early treaties.

[59] Ibid.

[60] St. Augustine, Letters, ccii, quoted by Andres O'Shea.

ways of African society. The belief was that a person is a person only through other persons, and a broken person needed to be helped to be healed. What the offence had disturbed should be restored, and the victim and the offender had to be helped to be reconciled.

The justifications for amnesty are frequently countered with arguments for justice. Yet, even justice needs to be pursued within the context of its associated goal of lasting peace. Gentili notes, "Therefore there is but one enduring principle, namely justice, which has been preserved in punishment and should be preserved also in taking vengeance and making conditions for the future. For one who has been injured beyond his deserts will not be tranquil, but will continually desire revenge; and one who is forced to take pitiless conditions will carry the burden only so long as he is under the necessity of obedience."

It is difficult to conceptualize a meaningful peace without reconciliation. As long as former enemies continue to be hostile to each other, the root causes of war continue to foreshadow the peace settlement and peace itself is fragile, assailable, and, ultimately, ephemeral. Reconciliation is therefore a catalyst for lasting peace. As a gesture of atonement for past wrongs, amnesty, by implication if not expressly, always, *inter alia,* serves the function of reconciliation. When given its most auspicious meaning, reconciliation refers to the process of making friends again or re-instituting alliances after estrangement. The reconciliatory function of amnesty is, however, more modest. The aim is not so much one of creating friendly relations as one of doing away with enmity resulting from previous hostilities. The government that gives amnesty to rebels or agrees to amnesty in a peace treaty usually has no desire to form alliances with its former foes. It merely wishes to diminish or extinguish the hostility that feeds the desire of war, by providing an incentive to individuals to participate in the peace process.

Although reconciliation is, by implication, a function served by all amnesties, the term itself has not traditionally been employed in this context. The concept appears to be deeply rooted in Christian theology.[61] For example, despite the firmly entrenched Roman

[61] Banks, Robert J., Reconciliation and Hope, Paternoster Press, Exeter, 1974, at p. 236.

Catholic tradition in Latin America, the concept as applied to political transition appeared to have taken on a more secular than religious, and a more forensic than spiritual, meaning.

2.4 Amnesty in other jurisdictions

It is important to note that all transitional societies that have suffered atrocities have one thing in common; a need to heal the wounds of the past.[62] The mechanisms or approach that they choose will depend not only on perceptions of what is best for the society, but also on the balance of power between the society and its former offenders.

2.4.1 Amnesty in South Africa

South Africa had been under apartheid rule since 1948. Cases of vicious human rights abuses and atrocities committed during such reign are countless. After the first democratically held elections in 1994, South Africa was faced with the dilemma that many transitional governments face today; the question as to how they would deal with their past. The most difficult task was creating a viable economic state while redressing the massive and systemic wrongs of the earlier regime. Reconciliation rather than vengeance was the only path available to them. Any attempt at Nuremberg-style trials would have created the economic and social havoc it hoped to avoid. Reconciliation and justice were only to be achieved through a full disclosure of the truth about the past and an amnesty for wrongdoers.

The South Africans adopted, what is called "restorative justice" as opposed to "retributive justice" which, unlike retribution is not concerned with punishment. It is not fundamentally punitive. It sets high score by healing the offence that has caused a breach in relations. It regards the offender as a subject with a sense of responsibility and a sense of shame that needs to be reintegrated into the community and not ostracized.

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[62] Kritz, J. Neil, Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights, 59 Law and Contemporary Problems, 127 (1996).

Those who were in support of amnesty held the view that; first, amnesty helps a society to achieve reconciliation and healing after a period of conflict and social trauma. Societies must therefore be ready to forego the redress of past human rights violations. South Africa, therefore, relied on this argument to provide amnesty to some of the perpetrators.

The reconciliation theory argues that a retributive approach to past atrocities may provoke by a causal chain, similar or even worse abuses. Secondly, such a process enabled the revealing of the truth and the establishment of official records of what happened, for posterity.

The Promotion of National Unity and Reconciliation Act[63] established the Truth and Reconciliation Commission in order to provide a useful window into apartheid and for arriving at justice through a clear sighted and ethically decisive grasp of the truth about the past. The Act provides an amnesty mechanism for perpetrators of human rights violations. Specifically, the Act provides that the Amnesty Committee shall grant amnesty to any applicant if satisfied that the application for amnesty involves an action associated with a political objective and that the applicant has made disclosure of all relevant facts

However, the granting of amnesty was not automatic. Certain considerations were to be taken into account before the commission could grant amnesty. Particularly the Amnesty Committee also had the explicit ability to withhold amnesty from one; an unrepentant applicant. Secondly, for reasons of principle also, the triumphalist approach of victors' justice, with its inevitable selectiveness and political opportunism, was rejected in favour of ideals of canon nation building and reconciliation between the oppressors and the previously oppressed. Thirdly, after a century of white domination of all aspects and institutions of the economy, a systemic and thorough exacting of revenge would unavoidably result in a massive white financial exodus and possibly undermine the ability of the ANC to rule. Relinquishing power and participating in elections by White South

[63] Act No. 34 of 1994

Africa was an admission of wrong and apology. The ANC victory was the most thorough revenge available. Moreover reconciliation allowed nation building or rebuilding to begin.

Archbishop Desmond Tutu views *ubuntu* as the guiding principle of the Truth and Reconciliation Commission as well as of the traditional culture. He explained *ubuntu* as follows, "We say that a human being is a human being because he belongs to a community and harmony is the essence of that community. So *ubuntu* actually demands that you forgive because resentment and anger and desire for revenge undermine harmony. In our understanding, when some one doesn't forgive; we say that person does not have *ubuntu*. That is to say, he is not really human".[64]

Economically, politically, and even culturally, reconciliation appears to have been the only prudent course. Over 13,000 applications for amnesty were received by the Commission before the cut-off date of May, 1997.[65]

In the Foreword to the Report of the Truth and Reconciliation Commission,[66] Archbishop Tutu succinctly stated why the Commission took the path of reconciliation: "There were those who believed we should follow the post World War II example of putting those guilty of gross violations of human rights on trial as the allies did at Nuremberg. In South Africa, where we had a military stalemate, that was clearly an impossible option .Neither side in the struggle, the state nor the liberation movements had defeated the other and hence nobody was in a position to enforce the so called victor's justice."[67]

In furtherance of this argument by Tutu, Justice Goldstone[68] states that, "When serious human rights violations have occurred, they must be responded to in a way that will

[64] Jeffrey A., "The Truth about the Truth Commission," Human Rights Magazine, Spring 2000 < www.abanet.org/irr> (Accessed 6 October 2009).

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] Ibid.

engender a sense of justice and which will enable the victims to heal, reconcile, and to move forward with building a peaceful future."[69]

2.4.1.1 The legal framework of the South African Truth and Reconciliation Commission

The law establishing the South African Truth and Reconciliation Commission created specific tasks for the institution. First, political acts, for which amnesty could be granted, were acts committed by a political organization or a member of the security troops, within the framework of obligations and authorities. These did not include acts directed at personal gain, foul acts, or acts which were not reasonably related to the goal.[70]

Secondly, victims were those who had been injured as a consequence of violations of human rights, those who had suffered or incurred financial losses or those whose human rights had not been respected. Victims also included relatives and persons who had mediated.[71]

Thirdly, the Commission would engage in investigating serious violations of human rights: killings, attempted killing, kidnapping, grievous bodily harm or torture committed by state officials, political organizations or persons with political motives between March 1960 and 5 December 1993.[72]

The Commission was authorized to summon people, demand documentation and articles and to take statements under oath. Summoned persons were obliged to account for their actions, even if this implied a declaration of complicity.

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[69] Ibid.

[70] Act no 34 of 1994.

[71] Ibid.

[72] Ibid.

The Commission comprised three sub-committees, namely, the Sub-Committee on Violation on Human Rights, the Sub-Committee on Amnesty and the Sub-Committee on Reparation and Rehabilitation.

The duties and functions of the Sub-Committee on Violations of Human Rights (hereinafter SVHR) were clearly defined in section 14 of the Promotion of National Unity and Reconciliation Act (The Act). The SVHR was mandated to enquire into systematic patterns of abuse to identify motives and perspectives; to establish the identity of individual and institutional perpetrators; to find whether violations were the result of deliberate planning on the part of the state or liberation movements; and to designate accountability, political or otherwise, for gross human rights violations.

The Sub-Committee was also responsible for making findings, confirming that victims had been the subject of gross human rights violation as defined in the Act. It acted as the engine of the Commission. It compiled a number of reports that formed part of the final report of the Commission, which was handed to President Mandela on 29th October 1998. The Sub-Committee was required to make findings confirming that persons making statements were victims of gross human rights violations as defined in the Act. Findings were made on a balance of probabilities.

The Commission policies and processes required that all of these statements be processed, registered, investigated or subjected to low-level corroboration, and finally to have victim findings made on them. The Sub-Committee concerned itself mainly with victims and their right to know the truth. In the course of its work, it discovered different kinds of truths; it discovered too that truth must be tempered with justice and compassion.

The second Sub-Committee, the Sub-Committee on Amnesty, was chaired by a former judge of the Supreme Court due to the obvious need for a clear understanding of the law. Its main function was to grant amnesty or indemnity in case all information was fully disclosed and the acts had political objectives.

Under section 20 of the Act, the Sub-Committee, would grant amnesty if, after considering an application for amnesty, it was satisfied that the application complied with the provisions of the Act and that the offence was of a political nature and that all relevant facts had been disclosed.

The Act defined an act associated with a political objective as any act or omission which was associated with a political objective, and which was advised, planned, directed, commanded, ordered or committed within or outside the Republic during the period March 1960 to the cut-off date which was by any person or officer of the Republic or any agent of the state.

