

The “New Law” of Transitional Justice*

Christine Bell

Abstract This paper asserts that the combination of peace agreement practice and legal developments have given rise to a “new law” of transitional justice. This “new law” draws on human rights law, humanitarian law, international criminal law and ordinary criminal law, but cannot be justified in terms of any one of these regimes on their own (and therefore remains controversial). The “new law” can be viewed as a new developing practice rather than a new law, but finds some basis in soft law standards that are emerging with reference to transitional justice, and in the practice of states and international organisations.

I open the chapter by “stating” this new law, and then examine where the “new law” can be backed up with reference to law and practice, illustrating its ambiguities and controversies. I then point to the difficulties of obtaining any further clarity, or resolution to these ambiguities and controversies, by recourse to the normative frameworks of human rights or humanitarian law. The chapter provides an assessment of the advantages and disadvantages of the “new law”, and considers whether it is advisable to try to clarify the new law’s ambiguities through further legal standards.

Finally, the chapter concludes by suggesting somewhat provocatively that there is a certain attractiveness to the current state of legal uncertainty around transitional justice, in enabling both the assertion of an obligation to combat impunity, while leaving some scope for flexibility in peace negotiations.

C. Bell

Transitional Justice Institute University of Ulster Northern Ireland, UK
e-mail: c.bell@ulster.ac.uk

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1 The New Law of Transitional Justice

The new “law” of transitional justice can be stated as follows:

1. Blanket amnesties that cover serious international crimes are not permitted.
2. Some amnesty, however, is required as conflict-related prisoners and detainees must be released, demilitarised, demobilised, and enabled to reintegrate.
3. Mechanisms should be creatively designed aimed at marrying the normative commitment to accountability, to the goal of sustaining the ceasefire and developing the constitutional commitments at the heart of the peace agreement. The following approaches may be used:
 - (a) Quasi-legal mechanisms which deliver forms of accountability other than criminal law processes with prosecution, such as truth commissions.
 - (b) A bifurcated approach whereby international criminal processes for the most serious offenders, coupled with creatively designed local mechanisms aimed at a range of goals such as accountability and reconciliation, for those further down the chain of responsibility, and general amnesty at the lowest level.
4. Where new mechanisms are innovated, they should be designed with as much consultation with affected communities as is possible.
5. Should any party evidence lack of commitment to the peace agreement, and in particular return to violence, any compromise on criminal justice is void and reversible through the use of international criminal justice.

2 Sources of the New Law, and its Ambiguities

2.1 Blanket Amnesties that Cover Serious Crimes are not Permitted

International law outlaws blanket amnesties, for “serious crimes under international law”. This prohibition has found articulation in Principles 19 of the Updated Principles to Combat Impunity which provides that:

States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.

These principles define serious crimes under international law as:

Grave breaches of the 1949 Geneva Conventions and of 1977 Additional Protocol I thereto and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity and other violations of internationally protected human rights that are crimes under international law and/or which international law requires states to penalise, such as torture, enforced disappearance, extrajudicial execution, and slavery.

Similarly, the United Nations Secretary General’s Report on The Rule of Law and Justice in Conflict and Post-Conflict Societies August 2004, provides in recommendation 64 that

Peace agreements and Security Council resolutions and mandates should:

- (a) Reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court
- (b) Ensure that the United Nations does not establish or directly participate in any tribunal for which capital punishment is included among possible sanctions

The prohibition on blanket amnesty for these crimes also finds a “hard law” basis in a number of treaties that specifically require prosecution of violations. These legal sources would seem to proscribe amnesty for at least the following sub-set of crimes: torture, genocide, and grave breaches of the Geneva Conventions, which include the following, if committed against protected persons (such as medical and religious personnel and prisoners) and property protected by the Convention (clearly civilian property): wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. The main treaty obligations are:

- (1) Genocide Convention: Persons committing genocide are required to be punished.
- (2) Convention Against Torture: alleged torture must be investigated and, if the state has jurisdiction under any of the enumerate bases, it must either extradite the offender, or “submit the case to its competent authorities for the purpose of prosecution”.
- (3) The Inter-American Convention on Forced Disappearance of Persons and the Inter-American Convention on Torture have similar provisions.
- (4) 1949 Geneva Conventions: require that persons accused of grave breaches be sought and prosecuted, or extradited to a state that will do so. This requirement, however, only applies in international conflicts, which under Protocol I to the Geneva Conventions includes conflicts involving “national liberation movements” – a term that is currently viewed as somewhat anachronistic with states resisting its use with reference to armed actors. Where Protocol I does apply, it also adds to the list of “grave breaches” matters such as: attacking a person who is hors de combat; perfidious use of the distinctive emblems of the International Committee of the Red Cross and other signs protected by the Convention; and practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.
- (5) The Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity: holds that the passage of time cannot bar prosecutions for war crimes, crimes against humanity and genocide.
- (6) The other major source of treaty-based obligation affecting the scope of amnesty is found in general human rights treaties at the international and regional level, including the International Covenant on Civil and Political Rights (ICCPR),

American Convention on Human Rights and European Convention on Human Rights. These treaties clearly outlaw deprivation of the right to life, including arbitrary disappearances and extra-judicial executions and torture. While the treaties, contain no explicit references to prosecution or amnesty, they prohibit the underlying violations, and provide for a right to a remedy (in general terms), and to a hearing before a competent tribunal for violations of rights. This might seem to leave open whether prosecution and punishment are required, or whether other “restorative justice” type approaches might fulfil human rights obligations. Increasingly, jurisprudence relating to torture and the right to life in particular requires adequate investigation capable of leading to a determination of guilt or innocence. In some cases the treaties and international bodies talk of prosecution and/or punishment. These obligations apply to successor regimes as regards the human rights abuses of the previous regime, provided that the state has been a party to the Conventions throughout.

