INFORMAL AMNESTIES IN ASSET RECOVERY PRACTICES IN TANZANIA: EXAMINING CRIMINAL JUSTICE CHALLENGES

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Abstract

Since the turn of the century, amnesties began to feature in transnational criminal law as a tool to facilitate the recovery of criminal assets. In particular, the provisions of Article 26(3) of the United Nations Convention against Transnational Organized Crime, 2000, and, Article 37(3) of the United Nations Convention against Corruption, 2003 made it possible for States Parties to adopt measures within their legal systems to provide for amnesties to suspects who are ready to cooperate with law enforcement agencies in order to facilitate successful prosecution of perpetrators of crime and consequently procure the recovery of criminal assets. This paper examines the use of amnesties in Tanzania, particularly, focusing on the 2008 and 2019 amnesties. The paper further investigates the extent to which such amnesties, which are implemented in Tanzania without necessary legislative framework, enhance asset recovery and criminal deterrence.

Key words: amnesty, asset recovery, corruption, criminal deterrence, criminal assets organized crime.

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1.0 INTRODUCTION

Before the turn of the century, the process of tracing, identifying and confiscating tainted assets for their ultimate recovery had been accomplished through a traditional criminal law approach which required criminal prosecution and conviction of suspects prior to forfeiture of tainted assets.[1] In other words, this scheme made asset recovery possible only in cases where criminal trial was successful. Proper investigation and prosecution therefore played a key role in enhancing successful asset recovery. Yet, given the fact that criminals use sophisticated mechanisms to steal and hide the loot, the process of gathering evidence for prosecution proved very challenging.[2] In many instances, investigation could not unearth the facts required to prove the commission of crime. Consequently, this resulted into acquittals of the accused, thereby leaving tainted assets at the disposal of criminal syndicates.[3]

In a bid to address the prosecutorial challenges inherent in the conviction-based forfeitures, some new measures were adopted. This saw the introduction by the United Nations Convention against Transnational Organized Crime (UNTOC)[4] of a scheme which

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[1] See Arts. 3 and 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

[2] Monteith, C., and Dornbierer, A., "Tracking and Tracing Stolen Assets in Foreign Jurisdictions", Basel: Basel Institute on Governance, International Centre for Asset Recovery, Working Paper Series No.15, at p.12; Goredema, C., "Recovery of proceeds of crime: observations on practical challenges in sub-Saharan Africa, in *Tracing Stolen Assets: A Practitioner's Handbook*, Basel: Basel Institute on Governance, International Centre for Asset Recovery, 2009, at pp. 24-32.

[3] Greenberg, et al, *Stolen Asset Recovery: A Good Practices Guide for Non-conviction based Asset Forfeiture*, Washington: World Bank, 2009, at pp.7-8.

[4] General Assembly resolution 55/25 of 2000. Tanzania signed this Convention on 13th December 2000 and accordingly ratified it on 24th May 2006. Details available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII12&chapter=18&clang=_en (accessed on 14 October 2020).

facilitates cooperation between suspects and the law enforcement for purposes of evidence gathering and prosecution.[5] By virtue of this scheme, criminal suspects could have their punishment mitigated,[6] or granted immunity from prosecution[7] if they agreed and indeed cooperated with law enforcement agencies to provide information useful for investigative and evidentiary purposes.[8] These measures are further entrenched in the United Nations Convention against Corruption (UNCAC)[9] and considered as pivotal in fighting corruption and organized crime generally.[10]

In light of this development, various forms of immunities have been granted by states to facilitate cooperation and evidence gathering for purposes of prosecution. In Tanzania, these immunities have taken the form of conditional amnesties whereby criminal suspects are given chance to return the loot in exchange for their release from detention or deferred prosecution. Yet, the manner in which these amnesties have been employed in Tanzania leaves a lot to be desired as such measures have been applied haphazardly and on *ad hoc* basis. This is attributable to the lack of requisite legislative framework in place for such measures, a fact that adversely affects the asset recovery objectives.[11] This article

[5] Art. 26 of the United Nations Convention against Transnational Organized Crime, 2000.
[6] Id, Art. 26(2).
[7] Id, Art. 26(3).
[8] Id, Art. 26(1) (a) and (b).
[9] General Assembly resolution 58/4 of 2003. Tanzania signed this Convention on 9th December 2003 and ratified it on 25th May 2005. Details available at http://www.unodc.org/unodc/en/corruption/ratification-status.html (accessed 14 October 2020).
[10] See Art. 37(1)-(3) of the United Nations Convention against Corruption, 2003.
[11] Asset recovery is premised on the need to punish the offender and forfeit illicit assets. This enhances
criminal deterrence and crime control and reduction. When amnesties are not regulated, they are

investigates the role of amnesty practices in Tanzania in the recovery of criminal assets. In doing so, the article traces the historic foundations of amnesty practices and their evolution into modern tools for asset recovery. It is argued that although these measures provide room for law enforcement to investigate and prosecute corruption and organized crime generally, requisite legislative controls are necessary to ensure such measures are not abused or misused by criminals or their associates. Lack of these controls make the asset recovery process illusory and meaningless.

2.0 UNDERSTANDING AMNESTIES

An amnesty is a legal mechanism designed to exempt criminal responsibilities to certain categories of individuals.[12] This mechanism enables states to prospectively bar prosecution of individuals for crimes committed at a given time or retrospectively nullifying criminal responsibility.[13] It is thus an act of clemency extended to certain categories of individuals such that they are absolved from any criminal responsibility.

Etymologically, amnesty derives its origin from ancient Greek word '*amnestia*' which means forgetfulness or oblivion.[14] This distinguishes it from pardon which is granted to commute sentence

applied too loosely such that they cannot serve the purposes for which they are intended.

[12] Office of the United Nations High Commissioner for Human Rights, "Rule -of - Law Tools for Post Conflict States: Amnesties", New York and Geneva: United Nations, 2009, at p.6.

[13] Id, at p.5.

[14] Lessa, F., and Payne, L.A., "Introduction" in Lessa, F and Payne, L.A. (eds.) *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, Cambridge: Cambridge University Press, 2012, at p.3; David, R., "Transitions to Clean Government: Amnesty as an Anti-Corruption Measure", 45(3) *Australian Journal of Political Science,* 2010, at p. 395.

after a criminal conviction.[15] For that reason, a state may grant amnesty in the course of exercising its sovereign power of mercy in respect of past criminal offences.[16] In doing so, the state essentially assumes that crime has been committed but removes the possibility of prosecution.[17] Such amnesties may be made conditional on the accused's obedience of the law and/or admission of crime commission and its subsequent repentance. The state thereby grants the 'repentant sinner' forgiveness such that he becomes free and immune from future prosecution in respect of his 'forgiven past sins'.

The power of amnesty is generally considered as important as the power to punish criminals for their infraction of the law.[18] Being a privilege enjoyed only by sovereign powers, the grant of amnesty is indeed an important aspect in expressing state power and sovereignty.[19] Records indicate that amnesties are not a modern innovation as they have been in use in various communities for centuries to meet various objectives.[20]

History indicates that the power to grant amnesties had been widely used from time immemorial whereby successor regimes sought peace with enemies by granting them amnesty.[21] That practice was

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[15] Office of the United Nations High Commissioner for Human Rights, above note 7, at p.5.
[16] McEnvoy, K., and Mallinder, L., "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy", 39(3) *Journal of Law and Society*, 2012, at pp.413-414.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Slye R. C., "The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?", 43(173) *Virginia Journal of International Law*, 2002, at pp.174-176.
[21] Dugard, J., "Dealing with Crimes of a Past Regime: Is Amnesty still an Option?" 12 *Leiden Journal of International Law*, 1999, at p. 1002.

carried on as amnesties became used for purposes of securing peace and political stability in post-conflict situations.[22] In some instances, states were able to grant blanket amnesties to shield repressive regimes from any possibility of future prosecution.[23] This development raised serious concerns whether amnesties reinforce the culture of impunity or enhance the administration of justice.

Development in international human rights law, particularly after World War II, led to a significant shift in amnesty paradigm as calls to end the culture of impunity became obvious.[24] Whereas this did not end the grant of amnesties by states, it rather made grants of such amnesties conditional on certain terms such as acknowledging the crime publicly and telling the truth.[25] Notwithstanding this development, the status of amnesties under international law remains debatable.