In *Application for Amnesty by Thamsanga David Jackson,*[73] the applicant had been charged and convicted of murder and sentenced to twelve years in prison. In his application for amnesty, it was established that the accused had killed a white policeman in the course of self defense after the deceased had physically assaulted the applicant, slapped him on the face, and threatened to kill him with a gun which he held out and pointed at the applicant. While dismissing the application for amnesty, the judge found that it was equally clear that the applicant's offence was not associated with a political objective. Accordingly, satisfied that the act committed by the applicant did not meet the requirements of section 29(2) and (3) of the Act at all, the application was dismissed.

In an *Application by Boy Diale and Christopher Makgale,*[74] the two applicants were convicted of the murder of Glad Mokfgattle and they were sentenced to imprisonment of 12 and 15 years respectively. They had attacked the deceased in his house, bundled him in a vehicle and sped off with him, with the intention of questioning him about the keys to a civic centre. The deceased was the Chairman of the Tribal Council of Bofakeng,

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[73] AC/96/0004 Application for Amnesty in Terms of section 18 of the Promotion of National Unity and Reconciliation Act (AM 0025/96) < *www.doj.gov.za/trc/decisions*> (accessed October 7, 2009).

[74] AM 0081/96 Application for Amnesty in terms of Section 18 of the Promotion of National Unity and Reconciliation Act, < *www.doj.gov.za/trc/decisions*> (accessed October 7, 2009).

while the two applicants were members of Action Committee. Along the way, the applicants assaulted the deceased when he turned out to be uncooperative. When the applicants realized that the accused would eventually succumb to the injuries that they had inflicted on him, they killed him in order to get rid of the evidence and to avoid being identified by the deceased. The Amnesty Sub-Committee came to the conclusion that their conduct met the requirements of the criteria set out in section 20(3) of the Act and were thereby granted amnesty.

In order to ascertain whether the act complained of was an offence as captured in the Act,[75] a set of criteria was developed which was to be applied. These criteria included such considerations as the motive of the person, the context in which the act, omission or offence took place and, in particular, whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto, and the legal and factual nature of the act. The Act, however, did not recognize those offences that were carried out for personal gain, or out of personal malice, ill-will or spite, directed against the victim of the acts committed.

The mandate of the sub-committee of the Reparation and Rehabilitation (RRC) was to affirm, acknowledge and consider the impact and consequences of gross violations of human rights on victims and to make recommendations accordingly.

2.4.2 Amnesty in Latin America

Latin America has made significant contribution to the development and scrutiny of the practice of amnesty. In the 1980s Latin American states resurrected the Athenian dimension to the concept of amnesty when new governments introduced or retained amnesty laws for human rights violators of the prior regimes. These laws retained the feature of generality and immediacy of effect. They were also designed in a fashion similar to the peace treaty clauses, to maintain peace and stability. The following cases are illustrative.

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[75] Section 20(3), Promotion of National Unity and Reconciliation Act, Act No. 34 of 1994.

2.4.2.1 Argentina

From March 1976, Argentina experienced seven years of military dictatorship after a coup deposed President Isabel Peron. Just before the democratic elections of 1983 that brought Raoul Alfonsin's Radical Party to power, the former regime introduced an amnesty law, known as 'The Law of National Pacification.'[76] This indemnified those suspected of acts of state terrorism and members of the armed forces for offences committed between 25 May, 1973 (which saw the return to power of General Juan Peron) and 17 June 1982 (the resignation of President Galtieri after the war with Britain over the sovereignty of the Falklands).

The pacification law excluded from its benefits members of "terrorist" or "subversive" organizations, who demonstrated an intention to continue to be connected with those organizations.[77] It is recorded that many political prisoners immediately refused the benefits of the law,[78] which had the effect of preventing both criminal and civil proceedings and had immediate unconditional application to persons eligible to its provision.[79] Days after taking office on 10 December, 1983, President Alfonsin issued a decree ordering the arrest and prosecution of high-ranking military officers.[80] On 27 December, 1983, Congress repealed the amnesty law created by the previous regime.

Alfonsin established[81] the National Commission on the Disappeared *(Commission National Para la Desaparicion de Personas).*[82] The Commission did not incorporate any

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[76] Law No. 22.924 of 22 September 1983. For a discussion of the duty to prosecute in the Argentinean Context, see Nino, The Duty to Punish Past Human Rights Put into Context: The Case of Argentina' islands.

[77] Article 2 of the Law of National Pacification No. 22.924

[78] Kritz, Neil, Transitional Justice: How Emerging Democracies Reckon With Former Regimes, United Institute for Peace, Washington DC, 1995.

[79] Ibid.

[80] Decree 158.

[81] Boraine, Alex, Janet (eds.) The Healing of A Nation, Justice in Transition, Cape Town, 1995.

[82] Hayner, Priscilla B., Fifteen Truth Commissions - 1974 to 1994: A Comparative Study, 16 Human Rights Quarterly, 1994 at p. 597.

amnesty process akin to the South African mechanism, but forwarded information on disappearances to the justice system. Its report, *Nunca Mas*, was widely disseminated.

Trials began before the Supreme Council of the Armed Forces[83] for acts committed between 24 March, 1976 and 26 September, 1983. However, on 5 December 1986 Alfonsin declared that it was time to extinguish 'interminable suspicion' attached to military officers, who must start to take part in rebuilding a democratic society. On 29 December, 1986 the 'full stop law' *(ley de puncto final)* was passed imposing a 60-day deadline for lodging formal charges and issuing summonses for crimes 'related to the establishment of political action.'[84] This law, as with the previous amnesty, had immediate effect. The law did not, as in South Africa, require the beneficiaries to apply for amnesty and give full disclosure of the events surrounding the commission of the offences. Full advantage was taken of the deadline to institute further proceedings.

On 4 June, 1987, in the face of pressure resulting from internal revolt within the army and the failure of army officials to respect court orders, Congress passed the due obedience law.[85] This created a presumption that, "without proof to the contrary being admitted", officials were following orders and had no possibility of resisting those orders, which would thus render them innocent. This was not called an amnesty law, but it would ultimately have a similar effect in ensuring that those subordinates responsible for violations of human rights remained unpunished. It excluded crimes of rape, kidnapping and hiding of minors, change of civil status and appropriation of immovable property through extortion.

Unconditional amnesties were finally granted in 1989 and 1990 to specific persons, through the adoption of presidential pardons. This was justified in order to 'overcome the deep divisions that still remain in the heart of our society'.[86] In April 1998, the due

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[83] The highest military tribunal.

[84] Supra, note 81.

[85] Ibid.

[86] See Decree 1002/89,

obedience law was repealed, although not annulled.[87] In other words it still remained in existence though not applicable in the referred circumstances.

2.4.2.2 Chile

Between 1973 and the end of 1989 Chile suffered sixteen years of military dictatorship under General Augusto Pinochet. The new government of 1990, led by Patricio Aylwin, did not reverse an amnesty law which had been introduced by the old military regime in 1978. This law covered the period 1973 to 1977,[88] and differs radically from the negotiated process in South Africa. Apart from being self- awarded, the Chilean amnesty was unconditional for those to whom it applied. Furthermore, it extended to 'all persons who, as principals or accessories, have committed criminal offences during the period of state of siege…' However, it excluded common crimes such as infanticide, armed robbery, rape, incest, fraud, embezzlement, crimes of dishonesty and drunk driving.[89] The list of exceptions, notably, did not include homicide, kidnapping and assault, nor did it apply to civil proceedings, although this had theoretical value to the victims of crimes long past.

Unlike Argentina's ephemeral self-amnesty, annulled in the context of an army that was demoralized and weak owing to the Falklands War and lack of popular support, the new democratic government could not easily revoke the Chilean self-amnesty. It had been in existence for a long time. The army had lost power through a plebiscite that it had introduced, but it remained strong and influential. The old regime continued to muster minority support and the right-wing elements had a sufficient stronghold in the Congress to block moves to delegislate the law.[90] Aylwin's reference to making efforts to have the law repealed met with fierce opposition suggesting that this would breach the compromise requiring respect for the institutional framework established by the prior

[87] Ibid.

[88] See Robert J. Quinn. Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Mode, 62 Fordham L. Rev. 905 (1994) at pp. 906, 918. .

[89] Ibid.

[90] Jorge Correa S., Dealing with Past Human Rights Violations: The Chilean Case after Dictatorship, 67 the Notre Dame Law Review pp. 1457-64 (1992).

regime. As in South Africa and Argentina, serious attempts were made to ensure that the failure to prosecute did not culminate in the burial of the truth about past human rights violations. The difference from the South African model lies in the fact that amnesty, truth and reparations were not treated as an integrated process and amnesty was not employed as a mechanism for eliciting the truth.

Six weeks after President Aylwin's inauguration, the government established the Commission on Truth and Reconciliation. It had several functions. It would create as complete a picture as possible of human rights violations and identify the victims and their fate. It would further recommend measures of reparation for the families of victims, vindicate the reputation of victims and recommend legal and administrative measures to prevent similar deeds from being committed in the future.[91] It had nine months in which to produce a report. The Commission was directed to forward evidence of criminal activity to the courts. President Aylwin called for 'justice to the extent that is possible'. The Commission further recommended the creation of a body to encourage and co-ordinate the compensation of the victims.[92]

The Commission's report was submitted to the Supreme Court by the government and the court was directed to hasten investigations into individual responsibility for human rights violations. Prosecution would not be possible for those cases covered by the amnesty law, the legality of which had been confirmed by the Supreme Court. However, prosecutions were instituted for offences committed after 1978 and for one offence committed in the United States before 1978 that was not covered by the amnesty law.