- (7) Crimes against humanity and gross human rights abuses. In addition to these treaty provisions, there are strong arguments that some fundamental rights are protected as a matter of customary law and apply even where key treaties have not been ratified. These arguments have been bolstered by the notion of “crimes against humanity” as crimes which cannot be amnestied. Crimes Against Humanity are defined by the statutes establishing the international criminal tribunals for Rwanda, the former Yugoslavia, the Sierra Leone Special Criminal Court and the Rome Statute of the International Criminal Court (ICC). They include crimes such as murder, extermination, enslavement, deportation, imprisonment, torture and rape. The crimes have to be part of widespread or systematic attack, and directed against a civilian population. As regards gross human rights violations, the violations need to be of a serious scale. While it has for a long time been the case that states have permission to prosecute for these crimes, a view that there a duty on states to prosecute crimes against humanity is beginning to emerge. Indeed, there have been increasing assertions of universal jurisdiction (the ability of states anywhere) to prosecute these offences regardless of where they occurred.

2.2 Some Amnesty, However, is Required as Conflict-Related Prisoners and Detainees must be Released, Demilitarised, Demobilised, and Enabled to Reintegrate

Some level of amnesty would seem to be allowed by international law and even required. Article 6(5) of Protocol II of the Geneva Conventions provides:

At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

The International Committee of the Red Cross (ICRC) view, however, is that this provision does not apply for those who have committed any crimes under international law.¹ The UN SG recommendations and the Updated Principles on Impunity also seem to contemplate that the use of amnesty is lawful on occasion.

It is also important to note that human rights standards require the release of those imprisoned for matters such as freedom of speech or association, where prescription of such activities as a crime itself violates human rights standards. However, it is problematic to achieve this through an “amnesty” which, by its very definition, suggests that a crime was still committed (see Principle 24 Impunity).

The notion of some scope for amnesty can also be argued to find a basis in human rights law itself. Orentlicher has argued that:

states operating under constraints commonly associated with political transition could satisfy their treaty obligations through exemplary prosecutions – focusing, for example, on those who appear to bear principle responsibility for systemic atrocities or on individuals believed to have committed notorious crimes that were emblematic of a regime’s depredations. (Orentlicher 2007, p. 14; see also Orentlicher 1991, p. 2548; Roht-Arriaza 1990, p. 505–511)

This suggests some residual role for amnesty.

2.3 *Remaining Ambiguities*

These first two statements of the “new law” however, have ambiguities. In particular, they do not clearly delimit where the prohibition on amnesty ends, or the scope of possible compromise between crimes that can, and crimes that cannot be amnestied. There is no easy “list” to hand to negotiators, and this means that clear instruction – the easiest way to ensure that mediators play a normative role – is not possible. The law as currently developed does not enable this.

2.3.1 **What is the Precise List of Crimes that cannot be Amnestied?**

The definition of serious crimes under international law as set out above, also talks of “other violations of international humanitarian law”, in a definition that has a circular quality – crimes are serious crimes when they are considered serious crimes. Exploring what these crimes might be exposes a grey area in international law. Common Article 3 of the Geneva Conventions and Protocol II apply to non-international armed conflicts. They do not explicitly impose an obligation to prosecute and punish. It is widely accepted that they permit individual responsibility and prosecutions and punishment and, as noted, international law seems to be moving to a position whereby “serious violations” require prosecution and punishment, and even enable

¹ Letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1975 and to the Department of Law at the University of California of 15 April 1997 (referring to CDDH, Official Records, 1977, Vol. IX, p. 319, as cited in Roht-Arriaza (2002, p. 97, n. 15).

universal jurisdiction. The notion of compulsory prosecution and punishment finds some support in the fact that the crimes in question have been included in the Rome Statute of the ICC, and in the statutes for the International Criminal Tribunals in Former Yugoslavia (ICTFY) and Rwanda (ICTR), which have added impetus to the idea that prosecution and punishment are compulsory. The list of crimes is a broad one, including: violence to life, health, and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation, or any form of corporal punishment. However, given lack of clarity as to whether prosecution and punishment are permitted or required, it is unclear what can be amnestied. A second grey area arises over the nature of the link between these crimes and the level of conflict prevailing: what the level of conflict is required to trigger these crimes; and what link is required between crime and conflict?

2.3.2 What is the Permissible Scope of Amnesty?

What then is the permissible scope of amnesty? Again, the answer is a little unclear (see further Roht-Arriaza 2006). First, perhaps individual war crimes that were neither grave breaches nor, in the cases of non-international conflict, violations of Article 3 of the 1949 Conventions and Protocol II, might be able to be amnestied so long as they did not at the same time constitute crimes against humanity due to the fact that they were part of a widespread and systematic attack. However, where it applies, this composite list of crimes is already quite extensive.

At a minimum it is possible to amnesty crimes such as treason or rebellion committed by insurgent forces (although interestingly certain peace agreements take a strong stand on coup d'état) (Roht-Arriaza 2006). In Côte D'Ivoire the Linas-Marcoussis Agreement (2003) for example holds that "the Government of National Reconciliation will take the necessary steps to ensure the release and amnesty for all military personnel being held on charges of threatening State security and will extend this measure to soldiers living in exile" (Article 3(i)).² To the extent that such an amnesty might include serious international crimes, a separate clause could exclude these, as the Côte D'Ivoire agreement went on to do ("The amnesty law will under no circumstances mean that those having committed serious economic violations and serious violations of human rights and international humanitarian law will go unpunished". Article 3(i)). In summary, the list of possible crimes which can be amnestied seems fairly minor, short, and not particularly helpful in terms of giving mediators some room to manoeuvre.

Secondly, crimes that breach only domestic law might be amnestied. Some conflicts, for example Northern Ireland (see below), can be argued not to trigger humanitarian law at all (although some argue that certain periods of the conflict did fall within its ambit). These crimes might include minor related crimes such as mayhem, arson and the like if not committed by state-related forces, or during armed conflict, or are widespread or systematic enough to be considered a crime against humanity.

