Post-conflict Amnesties and/as Plea Bargains

Patrick Lenta, Faculty of Law, University of Technology Sydney, New South Wales, Australia, patrick.lenta@uts.edu.au

Orcid: 0000-0003-4061-4376

Abstract. I assess the force of a justification for post-conflict amnesties that is aimed at overcoming the most common objection to their conferral: that they entail retributive injustice. According to this justification, retributivists ought to consider amnesties to be justified because they are analogous to plea bargains, and because retributivists need not consider plea bargains to be unacceptable. I argue with reference to the 2001 Timor-Leste immunity scheme that amnesties conditional upon perpetrators' not only admitting guilt and confessing but also making reparations may *count as* plea bargains, while amnesties not conditional upon perpetrators making reparations could *at most resemble* plea bargains. I show that plea bargains providing sentence discounts in return for guilty pleas, allowing offenders who accept these bargains to be punished in the absence of trials, and plea bargains offering leniency in punishment in exchange for offenders pleading guilty and providing testimony or other incriminating evidence against superiors or accomplices, may be consonant with versions of retributivism that allow less than the full measure of an offender's deserved punishment to be exacted where necessary to maximise or expand deserved punishment overall. I argue that amnesties that are also plea bargains may be considered justified by plea bargain-defending retributivists. So too may amnesties conferred in exchange for perpetrators' admitting guilt and providing incriminating testimony or other evidence against their superiors and accomplices, some of which count as plea bargains, since they too could in some cases maximise or expand deserved punishment.

Keywords: amnesties; retributivism; plea bargains; punishment; transitional justice

1. Introduction

My purpose in this paper is to assess the force of a justification for post-conflict amnesties. Post-conflict amnesties (henceforth, simply 'amnesties') are legal measures, most commonly legislative enactments, conferring immunity from criminal, and occasionally civil, liability on groups of perpetrators of politically motivated crimes, inclusive, not infrequently, of serious human rights abuses, that have occurred during violent political conflict. Use of amnesties has a history extending back more than two millennia (Close 2019: chapters 1-3), hundreds of amnesties having been instituted in countries across South America, North America, Africa, Europe and the Asia-Pacific region (Mallinder 2008; Freeman 2009; Jeffery 2014). Despite the 'justice cascade', the increasing tendency in recent decades for democratising states to hold perpetrators of human rights abuses criminally accountable through the use of trials in the aftermath of political conflict (Sikkink 2011), the bestowal of amnesties is widespread. Amnesty is reported to be the most commonly employed device of transitional justice (Olsen, Paine and Reiter 2010: 39; Jeffery 2014: 3).[1] Among the more common reasons for granting amnesty are to induce members of rebel groups to surrender, to incentivise autocratic regimes and their agents to relinquish power peacefully, and to defuse enmity or political tensions between former adversaries with a view to promoting peace and social reconciliation.

The terms on which amnesties are conferred vary. They may be extended to perpetrators of all crimes committed within a certain period, or they may be restricted to perpetrators of serious human rights violations or to perpetrators of less serious crimes. They may be granted automatically to all members of a group of perpetrators, or those perpetrators desiring

amnesty and eligible to receive it may be required to apply for it. They may be conferred conditionally upon perpetrators' performing acts in satisfaction of certain conditions, such as laying down their arms or admitting guilt and disclosing the details of their crimes, or they may be bestowed unconditionally, without perpetrators' having to fulfill any conditions.

The moral status of amnesties has long been, and remains, contentious.[2] Amnesties are very often opposed on retributivist grounds. As Colleen Murphy observes, "retributive theories of the criminal law … best capture a core source of the dissatisfaction with responses other than punishment in transitional societies" (Murphy 2017: 8, n18).[3] Amnesties are also, it is true, sometimes impugned on the consequentialist ground that their costs (including their forgoing of the putative benefits of punishment such as deterrence, incapacitation, reform and denunciation) have not been shown to outweigh the benefits (such as reconciliation) extolled by their supporters. But by far the most common objection to amnesties is that they entail a *sacrifice of justice*, where the conception of justice expressly or impliedly appealed to is retributive. And not only is the retributive objection to amnesties the most prevalent, it is also, in the view of many, including myself, the most powerful. For these reasons, I will be concerned in what follows primarily with the retributivist objection to amnesties and with an attempt to overcome it. I will nonetheless briefly address the implications of the principal argument of this paper for consequentialist assessments of amnesty in the penultimate section of this paper.

