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## **Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy**

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*Despite the much vaunted triumph of human rights, amnesties continue to be a frequently used technique of post-conflict transitional justice. For many critics, they are synonymous with unaccountability and injustice. This article argues that despite the rhetoric, there is no universal duty to prosecute under international law and that issues of selectivity and proportionality present serious challenges to the retributive rationale for punishment in international justice. It contends that many of the assumptions concerning the deterrent effect in the field are also oversold and poorly theorized. It also suggests that appropriately designed restorative amnesties can be both lawful and effective as routes to truth recovery, reconciliation, and a range of other peacemaking goals. Rather than mere instruments of impunity, amnesties should instead be seen as important institutions in the governance of mercy, the reassertion of state sovereignty and, if properly constituted, the return of law to a previously lawless domain.*

### INTRODUCTION

On 21 January 1977 the first act of the newly elected United States President Jimmy Carter was to introduce an amnesty for Americans who had evaded the draft during the Vietnam War. In making this hugely controversial move, Carter's stated intention was to 'show mercy' rather than continue to punish those who were still liable to be arrested and prosecuted if they returned to

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the United States and in so doing to seek to ‘heal the nation’s wounds’ as the country attempted to move on from its bitter and divisive conflict.<sup>1</sup> As Carter explained, ‘I think it’s time to get the Vietnamese War over with. I don’t have any desire to punish anyone . . . Just come back home, the whole thing is over.’<sup>2</sup> While this article is not an analysis of the ways presidential pardons and the like are used in settled democracies,<sup>3</sup> it does explore the same nexus of amnesties, punishment, restoration, and mercy in other societies seeking to move on from violent conflict.

Amnesties are often framed as being necessary for ‘the greater good’ in such societies. In effect, victims of the most egregious crimes are effectively asked to forego their individual desire for *punishment* – often viewed as synonymous with retributive justice – in the interests of broader collective objectives.<sup>4</sup> The article draws on over a decade of fieldwork and from a major database of over 530 amnesty laws in 138 countries between 1945 and 2011 created by Mallinder.<sup>5</sup> In many of the countries studied, there is a history of political or ethnic violence, a disregard for ‘the rule of law’, and a broad spectrum of differing levels of normative and practical attachment to democratic values and practices. In such societies, law becomes an important practical and symbolic break with the past, and rights discourses, in particular, are seen as key to publicly demonstrating a new found commitment to legitimacy amongst the community of nations.<sup>6</sup> In such contexts, accountability often appears synonymous with retribution and amnesties a byword for impunity.

We begin the article by exploring in a little more detail the notion of transitional justice and the historical and contemporary meanings of amnesties in the field. We then examine the outworking of amnesties more closely through three of the key themes in the punishment and society

- 1 D. Schichor and D. Ranish, ‘President Carter’s Vietnam Amnesty; An Analysis of a Public Policy Decision’ (1980) 10 *Presidential Studies Q.* 251–71.
- 2 L. Baskir and W. Strauss, *Chance and Circumstance: The Draft, the War, and the Vietnam Generation* (1978) 227.
- 3 J. Crouch, *The Presidential Pardon Power* (2000); C. Strange (ed.), *Qualities of Mercy: Justice, Punishment and Discretion* (2001).
- 4 S. Cullinan, *Torture Survivors’ Perceptions of Reparation* (2001), at <<http://www.redress.org/downloads/reparation/TSPR.pdf>>; T. Madlingozi, ‘On Transitional Justice Entrepreneurs and the Production of Victims’ (2010) 2 *J. of Human Rights Practice* 208–28.
- 5 Since 1995 the authors have conducted fieldwork in a range of transitional or conflicted jurisdictions which have considered amnesty or amnesty-like measures. These have included Argentina, South Africa, Uruguay, Uganda, Colombia, Rwanda, Sierra Leone, Israel/Palestine, and Northern Ireland. This work was variously funded by the Joseph Rowntree Charitable Trust, Atlantic Philanthropies and, most recently, the AHRC (Grant No AHRC AH/E008984/1 Beyond Legalism: Amnesties, Transition and Conflict Transformation).
- 6 K. McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2007) 34 *J. of Law and Society* 411–40.

literature, namely, retribution, deterrence, and restoration. The article concludes by examining the utility of the notion of mercy as a prism through which to explore amnesties as a tool of peacemaking.

## THE TRANSITIONAL JUSTICE CONTEXT

The term ‘transitional justice’ can be traced to a series of debates in the late 1980s and 1990s on how to deal with past violence in societies moving out of conflict or dictatorship.<sup>7</sup> From the outset, in jurisdictions such as Chile, Argentina, South Africa, Guatemala, and others, the field was marked by the inherent tensions between principle and pragmatism. On the one hand, there was and is a moral and political impetus towards punishing those who have visited ‘extraordinary evil’ on their victims.<sup>8</sup> On the other, the legal, practical, and political difficulties inherent in following through on such impulses are manifest. In circumstances where there may be no strong democratic tradition; where the military often remains powerful and suspicious of democracy in general, and oversight or accountability in particular; where the judiciary and police may be corrupt, incompetent or disinterested; where rebels or militia may retain their capacity for violence; and where political leaders are often faced with an array of pressing socio-economic challenges – it is perhaps little wonder that the tensions between the demands of *justice* and the demands of peaceful *transition* are so prominent.

In the two decades since the term was first used, transitional justice has grown into a multidisciplinary field of scholarship, policy, and practice. There are important documents produced by the UN,<sup>9</sup> a vibrant national and international non-governmental organization (NGO) sector, specialist journals, university courses, a plethora of books, heated debates, and all the other scholarly accoutrements that suggest a vibrant and energetic field of inquiry.<sup>10</sup> As argued elsewhere, what has given the area a particular ‘swagger’ has been the expenditure of billions of pounds on the creation of ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the International Criminal Court (ICC), and hybrid courts (involving a com-

7 R. Teitel, *Transitional Justice* (2000); P. Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31 *Human Rights Q.* 321–67.

8 D.F. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 *Yale Law J.* 2537–615; M. Aukerman, ‘Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice’ (2002) 15 *Harvard Human Rights J.* 39–98.

9 UNSC, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004) S/2004/616.

10 C. Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’ (2009) 3 *International J. of Transitional Justice* 5–27.

ination of domestic and international law) in places like Sierra Leone and Cambodia – all of which are designed to try those deemed most culpable of international crimes.<sup>11</sup> The institutionalization of transitional justice in these new legal bodies, the development and codification of a new body of international criminal law (for example, via the Rome Statute which established the ICC), and the increased importance of regional human rights mechanisms such as the Inter-American Court have underlined the authority and political importance of the field. As noted above, the dominance of legalism tends to narrow perspectives regarding the most appropriate responses to human rights abuses towards predominantly retributive responses.<sup>12</sup> Certainly, the vast bulk of expenditure in the field is spent on retributive trials.<sup>13</sup> That said, transitional justice does encompass a range of non-punitive measures designed to deal with past violence including truth commissions, reintegration programmes for ex-combatants, reparations programmes for victims, a plurality of forms of commemoration and remembrance, and of course, amnesties.

## AMNESTIES PAST AND PRESENT

Amnesties may be understood as the process by which states exercise their sovereign right to mercy by extinguishing criminal or civil liability for past crimes. In eradicating liability, amnesty essentially assumes that a crime has been committed but seeks to negate the possibility of prosecution.<sup>14</sup>

11 McEvoy, *op. cit.*, n. 6.

12 For an overview see K. McEvoy and L. McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (2008); R. Shaw and L. Waldorf (eds.), *Localising Transitional Justice: Interventions and Priorities After Mass Violence* (2010).

13 In 2006 the United Nations estimated that the cost of ‘a serious truth commission’ is usually \$5–10 million. After significant lobbying and legal activism by victims’ campaigners in South Africa, the reparations paid to victims of apartheid totalled \$71,375,000. In comparison, the total cost of the International Criminal Tribunal for the Former Yugoslavia (ICTY) up until 2011 was \$1,887,385,922. The International Criminal Tribunal for Rwanda (ICTR) appears to have stopped reporting their running costs in their annual reports from 2000 when the figure for that year was \$86,154,900. The budget for 2010–11 rose to \$245,295,800. Since it was established in 2002, and having initiated a total of 12 cases, the International Criminal Court has to 2011 cost a total of €732,647,100. For further discussion, see L. Mallinder and K. McEvoy, ‘Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies’ (2011) 6 *Contemporary Social Science* 107–28.

14 W. Bourdon, ‘Amnesty’ in *Crimes of War A–Z Guide*, at <<http://www.crimesofwar.org/about/crimes-of-war/>>. However, although the majority of amnesty laws apply to past crimes, there are also many examples of ‘prospective’ amnesties issued during the conflict as a device to encourage combatants to abandon their cause, for example, in Uganda, Algeria, Colombia, and Afghanistan. See M. Freeman, ‘Amnesties and DDR Programs’ in *Disarming the Past: Transitional Justice and Ex-Combatants*, eds. A. Patel et al. (2009).