3.0 AMNESTIES UNDER INTERNATIONAL LAW

Generally, the recognition and application of amnesties under international law can be clustered into two distinctive phases. The first phase constitutes of a period where amnesties were applied restrictively to address instances of violation of civil and political rights. In this respect, amnesties were mainly used in post-conflict situations to facilitate political transitions.[26] The second phase represents a period where amnesties are broadly applied with regard to organized crime generally. This development occurred

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[22] McEnvoy and Mallinder, *Amnesties in Transition,* above note 16, at p.414.
[23] Ibid.
[24] Ibid.
[25] Id, at p.415; Markel, D., "The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States", 49(3) *The University of Toronto Law Journal*, 1999, at pp. 390-396.
[26]Skaar, E., "Truth Commissions, trials-or nothing? Policy options in democratic transitions" 20(6) *Third World Quarterly,* 1999 at p.1111-1125.

from the beginning of 21st century, particularly, following the adoption of the UNTOC,[27] and UNCAC[28] respectively.

3.1 Restrictive Approach to Amnesties

As noted above, amnesties have historically been used to address instances of human rights violations, particularly, civil and political rights in post-conflict situations.[29] Yet, their recognition and acceptance in international law has long been a subject of debate. Traditionally, amnesties were not considered by international law as a proper means to address instances of human rights violations as they have always carried significant risk of violating international law obligations under which states are obliged to investigate and prosecute instances of grave human rights violations.[30] For that reason, international law took a very cautious approach towards recognition of amnesties such that these measures could only be valid where they are consistent with international law obligations.[31]

Despite the absence of explicit treaty provisions preventing states from granting amnesties,[32] the United Nations position on the matter has always been clear.[33] That is to say, amnesties are generally inconsistent with international law.[34] Whereas this seems to be a settled principle on amnesties, the United Nations' practices on the ground have surprisingly been inconsistent as in some

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[27] Art. 26 of the United Nations Convention against Transnational Organized Crime, 2000.
[28]Art. 37 of the United Nations Convention against Corruption, 2003.
[29]Skaar, *Truth Commissions, trials-or nothing?,* above note 26 at pp. 1111-1125.
[30] Trumbull IV, C.P., "Giving Amnesties a Second Chance", 25(2) *Berkeley Journal of International Law*,
2007, at pp. 283-306.
[31] Ibid.
[32] McEnvoy and Mallinder, *Amnesties in Transition, above note 22,* at p. 417.
[33] Slye, *The Legitimacy of Amnesties*, above note 20, at pp.180-181.
[34] Ibid.

cases, amnesties have been formally encouraged and supported.[35] This inconsistence displayed by the United Nations implicitly offers an encouragement to states as they continue to pursue domestic amnesties for their own political agendas.

As a result, amnesties have continued to be granted domestically to perpetrators of grave human rights violations contrary to relevant United Nations guidelines on the subject.[36] According to the guidelines, the scope of amnesties is limited such that they may only be acceptable if their application does not hinder prosecution of individuals for international law crimes,[37] gross violation of human rights, or gender specific violations.[38] Further, such amnesties should be crafted such that they do not interfere with victims' right to effective remedy or restrain victims and societies' rights to know the truth regarding violations of human rights and humanitarian law.[39]

This restrictive approach to amnesties meant that these measures could only be legally used in few instances of post-conflict situations.[40] In this regard, states were encouraged to grant widest possible amnesties to persons involved in armed conflict after such atrocities were over.[41] Notwithstanding this general approach to amnesties, state practice on this subject varies significantly. National governments continue to grant amnesties for various human rights violations, including violation of international criminal

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[35] Trumbull IV, *Giving Amnesties a Second Chance*, above note 30, at pp.292-295.
[36] Ibid.
[37] Office of the United Nations High Commissioner for Human Rights, Rule -of - Law Tools, above note 7, at p.11.
[38] Ibid.
[39] Ibid.
[40] Slye, *The Legitimacy of Amnesties*, above note 33, at pp. 177-180.
[41] Ibid.

law.[42] These amnesties are nevertheless granted domestically such that perpetrators of crimes are absolved of any criminal responsibility. This practice has been to a large extent based on the application of Article 6(5) of the Additional Protocol II to the 1949 Geneva Conventions.[43] Under this provision, states are encouraged to grant broadest amnesties possible in non-international post-conflict situations.[44]

Given the fact that this provision is designed to cater for combatants in internal armed conflicts, its application excludes any possibility of granting amnesties to perpetrators of grave human rights violations.[45] Restricted interpretation of this provision is arguably critical as it ensures its consistence with other international law rules providing for states obligation to prosecute individuals for grave human rights violations. It would follow, therefore, that the provision cannot be used to protect violators of international law but rather individuals who are detained or punished for their mere participation in non-international armed conflicts.[46]

Interestingly, however, the scope of this provision has been widely debated and divided scholarly opinions.[47] On the one hand, it has

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[42] Trumbull IV, *Giving Amnesties a Second Chance*, above note 35, at pp.284-286.
[43] The Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977.
[44] Ibid.
[45] Gavron, J., "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court", 51(1) *The International and Comparative Law Quarterly*, 2002, at pp. 101-102; Naqvi, Y., "Amnesty for War Crimes: Defining the Limits of International Recognition",85(851) *International Review of the Red Cross,* 2003, at pp.604-605.
[46] Slye, *The Legitimacy of Amnesties, above note* 40, at pp.177-180; Naqvi, *Amnesty for War Crimes* above note 45, at pp.603-605.
[47] Reiter, A. G., "Examining the Use of Amnesties and Pardons as a Response to Internal Armed Conflict",47(1) *Israel Law Review,* 2014, at pp. 134-138. See also Slye, *The Legitimacy of Amnesties*, above note 46, at pp.175-201; McEnvoy and

been argued that amnesties are generally bad as they encourage impunity, hinder accountability of perpetrators for grave human rights abuse and generally deny justice to the victims of such violations.[48] Yet basing on state practice, some have argued for recognition of amnesties under international law.[49] This argument is based on the fact that the duty to prosecute is absolute in only specified international law offences.[50] That is to say, states are at liberty to develop other mechanisms to deal with other offences whether committed against international or domestic law.[51]

3.2 Broad Approach to Amnesties

The adoption of UNTOC and UNCAC respectively changed the general outlook of amnesties globally. The two Conventions which focus on the fight against corruption, money laundering, and organized crime generally introduce the idea of amnesties for corruption and organized crime.[52] This represents a departure from the traditional approach as perpetrators of transnational organized crime and corruption are now amenable to amnesties. This development follows a realization that amnesties may play a pivotal role in states transitioning from massive violation of socio-economic and cultural rights (in the form of economic crimes and corruption)[53]

Mallinder, *Amnesties in Transition, above note 32, at* pp. 414-422; Trumbull IV, *Giving Amnesties a Second Chance*, above note 42, at pp.284-319.

[48] Ibid.

[49] Ibid.

[50] Trumbull IV, *Giving Amnesties a Second Chance*, above note 47, at pp.284-319.

[51] Id, pp. 301-304. See also Reiter, *Examining the Use of Amnesties,* above note 47, at pp.134-138.

[52] Art. 26 of the United Nations Convention against Transnational Organized Crime, 2000; Art. 37 of the
United Nations Convention against Corruption, 2003.
Economic, Social and Cultural rights are generally violated by acquisitive crimes, particularly, corruption. For details regarding such rights see Arts. 1-25 of the International Covenant on Economic Social and Cultural Rights, 1966.

in the same manner as it does in the field of civil and political rights.[54] As such, amnesties offer an alternative weapon in the fight against organized crime and corruption such that embezzlers may be afforded an amnesty in return for cooperation with the investigation to facilitate prosecution and ultimate recovery of swindled assets.

Despite this development, amnesties under these Conventions ought to be conditional. That is to say, they should only be granted where perpetrators of crime are ready and willing to cooperate with the law enforcement to facilitate the prosecution of suspects and forfeiture of tainted assets.[55] Indeed, this form of cooperation could consist in providing information that is useful for investigative and evidentiary purposes or any factual or specific help that may contribute to the forfeiture and ultimate recovery of tainted assets.[56] In other words, amnesties should not be granted loosely as that may hinder the administration of criminal justice and recovery of tainted assets.