In 1998, the former military dictator of Chile, General Pinochet travelled to the United Kingdom for medical treatment, but found himself subject to arrest, following the issuing in Spain of an international warrant for his arrest. The geographical limitations of the amnesty from which he benefited suddenly became patently clear.[93] During legal

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[91] Ibid.

[92] Ibid.

[93] O' Shea, Andreas, Amnesty in the light of Pinochet Proceedings, 4 South African Journal of Human Rights, 2000, at p. 642.

proceedings in the United Kingdom[94] challenging the validity of his arrest and possible extradition, it was never in issue that the amnesty law had any effect outside of Chile.[95] When Pinochet eventually was able to return to Chile, not only did he face an increasing number of civil actions but the Supreme Court overruled the old amnesty law.[96]

2.4.2.3 El Salvador

El Salvador's transition to democracy was achieved through international agreements and the assistance of the United Nations. The Treaty of Esquipulas was signed on 7 August, 1987 and provided for a general amnesty. Therefore, the mechanisms and safeguards of the South African process, including the requirement of full disclosure, were distinctly absent. In December 1989, the government of El Salvador and the Liberation Movement[97] approached the United Nations Secretary-General for assistance. The San José Accord[98] led to the creation of the Observer Mission in El Salvador (ONUSAL).[99] This was followed by further agreements for the consolidation of peace in El Salvador.[100]

The Commission on Truth for El Salvador was created by the Mexico Agreement of 27 April, 1991, with the mandate of 'investigating serious acts of violence which took place after 1980 and whose impact on society demands, as a matter of the greatest urgency, public knowledge of the truth.'[101] The Commission had six months to complete its work,

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[94] United Kingdom v. Augustino Pinochet, [1999] 1ALL E.R.577 (H.L.).

[95] See R vs. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (Amnesty International and Others Intervening) [2000] AC 61.

[96] Chilean Supreme Court strips Pinochet of Immunity, 8 August, 2000, available at *(www.cnn.com/2000/WORLD/america/08/chile.pinochet.02/)*

[97] Frente Farabundo Marti para la Liberacion National (FMLN).

[98] Signed 26 July, 1990.

[99] Security Council Resolution 693 of 1991; UN Doc. S/25500 (April 1, 1993).

[100] New York Agreement signed 25 September, 1999; Mexico Agreements signed 16 January, 1992 (ONUSAL's authority was extended to the implementation of these agreements by Security Council Resolution 729 of 1992) UN Doc 2/2500 at 18 (1993).

[101] Ibid.

but, again, had no role to play in the amnesty process. It produced its report to the Secretary-General of the United Nations in March 1993.[102]

The Law of General Amnesty for the Consolidation of Peace, 1993 implemented the amnesty on a national level.[103] This replaced an earlier more restricted amnesty[104] ''in order to be consistent with the development of the democratic process and the reunification of the Salvadonan society'' and ''in order to drive toward and to achieve national reconciliation''. The law provides that "a broad, absolute and unconditional amnesty'' is to be granted to those who participated in political crimes, crimes with political ramifications, or common crimes committed by no less than twenty people, before 1 January 1992. However, kidnapping, extortion, drug-related offences, and certain crimes committed with a view to profit are excluded from its scope.

This differs from the models of Argentina, Chile and South Africa by excluding certain serious categories of crimes and differs specifically from the South African model in the important respect that there is again no accompanying condition of disclosure. As in South Africa, the law covers civil as well as criminal responsibility.

When the legality of amnesty was challenged before El Salvador's Supreme Court, the Court held itself incompetent to rule on the matter because it considered that to rule on a purely political question would contravene the principle of separation of powers. As with the supreme courts of other countries, it further incidentally referred to Article 6(5) of Additional Protocol II to the Geneva Conventions of 12 August 1949, relating to the protection of Victims of non-international Armed Conflicts,[105] encouraging "the broadest possible amnesty" after non-international hostilities.

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[102] Ibid.

[103] Kritz, Neil, Transitional Justice: How Emerging Democracies Reckon With Former Regimes, United Institute for Peace, Washington DC. 1995.

[104] The Law of National Reconciliation, Legislative Decree No. 147, Official Journal No.14, Volume 314.

[105] Protocol II, adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts; 1125 UNTS 609.

2.5 Antecedents of a viable and sustainable regime of amnesty

The minimum antecedents (*sine qua non*) of the legal, policy and institutional framework for amnesty that emerge from the above comparative discussion are as follows:

i. It should be officially sanctioned, authorized and empowered by the state;
ii. The promulgation of the amnesty provision in the Constitution to provide for temporary suspension of rights;
iii. It should be *ad hoc;*
iv. The institution dealing with amnesty must be a non judicial body that enjoys some measure of *de jure* independence;
v. The process of amnesty must focus on the past atrocities and crimes and must investigate patterns of abuses over a period of time and not just a specific event;
vi. Conclude its work with submission of a final report that contains findings, recommendations and decisions.

The foregoing discussion reveals that though factors which gave rise to considerations of amnesty in these jurisdictions were different, there is a common objective which informed the process, that is, the desire for achieving sustainable and lasting peace and justice.

2.6 Conclusion

This chapter has introduced the basic conceptualizations, historical foundations and comparative perspectives on the concept of amnesty. These were studied with a view to identifying the antecedents of a viable and progressive regime of amnesty law that has the potential to secure sustainable peace and justice.

In the light of experiences from other jurisdictions highlighted, if Kenya were to have a law providing for amnesty, that law would have to be entrenched in the Constitution and other relevant laws, because without a legal framework it would not be viable to have amnesty. The criminal prosecution process is inherent in Kenya's constitutional democracy and the rule of law. It is thus crucial that the amnesty law be in conformity

with the Kenyan constitution. Equally important is the consideration as to whether the amnesty process is in conformity with international treaties, which Kenya has ratified.

CHAPTER THREE

THE POLICY AND LEGAL BASES FOR AMNESTY

3.1 Introduction

This chapter discusses the policy and legal bases for grant or denial of amnesty. Amnesty, as earlier defined in the previous chapter, is an act of justice through which the supreme power of the state restores those who may have been guilty of any offence to the position of innocent persons. It includes more than pardon in as much as it obliterates all legal remembrance of the offence.[106] It is usually in the form of constitutional entrenchments, legislations and peace agreements.

The discussion in this chapter shall be informed by the fact that in as much as amnesty is primarily a political act, thus an act of a sovereign power officially forgiving an individual or groups of individuals, it must be founded not only on political consensus but also on sound policy and legal bases for the purposes of clarity, certainty and predictability. Given the fact that the issue of amnesty is controversial and emotive, there is need for clarity on which crimes qualify for amnesty and which ones do not. Further, the codification of amnesty in law must be in line with age old principles of predictability and certainty of laws, especially when the said laws are apportioning rights and duties.[107]

3.2 Amnesty as a policy and legal issue

The protection of human rights is an internationally recognized and accepted practice by which states are obligated to protect and promote human rights and are held liable for

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[106] Wikipedia free encyclopedia ;< *http/www.wikipedia.com*> (accessed October 14, 2009).

[107] Cesare Bonesana, Marchese Beccaria., Dei delitti e delle pene (English: "On Crimes and Punishments"), Second American edition. Philadelphia (No. 175, Chestnut St.): Published by Philip H. Nicklin: A. Walker, printer, 24, Arch St., 1819. available at *http://www.constitution.org/cb/crim_pun.htm* accessed on 13 November 2009

violations of human rights committed in their jurisdictions. Such protection is founded on international declarations and treaties such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) which provides that everyone has the right to an effective remedy by a competent national tribunal for acts that violate the fundamental rights guaranteed to him by the constitution or laws.[108]

This position of international law regarding recognition of amnesties then becomes too strict to accommodate recognition of amnesties even in certain circumstances where recognition is necessary and serves to promote peace, justice and reconciliation in periods of conflict.

There is hence need for a clear policy and law premised on certain principal considerations to guide the process of grant or denial of amnesty, including the classification of crimes and the process of application for amnesty.

3.3 The policy and legal considerations for grant or refusal of amnesty

This study proposes the following criteria as a set of guidelines in determining the extent to which amnesty for perpetrators of post-election violence should be recognized and given effect. It encompasses recognition where it is necessary for the achievement of peace, justice and stability; recognition on the basis of the amnesty having been negotiated and passed under appropriate legal framework and legislation; recognition on the basis of the procedure for granting amnesty; recognition on the basis that amnesty is accompanied by other measures of accountability; recognition of amnesty for those "least responsible" and denial of the same for those with greater responsibility; and recognition on the basis of a policy and legal framework for compensation for the victims. We expound each one of these criteria in the discussion proffered herein below.

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[108] Article 8 of the 1948 Universal Declaration of Human Rights – UN Doc. A/811, December 10, 1948.

i. Recognition where it is necessary for the achievement of peace, justice and stability

In situations of transition after a period of internal conflict or transition from one regime characterized by autocracy and human rights violations to a democratic one or, like in the Kenyan scenario, of coming from a conflict that dismembered its social fabric, it may be necessary to recognize and accept amnesty as a way of securing sustainable peace, justice and stability.

In Kenya, it is obvious that prosecution of the suspected and/or arrested perpetrators of the violence will fuel instability, revenge and open up past wounds. It is important and necessary to grant amnesty to perpetrators of the post election violence and both international courts and tribunals should recognize such amnesties. For instance, had the South African government not included the amnesty clause in the Constitution to allow amnesty in respect of acts, omissions, and offences associated with political objectives, there could have been an outbreak of civil war.