Historically, amnesty laws were often described as ‘acts of oblivion’ or ‘legal amnesia’. Indeed, the word ‘amnesty’, like ‘amnesia’, can be traced to the Greek word ‘amnēstia’, meaning ‘forgetfulness’.<sup>15</sup> It is this linkage, advanced by Ricœur who characterized amnesties as ‘commanded forgetting’ and a denial of justice which tends to dominate the literature.<sup>16</sup> Like the right to punish more generally, the capacity to grant an amnesty and, in Ricœur’s terms, to command forgetting and forgiveness has long been a key element of sovereign power. As Parker notes, ‘for as long as there have been written laws there has been an institutionalized power of mercy, pardon and amnesty’.<sup>17</sup> As is explored below, the capacity for mercy and benevolence from the sovereign through the granting of an amnesty was arguably at least as important an exercise of power as the ability to visit violence and retribution on the wicked or the vanquished.<sup>18</sup>

The historical granting of amnesties as a means to secure post-conflict peace and stability and its relationship to ‘stateness’ is also relevant. For example, the signing of the 1648 peace treaties at Westphalia, which were designed to end decades of sustained conflict in Europe,<sup>19</sup> included a provision that all ‘insults, violent acts, hostilities, damages, and costs’ should be ‘forgiven and forgotten in eternity’.<sup>20</sup> At a practical level, the power to utilize amnesties, whether individualized or granted to designated groups after a war, evolved into a key element of post-conflict statecraft and governance.<sup>21</sup> In more recent times, in line with the changes in modern warfare, amnesties have increasingly been introduced in response to internal conflicts rather than international wars. At one level, they may be seen as a compromise between former warring parties. At another, the granting of amnesties also represents an important expression of state power and sovereignty, part of what Scott has described as ‘seeing like a state’,<sup>22</sup> particularly when that authority has been challenged.

The exercise of state sovereignty in the guise of amnesties has been qualified by the advance of the international human rights movement and the elaboration of international human rights law. Since the end of the Second World War the rise of human rights has been linked closely with the ‘fight

15 Orentlicher, *op. cit.*, n. 8, at p. 2543.

16 P. Ricœur, *Memory, History, Forgetting* (2003) 353.

17 R. Parker, ‘Fighting the Siren’s Song: The Problem of Amnesty in Historical and Contemporary Perspective’ (2001) 42 *Acta Juridica Hungaria* 69–89, at 76.

18 A. O’Shea, *Amnesty for Crime in International Law and Practice* (2002).

19 J. Caporaso (ed.), *Continuity and Change in the Westphalian Order* (2000).

20 H. Zepp-LaRouche, ‘The Treaty of Westphalia: A Precedent for Peace in the Balkans’ (1999) 1, at <[http://www.schillerinstitute.org/strategic/hzl\\_t\\_of\\_w\\_0599.html](http://www.schillerinstitute.org/strategic/hzl_t_of_w_0599.html)>.

21 N. Weisman, ‘A History and Discussion of Amnesty’ (1972) 4 *Columbia Human Rights Law Rev.* 520–40.

22 J.C. Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition have Failed* (1999).

against impunity'. In the 1970s, crude 'blanket amnesties' designed by the outgoing military dictatorships in Latin America and elsewhere were routinely afforded to the leaders, murderers, and torturers of the *ancien régime* who enacted unconditional amnesties to shield themselves from prosecution. In recent years such amnesties have increasingly come under attack from international and hybrid courts, universal jurisdiction proceedings, domestic legal challenges, and civil society campaigns. Particularly within South America, these challenges have restricted the scope of previously broad amnesties so that today their capacity to shield the perpetrators of serious human rights violations is significantly diminished.<sup>23</sup> Despite this 'justice cascade',<sup>24</sup> the frequency of amnesties has been largely unaffected.<sup>25</sup> Between January 1979 and December 2010, an average of 12.25 amnesty laws were enacted each year around the world.<sup>26</sup>

It is the design of amnesties which has changed. In particular, as is discussed further below, it is now relatively common to see amnesties linked in some fashion to processes designed to encourage former combatants to offer truth in return for non-prosecution. The strong gravitational pull exerted by the South African Truth and Reconciliation Commission in the field of transitional justice has seen versions of this model (exchanging amnesty for truth) reproduced in the mandates of truth commissions in Liberia and Timor-Leste as well as (arguably) in commissions of inquiry such as the Bloody Sunday Inquiry in Northern Ireland where evidence given by witnesses could not be used in any subsequent criminal proceedings against themselves.<sup>27</sup> Where an amnesty is linked to truth-recovery mechanisms in such contexts, the traditional notion that the crime has been obviated is removed, and such crimes may be investigated, acknowledged, recorded, and discussed in public discourse.<sup>28</sup>

In sum, a number of points need to be borne in mind as we seek to explore how amnesties map onto the key themes discussed below. First, in historical terms at least, amnesties have been associated with processes of 'commanded forgetting' where not only were perpetrators 'not punished' but, also, victims and affected communities were in effect asked to obviate the

23 L. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 *Virginia J. of International Law* 915–84.

24 K. Sikkink, *The Justice Cascade: How Human Rights Politics are Changing World Politics* (2011).

25 M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (2009) 4.

26 L. Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, eds. L. Payne and F. Lessa (2012).

27 Lord Saville of Newgate, *Report of the Bloody Sunday Inquiry* (2010).

28 J. Sarkin, 'An Evaluation of the South African Amnesty Process' in *Truth and Reconciliation in South Africa: Did the TRC Deliver?* eds A. Chapman and H. van der Merwe (2007).

memory of what had occurred. Second, as with the power to punish itself, the power not to punish – to show ‘mercy’ – in the guise of an amnesty is intimately connected to the power of the sovereign and now the state and has long been an important tool of post-conflict governance and peacemaking. Finally, while the increased importance of human rights discourses and international criminal law has shaped the contours and contents of more recent amnesties – often linking them to processes of truth recovery – neither their usage nor their political significance has diminished.

By far the most common rationale for punishing perpetrators in this field is retribution, and so we begin with an exploration of its outworkings in transitional justice. We then examine the closely linked claims that are advanced regarding the secondary justification for punishment in this context, namely, deterrence. Finally, in order to explore some of their more potentially positive contributions, we examine amnesties from a restorative perspective.

## AMNESTIES, RETRIBUTION, AND THE LAW

The declared rationale (or in Hart’s terms, the ‘general justifying aim’)<sup>29</sup> for the creation of international penal processes tends to fluctuate in emphasis between retribution and deterrence.<sup>30</sup> In stressing the importance of retribution, for example, the ICTY has held that such a focus should not be understood as fulfilling a desire for revenge but rather as expressing the outrage of the international community.<sup>31</sup> The issue of deterrence is discussed below but as scholars of international criminal justice and transitional justice have detailed, retribution is in some ways the most obvious ‘fit’ for the often outrageous crimes to which transitional justice must respond.<sup>32</sup> As Beigbeder sums up, retribution is for many the ‘primary object’ of international justice: its key role is to fight against the impunity hitherto enjoyed by those leaders most responsible for grave violations of human rights.<sup>33</sup>

The notion of retribution as meaning that criminals should be punished because they *deserve* it for what they have done is usually traced to Immanuel Kant.<sup>34</sup> For retributivists, the key mechanism for the delivery of

29 H.L.A. Hart, *Punishment and Responsibility* (1968).

30 R. Henman, ‘Conceptualizing Access to Justice and Victims’ Rights in International Sentencing’ (2004) 13 *Social and Legal Studies* 27–56.

31 *Alexsovski* (IT-95-14/1-A) Appeals Chamber, 24 March 2000, para. 185.

32 R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (2002); M. Drumbl, *Atrocity, Punishment and International Law* (2007).

33 Y. Beigbeder, *International Justice against Impunity: Progress and New Challenges* (2005) 226.

34 See, for example, I. Kant, *Metaphysical Elements of Justice: Part One of the Metaphysics of Morals* (1999, 2nd edn.) tr. J. Ladd.

such legitimate punishment is the law.<sup>35</sup> Crime is a breach of the law and the response to that breach, punishment, must be *legal*. It must be authorized, delivered, and regulated according to the law. While acknowledging the centrality of law does not offer easy solutions to perennial difficulties such as how to deal with unjust laws, contradictory laws or indeed behaviour that is manifestly wrong but not criminalized in a particular society, it is a useful axiom for this article. If we accept that punishment must be done according to the law within the retributive framework, we must therefore examine the legality of amnesties.

The legality of amnesties is regulated by both domestic and international law. At the domestic level, all legal systems provide for leniency within criminal justice processes, and this often regulates who can enact amnesties, what crimes they can cover, and whom they benefit. Depending on its scope, an amnesty can be lawful under domestic rules, but still potentially conflict with international law.

Today, many policymakers, scholars, and human rights activists claim that international law does not permit amnesty laws for the most serious crimes and instead imposes a duty on states to prosecute.<sup>36</sup> However, no international convention has explicitly prohibited amnesty laws.<sup>37</sup> Indeed, on every occasion where an explicit prohibition or discouragement of amnesties has been mooted in the context of a multilateral treaty negotiation, states have demonstrated ‘*a resolute unwillingness to agree to even the mildest discouragement*’ (emphasis added).<sup>38</sup> Without such an explicit prohibition, discerning whether amnesties violate international law requires reading a prohibition into distinct legal regimes: international humanitarian law (IHL), international human rights law, and international criminal law.<sup>39</sup> Furthermore, even for international crimes – namely, genocide, war crimes, and crimes against humanity – there are divergences regarding the existence and scope of a duty to prosecute.

For crimes that are proscribed by international conventions, namely, genocide<sup>40</sup> and ‘grave breaches’ of the Geneva Conventions and Additional

35 L. Zaibert, *Punishment and Retribution* (2006).

36 See, for example, OHCHR, *Rule of Law Tool: Amnesties* (2009).

37 R.C. Slye, ‘The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?’ (2002) 43 *Virginia J. of International Law* 173–248.

38 Freeman, *op. cit.*, n. 25, at p. 33.

39 L. Mallinder, ‘Peacebuilding, the Rule of Law and the Duty to Prosecute: What Role Remains for Amnesties?’ in *Building Peace in Post-Conflict States* ed. F. Medjoub (2012).

40 Article I of the Genocide Convention confirms that genocide ‘is a crime under international law which [the Contracting Parties] undertake to prevent and punish’. Article IV provides ‘Persons committing genocide or any other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals’.