The introduction and application of amnesty provisions with regard to perpetrators of transnational organized crime and corruption represents a new development in addressing criminal practices. This is because the traditional criminal justice approach to fight criminality and recover tainted assets demands that perpetrators of crime are prosecuted and, upon conviction, punished and have their tainted assets forfeited.[57] This process, which is also referred

[54] Arts. 1-27 of the International Covenant on Civil and Political Rights, 1966.
[55] Art. 26 of the United Nations Convention against Transnational Organized Crime, 2000; Art. 37 of the United Nations Convention against Corruption, 2003.
[56] Ibid.
[57]Arts. 3 and 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic

to as conviction-based forfeiture, ensures that the criminal suffers punishment that is proportional to the crime before his tainted assets are forfeited. This enhances retribution and criminal deterrence, and makes crime an ill bargain. In a way, the imposed penalty also serves other purposes of punishment such as reformation, and incapacitation.

In some exceptional cases, however, the process of recovering tainted assets could be accomplished without a criminal conviction.[58] This type of forfeiture which is also referred to as civil forfeiture or *in rem* forfeiture may only be invoked where conviction-based forfeiture is unavailable.[59] In this respect, it may only be employed to complement the conviction-based forfeiture process and not as its alternative.[60] For this reason, in rem forfeiture can only be invoked in cases where the suspect is dead, absent, has fled the country, or in other appropriate cases.[61]

Notwithstanding all this, fighting transnational organized crime continues to present new challenges to law enforcement as criminals employ sophisticated typologies to execute their illicit purposes. Use of foreign jurisdictions and professionals to ensure that illicit assets are safely hidden proves tricky to law enforcement and traditional criminal law mechanisms to curb criminality.

Indeed, once illicit assets are stashed in a foreign territory, traditional law enforcement approaches to curb criminality cannot be successfully applied without the involvement of a foreign state in

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Substances, 1988; Art. 14 of the United Nations Convention against Transnational Organized Crime, 2000; Arts. 30 and 31 of the United Nations Convention against Corruption, 2003.

58 Art. 54(1) (C) of the United Nations Convention against Corruption, 2003.

59 Greenberg, et al, *Stolen Asset Recovery,* above, note 3, at p. 29.

60 Ibid.

61 Art.54(1) (C) of the United Nations Convention against Corruption, 2003

which the loot is hidden. In this regard, necessary legal assistance ought to be extended to facilitate collection of evidence, enforcement of judicial orders and, in some cases, extradition of the accused. On many occasions, however, transnational law enforcement proves difficult due to lack of requisite political will to fight criminality as various avenues for mutual legal assistance are not pursued and delaying tactics employed by states in a bid to block any meaningful assistance.[62]

On the other hand, lack of political will has also been associated with inaction on the part of the state in respect of domestic offences as part of the strategy to shield repressive and corrupt regimes from accountability. Due to this inertia, requisite evidence is lost, witnesses die or fail to have a sound recollection of events as the state takes too long to commence prosecution. This makes the potential of mounting any successful prosecution and subsequent recovery of criminal assets unrealizable.

To circumvent these challenges, the international law introduces a range of measures designed to facilitate the recovery of criminal assets where conventional methods of evidence gathering and prosecution may prove futile.[63] Such measures are tailored to encourage individuals involved in the commission of crime to supply information to the investigation in order to facilitate the prosecution and recovery of criminal assets.[64] Such measures may include

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[62] Greenberg, et al, *Stolen Asset Recovery*, above, note 59, at p. 7.

[63] Art. 26 of the United Nations Convention against Transnational Organized Crime, 2000 and Art. 37 of the United Nations Convention against Corruption 2003.

[64] Id, Art. 37(1) of the United Nations Convention against Corruption, 2003; Art. 26(1) (a) and (b) of the United Nations Convention against Transnational Organized Crime, 2000.

mitigating the punishment of the accused,[65] or granting immunity from prosecution to such individuals.[66]

By virtue of these measures, states may now enact laws granting amnesties to individuals who are ready to reveal the truth that may lead to uncover information required to facilitate investigation and prosecution for ultimate asset recovery.[67] Attachment of such conditions when amnesty is granted is crucial in order to prevent abuse of amnesty provisions. In that regard, it is important that amnesties are properly regulated and applied in a way that does not stifle prosecution but rather assist in gathering relevant evidence that facilitate effective prosecution of perpetrators of crime as envisaged by relevant international law norms.[68] This implies that elaborate procedures in respect of granting of amnesties have to be developed such that amnesties are granted only where it is necessary.

Likewise, since amnesties are inherently selective, determination regarding matters that are forgivable and that can be disposed of through an amnesty process has to be made. In this determination, some matters will ordinarily be excluded from amnesty, giving way to normal trial processes to take place. Making this determination is always challenging as the process ought to be transparent and credible such that it enjoys public trust and confidence.[69] It is

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[65] Id, Art. 37(2) and Art. 26(2) respectively.
[66] Id, Art. 37(3); and Art. 26(3) respectively.
[67] Carranza, R., "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?" 2(3) *The International Journal of Transnational Justice,* 2008, at pp. 325-326.
[68]Article 26 of the United Nations Convention against Transnational Organized Crime, 2000; Arts 30
and 37 of the United Nations Convention against Corruption, 2003.
[69] United Nations Office on Drugs and Crime, *Anti-corruption Toolkit*, version 4, 2002, at p. 234.

therefore imperative that relevant legal provisions regarding amnesty are implemented and a special agency determining these matters is composed of people who enjoy public trust.[70] By and large, this evolution radically transforms the institution of amnesty whose application and recognition under international law had hitherto been limited to domestic post-conflict situations.

4.0 AMNESTIES IN TANZANIA

Amnesties are a potent weapon in the hand of the state used for recovering criminal assets. Their use in Tanzania is however suspicious and, at best, irregular given the fact that such mechanisms are not regulated by law. As such, attempts to resort to amnesties have always encountered a legitimacy challenge as the country's legal system does not envisage the use of amnesties to settle criminal charges. Instead, the constitution empowers the President to, in the course of exercising his prerogative power of mercy, commute sentences imposed on any person or grant a pardon conditionally or unconditionally on any person convicted of an offence.[71] As it stands, this power is only exercisable in respect of criminal convicts and not criminal suspects as would be the case of amnesty.

The rationale for limiting presidential prerogative in respect of criminal convicts is well established. That is to say, the law intends that the power to determine the innocence or guilty of a person to be exclusively reserved for courts of law and other legally established agencies.[72] In other words, the power to determine the fate of criminal suspects should be exercised independently without

[70] Ibid.
[71] Art. 45 of the Constitution of the United Republic of Tanzania, 1977.
[72] Id, Art. 13 (6).

any involvement of or interference by the President. That is why, even when amnesty is introduced into the country's legal system, international standards demand that a specific agency should be designated to independently receive and consider amnesty applications.[73] This enhances integrity of the process and propriety of actions.

Notwithstanding the above, amnesties have recurrently featured in Tanzania in the context of asset recovery. In each case where they are employed, it is the President who unilaterally determines who the beneficiary should be and the terms accompanying such amnesties. This indicates that the power to grant amnesties is regarded generally as and concurrent to the power of prerogative mercy provided for by the Constitution.[74] In addition, experience shows that amnesties are merely used as a tool for procuring the return of swindled assets and not for purposes of facilitating investigation and prosecution of perpetrators of crime as envisaged by international law. This is inconsistent with the spirit of both UNTOC and UNCAC under which amnesties for purposes of asset recovery trace their origin.[75]

Whereas experience shows that amnesties are productive in that they facilitate the return of tainted assets without the need for a criminal trial, failure to integrate these mechanisms within the criminal justice system means that they cannot be resorted to by law enforcement even in cases where practical impossibilities would hinder successful prosecution of criminal suspects and ultimate recovery of tainted assets. This is a misnomer that needs

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[73] United Nations Office on Drugs and Crime, *Anti-corruption Toolkit,* above note, 69 at p.234.

[74] Art. 45 of the Constitution of the United Republic of Tanzania, 1977.