² Agreement available at http://www.usip.org/library/pa/cote_divoire/cote_divoire.01242003en.html.

However, the current direction of human rights jurisprudence on the right to life and torture, particularly at the regional level, seem to indicate that murder and serious assault may have to be taken out of the equation altogether as this would violate the state’s positive obligation under international human rights conventions to proactively protect life and prevent torture, inhuman and degrading treatment, through adequate criminal laws, investigation and prosecution procedures.³ This could catch offences committed in conflicts even where humanitarian law was not triggered. Commentators arguing that human rights law requires prosecution and trial, have often contemplated this requirement as discharged by dealing with the most serious offenders and offences (see Orentlicher 1991, 2007; Roht-Arriaza 1990). The difficulty is that human rights jurisprudence is developed through individual complaints to which it is addressed: human rights bodies, in their complain mechanisms, do not make abstract decisions. Thus legal reasoning allows little to no consideration of how victims and society as a whole have been served by a selective approach, but requires adjudicating on whether an individual rights have been violated or not, within a framework that was not designed to deal with accountability of acts committed in the course of large scale violent conflict. As a result, judicial mechanisms are required to adjudicate on the individual’s rights meaning that any trade off between the individual’s rights and social goals directed at group benefits are likely to be found to violate human rights law.

2.4 Permissible Trade-offs

The scope and requirements of permissible “trade-offs” between blanket amnesty and full accountability, are also unclear. The “new law” stated two possibilities. The first possibility involved making an amnesty less “blanket” by having some process of accounting, short of criminal trials. The second suggestion was the possibility of having trials for the top end of crimes and offenders, and alternative forms of accountability and even amnesty for those further down. However, while both these options frequently appear in practice, neither of these options entirely squares with existing international law requiring accountability.

2.5 Quasi-Legal Mechanisms which Deliver Forms of Accountability Other than Criminal Law Processes Culminating in Punishment, such as Truth Commissions

Academic literature has begun to suggest that there are different types of amnesties, some of which offer comply with “justice” standards, and possibly international law, and most of which do not, depending on the extent to which the amnesty is coupled

³ See, e.g., *Jordan v. United Kingdom* 2003, 37 E.H.R.R. 2.

with some provision for accountability, and a rationale for sustainable peace (see, e.g., Slye 2002, pp. 172–247).⁴

Truth for amnesty/investigation without prosecution? One of key issues with impunity, particularly with relation to peace processes, is its denial of information or “truth” to victims and relatives. The Updated Principles on Impunity begin with a section detailing a “right to know”, that stresses the “inalienable right to truth”. Many of the instrumental goals of accountability listed above, such as reconciliation or institutional reform or even vetting, can be facilitated in part at least by full and accurate information about the type of abuses that occurred, what institutions or mechanisms facilitated them, what individuals perpetrated them, and what happened to victims. A practice of truth commissions is now fairly widespread (Hayner 2001; Freeman 2007). Although powers, remits, and effectiveness vary dramatically, all claim to offer some form of accounting for the past, usually in a social rather than an individual sense. At the least, truth commissions aim to establish some sort of record of the violations and abuses that were perpetrated.

Investigation or inquiry short of prosecution would seem to deliver a “right to truth”. Does investigation falling short of prosecution or punishment then, form a possible compromise between full accountability and blanket amnesty? Most famously, the South African Truth and Reconciliation Commission effectively traded truth against amnesty: amnesty was exchanged for full disclosure.⁵ Proponents of the South African Truth and Reconciliation Commission (TRC) did not justify this merely as a pragmatic trade-off between truth and justice. They argued that there were goals which could be accomplished by the Truth Commission mechanism that could not be accomplished by trials. Trials by their nature are concerned with high standards of proof to evaluate individual guilt or innocence. Victims are reduced to the standing of “mere witnesses”, with the state and the accused as the main parties. In contrast, a well-run commission, it is argued, can focus on overall patterns of violations, keep the focus on victims and design victim-friendly procedures, examine institutional responsibility as well as individual responsibility, and in general deal with the many “shades of grey” in terms of guilt and accountability that conflicts tend to produce. Furthermore, in offering a clear incentive for giving information (instead of a disincentive), truth commissions might be more effective than trials in delivering information and “truth”. The TRC in its final report argued that “justice” had not been denied, but that a concept of “restorative justice” had in fact been delivered – that is, justice as a process between victim, perpetrator and community, rather than justice as retributive punishment. When challenged in court in human rights terms, the Constitutional Court upheld the legislation, albeit with fairly scant attention to international law (they relied in part on Article 6(5) of Protocol II to the Geneva Conventions).⁶

⁴ In fact Slye finds that only one amnesty – that of South Africa – comes close to satisfying the conditions he identifies for legitimate amnesty.

⁵ Promotion of National Reconciliation Act, No. 34 of 1995, provided for “the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period”.

⁶ *Azapo v. President of the Republic of South Africa* 1996 (4) SA 562 (CC).

So are there occasions in which investigation alone can satisfy international standards requiring accountability? While standards on torture, genocide, and Geneva Conventions talk of “prosecution”, the main human rights standards do not mention a need for prosecution, and this seems to leave the investigation-only route open. The status of the Updated Principles on Impunity as principles rather than “law”, with their emphasis on the right to know, might also seem to suggest that “hard law” leaves negotiators able to work with a “spectrum of accountability” running from investigation through prosecution to punishment.

However, national and international courts and quasi-judicial bodies that have considered this issue have often not taken this view (see Roht-Arriaza 2006). Furthermore, the existence of a truth commission, or even administrative sanctions, has not been found to modify the state’s obligations to investigate, and if warranted, criminally prosecute. In the words of the Inter-American Court of Human Rights in the Barrios Altos case, 2001:

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law [emphasis added].⁷

National jurisprudence and legislation in the Americas has increasingly affirmed this view, as has the UN Human Rights Committee in addressing the requirements of the ICCPR. Furthermore, the Updated Principles on Impunity assert clearly that: “[t]he fact that a perpetrator discloses the violations that he, she or others have committed in order to benefit from the favourable provisions of legislation on disclosure or repentance cannot exempt him or her from criminal or other responsibility” (Principle 28).