The granting of amnesties is in tension with the tenets of retributivism.[4] For retributivists, malefactors' desert justifies their subjection to punishment and, more than this, on most renderings of retributivism the imposition of punishment on deserving miscreants is morally obligatory. Retributivists for the most part accept as an aspect of desert the principle of proportionality, which demands that the severity of the punishment to which an offender is subject must fit the seriousness of the wrongdoing for which it is imposed.[5] The significant

departure from proportionality in allowing offenders to escape punishment entirely, as amnesties tend to, is likely to appear to many retributivists, at least initially, as gravely unjust. And the appearance of injustice is likely to be all the more acute where amnesties are bestowed in favour of perpetrators of serious human rights violations such as abduction, torture and murder, especially in the eyes of retributivists for whom the duty (or reason) to punish the deserving is stronger in cases of serious wrongdoing than in cases of lesser or minor wrongdoing (Lippke 2009: 378-9; Husak 2013: 13).

Also contributing to amnesty's seeming injustice in the perspective of many retributivists is its violation of the *comparative* principle that perpetrators of equally serious crimes should be punished with equal severity (see, e.g., Ten 1987: 51; Moore 1997: 90). The degree of comparative injustice involved in granting amnesty is often appreciable. Consider the treatment of two torturers whose crimes are indistinguishably serious under an amnesty dispensation that conditions amnesty's conferral on perpetrators' admitting guilt and confessing the details of their crimes. One perpetrator admits guilt, confesses and, receiving amnesty, walks free, while the other, standing on their rights to remain silent and to stand trial, is tried, convicted and sentenced to severe punishment.[6] The pronounced disparity in the treatment of these offenders cannot be justified by appeal to the lower culpability of the amnesty recipient compared to the perpetrator subjected to severe punishment since admission of guilt and confession in return for amnesty does not lower (or mitigate) a perpetrator's culpability and is by no means necessarily a sign of remorse.[7]

Of course, as is well known, retributivists of a non-absolutist stripe can and should concede that there may be circumstances in which, all things considered, the deserving should not be punished. They can concede, that is, that conflicting reasons can sometimes outweigh the claims of desert or retributive justice such that amnesties in favour of even flagitious wrongdoers may sometimes be justified. For instance, non-absolutist retributivists

ought to consider justified an amnesty granted in transitional justice settings in which a brutal and oppressive outgoing regime retains sufficient power to require that amnesty in favour of its leaders and agents be granted as a condition of its relinquishing power peacefully, and in which refusal to forgo punishment of perpetrators by the incoming democratic regime would, given the power retained by the outgoing regime, almost certainly result in relapse into tyranny and/or the continuation of violent political conflict between supporters of the outgoing regime and its opponents at the cost of extensive loss of life and widespread suffering. The post-apartheid South African amnesty has quite often been justified by retributivists in this way (see, e.g., Murphy 2016: 31; Tasioulas 2011: 45).

But could retributivists (those, at least, who accept that retributivism has application in transitional justice settings[8]) consider amnesties justified on other grounds? A number of additional rationales for amnesty purporting to justify it from a retributivist vantage-point have been advanced (see, e.g., Markel 1999: 389; Allais 2011: 331; Espindola 2014: 971). I propose here to bring one such rationale under scrutiny, namely that because amnesties, or at least certain amnesties, resemble plea bargains, and because retributivists need not consider plea bargains to be morally unacceptable, retributivists ought to concede that amnesties, those at any rate that are analogous to plea bargains, are justified. This justification merits philosophical attention because, unlike most other justifications purporting to show the consistency of amnesty with retributivism, it has hitherto been almost completely neglected by philosophers, despite (certain) amnesties having often been likened to plea bargains (Markel 1999: 437-8; Osiel 2009: 218; Levinson 2000: 220; Mallinder 2008: 102; Freeman 2009: 208), and despite certain legal scholars prevailing on the analogy in their efforts to justify amnesty (Markel 1999: 437-8; Mallinder 2008: 102). Nor is the relative philosophical neglect of the plea bargain analogy attributable to its being inherently uninteresting or manifestly implausible. I hope to show that at least certain amnesties resemble plea bargains

and that some may actually be plea bargains; that certain plea bargains are consonant with versions of deontological and consequentialist retributivism; and that plea bargain-defending retributivists ought to consider amnesties that are or closely resemble plea bargains to be justified on the strength of the plea bargain analogy.

The structure of the paper is as follows. In section 2, I enquire into whether, and the degree to which, amnesties resemble plea bargains. In section 3, I consider whether retributivists could consider plea bargains to be morally acceptable. In section 4, I investigate whether justifications for plea bargains accepted by certain retributivists could apply to amnesties. I briefly assess whether the plea bargain analogy could assist consequentialists to justify amnesty in section 5. I conclude in section 6 by spelling out an important normative implication of my central argument for the design of amnesties in the future.