Protocol I to these conventions relating to international armed conflicts,<sup>41</sup> the duty to prosecute has been described as ‘absolute’ and mandatory.<sup>42</sup> However, these conventions may not be applicable in many situations of mass atrocity due to the limitations in their scope. For example, the Genocide Convention restricts the definition of genocide to actions taken with an ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group’.<sup>43</sup> Similarly, the duty to prosecute under the Geneva Conventions and Additional Protocol I applies only to ‘grave breaches’ committed during *international* armed conflicts. However, since the end of the Second World War, international wars have been rare, and today the majority of contemporary wars are *internal* armed conflicts, for which no explicit duty to prosecute is contained in IHL treaties. In addition, even where treaties contain an explicit duty to prosecute, current international practice, as reflected in the statutes of the international tribunals, focuses on prosecuting those who are deemed ‘most responsible’ for instigating and ordering atrocities. These conventions are not widely viewed as imposing an unrealistic duty on states to prosecute *all* perpetrators of these crimes, and instead, as explored below, there is scope for selectivity.

The treaty law governing war crimes committed in internal conflicts, namely, Common Article 3 to the Geneva Conventions and Additional Protocol II, creates minimum standards of protection for civilians but contains no duty to prosecute. Indeed, Article 6(5) of Additional Protocol II encourages States Parties to enact ‘the broadest possible amnesty’ at the end of hostilities.<sup>44</sup> The International Committee of the Red Cross (ICRC) has reinterpreted this provision to cover only ‘combat immunity’, with the result that combatants who commit acts equivalent to grave breaches would be prohibited from receiving amnesty. In its 2005 study of *Customary International Humanitarian Law*, the ICRC argued that its interpretation of Article 6(5) has become part of customary law.<sup>45</sup> However, the rather limited sample of state practice on amnesties on which this conclusion was based is by no means definitive.<sup>46</sup>

41 Each of the four Geneva Conventions requires States Parties to respond to ‘grave breaches’ by searching for, prosecuting and punishing perpetrators of grave breaches, unless they extradite them for purposes of trial by another State Party. Additional Protocol I extends the same obligations to punish to a wider range of ‘grave breaches’.

42 See, for example, M.P. Scharf, ‘The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes’ (1996) 59 *Law and Contemporary Problems* 41–61.

43 Genocide Convention 1948, Article 2.

44 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977, Article 6(5).

45 J. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, Vol. 1: Rules* (2005) Rule 159.

46 Volume Two of this study looks at ‘Practice’ and discusses six treaties (Additional Protocol II, plus five peace treaties), which provide for amnesty; and 17 amnesty

For war crimes committed in internal conflicts, as well as crimes against humanity, the absence of any international conventions prohibiting these crimes means that the existence of a duty to prosecute must be determined from customary international law. Although these crimes are sometimes prosecuted before national and international courts, these judgments are only subsidiary sources of international law. Instead, Article 38 of the International Court of Justice Statute requires that determinations of whether such a duty exists under customary international law must be based on state practice and *opinio juris*. This can include considering the existence or absence of amnesty laws; examining state practice in mediating peace agreements that include or exclude amnesty provisions, or exploring whether states support amnesty processes either financially and diplomatically. Of course, as noted above, state practice is also evidenced by the fact that states have avoided the opportunity to include provisions prohibiting amnesty in international conventions. As noted above, the extensive data gathered on amnesty law enactment in the Amnesty Law Database by Mallinder, and comparative research conducted by other scholars, contradicts the findings of the ICRC study, and instead suggests that states continue to enact amnesty laws even for the most serious crimes.<sup>47</sup> Furthermore, some states continue to support peace negotiations in which amnesties are agreed,<sup>48</sup> and even provide financial, logistical or personnel support to the implementation of amnesty processes, such as the Ugandan amnesty which benefits Lord's Resistance Army (LRA) members.<sup>49</sup> These trends in state practice have encouraged several commentators to question the prohibition of amnesties for crimes against humanity and war crimes in internal conflicts under customary international law.<sup>50</sup> As a result, in relation to international crimes regulated by customary international law, it appears that the best that can be argued at present is that the duty to prosecute is *permissive*, rather than mandatory, which leaves more discretion for states to explore alternative approaches to truth and accountability.

For serious crimes for which international humanitarian law or international criminal law may not be applicable, such as extrajudicial executions, sexual violence, slavery, and torture, scholars and practitioners have

laws from 11 states. In addition, it looks to other sources of practice including national legal provisions governing the grant of amnesty, military manuals, national and international case law, and UN resolutions. However, in each case, the number of sources employed is comparatively small.

47 Mallinder, *op. cit.*, n. 26.

48 'Lay down arms, surrender – European Parliament tells LTTE' *Colombo Times*, 6 February 2009; 'U.N. Security Council Asks LTTE To Surrender' *RTT News*, 22 April 2009.

49 'World Bank offers over sh3 billion to resettle former ADF, LRA Rebels' *New Vision*, 19 August 2008.

50 R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005); C. Trumbull, 'Giving Amnesties a Second Chance' (2007) 25 *Berkeley J. of International Law* 283–345; Freeman, *op. cit.*, n. 25.

based their arguments on the existence of a duty to prosecute on international human rights law. However, this duty is not explicitly mentioned in any human rights treaty. In addition, where amnesties for serious violations have been challenged before the regional human rights courts, only the Inter-American Court has found that amnesties for serious crimes violate a state's duty to prosecute. In contrast, the European Court of Human Rights has declined to proclaim an outright duty to punish. Instead, it has found that states are under an obligation to *investigate*, but not necessarily *prosecute*.<sup>51</sup> With regards to amnesties, it indicates that where amnesty laws prevent investigations into violations of the right to life, they would violate Article 2 of the European Convention on Human Rights. Amnesties that coexist with or encourage truth recovery may remain possible under this approach. The contradictory approach of these institutions casts doubt on the extent to which a universal prohibition of amnesty laws has become part of international human rights law.

In short, we would argue that there is a gap between some of the more grandiose rhetoric concerning the duty to prosecute serious violations and the reality of state practice with regard to amnesties. The tendency to overstate the clarity of international law as an element of social or political claims making is perfectly understandable as part of broader efforts to combat impunity. However, both international and domestic law accept a role for prosecution *and* amnesties in transitional justice settings.

Other significant challenges for advocates of an exclusively retributive approach in this field relate to *selectivity* and *proportionality*. Domestic and international prosecutions following mass violence are by definition selective.<sup>52</sup> This selectivity can be manifest in the situations that prompt the creation of ad hoc tribunals or hybrid courts, or the launching of investigations by the ICC,<sup>53</sup> which can be influenced by a 'random confluence of political concerns'.<sup>54</sup> This selectivity in awarding such tribunals jurisdiction can also influence the scope of their investigations. Furthermore, in these sites, resources are usually geared towards gathering evidence against so-called 'big fish' and the most winnable cases, not necessarily the ones which are most deserving.<sup>55</sup> This illustrates that, as will be discussed below in relation to certainty, punishment of all perpetrators is often legally, politically, and practically impossible. In trying and sentencing a few 'officially guilty' perpetrators who clearly *deserve* to be punished because of

51 For example, *Aydin v. Turkey* (57/1996/676/866) 25 September 1997.

52 Cryer, op. cit., n. 50.

53 A. Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21 *Ethics and International Affairs* 179–98.

54 D. Amann, 'Group Mentality, Expressivism, and Genocide' (2002) 2 *International Crim. Law Rev.* 93–143, at 116.

55 Drumbl, op. cit., n. 32.

their crimes, retributive justice also produces many more ‘false innocents’ who arguably deserve to be punished as well.<sup>56</sup>

With regard to proportionality, precisely because of the nature of the crimes involved, this too represents a test for the retributive rationale for punishment in such contexts. Hannah Arendt famously observed that the scale and the horror of the crimes of the Nazis was such that they ‘explode the limits of law . . . For these crimes, no punishment is severe enough.’<sup>57</sup> As Mark Drumbl has argued, a truly proportionate response to such crimes might involve torture or group elimination wherein survivors would become as depraved as their tormenters.<sup>58</sup> If, following Arendt, we accept that the search for proportionality in such circumstances is ‘*inadequate and absurd*’ (emphasis added),<sup>59</sup> then surely this too weakens the case for an exclusive focus on retributive punishment in transitional contexts and, by extension, creates the space for exploring in a fairly cold-eyed and pragmatic fashion the restorative potential of amnesties (as detailed below).

Before moving on to discuss the interrelated topic of deterrence, it might be useful at this juncture to deal with *expressive* functions of punishment.<sup>60</sup> For contemporary retributivists in particular, the expression of societal disapproval of criminal behaviour is an intrinsic element of the punishment process.<sup>61</sup> This expressive function of punishment, demarcating the boundaries of acceptable and unacceptable behaviour as well as underlining the moral authority of law,<sup>62</sup> is intimately bound up with what Hay<sup>63</sup> termed the ‘majesty’ of justice or what Douglas calls the ‘spectacle of legality’.<sup>64</sup> Of course, the expressivist messages of international trials may become distorted or blocked by entrenched cultures of violence, extreme nationalism or narratives of victimhood. For example, there is quite a lot of evidence to suggest that with regard to some of those who were prosecuted before the ICTY, the status of some war criminals as ‘heroes’ to their followers was amplified by such trials.<sup>65</sup> That said, the issue of public censure remains one which much be engaged with in discussing the question of amnesties.

56 H. Steinhert, ‘Fin De Siècle Criminology’ (1997) 1 *Theoretical Criminology* 111–29.

57 H. Arendt, *The Origins of Totalitarianism* (1973) 54.

58 Drumbl, op. cit., n. 32, p. 157.

59 Arendt, op. cit., n. 57, p. 439.

60 R. Sloane, ‘The Expressive Capacity of International Punishment’ (2007) 43 *Stanford J. of International Law* 39–94.

61 A. von Hirsch, *Censure and Sanction* (1993).

62 D. Garland, *Punishment and Modern Society* (1990), especially chs. 2 and 3.

63 D. Hay, ‘Property, Authority and the Criminal Law’ in *Albion’s Fatal Tree*, eds. D. Hay et al. (1975).

64 L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001).

65 M. Klarin, ‘The Impact of the ICTY on Public Opinion in the Former Yugoslavia’ (2009) 7 *J. of International Crim. Justice* 89–96.