Forgoing punishment? What then about investigating, prosecuting, and then failing to punish, either by use of pardon, or other measure? The South African invocation of restorative justice and confession as itself “punishment” further opens up the possibility of defining “punishment” as meaning something different from prison. Vetting, for example, could also be considered punitive.

The Updated Principles on Impunity do not rule this out as an amnesty “compromise”. Principle 24 suggests that “even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within . . . bounds”. One of these bounds is that perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met its obligations to prosecute, try and punish such offenders (Principle 24 together with Principle 19). Although Principle 19 talks of “criminal justice”, it leaves open the meaning of the term “punishment”, what constitutes punishment, and if imprisonment, what length of sentence is appropriate. Although it is unclear that the South African TRC, which had one of the

⁷ Inter-American Court of Human Rights, *Case of Barrio Altos v. Peru* Judgement of March 14, 2001, para 41.

most nuanced and “accountable” amnesties, could have presented itself as “criminal justice”. Principle 28 seems to indicate that reduction of sentence is at least appropriate; it provides that “[t]he disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth”. However, some doubt on the appropriateness of forgoing punishment is raised by the pronouncements of international human rights bodies which seem to be moving towards the notion that accountability requires punishment in a traditional sense under requirements of adequacy, effectiveness and proportionality.⁸ Against this, it is worth noting that restorative justice mechanisms are now a part of domestic criminal justice in many non-conflict situations. In the domestic context, restorative justice is viewed as a progressive form of criminal accountability, rather than denial of accountability or exception to criminal justice, but often does not apply to the most serious offences.

The case of Northern Ireland provides an interesting example of sentence shortening as a compromise. Here, a “sentence review” process set out in the Belfast Agreement set in train a process which resulted in nearly all of the prisoners imprisoned as a result of the conflict being released.⁹ However, technically the process was one of “sentence review” and sentence shortening, rather than amnesty or lifting of punishment altogether (life sentence prisoners remained subject to recall). The compromise preserved the accountability effected by the criminal law, while meeting the demands of paramilitary groups for “normalisation” – demands which were crucial to reaching a peace agreement. There are, however, some limitations to the application of this example elsewhere. Firstly, in Northern Ireland the level of conflict was low with the government insisting throughout the conflict that humanitarian law did not apply, and refusing to ratify Protocols I and II to the Geneva Conventions 1949. Therefore, the crimes for which shortened sentences were given did not amount to “grave breaches” of the Geneva Conventions of 1949 (under the Protocol I definition of international armed conflict), or a violation of Protocol II, or (more arguably) Common Article 3 of the Geneva Conventions. It is also difficult to argue that the conflict saw any crimes against humanity or gross human rights violations. Secondly, and even more pertinently, the only persons in prison were members of armed opposition groups (state actors seldom being prosecuted or imprisoned). Given that the only requirements as regards accountability came from human rights conventions, the duty with regard to these non-state actors was only that of a relatively loosely defined positive duty on the state to have in place criminal processes capable providing a safeguard for the right to life and the right not to be tortured. It is therefore easier to argue that the state responsibility as regards non-state actions had been satisfied by adequate investigation, a full trial and partial punishment.

⁸ The UN Human Rights Committee, addressing the requirements of the ICCPR, has found that disciplinary and administrative remedies were not “adequate and effective” under Art. 2(3) of the Covenant in the face of serious violations, and that criminal prosecution was required for such violations. General Comment No. 20 (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994)).

⁹ Northern Ireland Sentences Act 1998.

2.6 A Bifurcated Approach Whereby International Criminal Processes for the Most Serious Offenders, Coupled with Creatively Designed Local Mechanisms Aimed at a Range of Goals such as Accountability and Reconciliation, for those Further Down the Chain of Responsibility, and General Amnesty at the Lowest Level

The provision for the Sierra Leone Special Court to prosecute “persons who bear the greatest responsibility” for perpetration of “crimes against humanity, war crimes and other gross abuses of international humanitarian and Sierra Leonean law” (UN SC Res. 1315, 2000), also raises the question of whether prosecutions can be explicitly limited to “those most responsible” or conversely, whether an amnesty law can be valid if it excludes from its terms the top leaders and organizers, while encompassing lower- and mid-level fighters.

Peace processes indicate an emerging practice along these lines, even though neither the treaty instruments nor general human rights obligations make these types of distinctions (indeed humanitarian law expressly provides that being a foot soldier acting under superior orders does not remove individual responsibility, nor does lack of knowledge apparently absolve commanders of responsibility for serious crimes committed by those under their command). A number of recent peace agreement in Africa (for example Côte D’Ivoire 2003 Democratic Republic of Congo 2002) have all included amnesties or provision for release of prisoners but excepted serious crimes under international law (see also Georgia-Abkhazia 1994).¹⁰ In most cases, however, the agreement has not specified a mechanism to achieve accountability for these cases. While open to the charge of de facto impunity, these peace agreements at least formally comply with the international legal position by leaving open the possibility of future trials.

In Sierra Leone the bifurcation approach was unplanned. The Lomé Accord (2000) (like the earlier Abidjan Accord of 1996) had included a broad amnesty. Unlike the earlier accord it also provided for a Truth and Reconciliation Commission to be established. This Commission did not have a focus on individual accountability. However, after renewed fighting, the government appealed to the UN who through Security Council Resolution 1315 of 2000 established the Special Criminal Court for Sierra Leone. Although there were some tensions, both mechanisms were established and undertook their different mandates during overlapping time periods.