[75] Art. 26 of the United Nations Convention against Transnational Organized Crime, 2000; Art. 37 of the United Nations Convention against Corruption, 2003.

to be rectified. Indeed this situation makes the application of amnesties in criminal cases suspicious as the mechanisms are considered a strategy to favour and exempt some politically and economically powerful individuals from the normal course of justice.[76]

Since 2008, amnesties have been used twice in the context of asset recovery in Tanzania.[77] In each instance, the mechanism has been distinctively applied in respect of corporate entities and individuals accused of serious economic and financial crimes. When first applied in 2008, amnesty was widely considered not only as constituting breach of the law but also a mechanism for protecting criminals who occupy higher political positions in the government or are closely connected to high government leadership.[78] The second

[76] Maloto, L., "Msamaha wa Wahujumu Unakumbusha EPA", *The Citizen* (Dar es Salam), 12 October, 2019 available at https://www.mwananchi.co.tz/habari/Makala/siasa/Msamaha-wa-wahujumu-unakumbusha-EPA-/1597436-5308474-v22fpj/index.html (accessed 20 December 2019) [*loosely translated as amnesty for economic criminals reminds me of EPA].*

[77] Amnesty was for the first time used in 2008 during Kikwete's presidency in respect of individuals accused of looting funds form the Bank of Tanzania's External Payment Account (EPA). The mechanism has also been used recently by the Magufuli's government in respect of economic crimes suspects. See for instance Reuters Staff, "Tanzanian leader suggests amnesty for financial crimes" *Reuters* (Dar es Salaam) 22 September 2019 available at https://www.reuters.com/article/us-tanzania-judiciary-idUSKBN1W70OH (accessed 20 December 2020).

[78] Amizande, R., *Race, Nation and Citizenship in Postcolonial Africa: The Case of Tanzania*, New York: Cambridge University Press, 2013, at pp. 345-346; Chidawali, H., "Mbunge amtaja JK sakata la EPA", *Mwananchi* (Dar es Salaam), 31 May 2016 available at https://www.mwananchi.co.tz/habari/Mbunge-amtaja-JK-sakata-la-EPA/1597578-3225954-view-printVersion-rrv9ivz/index.html(accessed 20th December 2019) [*loosely translated as MP names Kikwete in EPA scam*]; Kubenea, S., "JK ameshindwa kunusuru chama chake", *Mwanahalisi* (Dar es Salaam) 13 April 2011 available at http://www.mwanahalisi.co.tz/jk_ameshindwa_kunusuru_chama_chake (accessed 20th December 2019) [*loosely translated* as *JK fails to rescue his party*]; Mtulya, A., "How corruption rocked Kikwete's govt in the past decade", *The Citizen* (Dar es Salaam), 24 June 2016 available at https://www.thecitizen.co.tz/news/How-corruption-rocked-Kikwete-s-govt-in-the-past-decade/1840340-2763268-604qo9z/index.html (accessed 20 December 2019).

amnesty in 2019 was however granted under different set of circumstances.[79] This facilitated the swift return of tainted assets without resorting to protracted judicial processes.

Although the circumstances surrounding the grant of the two amnesties differ considerably, they were both declared without necessary legal backing, thereby making them less transparent. On the other hand, unlike the 2008 amnesty which simply demanded the suspects to return the funds they had illicitly acquired, the second amnesty required criminal suspects to confess their wrongdoing and return the funds they had unlawfully acquired.[80] This means beneficiaries under the second amnesty are technically compelled to accept the offences levelled against them and return the funds to the government prior to enjoying amnesty provisions. These distinctive features of the two amnesties make it imperative that these amnesties are examined *seriatim* to ascertain their broad implications on asset recovery.

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[79] It appears that this amnesty was granted as strategy to de-congest prisons and short-circuit the process of return of illicit assets. The returned funds would in turn be invested in development projects whereas the freed suspects would have time to participate in production activities. For details see Ng'wanakilala, F., and Dausen, N., "Tanzanian leader suggests amnesty for financial crimes", *Reuters(*Dar es Salaam*)*, 22 September 2019 available at https://www.reuters.com/article/us-tanzania-judiciary/tanzanian-leader-suggests-amnesty-for-financial-crimes-idUSKBN1W70OH (accessed 20 December 2019); Jumanne, M., "Magufuli ashauri kuachiwa mahabusu wa uhujumu uchumi", *Mwananchi* (Dar es Salaam), 22 September 2019 available at https://www.mwananchi.co.tz/habari/kitaifa/Magufuli-ashauri-kuachiwa-mahabusu-wa-uhujumu-uchumi/1597296-5283376-yl7d5i/index.html (accessed 20 December 2019) [*loosely translated as Magufuli proposes amnesty for economic criminals*].

[80] Ibid.

4.1 The 2008 amnesty

One of the innovative but yet controversial anti-corruption measures adopted during Kikwete's regime was the use of amnesty in handling criminal suspects. This strategy was deemed necessary at the time to procure the recovery of funds looted from the Bank of Tanzania's External Payment Arrears (EPA) account.[81] As a matter of fact, this was an unprecedented initiative by the government as the potential of conducting successful criminal prosecution appeared very slim. Indeed, the government was prepared to have the assets returned to its coffers irrespective of whether the potential offenders are actually prosecuted or not. In the circumstances, however, the President decided that the suspects would only be prosecuted if they failed to return the looted money within the seventy day amnesty window (from 2 August – 31 October 2008).

In the aftermath of the loot, a team was appointed, as it is customary, to investigate the matter. According to the findings, the sum of Tanzanian Shillings 90,359,078,804 had been illegally paid to 13 local companies. The remaining 42,656,107,417 had been

[81]During 2005/6 fiscal year, it was revealed that public funds were looted from the Central Bank's External
Payment Arrears account (EPA) and dubiously paid to 22 companies between 2005 and 2006. EPA
scheme was an arrangement by the Tanzanian government with a view to assist local businessmen
and circumvent the effects caused by the shortage of foreign exchange in the country. Under this scheme, local businessmen paid for imported goods or services in equivalent local currency via the National Bank of Commerce which, in turn, processed for the foreign currency to pay the supplier. A special account was thus opened in 1979 and later on transferred to the Central Bank of Tanzania. In 1993 this arrangement was abolished when Tanzania changed its policy on foreign exchange control but the account remained dormant with colossal sums of money. For details see Assad, J.M., "Fraud at the Central Bank of Tanzania (A)," 1(1) *Emerald Emerging Markets Case Studies*, 2011, at pp. 2-3.

transferred to 9 companies that claimed to have been lawful recipients of the money after the same was duly assigned by their foreign counterparts.[82] This complicated the matter further as it necessitated broadening the scope of investigation and invoking mutual legal assistance provisions for purposes of investigating these claims. It is for that reason the amnesty was specifically granted in respect of 13 local companies that had apparently received the funds illegally.[83]

Yet this initiative remains controversial to date for want of necessary legal footing. As pointed above, this measure was applied administratively without necessary legal rules governing its administration. Consequently, the initiative spawns a number of legal challenges, namely; whether beneficiaries under this amnesty can be prosecuted in the future for their involvement in corruption-related conducts; and, whether mere return of stolen assets (without surrendering instrumentalities, benefits and other advantages accruing from the loot) is sufficient to curb criminality as anticipated by international law. Further, given the fact that asset recovery is designed to curb criminality through its deterrent and restorative mechanisms, it remains questionable if this objective can adequately be realized by this form of amnesty.

It is worthy to remember however the context in which the 2008 amnesty was granted. This understanding unveils a big picture of the state of affairs immediately preceding this amnesty. Indeed, given the fact that the loot occurred immediately before the 2005 general elections in Tanzania, this timing, it has been argued,

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[82] See the speech by President Kikwete delivered in the Parliament on 21st August 2008.