However, carefully designed truth commissions with amnesty available to encourage perpetrators to tell the truth and engage in efforts to repair the damage done may have an even greater expressive potential. To provide a concrete example, if the ICC's indictment against the Lord's Resistance Army leader, Joseph Kony, were ever to be brought to court, it is certainly arguable that the expressive power of his trial might well be 'muffled' by the court proceedings possibly being conducted thousands of miles from the communities he terrorized in the comparatively plush surroundings of The Hague.<sup>66</sup> If Kony adopted the position of many other mass murderers by denying or justifying his crimes, then the message might be all the more diluted. Alternatively, would a properly constituted truth commission in Uganda at which offenders admit their crimes provide a more powerful spectacle as well as a more effective and impactful mechanism to deal with the past violence of that region? Such a scenario is at the very least debatable.

To recap, while the retributive rationale remains the most commonly advanced in the field of transitional justice, it fails to retain its explanatory or justificatory power when subjected to even the most basic analysis. The obligation to prosecute under international law is less clear than is often argued and amnesties can be, if properly designed and implemented, perfectly lawful. Indeed, as we suggest further below, where prosecutions are by definition selective and where punishments can rarely be truly proportionate, a *lawful* amnesty which requires the performance of certain obligations such as occurs in a properly constituted truth commission may in fact be preferable to *de facto* impunity where the vast bulk of perpetrators are untouched by any legal process. Finally, while the expressive functions of punishment must be taken seriously, we would argue that carefully crafted restorative institutions can achieve the same goal.

## AMNESTIES, DETERRENCE, AND THE RATIONAL ACTOR

Since crime and punishment have become serious areas of study, deterrence has been advocated as a key justification for inflicting punishment. As Jeremy Bentham summed up:

When we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted upon the individual becomes a source of security for all.<sup>67</sup>

66 L. Keller, 'Achieving Peace With Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms' (2008) 23 *Connecticut J. of International Law* 209–78, at 245.

67 J. Bentham, *The Rationale of Punishment* (1830) 20.

Leaving crimes ‘unpunished’, as arguably is the case with amnesties, is an anathema from such a deterrence perspective. Contemporary discussions on deterrence tend to coalesce around two main themes. *Specific deterrence* involves punishing offenders so that they think again before re-offending, while *general deterrence* involves sending a message to others who might be tempted towards crime in the future. For punishment to achieve both specific and general deterrence, theorists have suggested that two characteristics must be present. First, it is more important that punishment be viewed by offenders to be *certain*, rather than severe, if it is to overcome the hope of impunity in the offenders.<sup>68</sup> Secondly, offenders must behave as rational actors and incorporate the risk of punishment into their decision-making process in order to decide whether the potential cost of punishment outweighs the benefits of engaging in criminality.<sup>69</sup> However, as this section will explore, the transplanted theory of deterrence from individual crimes in ordinary criminal justice to situations of mass violence faces several challenges.

In the field of international criminal justice, as noted above, deterrence is the other principal rationale deployed in support of prosecutions<sup>70</sup> and, either explicitly or implicitly, in opposition to amnesties. This objective of international tribunals has been recognized to varying degrees in the case law of the international tribunals. For example, the ICTR suggested the purpose of punishing those guilty of international crimes, ‘over and above’ the goal of retribution, is ‘deterrence, namely, to dissuade for ever others who may be tempted in the future to perpetrate such atrocities’.<sup>71</sup> To support these arguments, previous examples of a failure to punish and the consequent lack of deterrence to future generations are routinely made. For example, the former ICTY judge and prominent international law scholar Antonio Cassese argued that ‘the impunity of the leaders and organisers of the Armenian genocide ... gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later.’<sup>72</sup>

In making assertions on the deterrent potential of prosecutions to address mass atrocity, policymakers and scholars have often been highly ambitious. For example, the term specific (or ‘immediate’) deterrence is often used in transitional contexts to denote a belief that lawful punishment can prevent further violations and help to resolve conflict peacefully, even ‘in the

68 C. Beccaria, *On Crimes and Punishment* (1963) 58.

69 F. Zimring and G. Hawkin, *Deterrence: The Legal Threat in Crime Control* (1973).

70 For example, the ICTY has recognized achieving general and specific deterrence as one of the purposes that it can take into account when imposing sentences: see, for example, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement, para. 678 (ICTY Ap.Ch. 29 July 2004).

71 *Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (Judgement and Sentence), ICTR-96-3-T, 6 December 1999, para. 456.

72 A. Cassese, ‘Reflections on International Criminal Justice’ (1998) 61 *Modern Law Rev.* 1–10, at 2.

absence of effective peace negotiations, economic sanctions, or the use of military force'.<sup>73</sup> Similarly, general deterrence has been adapted within transitional justice literature to denote longer-term objectives within specific states such as national reconciliation, democracy, and the re-establishment of the rule of law.<sup>74</sup> Indeed, deterrence has been used even more broadly to convey ideas of deterrence that are 'neither confined to a particular individual or territory nor time-bound'<sup>75</sup> but, instead, seek to promote 'general deterrence vis-à-vis the world community'.<sup>76</sup>

Where human rights advocates make assertions about trials' deterrent capabilities, they rarely appear to engage with criminological literature on deterrence. Bill Schabas has suggested that many international lawyers' pronouncements on the theoretical rationales for punishment are 'marked by amateurishness . . . driven more by intuition than anything else'.<sup>77</sup> Certainly, in reviewing some of the relevant judgments and academic materials, there is a tendency to overstate the certainty and impact of the deterrent effect. While claims with regard to the intellectual viability of deterrence continue to vary within criminology, generalized claims such as those made by international lawyers are now a rarity amongst serious criminologists. As overviews of the vast quantitative, qualitative, and experimental literature on deterrence point out,<sup>78</sup> determining which individuals may be deterred from which crimes and in what circumstances has remained a significant challenge for policymakers and scholars despite decades of research on the topic. In addition to the uncertainty on deterrence in general, there are specific challenges in transitional contexts which should make any assertions even more tentative.

The first specific challenge is that in relation to international crimes, 'notwithstanding the fact that the prospect of getting caught is greater than it once was, it still remains tiny'.<sup>79</sup> This reality has been acknowledged by the UN Secretary General, who, in an influential report, stated that '[i]n the end, in post-conflict countries, the vast majority of perpetrators of serious violations . . . will never be tried, whether internationally or domestically.'<sup>80</sup> Even in situations where high-profile hybrid courts were established, only a

73 L. Vinjamuri, 'Democracy, Deterrence and the Pursuit of International Justice' (2010) 24 *Ethics and International Affairs* 191–211.

74 P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *Am. J. of International Law* 7–31.

75 Vinjamuri, op. cit., n. 73, p. 194.

76 K. Rodman, 'Darfur and the Limits of Legal Deterrence' (2008) 30 *Human Rights Q.* 529–60.

77 W. Schabas, 'Criminology, Accountability and International Justice' in *What is Criminology?* eds. M. Bosworth and C. Hoyle (2011) 349.

78 M. Tonry, 'Learning from the Limitations of Deterrence' (2008) 37 *Crime and Justice* 279–312; B. Jacobs, 'Deterrence and Deterrability' (2010) 48 *Criminology* 417–41.

79 Drumbl, op. cit., n. 32, p. 170.

80 UNSC, op. cit., n. 9, para. 46.

handful of suspects were indicted – five in Cambodia,<sup>81</sup> 13 in Sierra Leone,<sup>82</sup> 88 in Timor-Leste<sup>83</sup> – thus leaving thousands of other perpetrators benefiting from forms of amnesty. These examples illustrate that the ‘certainty of punishment’ that Beccaria viewed as essential for effective deterrence to operate is in reality lacking for serious human rights violations.<sup>84</sup> This clearly undermines arguments that rational offenders will be deterred from committing international crimes by the threat of punishment.

The second specific challenge to the application of deterrence theory to mass atrocity concerns the assumption of perpetrator *rationality*. For Akhavan, the key aim of international justice is to make ‘a credible threat of punishment’ part of the rational calculation wherein the political censure and international stigma associated with even being indicted (never mind prosecuted) is factored in before someone deliberately unleashes murderous forces.<sup>85</sup> However, the assumption that the threat of international punishment would affect the calculations of would-be directors of slaughter may be misplaced, as often such individuals already face threats which are more credible and more severe. While empirical studies are rare, one instructive study found that of 485 African leaders who came to power since 1945, over half were either killed, imprisoned or exiled.<sup>86</sup> Another study found that 66 per cent of African leaders who led coups or attempted coups were killed, imprisoned or exiled.<sup>87</sup> In other words, people involved in leading the types of groups which often carry out the worst types of atrocities are already facing intrinsic risks in their political and military activities, and may be less likely to be deterred by the rigours of international justice which may appear less immediate and less onerous than is sometimes assumed by international lawyers.

The relevance of deterrence theory to the ‘foot soldiers’ who do the dirty work of mass violence is, if anything, even more tenuous. Some of them are coercively conscripted or recruited as child soldiers and thus their scope for rational calculation is all the more reduced. For those who join voluntarily, the risk of being killed or imprisoned by their opponents is much greater than that of being indicted by a local or international court. In the case of Northern Ireland, for example, all new recruits to the IRA were told that the

81 Loi relative à la mise hors-la-loi de la clique du Kampuchea démocratique, Article 1 (1994) (Cambodia).

82 UN Department of Peacekeeping Operations, *Disarmament, Demobilisation and Reintegration of Ex-Combatants in a Peacekeeping Environment: Principles and Guidelines* (1999) 109, Annex B2.