The Arusha Peace and Reconciliation Agreement for Burundi (2000) provided for the bifurcated approach in its design in a multi-faceted and overlapping approach to the past.¹¹ The agreement provided for prisoner release, and established amnesty for all combatants other than for acts of genocide, crimes against humanity or war crimes, or participation in coups d’état. It also established a National Truth and Reconciliation Commission (TRC) with powers of investigation, arbitration and

¹⁰ All agreements available at <http://www.usip.org/library/pa.html>.

¹¹ For text of agreement see http://www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html.

reconciliation and clarification of history, and requested the UN Security Council to establish an International Judicial Commission of Inquiry and an International Criminal Tribunal. The Agreement also sets out as a political principle, the “establishment of a national observatory for the prevention and eradication of genocide, war crimes and other crimes against humanity”, and noted the need for a regional observatory to do the same.¹²

One way of interpreting this practice is that, rather than indicating scope for amnesty, it reflects a division of labour as between national and international courts or tribunals (Roth-Arriaza 2006). The Security Council, since at least 2000, has supported the idea that the International Criminal Tribunals for the Former Yugoslavia and Rwanda should focus on civilian, military and paramilitary leaders and should, as part of their completing strategy “concentrate on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes” while transferring cases involving lesser offenders to the national courts.¹³ The Prosecutor for the ICC has similarly expressed his office’s intention to focus on the leaders who bear most responsibility, leaving the rest to national courts or other (unspecified) means.¹⁴ However, this is not an absolute bar on moving further down a chain of command if necessary for the whole case to be properly considered. The Sierra Leone Special Court found that its mandate to prosecute those who bear the “greatest responsibility” could include not just leaders but mid-level commanders who by their acts encouraged others. The notion of “most responsibility” can be interpreted on a rank or level of responsibility basis, or on an “actual responsibility” basis that cuts across ranks. To a certain extent prosecutorial discretion will often focus on leaders and organisers. This also happens due to the nature of at least some international crimes, such as genocide, which require proof of elements, such as “intent to destroy a certain type of group, in whole or in part” which require a certain degree of command.¹⁵

Is it legitimate, therefore, for a peace agreement to amnesty all but the leaders and organisers – or those “bearing the greatest responsibility” – while specifying prosecution for these persons to the extent that they have committed international crimes? This might be permissible provided that there was a credible prosecution mechanism in place for the leaders, and an alternative form of accountability for those lower down. These alternatives might include national court prosecutions, a truth for amnesty scheme like South Africa’s, a gacaca-type process as used in Rwanda resulting in community service or some other sanction, or a new variant rooted in a country’s culture and community conflict resolution traditions.

¹² Arusha Peace and Reconciliation Agreement for Burundi, 28 August 2000, Protocol I “Nature of the Burundi Conflict: Problems of Genocide, Exclusion and their Solutions”, Article 6.

¹³ Security Council Res. 1329, U.N. Doc. S/RES/1329, 30 Nov. 2000; Security Council Res. 1503, U.N. Doc. S/RES/1503, 28 Aug. 2003; also S/RES/1534 (2004).

¹⁴ Paper on some policy issues before the Office of the Prosecutor, Sept. 2003, available at http://icc-cpi.int/library/organs/otp/030905_policy_paper.pdf.

¹⁵ Ibid.

It is, however, worth pointing out that this compromise does may do little to address any tensions between “human rights” and “conflict resolution”, as those at the negotiating table are likely to be the very leaders and organisers who remain vulnerable to prosecution under the scheme.

2.7 *The Development of the ICC*

As the International Criminal Court has begun its task, a new dimension has been added to the bifurcated approach. The threat of the ICC can potentially be used to toughen up the restorative justice mechanism at the domestic level, in an attempt to square the amnesty/accountability circle. States signing peace agreements can attempt to avoid international criminal jurisdiction by fashioning domestic mechanisms in the shadow of prosecution, so as to enable Prosecutor and Court to decide that accountability has taken place at the domestic level. This brings Article 17(a) and (b) of the Rome Statute 1998 into play, which provides that a case is inadmissible if the case is or has been “investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution”. If the state can come up with a satisfactory form of criminal justice it can displace the jurisdiction of the ICC.

The dynamic is illustrated by the AUC law in Colombia, and appears to characterise current attempts to reach agreement on amnesty in Uganda. In Colombia, the “Justice and Peace” law (Law 975) dealing with the demobilisation and reintegration of the United Self-Defence Forces of Colombia (AUC) seems designed so as not to appear an illegitimate amnesty, in order to satisfy the requirement for domestic investigation and prosecution and evade the ICC’s jurisdiction. The law links demobilisation to procedural benefits such as pardon and significantly reduced prison sentences, with little formal investigation.¹⁶ Similar dynamics are at work in Uganda. Here indictments were issued by the prosecutor of the International

¹⁶ While accepted by some international and regional organisations, the Office of the High Commissioner on Human Rights and human rights non-governmental organisations view it as a troubling example of impunity, given the self-amnesty dimension (the groups amnestied have links with the state), the lack of distinction between levels of responsibility, and the lack of any clear link to a coherent peace process capable of ending the conflict as a whole, and have called for it to be revoked, Amnesty International (2007) Colombia: the justice and peace law will benefit human rights abusers. Press Release, 13 September 2007. <http://news.amnesty.org/index/ENGAMR230302005>. See further International Crisis Group (2005) and International Center for Transitional Justice (2005). The law has been criticised by the Inter-American Court, and portions have been struck down by the Colombian Constitutional Court. *Caso de la “Masacre de la Mapiripán” v Colombia*, 15 September 2005, Inter-American Human Rights Court (found that the law did not provide sufficient incentive for exhaustive confessions, and that the multiple perpetrators who were part of demobilised paramilitary blocks could deny the full truth. The Court declared that the state must remove all actual and juridical obstacles to an exhaustive judicial examination of the violations, prosecution of those responsible, and reparations for the victim). See also, *Gustavo Gallon Giraldo y otros v. Colombia*, Constitutional Court Judgement No. C-370/2006, Expediente D-6032 (18 May 2006) available (in Spanish) at, <http://www.constitucional.gov.co/corte/>.