[83] Ibid. see also President Kikwete's speech delivered on 31st October 2008 available at https://issamichuzi.blogspot.com/2008/11/hotuba-ya-jk-kwa-wananchi-mwisho-wa.html (accessed 17 March 2020).

provides a clue into the actual motives of the 2008 amnesty. As Gray argues, there existed a close connection between the 22 companies implicated in the loot and the ruling party-*Chama Cha Mapinduzi* (CCM).[84] In addition, further assessment by Andreoni suggests that some of these companies were owned by senior members of CCM.[85] This marriage between politics and business made it easier for the siphoning of Tanzanian Shillings 133 billion from the Bank of Tanzania's External Payment Arrears Account (EPA). It is for this reason this loot is widely viewed as a financial strategy to accomplish some political objectives.[86]

Given this proximity between the government and party leaders on the one hand and criminal suspects involved in the loot on the other, the process of investigation and prosecuting those implicated proved very difficult and sensitive.[87] The suspects wielded enormous powers such that they proved to be more dangerous than terrorists.[88] In view of this, the Director General of the Prevention and Combating of Corruption Bureau (PCCB) at the time warned that attempts to arrest and prosecute those involved in this scandal could disrupt the economy and potentially paralyze the entire country.[89]

In light of these circumstances, recovery of tainted assets could not be accomplished using traditional criminal justice processes.

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[84] Gray, H.S., "The Political Economy of Grand Corruption in Tanzania", 114(456) *African Affairs*, 2015, at p. 392.
[85] Andreoni, A., "Anti-corruption in Tanzania: A Political Settlements Analysis", SOAS, University of London, Working Paper 001, 2017, at p.48.
[86] Cooksey, B., and Kelsall, T., "Africa Power and Politics: The Political Economy of the Investment Climate in Tanzania", London: 2011, at p.27; Andreoni, *Anti-corruption in Tanzania,* above note 85, at p.48.
[87] Amizande, *Race, Nation and Citizenship,* above note 78, at pp.344-345.
[88] Ibid.
[89] Ibid.

Nonetheless, the government felt obliged to ensure that reasonable steps are taken to ease pressure from the public over the handling of the EPA scandal. A new strategy was thus devised which saw the President declare amnesty to criminal suspects directing that they return the stolen funds by 31 October 2008 or face prosecution.[90] This was a balancing act as amnesty would appease the public for the misuse of public funds as the strategy facilitated the return of the loot to the state while at the same time ensuring that power relations within the political establishment are retained. This strategy saw a sum of Tanzanian Shillings 69.3 billion returned out of the stolen133 billion.[91]

Given these revelations, the chances that this amnesty may have had any deterrent implications on crime become very slim. Instead, the manner in which it was administered discloses a clear strategy for balancing political interests than fighting organized crime. As a matter of fa ct, even where the amnesty deal was made at arm's length, the fact that criminal suspects returned only the principal amount looted without surrendering the benefits (secondary proceeds) and instrumentalities of crime further makes the entire scheme a farce.[92]

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[90] See the speech by President Kikwete delivered in the Parliament on 21st August 2008.

[91] Lymo, K., "Recovering Illegal Wealth: India Learn from Kikwete", *Daily News* (Dar es Salaam), 29 July 2012 available at https://www.dailynews.co.tz/news/recovering-illegal-wealth-india-learns-from-kikwete.aspx (accessed 20 December 2019).

[92] A proper amnesty law should have provided conditional immunity to few cooperating individuals who disclose information necessary to facilitate the prosecution of perpetrators of crime and forfeiture of tainted assets (both the proceeds and instrumentalities of crime). This would have enhanced criminal deterrence.

4.1.1 Amnesty as a protective strategy

Looking at the background, one gathers that the 2008 amnesty was not granted primarily for facilitating the recovery of assets. Instead, it was a strategy intended to offer a blanket protection to those **implicated** in the loot.[93] In a way, this strategy would also encourage those implicated in the EPA scandal to return the funds to the government. This is implicit in the conduct of the government as no serious measures were taken from 2005/2006 when the loot was unveiled until 2008 when amnesty was granted. Lack of requisite political will in conducting investigation and prosecution of perpetrators of crime paralyzed the administration of criminal justice such that law enforcement agencies became powerless.

In this connection, whereas the 2008 amnesty is apparently viewed as an attempt to have stolen assets recovered, its implementation largely encouraged impunity as all those implicated were afforded opportunity to evade the course of justice contrary to the spirit of international asset recovery law.[94] This behaviour by the executive discourages law enforcement agencies from implementing various law enforcement strategies and compromises the integrity of the criminal justice system.

4.1.2 Public trust in amnesty process

One of the obvious challenges evident in 2008 amnesty was its lack of public support and confidence. This amnesty was merely seen as constituting violation of the law, abuse of power by the executive and, above all, an attempt to shield these criminal suspects from the vengeance of the law which in effect stymied the administration of criminal justice system. As a result, post amnesty period

[93] Amizande, *Race, Nation and Citizenship,* above note 87, at p. 346.
[94] Art.37 of the United Nations Convention against Corruption, 2003; art. 26 of the United Nations Convention against Transnational Organized Crime, 2000.

experienced strong opposition from different circles including the general public, members of parliament, Non-Governmental Organizations (NGOs) and the donor community who threatened to suspend aid unless some measures were taken to address the loot.[95]

Lack of regulatory framework governing amnesties meant the President ventured into the unchartered territory when granting amnesty. His exercise of power in this respect was well above his constitutional limits. The President thus determined cases that qualified for amnesty, the task which in an ideal situation would be discharged by a separate and independent agency. In addition, lack of regulations in this regard means lack of transparency in the process as no one can exactly tell the considerations taken into account when granting this amnesty. Given the fact that the President had close political ties with those implicated, his grant of amnesty in the absence of any legal backing disclosed overwhelming partiality in the process such that this amnesty was seen as a strategy to shield criminals from the vengeance of the law.

As a result of uncertainties surrounding this amnesty, its relevancy and purpose remain questionable as it is generally viewed as a special privilege reserved for the economically powerful individuals in Tanzania's economic and political setups. As amnesty was crafted for these individuals, cardinal principles of criminal justice stood compromised. Consequently, the administration of criminal justice and its integrity became seriously damaged.

[95] Amizande, *Race, Nation and Citizenship,* above note 93 at p. 344.

4.2 The 2019 amnesty

The changing political scene in Tanzania particularly from late 2015 witnessed a great push towards the fight against corruption and various forms of economic crimes. This development shook socio-economic and political establishments as various individuals who had hitherto been considered too strong to be prosecuted found themselves battling criminal charges in court. This dynamism had also witnessed the amendments of various laws to facilitate forfeiture and ultimate recovery of tainted assets.[96]

Despite the reenergized law enforcement initiatives in curbing corruption and other forms of organized crime, the complexity of these offences meant more time was required in investigation and prosecution. This had a direct implication on the administration of criminal justice as criminal suspects spent more time in prison pending investigation and prosecution. Likewise, delayed prosecution adversely affected asset recovery efforts as the country predominantly practices a conviction-based asset forfeiture system in which forfeiture processes commence once the person is convicted of crime. Overall, this trend resulted into overcrowding of prisons and low rate of asset recovery.

In a bid to address these challenges, a seven day amnesty was granted.[97] This decision was taken to, among other things, short-circuit the asset recovery process such that the allegedly tainted assets are returned to the government without resorting to conventional judicial processes. Indeed, the executive- engineered

[96] Various asset forfeiture-related laws have been significantly amended since 2016. See for instance the Written Laws (Miscellaneous Amendments) Act, No.3 of 2016; the Written Laws (Miscellaneous Amendments) (No.2) Act, No.7 of 2018, and the Written Laws (Miscellaneous Amendments) (No.4) Act, 2019.

[97] The originally seven day amnesty was later extended for another seven days.

amnesty process would see those implicated in illicit dealings set free and resume their business. Consequently, this strategy would lead to prisons' decongestion and thereby relieve pressure from law enforcement agencies.

Under the terms of this amnesty, its beneficiaries were those charged with economic sabotage offences. These were obliged, as a precondition, to confess their wrongdoing, return the money which they acquired illegally and undertake not to commit similar offences in the future. The grant of this amnesty was however to be implemented only if it was legally viable. Apparently, when making the amnesty proposal, the President was keen to ensure that the process is undertaken consistently with existing legal framework. The task of overseeing the implementation of the amnesty proposal was placed upon the Director of Public Prosecutions (DPP) who was implicitly required to examine the law and make recommendations regarding the legitimacy of granting amnesty to criminal suspects.

To the contrary, however, the DPP somewhat amended the amnesty proposal by the President and decided to give effect to it through a plea-bargaining process.[98] It thus became amnesty-cum-plea bargaining process which technically meant that prospective amnesty beneficiaries were now taken to court and got convicted as per the terms of the plea agreement.[99] This was to be done before any criminal suspects returned the money and got released.