83 Drumbl, *op. cit.*, n. 32, p. 170.

84 Beccaria, *op. cit.*, n. 68, p. 58.

85 Akhavan, *op. cit.* n. 74, p. 12.

86 J. Wiseman, *Political Leaders in Black Africa: A Biographical African Dictionary of the Major Politicians since Independence* (1993).

87 J. Ku and J. Nzelibe, ‘Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?’ (2006) 84 *Washington Law Rev.* 777–833.

most likely consequences of joining up were either prison or death.<sup>88</sup> Where individuals take such risks, the effect of the threat of prosecution is likely to be questionable. To argue that rational calculation based on the remote prospect of being indicted can play a significant part in these processes is at best naïve. As Drumbl puts it, do ‘genocidal fanatics, industrialized into well-oiled machineries of death, make cost-benefit analysis prior to beginning work?’<sup>89</sup> Once violence has been initiated, the mores, values, and targeting strategies of armed groups or militias, their command structure and levels of discipline, the perceived ‘justness’ of the political or military cause, and a range of other collective and environmental variables will often determine the nature of the ‘crimes committed’.<sup>90</sup>

In sum, it is hard to argue against making dictators, warlords, and the like think twice about their murderous intentions for fear that they may be dragged to The Hague or a similar body at some future point. It is a different matter to claim definitively that such individuals will be so deterred. The decision of the Syrian leadership in 2012 to continue carrying out crimes against humanity, notwithstanding the recent ICC indictments against Libyan leaders involved in similar violent suppression of demonstrations, and the clear threats from the UN that Syrian leaders would be next in line for such indictments,<sup>91</sup> speaks forcefully of the limited deterrent effect of international justice.

In our view, it is therefore unconvincing to claim that the deterrent effect of international punishment is so politically important that it rules out the potential of other arguably more creative and ambitious measures such as properly constituted amnesties. Although amnesties are today commonly condemned for undermining deterrence and contributing to cultures of impunity, for centuries, proponents of amnesty laws argued that they were necessary to ease social unrest, prevent further human rights violations, and encourage belligerent parties to sign peace agreements. This perspective is apparent in the title of the UN’s 1985 study of amnesty laws: ‘Study on Amnesty Laws and Their Role in the Safeguard and Protection of Human Rights’.<sup>92</sup> Although these views are greeted with some scepticism today, they continue to be invoked by some scholars and practitioners,<sup>93</sup> and have

88 R. English, *Armed Struggle: The History of the IRA* (2005).

89 Drumbl, *op. cit.*, n. 32, p. 171.

90 C. Nordstrom, *A Different Kind of War Story* (1997); C. Coady, *Morality and Political Violence* (2008); S. Kalyvas et al. (eds.), *Order, Conflict and Violence* (2008).

91 For example, the Office of the UN High Commissioner for Human Rights stated that ‘We believe, and we’ve said it and we’ll keep repeating it, that the case of Syria belongs in the international criminal court.’ See ‘Syria violence spreads to Aleppo as bomb blasts kill 28’ *Guardian*, 10 February 2012.

92 L. Joinet, ‘Study on Amnesty Laws and Their Role in the Safeguard and Protection of Human Rights’ (1985) UN Doc E/CN.4/Sub.2/1985/16.

93 Freeman, *op. cit.*, n. 25.

been supported by recent experiences in some conflicted and transitional states. For example, following the 2008 collapse of the Juba peace talks that aimed to find a peaceful settlement to the conflict between the Ugandan government and the rebel LRA, concerns have been expressed that the arrest warrants issued by the ICC for the LRA leadership prevented Joseph Kony from signing the comprehensive peace agreement.<sup>94</sup> Given the seclusion of the LRA leader, Joseph Kony, it is impossible to understand accurately his decision to refrain from signing the agreement. However, it is apparent from the LRA's sustained commission of crimes against humanity against civilians in the Democratic Republic of Congo that the arrest warrants have not deterred them from violence.<sup>95</sup>

Although demands for amnesty made by war criminals or repressive leaders in the midst of violence are clearly repugnant, where the threat of ongoing or renewed mass violations is genuine, Freeman has suggested that the international legal duty to *prevent* such horrific crimes, through measures such as amnesty laws, should be balanced against the duty to prosecute under international law.<sup>96</sup> Where amnesty laws can be used to encourage combatants to surrender and disarm, or engage in peace negotiations, they have the potential to make immediate contributions to deterring future violations within the specific state. Furthermore, as the following section will explore, where amnesties are conditioned on individual offenders engaging in restorative and truth recovery processes, they can contribute to the reintegration of former combatants into society as well as broader peacemaking goals.

## AMNESTIES, RESTORATION, REHABILITATION, AND TRUTH

As noted above, amnesty laws are often framed by those who oppose them as a more or less straightforward denial of justice.<sup>97</sup> However, increasingly within transitional states, the realities of amnesty design and implementation are that they can and do coexist with, or are components of, broader restorative justice processes.<sup>98</sup> As is outlined below, we believe that the locating of amnesties within the restorative justice framework (through which we also discuss offender rehabilitation and the role of truth) offers the possibility that rather than denying justice, amnesties can in fact be used to

94 K.A. Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) 50 *Virginia J. of International Law* 107–62, at 107.

95 UNHCR, 'LRA Attacks on the rise in Central Africa', 30 March 2012, at <<http://www.unhcr.org/4f7589ee9.html>>.

96 Freeman, *op. cit.*, n. 25.

97 Laplante, *op. cit.*, n. 23.

98 L. Mallinder, 'Amnesties in the Pursuit of Reconciliation, Peacebuilding and Restorative Justice' in *Restorative Justice, Reconciliation and Peacebuilding*, eds. D. Philpott and J.J. Llewellyn (2012).

facilitate and enhance compliance with the rule of law, strengthen justice norms as well as assist with broader processes of social and communal ‘dealing with the past’.

Before exploring the utility of restorative justice more specifically with regard to the question of amnesties, we would suggest a couple of cautionary notes should be borne in mind. First, in deploying restorative justice approaches to contexts of mass atrocity, it is important to acknowledge that restorative justice cannot aim to ‘restore’ relationships to some idealized prior existing state.<sup>99</sup> Loved ones who have suffered violent deaths cannot be returned and decimated communities cannot be magically rebuilt. In addition, previous communal relations may well have been discriminatory, patriarchal or even violent. Therefore, restoration in such contexts may mean something as relatively modest as creating conditions that make possible peaceful and lasting coexistence.

Second, as Chris Cunneen has argued, the contexts under discussion highlight the central role of the state in efforts to restore relations in such societies.<sup>100</sup> Often the state and its actors have been key abusers in the past and it is important to bear in mind that the state has international legal obligations and will inevitably bear a considerable responsibility in properly resourcing, regulating, and contributing to whatever restorative mechanisms are established.

Third, and closely related, restorative justice is sometimes accused of narrowing the focus too much onto individual perpetrators, victims, and communities. Not only must one bear in mind the role of the state and other powerful actors in past violence – what Mika and others have called the dangers of ‘astructural bias’<sup>101</sup> – but also that in deploying the necessary shorthand of victims and perpetrators, we remain cognisant that such identities are by definition simplified and may well change, coalesce or otherwise mutate in the messy realities of transitional societies.

The breadth of restorative justice theory and practice is discussed extensively elsewhere.<sup>102</sup> In this article, we are only drawing upon some key themes that are of direct relevance to the question of amnesties. Restorative justice is premised upon the belief that crime or anti-social behaviour is ‘a

99 J.J. Llewellyn, ‘Restorative Justice in Transitions and Beyond: The Justice Potential of Truth Telling Mechanisms for Post-Peace Accord Societies’ in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, ed. T.A. Borer (2006).

100 C. Cunneen, ‘Exploring the Relationship Between Reparations, the Gross Violation of Human Rights and Restorative Justice’ in *Handbook of Restorative Justice*, eds. D. Sullivan and L. Tift (2007) 355–68.

101 H. Mika, ‘Mediation Interventions and Restorative Justice: Responding to the Astructural Bias’ in *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation – International Research Perspectives*, eds. H. Messmer and H.U. Otto (1992).

102 For example, Sullivan and Tift, *op. cit.*, n. 100.

violation of people and relationships' rather than simply lawbreaking.<sup>103</sup> As a result, restorative approaches seek to identify the 'harms' caused by the offenders' actions to individual victims, their wider community, as well as the harm caused by the punishment and stigmatization to offenders themselves.<sup>104</sup> Though initially used predominantly to deal with less serious crimes,<sup>105</sup> restorative justice is now promoted by some of its most prominent advocates<sup>106</sup> to deal with the very worst crimes imaginable. Its often controversial and contested deployment to underpin, for example, the Truth and Reconciliation Commission in South Africa or post-genocidal *Gacaca* hearings in Rwanda, or indeed the restorative elements of some amnesty processes in different parts of the world, are proof positive of the increased political and practical importance of the framework.

In terms of its direct relevance to the topic of amnesties, a number of themes from the restorative justice literature are obvious. First, the fact that restorative justice has become increasingly prominent as a result of a widespread sense of exasperation at the failures of retributive punishment chimes with some of the discussions herein. Second, in terms of offenders, the focus within restorative justice theory and practice upon breaking cycles of offending and facilitating re-entry back into the community (discussed below) is obviously one of the key aims of any amnesty process. Third, with regard to trying as much as possible to repair the damage done to victims and society, as we will examine further below, the linkage of amnesties to processes such as truth recovery, reparations, social healing, and reconciliation is increasingly geared to achieving at least some of those objectives.