Although the issue of amnesty in Kenya is very emotive, controversial and has generated a lot of political debate, sustainable peace should be given pre-eminence over the desire to bring all perpetrators to justice, since peace and stability are the long-lasting goals of a country's development programme, while justice is often based on the need for strict enforcement of the law and the concept of punishment which may be counter-productive. It may, besides, be politically more prudent to pursue lasting peace than to seek justice in the present circumstances.

However, the question that would arise here is whether such amnesty granted for the sake of securing peace can be justified in international law. The point here is that amnesty granted in such a course finds justification under international law. It is instructive that the Rome Statute for the International Criminal Court (ICC)[109] gives the United Nations

[109] UN Doc. A/CONF.183/9, (1998); reprinted in 37 International Legal Materials 999(1998) (hereinafter "Rome Statute"), at Article 17.

Security Council power to request the ICC to defer investigations for a renewable period of six months. Premised on the above, the power, purpose and mandate of the UN Security Council in maintaining international peace and security, such request carries a heavy weight and will in fact have the same effect as amnesty in situations where prosecutions will jeopardize peace. In any event, maintenance of peace[110] is the primary objective of the United Nations and it is what any member of the international community should aim at. Therefore, where peace is facing a threat by any legal procedure or government objective, peace ought to be jealously guarded and protected at all costs.

ii. Recognition on the basis of the amnesty having been negotiated and passed under appropriate legislation.

It is a settled principle in law that "no man can be a judge in his own cause."[111] If he does so, there is bound to arise a conflict of interests. Therefore, the proposal for establishment of an amnesty law must be acceptable to both the victims and the perpetrators of the violence before it can be embedded in our legal system. This codification of amnesty under legislation must be entrenched in the constitution since it amounts to suspension of the victims' rights to an effective remedy resulting from the violations of their human rights, which rights are provided for by not only the constitution but also regional and international human rights instruments. Hence this suspension must be enshrined in the constitution to avoid heavy litigation.

The South African model of granting amnesty followed the aforesaid mode as it was as a result of a political process of negotiations involving the ANC, National Party (NP) and other stakeholders in the outgoing and incoming regimes.

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[110] Chapter VII of the United Nations Charter

[111] The Principle of *nemo judex in re causa sue*, is part of the principles of natural justice. See P.L.O. Lumumba, Judicial Review in Kenya, (University of Nairobi Press, 2003).

iii. Recognition on the basis of the procedure for granting amnesty

This study cannot over-emphasize the fact that impunity with regard to international crimes must not be tolerated.[112] Impunity is a denial of justice to the victim. A clear-cut distinction should be made between ordinary crimes under the Kenya's criminal law regime and crimes against humanity for purposes of granting amnesty. There should be no grant of amnesty for offences committed with impunity such as rapes, defilement of minors, organized criminal felonies such as murder, arson and other atrocities of unimaginable nature.

However, where the amnesty is granted on a conditional basis, it should be given a more serious consideration. "Conditional" should be understood to mean that each case should be evaluated on its merit. For example, those crimes committed as part of a plan ought not to be pardoned.

In cases where it becomes necessary, such as in cases where minors are involved, people being used by the state as witnesses, for amnesty to be granted for serious crimes, for instance, crimes against humanity, for purposes of validity under international law, there should also be conditional rather than blanket amnesty.

The South African system under its Truth and Reconciliation Commission (TRC), particularly the Amnesty Sub-Committee established under it, provides the best precedent. Under the system, persons suspected of having engaged in human rights violations during the apartheid regime were given the opportunity to apply for amnesty on condition that there was full disclosure of the nature and scope of their participation.[113] Those implicated but refusing to take advantage of the amnesty provisions would be recommended for investigations and prosecutions by the

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[112] Than De Claire and Short Edwin, International Criminal Law and Human Rights, Sweet & Maxwell, London, (2004).

[113] Ibid.

prosecutor.[114] The advantage of such a system is that there is an opportunity for facts about atrocities to be brought forward for records purposes. This conditional system also ensures that there is thorough vetting so that only deserving cases receive amnesty.

However, arguments abound on the side of and against amnesty. It is said that amnesty allows for a new beginning; forgetting the past in favour of the future. It is also said that amnesty condones perpetrator injustice and encourages such conduct. There is a range of scholarly literature on this difficult matter; on the one hand are those who argue that international law puts states under an obligation to prosecute and punish abusers of human rights; on the other are those who discount the existence of such a clear international obligation arguing that the difficulties of nurturing a young democracy or restoring order to society after a period of turmoil does not allow the luxury of following the rigid dictates of criminal law.[115] There is however, a consensus that amnesty shall not be granted for the most serious crimes of international concern as defined in the Rome Statute of the International Criminal Court.[116]

International criminal law places a duty upon states to prosecute for grave human rights breaches. This implies that criminal acts in this realm cannot in principle be the subject of an amnesty.[117]

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[114] Ibid.

[115] See, for instance, Darryl Robinson, Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court, 14 European Journal of International Law 481 (2003).

[116] Article 5 of the Rome Statute identifies these crimes as 'crimes of genocide, crimes against humanity, war crimes and the crime of aggression (subject to Art. 5 [2]).

[117] International norms permitting amnesty, like Art. 6 (5) of the Second Additional Protocol to the Geneva Conventions, does not contradict this view as it relates to a different situation

iv. Recognition on the basis that amnesty is accompanied by other measures of accountability

It has been argued elsewhere in this study that there can be no peace without justice. Justice in this context is taken to entail or involve judicial trials of perpetrators. Judicial handling of a case has the effect of unraveling facts about what exactly happened and who was responsible for what as well as dismantling the perpetrators' structural base. This is helpful in dealing with and preventing similar incidences in the future. More importantly, the procedure provides an opportunity for the victim to meet the perpetrator and gauge whether he has shown remorse for his acts and that he has accepted responsibility. The aforementioned is a prerequisite for the healing process after a period of war or conflict.

Truth and reconciliation are becoming the contemporary way of addressing pains and tensions in transitional situations. Truth and reconciliation commissions have been used to bring healing and reconciliation in countries going through transitions such as South Africa and other countries, as discussed in Chapter 2.

Other methods such as payment of compensation to victims or their next of kin are also helpful in complementing prosecutions. In this study, it is proposed that justice should be given a progressive interpretation to include restorative justice as opposed to retributive justice. Retributive justice has its basis on the idea of desire to revenge. On other hand, restorative justice is a model of criminal justice that captures the essence of reconciliation. It seeks to correct imbalances, restoring broken relationships and brings with it healing, national cohesion and harmony.[118]

One potential advantage of the transitional and restorative justice paradigm is that it involves all parties affected, perpetrators and victims. The process of restoration is, therefore, better placed to achieve national healing and reconciliation.

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[118] Llewellyn and Howse, Restorative Justice: A Conceptual Framework, (1998) at p. 79.

v. Recognition of amnesty for those "least responsible" and denial of the same for those with greatest responsibility

It may be necessary to consider an offer of amnesty to some minor offenders of the post election violence in exchange for truthful confessions and assistance in the arrest and prosecution of the planners, organizers and funders of the post election violence. Further, this would help in achieving the objective of justice, peace and reconciliation and return of internally displaced persons to their homes.

Failure by the Kenyan successive governments to deal with perpetrators of violence in the past has allowed the culture of impunity to continue and has now assumed a life of its own.[119] Criminal gangs and their sponsors commit crimes in the knowledge that nothing will happen to them, because past experience has shown that no action is taken against the perpetrators. It is in this regard that the Commission of Inquiry into the Post Election Violence report ruled out amnesty for people accused of serious crimes. The report took the position that amnesty for the perpetrators of impunity would result in greater future violence than the one witnessed in the wake of the post election violence.

Indeed, the report recommended the need to set up a Special Tribunal for Kenya (STK) to pursue truth and justice if the nation is to heal. It further recommended that in the event that prosecutions were not commenced within six months, the names of the perpetrators would be forwarded to the ICC for prosecution to which Kenya is a signatory. The report further recommended that STK should sit as a court and seek accountability against persons bearing the greatest responsibility for crimes relating to the 2007 General Elections.

Whereas it may be true, as the Report recommended, that prosecutions are necessary for people bearing the greatest responsibility to resolve the issues of impunity once and for all, nonetheless, we should be alive to the fact that a strict rejection of amnesty will defeat

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[119] Report of the Akimwumi Report Judicial Commission on the Law Clashes, available at *www.nationaudio.com* (accessed on October 20, 2009).

efforts to end conflict and discourage conflicting communities and groups from co-existing peacefully. Amnesty with impunity as argued above is a denial of justice to the victims who have the right to see the perpetrators of the post-election violence held accountable.

Amnesty is often treated as the antithesis for punishment. Hence, in conceptualizing the policy and legal basis for grant or denial of amnesty, an attempt must be made to comprehensively address the policy, legal and juristic foundations of the concept of amnesty. It should be noted that, deliberations on amnesty are almost always undertaken in an environment of a transition which does not however establish a clear political and social change. Amnesty then becomes a negotiating tool. The question of amnesty becomes an issue of balancing between accountability for abuses of the past and satisfying the expectations of justice. The call to punish human rights criminals can present complex and agonizing problems that have no single or simple solution. [120]

3.4 Key principles and elements of amnesty policies and laws

A viable policy and legal framework for amnesty must address a number of fundamental principles that are crucial to the establishment and sustenance of a national institutional framework on the amnesty regime.

The first fundamental principle is that of national choice. Whether designated a truth commission, or whatever the designation, the institution must have a national character that is organic in nature. A truth commission is not appropriate for every country or every transition, and the decision to have a commission must always be taken by nationals.[121] This decision should be based on a broad consultative process to seek especially the

[120] Judge Marvin Frankel, as quoted by Alex Boraine, A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission 28 (Oxford University Press, Oxford, 2000), at p. 283.