Criminal Court (ICC), against the Lord's Resistance Army (LRA), during the conflict.¹⁷ A peace process subsequently developed to which the indictments were argued to be an obstacle.¹⁸ At time of writing, this peace process has seen a peace agreement on accountability signed between the LRA and the government.¹⁹ The agreement appears to be attempting to creatively discharge the state obligation to investigate and prosecute, so as to displace the ICC's jurisdiction under Article 17 Rome Statute 1998. The agreement's preamble notes "the principle of complementarity" and its text provides a blueprint involving broad commitments to combine conventional criminal justice with more restorative elements aimed at "reconciliation".

The shadow of international criminal law in Colombia and Uganda can be argued to be capable of forcing greater domestic accountability than would otherwise be contemplated. However, Uganda and Colombia also show the capacity for hard cases to soften the court's hard criminal justice edge. The political demand for compromise delivers criminal justice sufficient to displace the court's jurisdiction, but in the process may well redefine criminal justice as a softer mechanism than normally envisaged.

2.8 Where New Mechanisms are Innovated, they should be Designed with as much Consultation with Affected Communities as is Possible

A number of soft law standards require consultation with affected groups, and women before peace agreements and/or transitional justice mechanisms are designed and implemented. These standards include various victims' rights standards, the Updated Principles on Impunity, UN SC Res 1325 of 2000, on women, peace and security, and the UN SG 2004 report recommendations. Furthermore, international criminal law mechanisms have increasingly involved constituencies, in particular women, to enable them to effectively input to their design and mandate. Peace agreements also have provided for broader input into transitional justice issues; for

¹⁷ In December 2003, President Museveni referred the situation in Northern Uganda to the International Criminal Court (ICC). In October 2005, the ICC made public its first arrest warrants since it was established in 2002, indicting LRA leaders Joseph Kony and Vincent Otti, as well as three other LRA commanders, Raska Lukwiya, Okot Odiambo, and Dominic Ongwen, see <http://www.icc-cpi.int/cases/UGD.html>.

¹⁸ Note, however, Statement by the Chief Prosecutor Luis Moreno-Ocampo, The Hague, 12 July 2006, noting that the prosecutor was updated on the peace process and that "It is the view of the Office of the Prosecutor and the Government of Uganda that justice and peace have worked together thus far and can continue to work together". Available at http://www.icc-cpi.int/pressrelease_details?id=167&l=en.html.

¹⁹ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, 29 June 2007, UN Doc S/2007/435 [hereafter Ugandan Agreement on Accountability], at http://www.fides.org/eng/documents/uganda_agreement_290607.doc.

example, Guatemala’s 1996 Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in Democratic Society (III.16(i)) provides for the active involvement of bodies outside the state system of justice in the legal reform process, and the Arusha Accord in 2000 (Protocol 1, Art. 8.2) provided for civil society organizations to put forward candidates for membership of the Burundian Truth and Reconciliation Commission. In El Salvador, the Mexico Agreement (1991) provided for the restructuring of National Council of the Judiciary to include sectors of society not directly connected with the administration of justice.

2.9 Should any Party Evidence Lack of Commitment to the Peace Agreement, and in Particular Return to Violence, any Compromise on Criminal Justice is Void and Reversible through the Use of International Criminal Justice

This requirement has been “stated” somewhat boldly. It does not appear in any soft law standards, nor find articulation in any peace agreement. However, if one looks at the cases where explicit and implicit amnesty deals have been overruled within a relatively short time period, then this return to violence would seem to provide some level of explanation. In Sierra Leone, as noted, the UN Security Council was established explicitly because of renewed fighting by the RUF who were benefiting from the amnesty. Indeed, in one of the challenges before the court where defendants used the peace agreement amnesty to argue that prosecution was an “abuse of process”, one of the judges in one of the cases found that the amnesty ceased to have any effect once the fighting resumed (the other judges and other cases found the amnesty to be irrelevant because they found the Lomé Agreement to be a domestic agreement).²⁰ It can also be more argued that Milošević’s indictment and prosecution were enabled politically because of his role in the conflict in Kosovo. Finally, Charles Taylor’s indictment before the Sierra Leone Criminal Court, even though amnestied by the peace accord in Liberia, was arguably accepted more easily because of his on-going military role. There is some commonality between the notion of a “wait and see” approach, and the notion of temporary stays of prosecution to take account of the political situation in the ICC’s Rome Statute, article 16, which permits the UN Security Council to ask for such a stay of prosecution for a period of up to 12 months. Furthermore, the notion that some amnesties may be more justifiable than others is also asserted by academic writers who suggest that “justifiable” amnesties must be linked to the goal of peace (see further Slye 2002). Logically, this suggests that should those amnestied be involved in fighting should have their amnesty revoked if they subsequently return to violence. Domestic “prisoner release” provisions often condition prisoner release on a commitment to peace, and the Northern Irish provi-

²⁰ For a good review of the cases see William (2005, p. 271).

sions explicitly provided for “recall” to prison in the event of new offences being committed (although this raised some fair trial issues).²¹

3 The Advantages of the New Law

The new law can be argued to evidence an increased commitment to accountability for serious violations of human rights and humanitarian law. While the law’s coverage may be unclear and impartial, it can be argued that unclear and impartial is better than no normative impact at all. We should not forget that as recently as 1990 requirements of accountability were not widely viewed as applicable, and amnesty was seen by mediators and parties to conflict as a tool that could readily be used with few international consequences. In fact, until the UN’s dissent in the Lomé Accord in 2000, human rights standards on accountability held little sway outside peace agreements in Central and South America. Controversial as the UN’s Lomé Accord dissent was and is, it played a key awareness raising role that norms mattered in peace negotiations.