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[98] This was implicit in DPPs report to the President on the progress made in implementing amnesty proposal. He noted that the suspects write letters, confess the crimes, are taken to court and convicted. After this conviction, the accused repay the money as indicated in the agreement. In this respect, the DPP also noted that some suspects confessed their wrongdoing, returned the illicitly acquired assets and paid the fine imposed by court. The event was aired live on Tanzania Broadcasting Corporation (TBC) on 30th September 2019.

[99] Ibid.

According to the DPP, this legal process (plea-bargaining) was necessary in this regard in order to avoid any potential government liability in the future.[100] This is indicative of the fact that the DPP is aware that amnesty is legally untenable in Tanzania.

Despite the unique approach to this amnesty, its application remained inconsistent with international law rules which ordain that amnesties should be granted in exchange for perpetrators' cooperation with the law enforcement.[101] Indeed, such cooperation should, in the end, facilitate prosecution of suspects and procure the recovery of tainted assets.[102] Likewise, given the fact that amnesties are yet to be regulated in Tanzania, informal application of such measures remained contrary to the law governing the administration of criminal justice notwithstanding that this amnesty was implemented via a plea bargaining process.

As a matter of principle, a plea bargaining does not start with an amnesty offer. Instead, parties involved in the case negotiate the pleas and reach a settlement which is later on registered and enforced by the court.[103] This is an independent and distinct process which enables parties to the case to avoid protracted trials in favour of a settlement. In this respect, the prosecution may withdraw or drop serious offences with which the accused is charged in order that he enters a guilty plea for less serious offences.[104] This process differs significantly from an amnesty process and is beyond the scope of this paper.

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[100] Ibid.
[101] Art. 26(1) of the United Nations Convention against Transnational Organized Crime, 2000; Art. 37(1) of the United Nations Convention against Corruption, 2003.
[102] Ibid.
[103] Ss. 194A-194H of the Criminal Procedure Act, [Cap. 20 R.E.2019].
[104] Id, s. 194B.

4.2.1 Amnesty as a prisons' decongestion strategy

One of the challenges facing law enforcement agencies is lack of enough infrastructure for handling inmates both criminal convicts and remandees. According to the statistics, the number of inmates in Tanzania far exceeds the holding capacity of prisons.[105] In 2013 and 2014, for instance, the number of inmates was double the actual capacity of prisons,[106] which meant more pressure on law enforcement agencies. Worse still, the records show that overcrowding in prisons is further enhanced by the increasing number of remandees whose number surpasses that of criminal convicts.[107] Notwithstanding this problem, law enforcement agencies continue to hold criminal suspects in prisons for unreasonably long period as little efforts are made to promptly investigate and prosecute the offences for which the suspects are held.

To address this challenge, relevant authorities were directed to take measures necessary to reduce overcrowding in prisons which

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[105] Jamhuri ya Muungano wa Tanzania, *Takwimu za Wafungwa na Mahabusu Tanzania Bara Mwaka 2013 na 2014*, Dar es Salaam: Jeshi la Magereza Tanzania Bara na Ofisi ya Taifa ya Takwimu, at p. 5 available at http://magereza.go.tz/docs/Ripoti%20ya%20wafungwa%202013%20na%202014.pdf (accessed 17 January 2020) [*loosely translated as United Republic of Tanzania, Detainees Statistics for Mainland Tanzania for 2013*]; Matagi, P. R., "Reasons for Chronic Existence of Prison Congestion in Tanzania: Critical Analysis of the Law and Practice at Musoma Prison", LL.M Dissertation, Mzumbe University, 2016, at p. 6 available at http://scholar.mzumbe.ac.tz/bitstream/handle/11192/2136/LLM-C%26A.Matagi.Peter-2016.pdf?sequence=1 (accessed 17 January 2020).

[106] Ibid.

[107] President Magufuli's Independence day commemoration speech as reported by ITV News aired on 9th December 2019 and posted on https://www.itv.co.tz/news/rais-wa-tanzania-atoa-msamaha-kwa-wafungwa-wapatao-elfu-5-na-53 (accessed on 20 January 2020). According to the President, the number of remandees stands at 18256 whereas that of criminal convicts is 17547.

included freeing those illegally remanded.[108] This included the release of suspects detained for unbailable offences especially, economic offences. For this reason, the 2019 amnesty was granted.[109] If thoroughly implemented, this strategy would enable all economic crime suspects who were ready to confess their wrongdoing and return the illicitly acquired wealth to be freed from prison.[110] Theoretically, this would relieve pressure from the law enforcement, hasten the speed of asset recovery and enable the released individuals engage in economic activities.

Yet, it is interesting to note however that the law in Tanzania is categorical regarding unbailable offences. Indeed, the law provides a list of offences such as murder, money laundering, illicit trafficking in drugs, terrorism, armed robbery, defilement, and trafficking in persons, among others, as unbailable offences.[111] That means a genuine strategy to decongest overcrowded prisons would take on board a broad range of unbailable offences than limiting the scope of amnesty to economic crimes only. Given the fact that economic crime detainees form only a small section of those held in prisons, this strategy would obviously have limited results as substantial number of inmates would be excluded from amnesty provision. No wonder that even after the first seven days deadline for amnesty application had passed, only 467 applications had been lodged for

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[108] The East African, "Magufuli orders Tanzanian prisons to reduce overcrowding", *The East African (Nairobi)*, 17 July 2019 available at https://www.theeastafrican.co.ke/news/ea/John-magufuli-orders-tanzanian-prisons-reduce-overcrowding/4552908-5201306-15nh063/index.html (accessed 20 January 2020).

[109] Ng'wanakilala and Dausen, Tanzanian leader suggests amnesty for financial crimes, above note 56, available at https://www.reuters.com/article/us-tanzania-judiciary/tanzanian-leader-suggests-amnesty-for-financial-crimes-idUSKBN1W70OH (accessed 20December 2019).

[110] Ibid.

[111] S. 148(5) of the Criminal Procedure Act [Cap. 20 R.E.2019].

consideration.[112] This number was nevertheless seen as remarkable as inmates' response had exceeded expectation.[113]

In light of the above experience, it is submitted that developing a legal framework is necessary in order to address challenges connected to the administration of amnesties. This would enhance transparency and certainty in amnesty processes, and increase public trust and confidence in the administration of criminal justice.

4.2.2 Amnesty as a fiscal strategy

Handling of economic crime cases by the government and subsequent grant of amnesty to criminal suspects has recently attracted different views.[114] In particular, the grant of amnesty to economic crimes suspects has seen some label it as unjustified action whereas others consider it as legitimate, humane and

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[112] Mallya, R., "Mabilioni uhujumu uchumi kufanya makubwa", *Nipashe* (Dar es Salaam) 1October, 2019 available at https://www.ippmedia.com/sw/node/69273 (accessed 20 January 2020) [*loosely translated* as *Economic crimes money to accomplish greater projects*].

[113] Ibid.

[114] Msuya, E., "Video: Mkanganyiko msamaha kwa wahujumu uchumi" , *Mwnanchi* (Dar es Salaam), 2 October 2019 available at https://www.mwananchi.co.tz/habari/kitaifa/VIDEO--Mkanganyiko-msamaha-kwa-wahujumu-uchumi/1597296-5295390-q8l55yz/index.html (accessed 20 January 2020) [*loosely translated as Confusion surrounds economic crimes amnesty];* Voice of America, "Mjadala msamaha wa uhujumu uchumi waendelea", available at https://www.youtube.com/watch?v=ATuexsAZlb4 October 2019, (accessed on 31 January 2020) [*loosely translated as Discussion on economic crimes amnesty continues*]; Sued, H. K., "Kukosekana kwa adhabu kali hakutamaliza ufisadi", *Rai*(Dar es Salaam) 18th April, 2019 available at http://www.rai.co.tz/%EF%BB%BFkukosekana-kwa-adhabu-kali-hakutamaliza-ufisadi/ (accessed 31 January 2020) [*loosely translated as Lack of stringent punishment a cause for continued fraud*]; The Citizen, "Plea Bargaining takes new twist as Chief Justice weighs in", the Citizen(Dar es Salaam), 4 October 2019 available at https://www.thecitizen.co.tz/news/Plea-bargaining-takes-new-twist-as-Chief-Justice-weighs-in/1840340-5298134-9b1r5j/index.html (accessed 31 October 2020).

necessary for the general public good.[115] Notwithstanding these differences, it is an undisputed fact that amnesty has made it possible for the government to recover monetary and other assets which had allegedly been misappropriated or stolen form public coffers without resorting to the protracted judicial processes.