[121] Office of The United Nations High Commissioner for Human Rights (OHNCHR), Rule-of-Law Tools For Post-Conflict States Truth Commissions; Truth Commissions, (2006).

views of victims. Further, the process should make clear the constitution, tenure, powers, functions, strengths and limitations of truth commissions. International actors should provide comparative information and expertise, but should recognize from the start that a country may choose, for very legitimate reasons, not to have a truth commission or at least not to have one immediately upon transition. National views on this matter should be respected. Further, whether the institutional autonomy and independence are secured through a constitutional entrenchment or a constitutive piece of legislation should be a matter of national decision.

The second principle is that, by their very nature, truth commissions are only one part of a comprehensive transitional justice strategy, and should be considered together with possible initiatives towards prosecutions, reparations, vetting and other accountability or reform programmes. The relationship between these various initiatives must also be given consideration, while recognizing that all of these policies and interrelationships cannot be worked out in advance, as options will change over time and unexpected initiatives may arise. Early consideration of these questions may help to shape the process and investigative mandate of a commission.[122]

The third principle is founded on the fact that national priorities and imperatives sought to be served by amnesty are not the same or similar in two or more states. The essence here is that every truth commission will be unique, responding to the national context and prevailing circumstances. While many technical and operational best practices from other commissions' experiences may usefully be incorporated, no one truth commission model should be imported from elsewhere. This is true of the design of the commission's mandate as well as in specific operational aspects. Many key decisions should be based on local economic, social, political and cultural circumstances. This approach is likely to result in a stronger commission and to enhance a sense of national ownership.

The fourth principle is that there must be political will and support for the creation and nurture of an autonomous and independent institution on amnesty. A commission is

[122] Ibid.

likely to be most successful if there is genuine political will for rigorous investigation and truth reporting. This will be reflected, for example, in the authorities' cooperation in giving the commission access to official documents and in the level of public funds allocated to its work. The Government should provide records to the commission pertinent to its investigations, including restricted documents. Officials, or former officials, with knowledge of the acts and events under investigation should be expected to provide information to the commission, either in public hearings or, at the discretion of the commission, in private meetings. Such support for a commission's work should coincide with clear institutional autonomy and operational independence. The legitimacy and public confidence that are essential for a successful truth commission process depend on the commission's ability to carry out its work without political interference. Once established, the commission should operate free of direct influence or control by the government, including in its research and investigations, budgetary decision-making, and in its report and recommendations. Where financial oversight is needed, operational independence should be preserved. Political authorities should give clear signals that the commission will be operating independently.

Fifth, given the close nexus between the powers and functions of a national amnesty institution and the international legal obligations relating to the recognition and observance of human rights, as well as international crimes, the international implications of a viable and sustainable regime on amnesty must be carefully considered. The national institutional framework may be required to function in accordance with agreed international minimum standards or even to draw on technical support of international institutions. Most truth commissions must rely on significant international support if they are to fulfill their mandates successfully. This includes, but is not limited to financial, support. Other important international contributions include access to documents in foreign government archives, technical and Policy and Legal assistance usually provided by international inter-governmental and non-governmental organisations, investigators, sometimes loaned to the commission by foreign governments, and access to experts from previous truth commissions.[123] Countries considering a truth commission, and

[123] Ibid.

international actors that support such as development should be aware that significant international backing will be required for the process to succeed.

Finally, a sustainable national regime on amnesty must be part of a comprehensive national plan for truth, justice and reparation. Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissal, or an appropriately conceived combination thereof.[124] Societies emerging from a history of crimes under international law and other serious human rights violations should create a long-term strategic action plan to ensure that the truth is told, that justice is done and that reparation is provided to all the victims. Judicial measures may be combined with non-judicial measures, including truth commissions, effective procedures for granting reparation and mechanisms for vetting armed and security forces. Thorough investigations into allegations of human rights violations must be undertaken by independent and impartial institutions, which must be granted the necessary authority and resources for their task. The results of such investigations should be made public to provide a full account of the facts to the victims, their relatives and society as a whole. If sufficient admissible evidence is gathered, those alleged to be responsible for crimes under international law must be prosecuted. Victims of gross violations of international human rights law and serious violations of international humanitarian law must be provided with full and effective reparation in terms of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Legislative, institutional and other reforms must be enacted to address the causes of the human rights violations of the past. This should include reforming the national criminal legislation to ensure that it fully complies with international law, and recognizes the differential impact of conflict and rule of law deficits on women, children and marginalized groups and the need to ensure gender sensitivity in restoration of rule of law and transitional justice, as well as the need to ensure the full participation of women.

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[124] Final Report of the Truth and Reconciliation Commission of Peru, 28 August, 2003, Volume IX, p. 27. Available at *http://www.cverdad.org.pe/ifinal/index.php* [Official website] (accessed 14 October, 2009).

The value of truth commissions is that they are created, not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail. Truth commissions should uphold the right of victims of past human rights violations to obtain truth, justice and reparation. To this end, truth commissions should clarify, as far as possible, the facts about past human rights violations; feed the evidence they gather into continuing and new investigations and criminal judicial proceedings; and formulate effective recommendations for providing full reparation to all the victims and their relatives. In order to effectively do this, they must be well grounded in law and policy.

3.5 Conclusion

This chapter has introduced the policy and legal bases for grant or denial of amnesty. The researcher also states that the political context of amnesties must not be a bar to formulating sound legal and policy bases for the grant or denial of the same. The chapter further related the concept of amnesty with the concept of human rights. The researcher then gave an overview of key principles which should be entrenched in the policy and law.

CHAPTER FOUR

AMNESTY UNDER KENYAN LAW

The cause of the Irish Problem, suggested William Gladstone, is that the Irish never forget, while the English never remember. Is there then a golden mean, some 'proper' degree of collective memory appropriate for bearing in mind the cruelties and lessons of a troubled past, while not so consuming as to stifle the possibilities of reconciliation and growth? How might one imprint such a memory on a people's or state's conscience? What kinds of institutions or processes would be appropriate? What purposes might be served by a detailed recording of gross abuses, not only for the collectivity, but also for the individuals involved as victims or perpetrators.[125]

4.1 Introduction

Whereas this chapter is primarily concerned with the legal and policy prescriptions for amnesty and the frameworks needed to be established for a viable national regime on grant of amnesty to crimes, it does also discuss the Truth, Justice and Reconciliation Commission (TJRC) Act.[126]

Whatever critique this study raises on the Act, it cannot derogate from the appreciation that no master template exists and/or can there be a perfect legislation capable of sufficiently addressing the specific needs of a country. The Truth, Justice and Reconciliation Commission is not a new thing and, while appreciating country-specifics, our own formulation needs to bear in mind the lessons learned elsewhere. These are

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[125] Henry J. Steiner Introduction to Truth Commissions, in Harvard Law School Human Rights Program and World Peace Foundation; Truth Commissions: A Comparative Assessment (1997), at 7

[126] Act no. 6 of 2008. Commencement date; 9th March 2009.

sobering and essentially present a series of devil's choices,[127] which must nevertheless be made, and dilemmas that must be resolved.

The establishment of a national legal, policy and institutional framework on amnesty, should be a consultative process between government, human rights NGOs, church groups, and ordinary Kenyans who are the perpetrators and victims of human rights abuses and violations.

A truth commission, as an institutional framework on amnesty, is inherently vulnerable to politically imposed limitations. Its structure, sponsor mandate, political support, financial or staff resources, access to information, willingness or ability to take on sensitive cases and strength of the final report will always be largely determined by the political realities in which it operates and the political forces at play when it is created.[128]

4.2 The political debate on amnesty in Kenya

The debate on the issue of amnesty has been of great interest to the general public. The major participants in the debate are the political and religious leaders, the civil society, the media, academicians and the lawyers. There have been conflicting views on whether the perpetrators should be granted or denied amnesty.

It is evident among states emerging from periods of instability or undergoing change of regime that reason behind amnesty is to motivate belligerents to agree to peace by dealing with the fear of prosecution and punishment.

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[127] Per Luc Huyse in, Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past, Law and Social Enquiry 20, no. 1. He lists four lessons namely; 1. There are neither universal nor miracle solutions for dealing with a repressive past. 2. Memory is the ultimate form of justice. 3. Dealing with the past is an inescapable task of new democratic regimes. 4. Crimes against humanity cannot be left unpunished.

[128] In being allowed to tell their stories in public the victims' loss and pain is affirmed in a more conducive environment.

The view which is mostly fronted by ethno-political leaders sympathetic with the Orange Democratic Movement (ODM), which is a wing of the Grand Coalition Government (GCG), is for blanket amnesty. This view is basically informed by the opinion that the youths who were blamed for the offences are innocent of the charges and were merely expressing their displeasure at the "stealing" of the elections by the Party of National Unity (PNU). This, they claimed, was their (youths) democratic right, which no one should be denied and victimized when pursuing. They also contended that the ODM supporters suffered from historical injustices, especially land grievances and inequitable distribution of national resources.[129] They, therefore, proposed an unconditional amnesty and release of the youths already charged of the said offences and the resettlement of the "foreigners" away from their ancestral land (the Rift Valley) as a settlement of the contention. They, however, demanded that the *Mungiki* Sect members, who had since been indicted by the Commission of Inquiry into the Post Election Violence (CIPEV) report for having been facilitated and used by the PNU top brass in Government to recruit, regroup and murder in Nakuru and Naivasha Districts, be arrested, prosecuted and the sect's structures be dismantled by cogent state intervention. They also prescribed that there was to be no amnesty for police and security agents who committed unjustifiable massacre of more than four hundred and five unarmed civilians.[130]

The PNU, on the other hand, contended that there was to be no amnesty for the perpetrators of post election violence, especially those who participated in killings and burning of houses. Besides, they blamed the violence on organization and incitement by ODM leaders and, recommended in public rallies that they should not only be thoroughly investigated, charged and tried under Kenyan laws, but also be taken for accountability at

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[129] The historical injustices referred to range from inequitable distribution of land in the Rift Valley-where the Kalenjin are determined to reclaim what they see as their ancestral land from the Kikuyu and the Kisii, grand corruption, political violence. Refer to CIPEV and Kenya in Crisis Reports of October 15, 2008 and February 28, 2008 respectively.