Many of the arguments outlined above regarding the limits of retribution in transitional justice would resonate with restorative justice advocates. However, one important caveat is worth noting at this point. Both Daly and Duff have argued that restorative justice can in fact entail some form of 'punishment'. Daly has contended that restorative justice outcomes are 'alternative punishments' and not 'alternatives to punishment'.<sup>107</sup> Her argument is that even well-intentioned 'rehabilitative' measures may well be viewed by those on the receiving end as 'unpleasant, a burden, or an imposition of some sort' and such methods should therefore be viewed as punishment, albeit as part of a broader restorative process. Duff takes a

103 H. Zehr, 'Doing Justice, Healing Trauma: The Role of Restorative Justice in Peacebuilding' (2008) 1 *South Asian J. of Peacebuilding* 2–16.

104 J. Braithwaite, *Restorative Justice and Responsive Regulation* (2002).

105 H.V. Miller, *Restorative Justice from Theory to Practice* (2008).

106 Braithwaite, op. cit., n. 104; J. Braithwaite, 'Between Proportionality and Impunity: Confrontation, Truth, Prevention' (2005) 43 *Criminology* 283–305; J. Braithwaite et al., *Anomie and Violence: Non-Truth and Reconciliation in Indonesian Peacebuilding* (2010).

107 K. Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in *Restorative Justice: From Philosophy to Practice*, eds. H. Strang and J. Braithwaite (2000) 36.

similar view, describing his approach as ‘restoration through retribution’.<sup>108</sup> By this, he too means that perpetrators can be compelled to partake in a mechanism that is at some level painful or burdensome, where the offender undertakes or undergoes a process of being confronted with his or her past wrongs, of being censured, and of making reparation. While such views are controversial in some restorative justice circles, for our purposes, we are quite comfortable with the notion of amnesties as an imposition upon perpetrators which may be painful or burdensome, which can entail forms of social censure for previous crimes, and which require some efforts at practical or symbolic repair for the damage that has been done. The key challenge is to ensure that this is done in ways that do not humiliate the offender and therefore render him or her liable to reoffend.

That challenge is famously referred to by John Braithwaite as ‘reintegrative shaming’ – finding mechanisms where offenders are subject to expressions of community disapproval which are in turn followed by ‘gestures of reintegration into the community of law-abiding citizens’.<sup>109</sup> The alternative – what Braithwaite terms disintegrative shaming – is a process that ‘creates a class of outcasts’.<sup>110</sup> In subsequent work, Braithwaite has explicitly held out the possibility of amnesties which are compatible with restorative justice so long as they contribute to ending a war, so long as all stakeholders are given a voice in the amnesty negotiations, and so long as those who will benefit are willing to ‘*show public remorse for their crimes and to commit to the service of the new nation and its people and repair some of the harm they have done*’ (emphasis added).<sup>111</sup>

Whether amnesties can fulfil Braithwaite’s criteria might be best illustrated by some concrete examples. Firstly, with regard to giving all stakeholders a voice in the amnesty negotiations, historically, amnesties such as those passed in Chile, El Salvador, France (in the wake of the Algerian conflict), and elsewhere tended to be crafted by and in the interests of the political or military elites with little if any heed given to the needs of victims.<sup>112</sup> However, in recent years, the feasibility of meaningful participation by victims and affected communities has become more apparent. In Uganda, for example, the mobilization which led to the Amnesty Act of 2000 actually came about in the wake of a lengthy campaign by religious, cultural, and political leaders from the region worst affected by the conflict between the Ugandan government

108 A. Duff, ‘Restoration and Retribution’ in *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*, eds. A. von Hirsch et al. (2003) 393.

109 J. Braithwaite, ‘Restorative Justice: Assessing Optimistic and Pessimistic Accounts’ (1999) 25 *Crime and Justice* 1–107, at 55.

110 *id.*

111 Braithwaite, *op. cit.*, n. 104, p. 203.

112 L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (2008).

and the LRA.<sup>113</sup> Once the legislation was introduced, the Amnesty Commission was required to co-ordinate a programme of public sensitization to the amnesty as well as to consider and promote appropriate reconciliation mechanisms in the conflict-affected areas.<sup>114</sup> In Timor-Leste, following complaints from local leaders that the transitional justice processes were being dominated by international actors and political elites, the National Council for Timorese Resistance (the UN's local governing partner) created a steering committee comprising government officials, non-governmental organizations, and international experts to consult on national reconciliation strategies including amnesty.<sup>115</sup> In Uruguay, an amnesty which was originally negotiated in the wake of the handover of power by the military in the 1980s has twice been upheld by national plebiscites, the most recent in the wake of a very lively civil society-led debate in 2009.<sup>116</sup> In Northern Ireland, local NGOs including some prominent victims' organizations have been at the forefront of promoting ongoing debate and dialogue on whether non-prosecutions should be on offer in return for an inclusive truth process.<sup>117</sup>

In addition, amnesty processes designed along restorative lines can also be specifically constructed to include engagement with victims and affected communities during the implementation process. In doing this, such restorative processes can create a forum for achieving the restorative justice goal of restoring relationships. In South Africa, for example, there was some scope for the presence and participation of victims in the Amnesty Committee hearings.<sup>118</sup> Victims' rights in these hearings included the right to be notified of the hearings, to provide evidence that was taken into consideration, to give formal testimony, to question amnesty applicants, either personally or through legal representatives, and to make impact statements, either orally or in writing.<sup>119</sup> Finally, in addition to the Amnesty Committee's formal hearings, in exceptional cases following a victim request, the hearings were accompanied by 'behind the scenes interpersonal dialogues' between victims and perpetrators, facilitated by TRC staff.<sup>120</sup> Overall, while

113 G.M. Khadiagala, *The Role of the Acholi Religious Leaders' Peace Initiative (ARLPI) in Peace Building in Northern Uganda* (2001).

114 Interview with James Nyeko, Acholi Religious Leaders Peace Initiative (Gulu, 7 May 2008); interview with Fr. Joseph Okumu (Gulu, 8 May 2008); and interview with Haji B. Ganyana-Miuro, Amnesty Commissioner (Kampala, 9 May 2008).

115 A. Senior, 'Traditional Justice as Transitional Justice: A Comparative Case Study of Rwanda and East Timor' (2008) XXIII *Praxis: Fletcher J. of Human Security* 67–88.

116 P. Galain Palermo, 'The Prosecution of International Crimes in Uruguay' (2010) 10 *International Crim. Law Rev.* 601–18.

117 K. McEvoy, *Making Peace With the Past: Options for Truth Recovery in Northern Ireland* (2006).

118 J. Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (2004).

119 A. du Bois-Pedain, *Transitional Amnesty in South Africa* (2007).

120 Chapman and van der Merwe, *op. cit.*, n. 28, p. 11.

it can be justifiably criticized for a range of failings including excessive legalism and a perceived pressure on victims to forgive,<sup>121</sup> the South African amnesty process did offer victims more extensive participation rights than had featured in any previous amnesty around the world.

Other examples of amnesties have highlighted the potential for victim and community participation at a localized level, in the towns and villages most affected by past violence. For example, in both Northern Uganda and Timor-Leste, traditional healing or reconciliation ceremonies have been used alongside or within amnesty processes. In Uganda, these localized ceremonies may include a cleansing ritual, *nyono tong gweno* – the stepping on the egg ceremony – or two justice-and-reconciliation processes and ceremonies, *mato oput* (drinking of the bitter root) and *gomo tong* (the bending of the spears).<sup>122</sup> These rituals variously require public confession from the perpetrator, participation by victims' families, perpetrators, and village elders, and some form of compensation – usually livestock or small amounts of money. Although the Ugandan Amnesty Act 2000 does not require participation in such ceremonies, some participants have argued that they were under orders from their local LRA commanders to participate, confess their crimes, and ask for forgiveness.<sup>123</sup> In Timor-Leste, individuals who wished to benefit from an amnesty had to take part in a Community Reconciliation Process (CRP) facilitated by the truth commission, during which community members could listen to the statements of victims and offenders, ask questions, and contribute to decisions on appropriate form of reparations, including community work.<sup>124</sup>

Of course, amnesty-related mechanisms that facilitate victim or community engagement are not a panacea for all ills. Processes which are designed primarily by elites as part of a political deal always run the risk of instrumentalizing victims or local communities,<sup>125</sup> whose meaningful participation can be seriously inhibited by knowledge or capacity gaps.<sup>126</sup> Other perennial problems of restorative justice remain, such as determining how genuine an apology or an act of remorse is, how to prevent perpetrators from promising too much, or how to prevent acts of revenge. If anything, these challenges are felt all the more acutely in post-conflict efforts to involve

121 L. Mallinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa' (2009).

122 C. Rose, 'Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations' (2008) 28 *Boston College Third World Law J.* 345–400.

123 OHCHR, *Making Peace our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (2007) 57, at <<http://www.unhcr.org/refworld/docid/46cc4a690.html>>.

124 E. Stanley, *Torture, Truth and Justice: The Case of Timor-Leste* (2009).

125 Madlingozi, *op. cit.*, n. 4.

126 T. Allen, 'The International Criminal Court and the Invention of Traditional Justice in Northern Uganda' (2007) 107 *Politique Africaine* 147–66.

victims and violence-affected communities.<sup>127</sup> That said, as McEvoy has argued previously,<sup>128</sup> a criminologically-informed view of transitional justice is alive to *seeing* challenges and to trying (at least) to meet them rather than simply defaulting to top-down formalism which would simply pass an amnesty act and make no effort to engage with either victims or communities.