Despite this apparent success in recovery of criminal assets, the manner in which amnesty is employed has raised concerns that it is used as a tool for revenue collection rather than an anti-crime strategy.[116] Lack of clear legal authority regarding the use of amnesty in criminal matters coupled with the fact that amnesty has only been available to financial crime suspects make people think that such offences are merely used for purposes of intimidating individuals in order that they pay money to support government spending.[117]

The essence of this theory lies in the fact that under the amnesty arrangement, criminal suspects are afforded opportunity to return the allegedly stolen assets to the public coffers in exchange for their release from detention. By virtual of this approach, the state indirectly coerces the suspects to return the funds allegedly stolen in return for an offer of amnesty.[118] The suspects in turn pay the money in order to regain their lost freedom irrespective of whether they actually committed the alleged criminal conducts.[119]

Indeed, this practice whereby criminal charges are informally 'settled' outside the conventional criminal justice system seems to have been in place for quite some time. Long before the granting of

[115] Ibid.
[116] Standard Attorneys Advocate, interview by author (30 January 2020, Dar es Salaam).
[117] Ibid.
[118] Ibid.
[119] Ibid.

this amnesty, various individuals charged with economic sabotage offences were afforded opportunity to settle their cases outside the conventional criminal justice system.[120] In this respect, a good example of such informal arrangements is evidenced by economic crimes case involving some senior Vodacom officials in Tanzania.[121] This practice has been criticized as being an improper method of raising government revenue; discriminatory and, above all, inimical to rule of law.[122]

The feeling that amnesty is used to cater for economic purposes may thus be attributed to two main factors, namely; the scope of its application and desired outcome of the process. It is worth noting that when amnesty was declared, it only targeted individuals accused of various forms of financial crimes. This category of suspects ordinarily possess enormous financial power necessary to enable them buy their freedom. That is why these suspects were considered worthy of an amnesty if they accepted to return the assets back to the government. This has made some argue that the

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[120] Ex- asset recovery Prosecutor, interview by author (28 May 2019, Dar es Salaam).

[121] *R v Ahmed Hashim Ngassa and 8 Others*, Economic Crimes Case No. 20 of 2019 [before the subordinate court at Kisutu Resident Magistrate's Court]; CGTN Africa, "Vodacom Tanzania pays $ 2.3M settlement to free MD and others of economic crimes", 12 April 2019 available at https://africa.cgtn.com/2019/04/12/vodacom-tanzania-pays-2-3m-settlement-to-free-md-and-others-of-economic-crimes/ (accessed 13 April 2019; Jumanne, H., "Vodacom Tanzania CEO Released after Paying Sh6 Billion Compensation", *the Citizen* (Dar es Salaam), 11 April 2019 available at https://www.thecitizen.co.tz/News/Vodacom-Tanzania-CEO-released-after-paying-Sh6-billion/1840340-5067422-w1eye1/index.html (accessed 13 April 2019).

[122] Fidelis, B., "Mbowe na Zitto wahoji Maafikiano DPP, Washtakiwa", *Mwananchi* (Dar es Salaam), 14 April 2019 available at https://www.mwananchi.co.tz/habari/kitaifa/Mbowe-na-Zitto-wahoji-maafikiano-DPP--washtakiwa/1597296-5070742-lbqe4r/index.html (accessed 20 January 2020) *[loosely translated as Mbowe and Zitto question the legality of plea bargaining by the DPP].*

government improperly uses economic offences as a tool for revenue collection at the expense of individual rights.[123]

Yet, on the other hand, the grant of amnesty was mandated to facilitate the return of allegedly stolen assets to the state. This exercise not only serves economic interests by ensuring sufficient resources in the government coffers, but also criminal law objectives as tainted assets are taken away from criminal enterprise. Given the fact that the returned assets would in turn be channeled to support various public projects and improve the provision of social services such as education and health[124] has further cemented the idea that amnesty is a state sponsored fiscal strategy.

5.0 AMNESTY AND CRIMINAL DETERRENCE

Asset forfeiture is generally considered as a potent tool for crime control.[125] The removal of illicit gains from criminals is said to have deterrent effect on criminals as the lure of crime (the illicit gains) is confiscated to the state. In principle, criminal deterrence is not achieved when asset forfeiture is applied lonely.[126] Instead, its deterrent effect is achieved when is applied in connection with other measures such as fines and or incarceration.[127] It is for this reason therefore that forfeiture is generally made after a criminal conviction

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[123] Ibid.

[124] Jumanne, M. "Magufuli ashauri kuachiwa mahabusu wa uhujumu uchumi", *Mwananchi* (Dar es Salaam), 22 September 2019 available at https://www.mwananchi.co.tz/habari/kitaifa/Magufuli-ashauri-kuachiwa-mahabusu-wa-uhujumu-uchumi/1597296-5283376-yl7d5i/index.html (accessed 20 December 2019) [*loosely translated as Magufuli proposes amnesty for economic criminals*].

[125] Sittlington, S. and Harvey, J., "Prevention of Money Laundering and the Role of Asset Recovery", *Crime, Law and Social Change*, 2018, at pp.432-433.

[126] Ibid.

[127] Ibid.

and in addition to other penal sanctions. That said, any measures that facilitate the recovery of assets without ancillary criminal sanctions may potentially lack the deterrent effect on crime.

For this reason, use of amnesties has to be limited and carefully regulated such that it enhances criminal deterrence rather than facilitating impunity. This is attainable where amnesty provisions are drafted in a way that facilitates the return of tainted assets (proceeds and instrumentalities of crime), enhances criminal investigation and prosecution, and imposition of ancillary penal sanctions in appropriate cases. This in in line with international standards which demand that measures intended for mitigation of punishment, or granting of amnesties and immunity be used in exceptional cases as an inducement to enable perpetrators of crime cooperate with law enforcement agencies.[128] This cooperation in turn enhances administration of criminal justice whereby criminals are held responsible.

Whereas amnesties may prove key to recovering criminal assets in specific instances, they may nevertheless be disastrous where improperly managed and unregulated as they lack requisite deterrent effect on crime. Worse still, even where they are regulated, amnesties may still pose a challenge to the administration of criminal justice thereby hindering the purposes for which asset recovery is undertaken. This has, as a result, made amnesty being regarded as constituting an endorsement of past offences, denial of justice and, above all, a mechanism that enhances a culture of impunity.[129]

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[128] Art. 26 of the United Nations Convention against Transnational Organized Crime, 2000; art. 37 of the United Nations Convention against Corruption, 2003.
[129] McEnvoy and Mallinder, *Amnesties in Transition,* above note 47 at p. 439.

Despite all this, the manner in which amnesties are invoked in Tanzania appears to be inconsistent with international law on asset recovery. Taking the 2008 amnesty, for instance, its application was politically motivated as no legal framework had been put in place to regulate its provision. For that reason it was merely invoked to facilitate the recovery of stolen assets (the principal assets) leaving aside any benefits and instrumentalities of crime. This is a misnomer as criminal deterrence is attained when benefits and instrumentalities of crime are forfeited together with the principal asset stolen. Further, this informal nature of amnesties makes their use less deterrent on crime as they are not used to facilitate investigation and prosecution as contemplated by international law. It would follow therefore that no ancillary penal sanctions can be imposed on amnesty beneficiaries (criminal suspects) as no formal judicial process is invoked.

Indeed, the challenges relating to criminal deterrence in amnesty provisions were also evident in the 2019 amnesty. Yet, unlike in 2008, some innovations had been made this time around to ensure that the risks associated with informal amnesties are minimized. This saw the amnesty being merged a with plea-bargaining process whereby criminal suspects eligible for amnesty were required to go through a plea-bargaining process in which they pleaded guilty and got convicted prior to returning the tainted assets. This novel approach was invented in 2019 following the introduction of plea-bargaining law in Tanzania's criminal justice system.[130] This hybrid approach ensures that criminal suspects admit their wrong doing and get convicted accordingly prior to the return of criminal assets.