[130] See, Report of The Commission of Inquiry into the Post Election Violence released October 15, 2008, summarized in *Daily Nation*, (Nairobi), Thursday October 16, 2008 at pp. 15 – 18.

The Hague. Ironically, this group was mum about the fate of the police and *Mungiki* culprits.

Another argument by PNU and the Government was that granting amnesty to the suspects would encourage impunity and threaten the rule of law. This, they said, would be tantamount to abolishing civilized society and going back to the rule of the jungle. They argued that this would also encourage organized violence.[131]

Civil society organizations, on the other hand, argued in supporting the case for amnesty, that by doing what the youths were alleged to have done, they contributed to the formation of the grand coalition government and it therefore did not make sense to have them languishing in jail while the politicians they "fought for" enjoyed power. It was also argued that the holding of the youths in custody discriminated against the poor, since politicians who mobilized them were themselves enjoying their liberty.[132]

A further argument advanced was that 'host communities' were unlikely to cooperate with the return and resettlement of the internally displaced people while their own sons were languishing in jail. It was a compelling argument from the point of view that the situation was still volatile in some of the regions, as some locals threatened not to allow the internally displaced persons from returning. Indeed, violence had broken out after the return of some internally displaced persons in places like Molo. However, this argument was countered by those who said that Kenyans have a right to property and to settle anywhere in the republic and that the government was not to be blackmailed into releasing alleged perpetrators on the threat of communities to sabotage the internally displaced persons return programme.[133]

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[131] *www.government of Kenya.go.ke* (accessed October 15, 2009)

[132] See, Patrick Kiage, International Criminal Justice; A paper presented by the Annual Conference of International Commission of Jurists, (Kenya Section), held at Mombasa on August 28-31, 2008

[133] Operation "Rudi Nyumbani" was a project of the government and development partners implemented by the Ministry of Special Programmes in the Office of the President to return the internally displaced persons.

The principal justifications for amnesty, that is, transitional justice, reparations, memorials, lustration and amnesty, feed into a common till skewed at obtaining an uncommon but satisfactory closure to an indecent past[134]. For this reason, certain aspects of criminal law may be surrendered for a greater social goal. To say this is not to support or encourage impunity, but to open our eyes to the value that is obtainable only when the victims return to make peace with the perpetrators; for the victim cannot reconcile with himself when the perpetrator is serving a jail sentence. Pre-occupation with punishment represents a segment of justice but completely ignores the big picture of reconciling the community. This is not to say that amnesty is better than prosecution, it is to admit that amnesty is the better vehicle to reconciliation[135].

The point here is that prosecutions may be destabilizing for fragile transitional governments like the grand coalition government, particularly where the new government is reliant on or must cooperate with the elements of the old regime. Perpetrators may resist punishment, resort to violence and resist the return of internally displaced persons. Stability in Kenya must be a priority and should prevail over everything. Indeed, it is better to compromise on justice in the short term by granting amnesty to some of the perpetrators of the post-election violence to meet the longer objectives of peace, stability and national cohesion and healing. In any case, there cannot be true justice without peace.

Secondly, amnesty may improve prospects for survival of the grand coalition government, by strengthening the relationship between the partners and, most importantly, in helping to build trust and confidence as amongst themselves, and the general citizenry.

Third, amnesty may be the only practical measure in the circumstances. This is because our judicial system lacks sufficient capacity to conduct prosecutions. Our courts cannot prosecute all perpetrators due to lack of adequate personnel and, further, we do not have the capacity to punish perpetrators of the post-election violence since some of the crimes

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[134] Supra note 38.

[135] Ibid.

committed, for example, crimes against humanity and violations of human rights of a serious nature, are not covered by the Kenyan criminal legal system.

4.3 Historical background of amnesty in Kenya

During the transitions that Kenya has undergone from one regime to another, the issue of violations of human rights and other atrocities that the colonialists meted out to the Africans and the suffering the latter underwent is yet to be addressed. Over the years, there have been cases of detention without trial, torture, police brutality, abuse of human rights, misuse of power and massive corruption.[136] The latter includes fleecing of public corporations, illegal tendering procedures, bribery, land grabbing and abuse of office.

4.3.1. Kenyatta regime

Since 1960s, Kenya has undergone a number of transitions. There was the attainment of independence from colonial rule in 1963 with the late Jomo Kenyatta as the Prime Minister. In 1964, Kenya became a Republic with President Jomo Kenyatta as the Head of State and Government.[137] This had the effect of formally divorcing Kenya from British rule, influence and exercising its sovereignty.

The issue of amnesty in Kenya did not begin with 2007 general election. It could be said to have started at the time of independence from the colonialists though the concept of amnesty was an implied one. On attaining independence, most of the property and the economy were still in the hands of the colonialists. The late President, Jomo Kenyatta, stated that in order to develop Kenya, it would involve forgiveness of past wrongs and participation of all people in this process. He said, "In all I have seen in many countries and in my lifetime, never has there seemed to be any purpose in arguments about the past,

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136 World Bank, Kenyan State of Affairs, World Bank, Washington, D.C., 2001.

137 Constitution of Kenya (Amendment) No. 28 of 1962

or in revenge. Let us agree that we shall never refer to the past. Let us unite in all utterances, activities and in construction of our country".[138]

In this statement, he reiterated the principle of "let by-gones be by-gones". Atrocities and injustices committed during the colonial and emergency period were to be a thing of the past. Colonialists were not to be held accountable for what took place. This could be said to be the birth of amnesty in Kenya.

During the Kenyatta regime, there was some form of amnesty applied by the Legislature albeit indirectly. This was through the enactment of laws that seemed to ensure that perpetrators of crimes are not held accountable for the same. A case in point was in relation to the Amendment of the Constitution of Kenya.[139] The amendment followed the conviction of Paul Ngei, then a senior Cabinet Minister, of electoral malpractices following the 1974 general elections and his disqualification from holding a Parliamentary seat for five years.[140] The amendment was then drafted and passed one day before Parliament adjourned for the Christmas recess in an afternoon seating. This could be termed as camouflaged amnesty as the Legislature rendered ineffective the court's judgment. Though this may not have been a serious offence, it is a prime example that Parliament can use its powers to shield people from prosecution. The purpose of the Act was to allow the President to exercise his prerogative of mercy in cases where one had been disqualified from vying for elections following conviction of an electoral offence.

4.3.2 Moi's Regime

In 1978, following the death of the founding father, the late President Jomo Kenyatta, President Daniel T. Arap Moi ascended to power as the Head of State and Government.

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138 Late Jomo Kenyatta, President of the Republic of Kenya, (1963-1978) State House, Nakuru, October 20 1964. Collin Leys, Underdevelopment in Kenya (Heinemann, London, 1974), pp. 51 - 54.

139 Act No. 14 of 1975.

140 Raphael S. Kithika Mbondo v. Luka Galgalo and Paul Ngei, Nairobi High Court, Election Petition No. 16 of 1974 (unreported).

A constitutional amendment in 1982 introduced Section 2(A), changing the de facto one party system, which had been in existence since 1966, to a *de jure* one party system.[141] This section outlawed the formation of other political parties and made Kenya a one party state. This same section was repealed in 1992 following agitation for multiparty democracy by the Constitution of Kenya.[142]

During Moi's regime, the Judiciary has also played a role in handling implied amnesty. The first instance relates to the courts' declining to dismiss cases on trivial grounds and lending more ears to due process, hence meeting the ends of justice. A case in point is the case of Republic v. Attorney General and Chief's Magistrate Court at Nairobi, ex-parte Kipng'eno Arap Ngeny.[143] The applicant was charged with the offence of abuse of office by arbitrarily commissioning professional consultancy services resulting in the now defunct Kenya Posts and Telecommunication incurring a loss of about Kshs 186 million. The court's ruling was that there was unexplained delay in bringing the case to trial hence, charging nine years after commission of the alleged offence, would amount to unfair trial, thereby offending Section 77(1) of the Constitution. This was notwithstanding that there is no time limit imposed for prosecution of criminal offences except those crimes specifically stated by statute. The bottom line is that though a colossal sum of money was involved, the case was dismissed on a technicality. By the passing of such judgments and/or rulings, then, the judiciary can also be said to be dishing out some form of amnesty.

The Attorney General's office could also be said to facilitate the provision of amnesty. The office is charged with the responsibility of prosecuting criminal offences in Kenya and also offences relating to the state. When cases of corruption and human rights abuse are brought to his attention and he does not prosecute, then he is impliedly offering

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141 Constitution of Kenya (Amendment) No. 7 of 1982.

142 Amendment No. 12 of 1991.

143 Miscellaneous Criminal Application, No 406, High Court at Nairobi (unreported)

amnesty to those who are accused of these offences. One such example relates to the *case of Stanley Munga Githunguri.*[144]

Githunguri was charged with an offence under the Exchange Control Act.[145] The then Attorney General, Charles Njonjo, gave written assurance to Githunguri that he would not be charged. Two subsequent Attorneys General did not charge him either. He was then charged, eight years later, for the offences. On a constitutional application, it was held that it was unfair for one to be tried after repeated assurance that he would not be tried. Though the case was correctly decided, the fact remains that Githunguri committed an offence and the first Attorney General decided not to hold him accountable thereby providing amnesty.