The second criterion suggested by Braithwaite is: does it ‘contribute to ending a war’?<sup>129</sup> We have interpreted this to mean not just is the amnesty part of the process of ending violent conflict but also does it ‘work’ in terms of ‘identifying paths to prevention’? In exploring these ideas in the space available, we will focus on complex issues related to ‘rehabilitation’. A key element of the goal of restoring relationships is that offenders should be rehabilitated and reintegrated into society rather than being alienated and isolated through penal sanctions.<sup>130</sup> The complex and controversial history of how rehabilitation became a ‘dirty word’ in criminology, was rebranded, and at least partially re-emerged under different guises is beyond the purview of this article.<sup>131</sup> However, rehabilitation of offenders is a commonly accepted rationale for punishment,<sup>132</sup> believed to benefit not just individual offenders, but also society by ensuring that the offender will no longer commit crimes.<sup>133</sup> Although rehabilitation of torturers and war criminals may seem repugnant to large sectors of the population, particularly when it entails decisions to remove or reduce punishments, it nonetheless has become a feature of transitional contexts. For child soldiers, at least, the responsibility to promote rehabilitation has been accepted within international criminal law.<sup>134</sup> For adults, the rehabilitation of former combatants is normally approached through the framework of disarmament, demobilization, and reintegration (DDR) programmes that entail removing and/or destroying weapons, disbanding armed groups, and returning individuals to civilian life.<sup>135</sup>

127 Shaw and Waldorf, op. cit., n. 12.

128 McEvoy, op. cit., n. 6.

129 Braithwaite, op. cit., n. 104, p. 203.

130 S. Parmentier et al., ‘Dealing with the Legacy of Mass Violence: Changing Lenses to Restorative Justice’ in *Supranational Criminology: Towards a Criminology of International Crimes*, eds. A. Smeulers and R. Haveman (2008) 335–56, at 344.

131 T. Ward and S. Maruna, *Rehabilitation: Beyond the Risk Paradigm* (2007).

132 Mani, op. cit., n. 32, p. 32.

133 Aukerman, op. cit., n. 8.

134 For example, Article 7 of Statute of the Special Court of Sierra Leone states that if ‘any person who was . . . between 15 and 18 years of age’ when they committed their alleged crimes comes before the Court ‘he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society’.

135 Patel et al., op. cit., n. 14.

Amnesty laws can play an important role in reintegrating offenders by simply preventing the use of ‘isolating punishment mechanisms’.<sup>136</sup> However, they can also contribute to creating conditions in which offenders can fulfil their responsibilities to repair the harms they caused. At this basic level, this can entail requiring combatants to surrender their weapons and renounce violence within DDR programmes before they can benefit from the amnesty.<sup>137</sup> Although the sequencing of amnesties and DDR, the nature of the conditions attached, and the extent to which any possible ‘stick’ is present (such as liability to future prosecution for non-compliance)<sup>138</sup> all vary, the linkage of amnesties and DDR has been broadly approved by the UN, which encouraged ‘carefully crafted amnesties’ as part of broader efforts to assist in the return and reintegration of former fighters.<sup>139</sup>

In rehabilitation studies in general, the fact that rehabilitation appeared regularly to fail in its stated task of reducing recidivism rates was crucial to the erosion of its credibility as an underpinning philosophy of punishment. In the realm of transitional justice, there is the beginning of something akin to a ‘what works’ movement.<sup>140</sup> It is, however, in its infancy and is focused primarily on the contribution of transitional justice mechanisms to the achievement of broader social goals, such as democracy and peace. With regards to recidivism rates, we are unaware of any meta-analysis on reoffending rates for those who have been granted an amnesty. While there are sporadic local studies which are encouraging,<sup>141</sup> we do not believe that there is sufficient robust data to say that amnesties either ‘work’ or do not ‘work’ in simple recidivism terms.

As Braithwaite has noted, what is defined as ‘working’ in a post-conflict context where the overall aim may be something as grand as ‘the healing of a

136 Llewellyn, *op. cit.*, n. 99, p. 98.

137 Freeman, *op. cit.*, n. 25.

138 L. Waldorf, ‘Linking DDR and Transitional Justice’ in Patel et al., *op. cit.*, n. 14.

139 UNSC, *op. cit.*, n. 9. It is important to note that the Secretary General’s view of such amnesties was that they should exclude the most serious offences (para. 32).

140 See, for example, H. van der Merwe et al. (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (2009); T. Olsen et al., *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (2010).

141 In Northern Ireland, for example, although there are debates as to whether it qualified as an amnesty, approximately 450 politically-motivated prisoners belonging to organizations on ceasefire were released on licence within two years of the signing of the Good Friday Agreement. As of July 2011, 23 prisoners have had their licences suspended and were returned to prison, 10 for alleged involvement in politically-motivated offences and 13 for involvement in ‘ordinary’ crime. This recidivism rate, just over 5 per cent after 13 years, compares to one of 48 per cent for ordinary offenders within two years (see, further, P. Shirlow and K. McEvoy, *Beyond the Wire: Former Prisoners and Conflict Transformation in Northern Ireland* (2008). Again, however, it should be stressed that these were prisoners rather than combatants ‘still in the field’ who had benefited from the provisions of the Agreement.

nation' is rather more complex than analysing reoffending rates.<sup>142</sup> While the engagement of former combatants who have benefited from amnesty or amnesty-like provisions in further acts of political violence or even ordinary criminality would certainly undermine the credibility of any settlement, we would argue that this is actually quite a low bar to assess success. A strong critique of DDR and its associated linkage with the notion of 'rehabilitation', and one which resonates with some of the literature on desistance by Maruna and others, is the assumed *passivity* of the ex-combatant in such terminology and practice. In this context, reintegration, resettlement, rehabilitation, and the like are processes that are done *to* or *for* those who attend such programmes. In our fieldwork in Northern Ireland and beyond, we have frequently encountered strong resistance amongst ex-combatants towards such a worldview. Instead, as McEvoy (with Shirlow) has argued elsewhere with regard to Northern Ireland, success would also be better measured by the extent to which ex-combatants exercise conspicuous agency and leadership in peacemaking work, including healing relationships with victims and affected communities.<sup>143</sup> 'Not reoffending' is simply not enough if amnesties are to judged a success.

In terms of making a restorative contribution to social reconstruction more generally, in the remainder of this section we will explore Braithwaite's final criterion that requires offenders 'to show public remorse for their crimes and to commit to the service of the new nation and its people and repair some of the harm they have done' by considering the link between amnesties and truth recovery. As noted above, although amnesty laws were historically perceived as acts of legal forgetting, in recent years, several truth recovery processes have been empowered to hear testimony from offenders and to offer incentives such as amnesty to encourage them to recount their crimes.

Transitional justice scholars and activists commonly argue that such truth recovery is important for preventing a repetition of crimes and contributing to the healing of victims and society.<sup>144</sup> Parmentier et al. also contend that the process of testifying encourages offenders 'to tell their own story and allow them to gain back the control over their position and their role in the conflict, and later also their place in the community'.<sup>145</sup> Gathering and analysing testimonies from former combatants may in turn contribute to social understanding of the causes of the violence. Furthermore, through publicly answering for their actions, offenders are subjected to different forms of accountability.<sup>146</sup> At a more general level, whilst an accepted

142 Braithwaite, *op. cit.*, n. 104, p. 69.

143 Shirlow and McEvoy, *op. cit.*, n. 141.

144 P.B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2010, 2nd edn.).

145 Parmentier et al., *op. cit.*, n. 130, p. 347.

146 Mallinder and McEvoy, *op. cit.*, n. 13.

version of the truth with regard to past violence may well be unobtainable, the process of assembling, presenting, and testing the myriad versions of 'truth' does at least (to borrow a phrase from Ignatieff), 'narrow the range of permissible lies' in such societies.<sup>147</sup> Amnesties are a central part of that process. By creating space for offender accounts, they can contribute to the development of richer, more inclusive narratives on which a shared history can be formed.<sup>148</sup>

Again, the most high-profile example of exchanging amnesty for truth occurred as part of the South African Truth and Reconciliation Commission. Under the legislation that established the TRC, perpetrators were required to disclose fully their political offences in order to obtain amnesty.<sup>149</sup> Following a challenge by the family of anti-apartheid activist Steve Biko who was murdered in police custody, the South African Constitutional Court underlined the amnesty's importance for overall truth recovery and national reconciliation in upholding its legality.<sup>150</sup> As noted above, the procedures of the TRC's Amnesty Committee in receiving and processing offender testimony have been criticized for taking a narrow, legalistic, and somewhat inconsistent approach towards what offenders were required to disclose. In turn, the unwillingness of large numbers of offenders to apply or to disclose certain crimes created further gaps in the information revealed.<sup>151</sup> Despite the difficulties with the mandate, resources, and proceedings of the Amnesty Committee, it is widely accepted that the process obtained more truth than would have been possible without the offer of amnesty.<sup>152</sup> In its final report, the TRC argued that even if trials had been pursued, they 'would probably have contributed far less than did the amnesty process towards revealing the truth about what had happened to many victims and their loved ones'.<sup>153</sup>

The importance of truth as a corrective to the amnesia effect sometimes associated with amnesties was well illustrated in a recent case concerning a controversial former member of *Umkhonto we Sizwe* (MK), the military wing of the African National Congress (ANC), Mr Robert McBride. McBride bombed a bar in Durban in 1986 in which three civilians were

147 M. Ignatieff, 'Articles of Faith' (1996) 25 *Index on Censorship* 110–22, at 113.

148 G. Theissen, 'Common Past, Divided Truth: The Truth and Reconciliation Commission in South African Public Opinion' in *Legal Institutions and Collective Memories*, ed. S. Karstedt (2009).

149 du Bois-Pedain, op. cit., n. 119.

150 *Azanian Peoples Organisation (AZAPO) and others v. The President of the Republic of South Africa and others* 1996 (4) SA 671 (CC), para. 17.

151 G. Simpson, "'Tell no Lies, Claim no Easy Victories": A Brief Evaluation of South Africa's Truth and Reconciliation Commission' in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, eds. D. Posel and G. Simpson (2002); Sarkin, op. cit., n. 118; Chapman and van der Merwe, op. cit., n. 28.