[130] Ss. 194A-194H of the Criminal Procedure Act, [Cap. 20 R.E.2002] now [Cap.20 R.E.2019] were introduced vide the Written Laws (Miscellaneous Amendments) (No.4) Act, 2019.

Looking at this model, one may argue that this hybrid approach enhances criminal deterrent as return of criminal assets is at least preceded by a criminal conviction and potential criminal penalty. By virtue of this approach, adverse effects and risks associated with informal amnesties are minimized as judicial censure is ensured. Yet, it is worth-remembering that requisite skills are required to ensure that this process is properly administered for criminal deterrence to be attained. Indeed, ill-bargained agreements effectively defeat the purposes for which asset recovery is undertaken as loss accessioned by criminals may be greater than the settlement amount and penalty combined.[131] Consequently, the plea bargaining process becomes suspicious as criminals go unscathed.

6.0 REGULARIZING THE USE OF AMNESTIES IN TANZANIA

As shown above, both the 2008 and 2019 amnesties were informal and unregulated. That is to say, they were invoked without necessary domestic legislation contrary to the international law rules governing amnesties.[132] This has, as a result, led to uncertainties regarding the true motive behind the informal use of amnesties in the administration of criminal justice. This informality has further enhanced leniency in dealing with criminal suspects

[131] Vodacom was accused of occasioning loss of to the government amounting to 11 billion Tanzania shillings. In plea-bargaining the company paid nearly 6 billion being the fine and settlement amount. For details see: Staff writer, Vodacom Tanzania settles charges against execs, *ITWeb*, 12th April, 2019 available at https://www.itweb.co.za/content/LPp6V7r4wB5qDKQz viewed on 18th March 2020; Money laundering cases: DPP faulted, *The Citizen* (Dar es Salaam), 14 April 2019 available at https://www.thecitizen.co.tz/News/1840340-5070936-c0vpxg/index.html (accessed 18th March 2020).

[132] Art. 26 of the United Nations Convention against Transnational Organized Crime, 2000; Art. 37 of the United Nations Convention against Corruption, 2003.

such that criminal deterrence is not attained. Indeed, this anomaly needs to be addressed if amnesties are to play any pivotal role in the administration of criminal justice generally and the recovery of tainted assets in particular.

Yet, it is worth remembering that amnesties do not serve any punishment objective.[133] Nevertheless, such mechanisms are increasingly employed in criminal law contexts to facilitate investigation and discovery of evidence necessary for prosecution of perpetrators of crime. In the process of granting amnesties, however, some perpetrators of crime are shielded from prosecution as part of amnesty agreements. It is for this reason that amnesties are to be legally regulated in order that they are not abused. This regulation is essential because the practice of using amnesties to settle criminal charges carries a greater risk of compromising the integrity of the criminal justice system. When such mechanisms are improperly employed or in some ways abused, people may lose confidence in the administration of criminal justice and consider such measures as supportive of illicit conducts.

To avert this danger, necessary safeguards have to be installed and a proper balance maintained such that amnesties are only used when it is necessary.[134] Further, relevant legislative regulations should be enacted to regulate and limit instances where amnesty may be applied.[135] International recommendations in this respect demand that states invoke amnesties only in three situations, namely; where the government is undertaking a new anti-corruption

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[133] United Nations Office on Drugs and Crime, *The Global Programme against Corruption: UN Anti-corruption Toolkit*, (2nd Edition), Vienna: United Nations Office on Drugs and Crime, 2004, at p. 489.
[134] Id, at p.490.
[135] United Nations Office on Drugs and Crime, *Anti-corruption Toolkit,* above note 73, at p.234.

strategy; where corruption is systemic such that it may paralyze the newly established anti-corruption agency due large number of cases from the past, and where many public servants are forced to commit corruption offences with a view to sustaining their livelihood.[136]

Understanding the spirit of the law in dealing with perpetrators of crime is crucial when determining whether to grant amnesty to such individuals. As it is now certain that the provision of amnesty in the administration of criminal justice system do not serve any criminal law purposes, such measures should only be used as a stepping stone to facilitate investigation and prosecution of offenders for ultimate asset recovery. Where employment of such measures is likely to stifle investigation and prosecution, insistence on such measures may contravene international law obligation placed upon states to prosecute criminals with a view to end impunity.

6.1 Legislative control of amnesties

First and foremost, amnesty practices and procedures ought to be legally controlled.[137] This places upon the parliament, where it enjoys supreme law making function as it is the case in Tanzania,[138] the duty to enact the applicable amnesty rules to govern the provision of amnesty. Such rules should provide for cases that may be disposed of by way of amnesties; cases that must go to trial; the consequences of granting amnesty upon individuals, and the implications where amnesty conditions are breached.

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[136] Id, at p.235.
[137] United Nations Office on Drugs and Crime, *The Global Programme against Corruption,* above note 133, at p. 489.
[138] Art. 64(1) of the Constitution of the United Republic of Tanzania, 1977.

Where amnesties are legally controlled, the power of the state in this respect becomes restrained.[139] In such cases, no other organ may invoke or grant amnesties except in accordance with the law promulgated by the legislature.[140] Once such regulation is attained, it enhances transparency and public scrutiny of the process such that instances of abuse of such power are minimized and controlled. Adherence to such procedures upholds rule of law as the executive invokes power that is legally established. Apart from placing restraints upon the state, regulated power enhances public trust and confidence in the processes leading to the grant of amnesties. As such, fears that such mechanism is used to shield some influential individuals from prosecution is thereby dispelled as popular support of the mechanism is retained.

Conversely, where amnesties are practiced '*administratively*' without necessary legal basis as it is the case in Tanzania, the state's ability to regulate its application is eroded. At that point, uncertainties and unpredictability engulf the process such that it becomes unclear who may benefit from amnesties and the terms of such grant. As this occurs, negative perceptions are harboured by the population as amnesties are thereby perceived as being counterproductive and discriminatory.

6.2 Establishing amnesty determination agency

Once amnesties are regulated, the task of determining whether a given case is to be disposed of by way of amnesty ought to be discharged by a specified agency.[141] This agency should have the

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139 United Nations Office on Drugs and Crime, *The Global Programme against Corruption,* above note 137, at p.489.

140 Ibid.

141 United Nations Office on Drugs and Crime, *Anti-corruption Toolkit*, above note 135, at p.234.

power to independently assess the facts of each case and make recommendation either for amnesty or normal trial processes. The establishment of this agency which oversees the administration of amnesty generally enhances efficiency in amnesty administration as the process becomes controlled not by the executive but by a legally designated authority. This is important for purposes of enhancing transparency and integrity in amnesty processes.

7. CONCLUSION

Fighting transnational organized crime and procuring the recovery of criminal assets is increasingly becoming a challenging task to law enforcement agencies as criminal syndicates employ advanced and highly sophisticated mechanisms to accomplish their illicit purposes. This renders the reliance on traditional approaches to criminal justice in which criminal suspects are prosecuted and convicted before the tainted assets are forfeited, to have a very limited efficiency. This has prompted the need for a concerted, well-coordinated and multifaceted approach to criminal justice and asset recovery in particular. This development has seen amnesties being employed as an alternative tool to facilitate investigation, prosecution and ultimate recovery of tainted assets.

However, despite the potential presented by amnesties in the recovery of tainted assets, these measures are to be employed not as an alternative to trial but as a complementary tool to facilitate investigation and prosecution of criminal suspects. For this reason, enacting a legislative framework regulating the administration of amnesties becomes necessary in order that these measures are not abused. This must ensure that the process of administering amnesties is rendered independent and free from political patronage.

Nonetheless, the experience in Tanzania shows that amnesties are being occasionally invoked to facilitate the recovery of tainted assets but they remain largely informal as no legislative measures have been taken to regularize their application in the administration of criminal justice. That means it is the executive (the President) that unilaterally determines when amnesties are invoked and individuals that are eligible for amnesty. This is inimical to the rule of law and has led to inconsistencies in the application of amnesties and distrust in the amnesty process. Consequently, the integrity of the criminal process is eroded and the purposes for which asset recovery is undertaken are defeated.