The Attorney General also has power to draft Bills and table them in Parliament. Either purposefully or on default, some Bills are drafted with loopholes that may be taken advantage of. The case of *Stephen Mwai Gachiengo and Albert Muthee Kahuria vs. Republic*[146] is an example. This case centered on the Kenya Anti-Corruption Authority (KACA).[147] The court held that KACA was unconstitutional as the powers to prosecute only vested in the Attorney General, and accordingly, KACA could not purport to exercise these powers. This anomaly was laid at the doorstep of the Attorney General's office as he did draft the Act establishing the institution. KACA, at the time, had 132 cases of corruption pending which were taken up by the AG. An attempt was made to entrench a new KACA in the Constitution to ensure its operations are not interfered with, but this did not meet the required two-thirds majority to be passed into law.[148]

During the first few months of 2001 there was a lot of talk on amnesty, which centered on economic crimes. The matters were brought to the fore by the Bretton Woods Institutions

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144 Miscellaneous Criminal Application. No 302 of 2000 High Court, Nairobi (unreported).

145 Chapter 113, Laws of Kenya. The Act has since been repealed.

146 Miscellaneous Criminal Application, No. 302 of 2000 High Court, Nairobi (unreported).

147 This institution was declared unconstitutional on December 2000 by an order of the High Court of Kenya.

148 Constitution of Kenya (Amendment) (No. 2) Bill 2001, (Government Printer, Nairobi, 2001).

who called on Kenya to take effective steps to fight corruption as a prerequisite for resumption of aid which had been suspended. In trying to address these issues the question of what to do with the perpetrators of economic crimes[149] was advanced. As a result of the debate, various reasons as to why the option to provide amnesty should be taken, as opposed to prosecution, were promulgated.

In 2001 there was a bid to provide for amnesty through clause 63 (1) of the Anti-Corruption and Economic Crimes Bill which proposed to provide amnesty for the perpetrators of economic crimes committed prior to 31 December 1997. The clause was, however, omitted from the resultant Act after spirited political campaign against it.

First, there was the economic aspect. Kenya was facing an economic downturn with inflation, little investment, and balance of payment problems. The problem was further compounded by refusal of the Bretton Woods Institutions to grant aid to Kenya. In addition, the year 2002 was an election year and a lot of money was required to finance the election.

4.3.3 Kibaki's regime

In 2002, there was another transition. It signified the end of the 24 years reign of President Moi and ushered in coalition politics. During this regime the Attorney General entered *nolle* on prominent cases in a manner that was perceived, by a section of the public, to be favoring the powerful and wealthy citizens. This can be illustrated by the

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[149] For example, Kamlesh Pattni, "Goldenberg architect Kamlesh Pattni's surrender of the Grand Regency hotel to the Central Bank of Kenya did not include an amnesty of all cases he faces over the scandal.Though he had requested for the amnesty, it has emerged that the consent registered in the High Court whose order was given omitted three essential clauses in his plea." From: *http://africanpress.wordpress.com/2008/04/24/indian-kamlesh-pattni-gets-no-pardon-from-crimes-accused-of-committing/* visited on June, 15 2010.

case of *R vs. Tom Cholmondley*,[150] in which the accused had been charged with the offence of murder, a non-bailable offence that carries capital sentence, and an assault case implicating the First Lady Lucy Kibaki.[151]

Before the enactment of the Truth, Justice and Reconciliation Act, 2008, the only provisions that came close to pardon are sections 82 and 87 of the Criminal Procedure Code (CPC)[152] which deals with the Attorney General's power of *nolle prosequi*[153] and withdrawal of prosecution.[154] The effect of entry of a nolle and withdrawal is that they fully terminate the proceedings with a provision for subsequent proceedings against the accused person on account of the same fact. It should be noted, however, that these powers are exercisable only when a criminal prosecution has been initiated and that it does not bar future prosecution. On the other hand the President has got the power of

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150 *High Court Criminal Case No. 55 of 2006,* Nairobi (Unreported). Cholomondley is the owner of the Delamare Estate and grandson to the late wealthy colonial land owner, Lord Delamare.

151 Unreported Private Prosecution (2005) Mrs. Kibaki was alleged to have assaulted Journalist Clifford Derrick Otieno.

152 Chapter 75, Laws of Kenya, (Revised edition, 1987).

153 Section 82 of the CPC provides as follows: (1) In any criminal case at any stage thereof before verdict or judgment , as the case may be, the Attorney – General may enter *a nolle prosequi*, either by stating in court or by informing the court in writing that the Republic intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the *nolle prosequi* is entered, and if he has been committed to prison shall be released, or is on a bail his recognizance shall be discharged: but discharge of an accused person shall not operate as a bar to future prosecution when a *nolle prosequi* is entered, the registrar or cleric of the court shall forthwith cause notice in writing of the entry of the *nolle prosequi* to be given to the keeper of the prison in which, and also if the accused person has been committed for trial, to the subordinate court by which he was so committed, and the accused and his sureties in case he shall have been admitted to bail shall be informed.

154 Section 87 of the CPC provides as follows: In trial before a subordinate court of a public prosecution may, with the consent of the court or on the instructions of the Attorney-General at any time before judgment is pronounced, withdraw the prosecution of any person , and upon withdrawal; (a) If it is made before accused person has been put on defence the *nolle prosequi* shall not operate as a bar to subsequent proceedings against him on account of the same facts; (b) if it is made after the accused person has been called upon to make his defence, he shall be acquitted.

prerogative of mercy.[155] These powers, strictly speaking, do not amount to grant of amnesty because powers of the President to pardon come into force where arrest, prosecution and conviction has already taken place. This is not amnesty because it is dependent on the whims of the person of the President.

4.4 Proposal for a legal framework

In the aftermath of widespread post election violence in Kenya, the National Accord and Reconciliation Act[156] jump-started the Kriegler[157] and Waki[158] Commissions of Inquiry, respectively. These were followed by the drafting of a Truth Justice and Reconciliation Bill.

As Kenya grapples with the problem of the truth commission, there are pertinent questions that need to be addressed: What is the truth? Truth according to whom? Truth about what? Is there a shared belief that crimes and other atrocities were committed against the victims by the perpetrators of post-election violence? The dilemma here is that those who participated in the post-election violence seem to borrow from the South African experience by arguing that they did so for the sake of democracy by fighting against a 'stolen election.' Further, they argued that they were pursuing a political aim, which helped to bring about greater democratic dispensation.On the other hand, those who are pushing for the commission will want to occupy a high moral ground and point an accusing finger. This constitutes a recipe for confrontation and the possibility of reconciliation thereafter evaporates into thin air.

The above, has led to a raging debate as to whether persons arrested in the wake of the post election violence should be prosecuted or granted amnesty. These persons comprise mainly youths from Rift Valley, Nyanza, Coast, Central and Nairobi Provinces who are

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155 Section 27 of the Constitution of Kenya.

156 Act No. 4 of 2008 (Government Printer, Nairobi, 2008).

157 Gazette No. 4473 of 2008 (Government Printer, Nairobi, 2008).

158 Gazette No. 4474 of 2008 (Government Printer, Nairobi, 2008).

alleged to have committed various offences on diverse dates between December 27, 2007 and February 28, 2008.

This study argues that should a decision be made to grant or deny amnesty, then it should be within the framework of a Truth Justice and Reconciliation Commission (TJRC) which must meet common characteristics that other truth commissions have set.

4.5 The Truth, Justice and Reconciliation Act, 2008

In its endeavour to address the issue of amnesty and the attendant policy and legal implications, the Government of Kenya enacted the Truth, Justice and Reconciliation Act, 2008. The Act provides for the establishment, powers and functions of the Truth, Justice and Reconciliation Commission. The Act was borne out of the realization that lasting peace and co-existence cannot prevail in Kenya unless historical injustices and violation and abuse of human rights have been addressed, and emanates from the deliberations of the National Dialogue and Reconciliation Committee which was formed after the political crisis that ensued following the disputed outcome of the Presidential elections held on 27 December, 2007. The establishment of the commission was conceived with a view to addressing historical problems and injustices which, if left undressed, threatened the very existence of Kenya as a modern society.

The Act established of a Truth, Justice and Reconciliation Commission as a body corporate with perpetual succession and a common seal, with objectives of promoting peace, justice, national unity, healing and reconciliation among the people of Kenya.[159] The commission is to accomplish these objectives by, *inter alia,* facilitating the granting of conditional amnesty to persons who make full disclosure of the relevant facts relating to acts associated with gross human rights violations and economic crimes and complying with the requirements of the statute; providing victims of human rights abuses and corruption with a forum to be heard and restore their dignity; and providing repentant

[159] Sections 3 and 5.

perpetrators or participants in gross human rights violations with a forum to confess their actions as a way of bringing reconciliation. [160]

Section 6 provides for the functions of the commission. It is noteworthy that the functions are limited to investigations and recommendations; the commission, apparently, has no decision making powers. Although the Act provides that the commission shall not be subject to the direction or control of any other person or authority in the exercise of its powers for the execution of its functions,[161] this independence does not include independence with respect to substantive issues. The independence relates only to procedural aspects of the commission's functions such as gathering information, visiting any establishment or place without giving prior notice, requiring that statements be given under oath or affirmation, and issuing subpoenas or summons as deemed necessary in fulfillment of its mandate.[162]

The Commission shall consist of seven members, three of whom shall be non-citizens of Kenya, selected in accordance with the prescribed procedure and appointed by the President.[163] The members of the commission shall hold office until dissolution of the commission under Section 50, unless the membership ceases earlier owing to any of the reasons under Section 16.[164] Under the provisions of Section 50, the commission shall stand dissolved three months after submission of its report to the President. This provision is significant in relation to the subject of this study because the commission's mandate with respect to amnesty is, under Section 38, limited to violations and abuses of human rights committed during the period 12 December 1963 to 28 February, 2008. Accordingly, the commission shall be *ad hoc* with no mandate to consider future violations and abuses of human rights. Apparently, the government is of the view that there will be no useful purpose to be served by the Commission in relation to events

[160] Section 5(1).