152 Sarkin, id.

153 South African Truth and Reconciliation Commission, *Final Report* (2003) para. 66.

killed and 69 people injured and was convicted of murder and sentenced to death. He was subsequently released as part of the political negotiations, and applied for and was granted an amnesty by the TRC. In 2003, Mr McBride was in line for a senior policing appointment, and the *Citizen* newspaper (which was vehemently opposed to his appointment) published a number of critical articles referring to him as a murderer and a criminal. Mr McBride sued for defamation, arguing that the amnesty granted to him meant that he could not be so described. The Constitutional Court found against Mr McBride, arguing that:

The statute's aim was national reconciliation, premised on full disclosure of the truth. It is hardly conceivable that its provisions could muzzle truth and render true statements about our history false.<sup>154</sup>

It further concluded that although the amnesty in effect expunged the murder in terms of its impact on Mr McBride's civic right to employment, to run for office, and so forth, it did not mean that newspapers or citizens had to conduct discourses on the past as if events had not happened.<sup>155</sup> The linkage of the amnesty to truth recovery in this context did not require or facilitate 'commanded forgetting' (as Ricœur has suggested), quite the opposite. Rather, amnesties were one element of a broader architecture which, while intended to achieve national reconciliation, did not impede a robust 'warts-and-all' public discussion about a violent past.

In sum, we would argue that viewed from the restorative perspective, amnesties have a key role to play in transitional contexts. Carefully designed restorative amnesties can help foster the rebuilding of relationships shattered by mass violence, by facilitating an inclusive, participative dialogue both on the need for amnesty and on the implementation of amnesty processes. In particular, where the granting of amnesty is conditioned on individual offender participation, they can contribute to offender rehabilitation by offering an alternative to penal sanctions, and by creating a forum for offender narratives to be told and incorporated into national truth recovery projects. In such contexts, rather than being a denial of justice, amnesty laws can in fact complement restorative justice principles and objectives.

## CONCLUSION: AMNESTIES AND THE GOVERNANCE OF MERCY

In this final section of our analysis of the relationship between amnesties, punishment, restoration, and transitional societies, we wish to focus on the notion of mercy. The concept of mercy is a complex one, much discussed in philosophy, theology, literature and, of course, theoretical writings on

154 See *Citizen v. McBride*, Case CCT 23/10, Judgment of the Constitutional Court of South Africa, [2011] ZACC 11.

155 *id.*

punishment.<sup>156</sup> Doing justice to that rich literature is beyond the space available; rather, we hope to focus on a number of discrete themes which are most relevant for our argument. We are drawn to the idea of mercy because of its history as an expression of the *power* of the sovereign, because it requires us to ask important *governmentality-style* questions (who is being merciful to whom and for what end), and because it compels us to look more closely at the centrality of *law* to debates on mercy and punishment. In particular, as Duff has argued, whether or not mercy should be viewed as something that ‘rather intrudes into the criminal law, as a voice that speaks from outside the law in tones that belong to distinct normative perspectives’.<sup>157</sup>

While there are multiple definitions, Dan Markel’s description of mercy as ‘the remission of a deserved punishment in part or in whole’ will suffice for current purposes.<sup>158</sup> As noted above, much of the literature on the topic begins with the premise that mercy is closely associated with notions of state sovereignty and the exercise of state power. Schmitt, for example, refers explicitly to pardons and amnesties as examples of the ‘omnipotence of the modern law giver’.<sup>159</sup> Similarly, Weber describes mercy as combining rigid tradition with ‘a sphere of free discretion and the grace of the ruler’.<sup>160</sup> Douglas Hay’s seminal work on late-eighteenth and early-nineteenth-century England charted England’s infamous ‘bloody code’ where the range and severity of its penal sanctions made its laws appear the most punitive in Europe.<sup>161</sup> However, as Hay argues persuasively, such excess was tempered in practice by a calibrated deployment of mercy so that such ‘benevolence’ was at least as important as terror in protecting the interests of the ruling elites. While the transition towards democracy may somewhat obscure the visibility of power, as Strange has argued, the exercise of mercy ultimately expresses ‘the politics of rule’.<sup>162</sup>

While amnesties remain intimately bound up with state power, the power relations at work in contemporary amnesties are much more complex than simply an expression of the will of the sovereign. Amnesties usually come in the wake of a direct challenge to the state’s monopoly on the use of force. In such contexts, the exercise of power may be fragile, contingent, and certainly contested. Indeed, in such contexts, amnesties may be more an effort to garner or consolidate state power rather than an expression of dominance.

Amnesties, like punishment, are, in our view, a particularly important realm of governance in transitional contexts. As Garland, Simon, Loader and

156 For an overview, see L. Meyer, *The Justice of Mercy* (2010).

157 A. Duff, ‘The Intrusion of Mercy’ (2007) 4 *Ohio State J. of Criminal Law* 361–87.

158 D. Markel, ‘Against Mercy’ (2004) 88 *Minnesota Law Rev.* 1421–80, at 1435.

159 C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1985) 38.

160 M. Weber, *From Max Weber: Essays in Sociology* (1970) 216.

161 Hay, *op. cit.*, n. 63.

162 Strange, *op. cit.*, n. 3, p. 5.

Walker, and others have demonstrated in different ways over the last decade, it is precisely because notions of punishment, crime or security are so central to contemporary notions of governance that they have come to occupy an arguably over-privileged space in the social, political, and cultural lives of many societies.<sup>163</sup> To paraphrase Simon,<sup>164</sup> crime and related discourses on how to deal with it are much more than ‘one social problem’ amongst many in the modern era. Instead, these realms involve a range of actors and provide techniques, rationales, and visions for governance that map onto much broader understandings of social and political relations in the material and ‘imagined communities’ in which they are located.<sup>165</sup> They offer points of resistance, acquiescence, mobilization, and realignment in horizontal and vertical power relations, which are often much more subtle than the will of the most powerful political and military actors on the stage.

Amnesties, precisely because they are seen by some as an endorsement of past crimes, a denial of justice, and a potential threat to future security (for example, because they encourage cultures of impunity),<sup>166</sup> occupy a similarly complex space in the political and social lives of the societies into which they are introduced. As in settled democracies, the politics of who is entitled to mercy in what circumstances are almost inevitably a source of controversy and division. Decisions on whether or not an amnesty should be introduced; which actions are ‘deserving’ of an amnesty and which are excluded; the definitional wranglings on whether amnesty beneficiaries are combatants, perpetrators, criminals, heroes or victims; questions of the linkage to truth, reparations, and all of the other discussions outlined above speak directly to fundamentally contested versions of the past and indeed often the future of transitional societies.

Thinking about amnesties in South Africa, Sierra Leone, Uganda or indeed Northern Ireland therefore requires a close grasp of local material and ‘imagined’ politics, a nuanced understanding of the rules (discussed below), and a feel for the key actors and in particular what Foucault referred to as grasping the ‘technologies of the self’ (the ways that different people and groups see themselves as both exercisers and subjects of power).<sup>167</sup> The design and implementation of amnesties can no longer be caricatured as the last act of the outgoing general as he signs the sweeping amnesty to protect now and forever all loyal assassins and toenail pullers just before departing the presidential palace. As well as being fettered by law, the shape and

163 D. Garland, *The Culture of Control* (2001); J. Simon, *Governing Through Crime* (2007); I. Loader and N. Walker, *Civilizing Security* (2007).

164 Simon, *id.*, p. 10.

165 B. Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (1991).

166 Laplante, *op. cit.*, n. 23.

167 M. Foucault, *Society Must be Defended: Lectures at the Collège de France 1975–1976* (2004) 29.

content of amnesties is also influenced by a myriad of other factors including the views and input of the international community; the level of organization of victims, ex-combatants, human rights activists, and other civil society actors; the particular history of conflict; the relations between key political parties; the socio-economic context; and various other factors. In short, understanding amnesties as mercy is useful because it directs us to the intersection between law, punishment, and governance but it also demands a fully-rounded grasp of the local power relations in order to do it justice.

Finally with regard to the ‘rules’, as David Garland reminds us in his panoramic discussion of punishment and its multiple meanings, at its core, punishment is ‘the legal process whereby violators of the criminal law are condemned and sanctioned in accordance with specified legal categories and procedures’.<sup>168</sup> Unlike scholars such as Duff and others who tend to regard mercy in the ordinary criminal justice system as something which is essentially ‘intruding’ from outside, we would argue that in the world of transitional justice amnesties represent an attempt to turn what was historically untrammelled power into a creature of law. Amnesties usually require legislation, they must be compliant with international law, they often entail the creation of some kind of commission that must make decisions against declared criteria, they may be subject to judicial scrutiny, and so forth. In short, the institutional requirements of establishing an amnesty process may be viewed as part of what Bourdieu has termed ‘the force of law’, its ‘pull’ wherein aspects of social or political life are shaped by what he terms the ‘juridical field’.<sup>169</sup> Although, as commentators such as de Sousa Santos have argued, this ‘creeping legalism’ is certainly not an unadulterated force for good,<sup>170</sup> in the case of amnesties which were traditionally an example par excellence of unfettered state power, it is hard to argue against some checks and balances, or requirement for forms of restoration where previously there were none. More broadly, by legalizing this sphere, however imperfectly, one at least creates a structure or a process whereby those who would have hitherto enjoyed either complete *de facto* or *de jure* impunity from *any* legal process must subject themselves to a legal framework. Properly constituted, amnesties bring law to a previously *lawless* domain in the exercise of post-conflict mercy.

168 Garland, *op. cit.*, n. 62, p. 17.

169 See J.R. Terdiman, translator’s introduction to P. Bourdieu, ‘The Force of Law: Towards a Sociology of the Juridical Field’ (1987) 38 *Hastings Law J.* 805–53.

170 B. de Sousa Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (2002) 556.