The normative consensus that has emerged has underlined amnesty as an exception to a norm of accountability, rather than an option of first resort. This has arguably changed the emphasis of public debate – international and local – in peace negotiations. Rather than needing to justify measures aimed at accountability, acceptance of the relevance of international law means that it is now the use of amnesty that must be justified. The argument still persists that issues of accountability should not constrain negotiations (see below). However, the position is asserted in less absolute terms than before, with detractors fewer and quieter, and where a counter-practice of innovative forms of accountability can now be pointed to.

Accountability is now seen as having a pragmatic as well as principled arguments in its favour. The period in which human rights norms were viewed as marginal to a peace process was the period when peace agreements briefly seemed to be an end in themselves, and the point at which international actors could walk away. That is no longer the case. Increasingly, the crucial conflict resolution difficulty seems to be implementing the deal rather than “cutting it”. The UN has stated that nearly half of all peace agreements collapse within 5 years (see United Nations 2004). Increasingly, difficulties of implementing the rule of law are being seen as key to that failure. The more that mediators and international actors are faced with a role in implementing and sustaining the peace they have negotiated, the more questions of the rule of law, accountable political and legal institutions, and the symbolism of justice, matter. It is difficult to build a culture based on the rule of law, when the deal is founded in impunity. It can be argued that these practical arguments as much as shifts in the norms, have created a situation in which the choice is increasingly seen as “how much accountability when” rather than a choice between some and none.

²¹ On the issue of “risk” see Dwyer (2007, pp. 779–797).

The “new law” has the second advantage that it retains some scope for compromise, even if this is through lack of clarity in what standards require, as much as by design.

Finally, the new law is usefully beginning to set standards of participation in transitional justice design, which can be argued to be important not just to those mechanisms, but to requiring the participation of a broader range of actors than military elites in peace processes more generally.²² This is important not only to democratic practice, but to enabling creative locally tailored approaches and broad public debate over the connections between the means and the end of transitional justice mechanisms.

4 The Disadvantages of the New Law

As noted, some criticise normative constraints on amnesties. These critics cannot all be dismissed as committed “pragmatists” who have no commitment to human rights. Just as principled arguments can appeal to pragmatism, so pragmatic arguments can appeal to principle. The Truth Commission in Sierra Leone, for example, recognised the principle that it is generally desirable to prosecute perpetrators of serious human rights abuses, particularly when they rise to the level of gravity of crimes against humanity. However stated that it was “unable to condemn the sort to amnesty by those who negotiated the Lomé Peace Agreement” as too high a price for peace (Truth Commission in Sierra Leone 2004, Chap. 6, p. 4). This statement has been defended by Commission member, Professor William Schabas. Professor Schabas (2004, p. 163–164) argues that “those who argue that peace cannot be bartered in exchange for justice, under any circumstances must be prepared to justify the likely prolongation of an armed conflict”. For those who thought that the tension between peace and justice was resolved, current developments in Uganda where International Criminal Court indictments stand in tension with a developing peace process, point to the on-going relevance of the debate.

The new law’s ambiguities can conversely be criticised for being too soft on accountability (to the point of being unable to be reconciled with human rights standards), and open to manipulation. The suggestion that responses other than criminal justice in the sense of prosecution and punishment are permissible, can be argued not to comply with developing jurisprudence, particularly at the regional level in the Americas, but lately also in Europe. From a more pragmatic point of view, the “new law” can be argued to enable new more devious forms of impunity. The “Justice and Peace” law dealing with demobilisation and reintegration of the United Self-Defence Forces of Colombia (AUC), seems designed so as not to appear as an illegitimate amnesty –it links demobilisation to procedural benefits such as pardon and significantly reduced prison sentences, with little formal investigation (see further Laplante and Theidon 2007, pp. 49–108; International Crisis

²² See Freeman (2007) (setting out procedural standards which should apply to Truth Commissions).

Group (2005). While apparently accepted by international and regional organisations, it has been condemned by human rights NGOs who view it as a troubling example of impunity, given the self-amnesty dimension (the groups amnestied are pro-state), the lack of distinction between levels of responsibility, and the lack of any clear link to coherent process capable of ending the conflict as a whole. The law has now been criticised by the Inter-American Court of Human Rights, and elements struck down by the Colombian Constitutional Court.²³

Finally, it can be argued that an unclear law is a bad law that brings the concept of normativity as something that aims to guiding conduct, into disrepute. Liberal proceduralists, for example would reject any advance in ends (such as increased accountability), if the means are inconsistent with those ends. They would reject any notion that the rule of law in a substantive sense can be promoted by processes that themselves violate the rule of law in a procedural sense.

5 Developing the New Law

The new law will be developed whether anyone “develops” it or not. Peace agreements cannot but deal with the past – at the very least prisoners need released and so something about the past has to be said. More often achieving a deal requires some more substantial agreement on a process for dealing with the past. Human rights bodies and international organisations are then required to take a position. The post 1990 practice has shown just how rapidly the interpretive interaction between peace process and normative assertion can produce shifts in what the norms are understood to require, and even produce new norms and mechanisms. There are on-going attempts to further codify the law in the form of statements, UN resolutions, and various soft law standards. These can have just as much effect as “hard” law in effecting compliance.

The question remains, however: to what extent is it possible to develop the law so as to resolve its ambiguities? It is assumed that this would lead to further consolidation and extension of what seems like a trend towards an emphasis on accountability. A note of caution should perhaps be sounded, at least for sake of discussion.