[161] Section 7(1). The independence of the Commission in the performance of its functions is further reinforced by Section 12(1).

[162] Section 7(2).

[163] Sections 10(1) & (2).

[164] Section 12.

occurring after 28 February, 2008. Whether this was informed by any empirical reason is not easy to tell. However, it is submitted that a good law is one that is proactive by envisaging and catering for contingencies.

Further, the Act gives the Commission a lifespan of two years from the date of its inauguration.[165] The inauguration itself is to take place within twenty one days of the appointment of its members.[166] Given the statutory objectives and functions of the Commission,[167] the prospect of the Commission mastering the requisite financial, human, and technical resources to enable it effectively carry these objectives and functions, and thereafter make a comprehensive report to the President within two years, seem too remote.

The specific question of amnesty is provided for under Part III which is prefixed by the provision that there shall be no amnesty for acts, omissions or offences that constitute crimes against humanity or genocide within the meaning of international human rights law.[168] This delineates the jurisdiction of the Commission with respect to the grant of amnesty, and conforms to state practice whereby international crimes generally are not eligible for amnesty.[169] Further, under the Act, amnesty as a pardon extended by the government for offences with respect to which forgiveness is deemed more expedient for the public welfare than prosecution and punishment, shall not be granted automatically or generally to all guilty persons or groups or classes of persons. Instead, the Commission shall have to announce amnesty. Then, any person who wishes to apply for amnesty in respect of any act, omission or offence must submit an application to the Commission, in the prescribed form, within one month from the date of such announcement or within

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[165] Section 20 (1).

[166] Ibid.

[167] Section 5(1) lists a total of eighteen objectives of the Commission, while Section 6 lists a total of twelve functions.

[168] Section 34.

[169] See for instance, Yasmin Naqvi, Amnesty for War Crimes: Defining the Limits of International Recognition, 85 International Review of the Red Cross 585 (2003).

such extended period as the Commission may prescribe.[170] The Commission shall give priority to persons in custody in respect of such applications.[171] The Act does not list any factors or criteria to guide the Commission in determining when and how to announce amnesty. The procedure is left to the discretion of the Commission.

Upon receipt of an application for amnesty, the Commission may give such directions as may be necessary or request the applicant to provide such further particulars as it may require. The Commission must then review the application and make such enquiries as considered necessary. Thereafter, it may inform the applicant that the application does not relate to an act of gross human rights violations; afford the applicant the opportunity to make further submissions; or reject the application and inform the applicant accordingly.[172] Where the Commission is satisfied that there is no need for a hearing upon an application and investigation, it shall recommend an amnesty and it shall inform the applicant accordingly.[173] However, where the Commission decides to conduct a hearing for amnesty upon application, it must notify the applicant and any victim or person implicated or having an interest in the application, of the hearing, and inform the persons of the rights to be present and to testify at the hearing.[174] The hearing of an application for amnesty has the effect of suspending any pending civil proceedings and postponing any pending criminal proceedings in respect of any act or omissions to which the application relates, pending the consideration and disposal of the application for amnesty.[175] In that eventuality, the Commission must, however, investigate and determine the application for grant of amnesty within ninety and forty five days in civil and criminal cases, respectively, from the date of the order suspending or staying the proceedings.[176] If the investigation and determination of an application for grant of amnesty is not concluded within this period, the suspended hearings shall proceed.[177]

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[170] Section 35(1).

[171] Section 35(2).

[172] Section 36(1)-(3).

[173] Section 36(4).

[174] Section 36 (5).

[175] Section 36(7) & (8).

[176] Section 37(1).

If the Commission, after considering application for amnesty, is satisfied that the application complies with the requirements of the statute, and that the applicant has made a full disclosure of all relevant facts, it may recommend the grant of amnesty.[178] The Commission shall then inform the person concerned and, if possible any victim, of the decision to grant amnesty.[179] It shall also gazette the names of persons to whom amnesty has been recommended and sufficient information to identify the act, omission or offence in respect of which amnesty has been recommended.[180] Where the commission has refused application for amnesty, it must notify its decision in writing to the applicant and any victim in relation to the subject acts, omissions or offence.[181] The commission is empowered to recommend reparation to and rehabilitation of any victim of any act, omission or offence in respect of which amnesty has been recommended.[182]

It is apparent from the above review of the Act that the procedure for the grant of amnesty is not simple and straight forward. It is complex and time consuming. Coupled with the fact that there shall be no unconditional amnesty and, that the final determination on the grant of amnesty rests with the President (the Commission's powers are limited to recommendations only).[183] This may not motivate many applications for amnesty and may, in the end, compromise the promotion of peace, justice, national unity, healing, and reconciliation in Kenya that the Act tries to accomplish.

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177 Section 37(2).

178 Section 38(2).

179 Section 38(4).

180 Section 38(5).

181 Section 40.

182 Section 41.

183 Sections 5(l) (m), 38(2), and 47(2) (e) & (3).

4.6 Conclusion

A survey of the policy and legal bases, powers and procedures of truth commissions[184] in other jurisdictions bears witness to the fact that an amnesty provision contributes to confidence building in the revelation of the truth and hence reconciliation.[185] Where provision for amnesty exists, especially in a nation's legal system, persons are more willing to tell the truth, opening the door to accountability. This is because they will have no fears of revenge when they own up to abuses or violations of human rights. The law provides them with protection after they have owned up and asked for forgiveness. On the other hand, the victims may not, even after reconciliation harbour the desire for revenge because the law has made provision for reparations and reconciliation. With respect to the post-2007 election violence, and in order that the different communities may build trust and confidence in each other and move forward, the latent and potential conflicts must be rested. This requires an honest and truthful account of the events leading to the disorder.

Further a review of the shows that the Act does not incorporate the key principles and elements of amnesty that we discussed above. In particular, it is inauspicious that the Act creates an *ad hoc* Commission whose mandate is so limited, without provision of any guarantee that the post election episodes of violence witnessed in 1992, 1997, and 2007/2008 and the attendant impunity will not be repeated in future.

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184 Supra, Chapter 2

185 The South African case is apposite.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The study has examined the concept of amnesty in Kenya within the context of the post 2007 election violence. The study, as captured in the hypothesis, was in essence answering the question posited in the statement of the problem, namely, whether amnesty can be a prescription for sustainable justice and peace without a legal, policy or institutional framework, as its foundation. The study has shown that the existence of a policy, legal and institutional framework is fundamental in order to address the question of amnesty and its various implications on a sustainable, rather than *ad hoc*, basis for lasting peace and public welfare.

5.2 Conclusion

The study has established that sustainable peace and justice cannot be achieved in Kenya without a legal, policy and institutional framework on amnesty. The study has demonstrated that there is a legal lacuna within our municipal law regime for grant or denial of amnesty, both in the Constitution[186] and the Criminal Procedure Code.[187]

Through analysis of the comparative experiences in other jurisdictions,[188] the study has established the *sine qua non* for a viable and sustainable regime for amnesty. The study has established that for amnesty to be viable, the national perspective (Kenyan) needs to be placed within the global framework of transitional justice. The Truth, Justice and Reconciliation Commission, as the institutional framework, must therefore, as a matter of necessity, be entrenched in the Constitution.

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186 Constitution of the Republic of Kenya (as revised in 2008).

187 Chapter 75, Laws of Kenya (Revised edition, 1987).

188 South Africa and Latin America.

In this regard, the study discussed the Truth, Justice and Reconciliation Act, [189] and noted its shortcomings that may lead to the establishment of a weak institutional framework on amnesty. The study therefore concludes that currently, the legal, policy, and institutional framework under the Truth, Justice and Reconciliation Act is inadequate to create a comprehensive and viable regime on amnesty. Accordingly, it does not provide a prescription for sustainable peace, national healing, reconciliation and cohesion.

5.3 Recommendations

The Act must be a vehicle for an honest coming to terms with the past and an avenue for justice for all, but not a tool for fresh victimization, denunciation and demonisation. In the light of the above findings, the study makes the following recommendations.

(i) First, there is need for an aggressive and sustained national publicity, dissemination, legal education and awareness creation to sensitize the public, in general, and the perpetrators and victims of human rights abuses and violations in particular, to the advantages and disadvantages of amnesty. The object will be to create consensus on the need for amnesty, as opposed to justice, and to seek the society's ownership of amnesty so that it is accepted as an organic part of the society's ethos and fabric. Unless the Kenyan society owns and internalizes the concept and procedure of amnesty, the same is likely to be politicized and used as a mechanism for partisan interests.

(ii) Second, the current debate in Kenya on the issue of amnesty is dictated more by the partisan interests than by the interests of the country as a whole. Partisan interests are transient, contrary to national interests. There needs to be a shift in focus to bring on centre stage the interests of the country in long lasting peace and harmonious co-existence irrespective of ethnic background or political opinion or persuasion. Amnesty should be the mechanism used to achieve long lasting peace and harmony and not a reward for political support.

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[189] Act no 6 of 2008.

(iii) Finally, the search for peace, harmony and social and political stability, brought about by the institutionalization of amnesty in the country's ethos and fabric, should be viewed as the responsibility of all Kenyans and must not be hijacked by politicians whose interests are short lived. It should be seen as the best legacy that the present generation should bequeath to the future generations of Kenyans regardless of their political persuasion, for the sake of a strong united Kenya.

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