The idea of an international consensus on a prohibition on amnesty should not be assumed. There is a great danger that in trying to tie down this consensus further, it would be tested. Moreover, the need to preserve some flexibility to enable negotiated ends to conflict is a real one. While the law can be charged as being incoherent and inconsistent, this is at present the main way that flexibility for negotiations is enabled. Reducing this flexibility further could again lead to normative frameworks being rejected more easily. Any attempt to articulate more clearly within normative frameworks the permissible scope of exceptions or alternative approaches to accountability, would start to be very prescriptive, and it is unclear that it is a project

²³ *Op cit.*

that has any coherent possibilities at all. There is further the possibility that in articulating any exceptional regime, human rights framework as they apply in more normal situations would be weakened. Transitional justice discourses have a contemporary purchase well beyond transitions from violent conflict. Exceptionalism in the name of the difficulties of transition could lead to a broad exceptionalism as more and more situations are defined as transitional.²⁴

Increased normativity also can have some unintended side effects. In particular, it stands to implicate mediators as well as parties to conflicts. Viewing mediators as themselves “caught” by amnesty norms (as logically should happen) can lead to two unintended side effects:

- (a) *Norm-dodging mediators.* There are several possible norm-dodging techniques, such as fashioning meaningless exceptions to blanket amnesties which will never see a mechanism for accountability implemented. More subtly, normative restrictions on mediators could lead to those mediators defining the mediation role in terms of a “client-lawyer” or disconnected “facilitator” in which the mediator has no tangible connection with the agreement (and therefore is not “tainted” with its amnesty). This would be a pity. At present mediators and international actors often sign peace agreements as witnesses, guarantors or observers, or sometimes with no specific nomenclature. While signature can be viewed as a paper commitment only, it can also be viewed as important to the status of the peace agreement, the parties sense of obligation, and, pertinently, the norm promotion role that third parties, groups of “friends” and international organisations can bring.
- (b) *Normative-mediator dodging parties.* The field of mediation is a “sexy” and crowded one. Parties are astute at choosing mediators who will serve them. There have been suggestions that in adopting a normative stance the UN ruled itself out of mediation business. In the case of the UN this may not matter; it can be argued that it will always be in peace processes in some shape or form, it was unclear that this was part of its business in any case, and that given that the key norms at stake are UN norms, its own normative commitment had to be beyond doubt. However, it would be clearly undesirable if all those who took their normative commitments seriously were ruled out of business.

These possibilities should not, however, be overstated.

6 Conclusions: In Defence of Mess

The prohibition on blanket amnesty has been important. It has particularly been important in conflicts where the nature of the conflict has been closely tied to impunity. To some extent, this explains why the jurisprudence from central America most clearly articulates the need for accountability in the form of prosecution, trial and

²⁴ Posner and Vermule argue in any case, that transitional justice is ordinary justice, see Posner and Vermule (2004, pp. 761–825).

even punishment. (More controversially, it suggests that this jurisprudence should not be read automatically into all contexts.)

In other conflicts, silence on the past, or even explicit amnesties, have been important to achieving an end to fighting and human rights abuses. Two types of conflicts have seen this approach as prevalent: first, conflicts in Africa where both state and non-state actors often have the appearance of private rather than public actors, and second, in conflicts that only arguably triggered humanitarian law at all and where prosecution and punishment were let-go but this was seen as a purely domestic process of demobilisation.

At present international law emphasises the need for clear accountability for the most serious abuses and violations, and points in the direction of a need for accountability more generally. A presumption of the legality of amnesties has been replaced with a presumption of their illegality. However, the new law has ambiguities, gaps and incoherencies that leave some room for negotiation, sequencing, and creative approaches.

The question is, does the law need to be more coherent than this? It can be argued that the current position points away from a direct choice between accountability or no accountability, towards its reframing in terms of how much accountability can be achieved when. If one follows up what happens peace agreement provisions, the following observations can be made:

- (a) Not all blanket amnesties last. Arguments for accountability persist, internationally and locally, seldom without effect. The early transitions of Chile and Argentina where amnesties continue to be “undone” by courts serve as an example.
- (b) Often reasonable and effective accountability mechanisms are followed by effective broad amnesty though inaction, as in El Salvador and Guatemala (although here again the picture is not static with new trials emerging).
- (c) “Strong” accountability mechanisms such as trials often deliver “weak” results. The numbers and calibre of military figures dealt with by ad hoc international criminal tribunals, and sometimes the outcome, are often disappointing.
- (d) Weak mechanisms can deliver strong results, where they mobilise constituencies and rule of law arguments that the powerful cannot resist, as (a) and (b) indicate.

This might leave one to argue that the symbolism and the “idea of law” is as important as what the law actually says at any one point in time. If this is the case, then the question becomes: how do we best create a common consensus as to the “idea of law”. The answer might be – we establish a notion of best practice, and encourage people to comply through processes that include democratic dialogue on how international standards are best implemented in any one context. Is this not the best that international law can offer in any case?

I leave with Sierra Leone as an analogy. Disagreement continues on whether the UN “disclaimer” to the Lome accords (accent on Lome) fuelled renewed conflict, or enabled its root causes to eventually be addressed. Disagreement continues on whether the Special Criminal Court’s rejection of the amnesty’s validity completed

the peace process (and even assisted one in Liberia), or was unfair and unhelpfully removed amnesty from the mediation tool kit.

However, there seems to be broad agreement that while the Lomé Accord was not perfect, in the words of Schabas (2004, p. 164): “it provided a framework for a process that pacified the combatants and, 5 years later, has returned Sierra Leoneans to a country in which they need not fear daily violence and atrocity”.

In hindsight, is it just possible that both Truth and Reconciliation Commission and Special Criminal Court played a role? The TRC through acknowledgement (still rooted in a concept of truth as accountability) of the political relationship between both the promulgation of the amnesty and its rejection and mutations in the violent conflict. The Special Criminal Court by articulating objective justice standards capable of underwriting the democracy. Could it be that the very inconsistencies between the two mechanisms were important in reflecting a complex conflict, and in acknowledging the difficulties of right answers? Could it be, that what is prescribed on paper is less important than what the mechanisms and those who interact with them are able to articulate and acknowledge through them?

The existence of both the Truth Commission and the Special Criminal Court brought inconsistencies, complications and a certain degree of mess. But in conflicts and peace processes in which easy right answers are seldom to be found, and dilemmas and inconsistencies to be managed rather than wished away, perhaps this should be embraced rather than sorted out.

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