2. Amnesties as Plea Bargains

There are two kinds of plea bargain that could potentially bear a resemblance to amnesty depending on the terms on which amnesty is conferred. The first, most common type consists in a reduction in the sentence a criminal defendant would receive if convicted at trial in return for waiving their rights against self-incrimination, and to stand trial, by pleading guilty. The second is a sentence discount in return for an offender's co-operation in the form of testifying or providing evidence against their accomplices and associates.[9] I will in this section and the next be considering only the first type of plea bargain. I will recur to the second type in section 4.

The degree of similarity between amnesties and plea bargains depends on the kind of amnesty under consideration. Self-amnesties such as that granted by General Pinochet in Chile in 1978 with the aim of shielding the junta's officials and agents from criminal liability

for serious human rights abuses, including the execution, torture and abduction, are not like plea bargains at all because they are not bargains of any description. Unconditional amnesties granted by an incoming regime covering officials and agents of an outgoing regime in exchange for the latter's relinquishing power peacefully resemble plea bargains insofar as they at least are bargains: the *ancien regime* gives up something of value (power) in return for prosecution and punishment forbearance (Osiel 2009: 218). Yet these amnesties lack a crucial feature of plea bargains: the bargains struck are bereft of the element of (guilty) plea. Amnesties bear a significant resemblance to plea bargains when (and only when) the bargain includes the term that amnesty will be granted contingently, at the minimum, upon recipients admitting guilt and confessing their crimes, as the amnesties granted by the South African Truth and Reconciliation Commission, for example, did. But while amnesties conditional only upon perpetrators' admitting guilt and disclosing the details of their misdeeds are sometimes characterised as plea bargains – Justice Robertson of the Special Court for Sierra Leone, Appeals Chamber, for instance, describes the post-apartheid South African amnesty as "a plea bargaining device" (quoted in Freeman 2009: 208) – they closely resemble, without actually being, plea bargains. Plea bargains afford individuals *sentence discounts*, a reduction in legal punishment such that they are still held criminally liable and receive some legal punishment,[10] whereas amnesties conditional only upon perpetrators' admitting guilt and disclosing the details of their misdoings ensure that their recipients *escape legal punishment altogether* (Markel 1999: 438; Combs 2007: 130; Freeman 2009: 14).[11]

Could amnesties ever be plea bargains? That is, could amnesties be granted conditionally upon perpetrators' not only admitting guilt and confessing but also undergoing punishment that is lenient compared to the severity of punishment to which they would otherwise be sentenced if convicted at trial? This seems like an impossibility given that amnesties confer immunity from prosecution and punishment *by definition*. But consider the Timor-Leste

immunity scheme. In July 2001, the United Nations Transitional Administration in Timor-Leste, authorised by United Nations Regulation no. 2001/10 (hereafter, 'the Regulation'),[12] established a Commission for Reception, Truth, and Reconciliation Commission (a truth commission known by the Portuguese acronym CAVR), which included a Community Reconciliation Process (CRP) aimed at reconciling perpetrators of less serious crimes such as theft and minor assault with their victims and the community as a whole.[13] Perpetrators were required as a condition of participating in the CRP, in preference to exposure to the possibility of prosecution and trial, to submit to the CAVR a written statement containing an admission of guilt and a comprehensive description of their crimes. Once an offender had submitted this statement, a copy was sent to the Office of the General Prosecutor to allow it to exercise jurisdiction if it deemed the offense(s) described in the statement to be too serious to be processed through the CRP.[14] If the Office of the General Prosecutor waived its right to prosecute, the CAVR scheduled a public hearing presided over by a panel that included community representatives and was chaired by a CAVR regional commissioner. After offenders' statements had been read out, offenders were afforded an opportunity to make an oral statement, whereupon they were required to answer questions posed by the CRP panel, victims and community members about the wrongful acts they had disclosed. At the end of the hearing, the panel decided upon an appropriate "act of reconciliation" – a public apology, as well as, in some cases, community service or compensation – which, if the offender agreed to it, was recorded in a Community Reconciliation Agreement (CRA), which also included the time limit for its performance. A perpetrator's refusal to agree to carry out the act of reconciliation determined by the panel as suitable resulted in the matter being referred back to the CAVR, and from there, potentially, to the Office of the General Prosecutor for prosecution. Offenders' non-compliance with the terms of CRAs was defined as a criminal offence exposing them to criminal punishment. Perpetrators' performance in full of their

obligations under CRAs resulted automatically in their receiving immunity from criminal and civil liability.

Pre-eminent commentators on amnesty disagree about whether this immunity dispensation counts as an amnesty or a plea bargain. The Office of the United Nations High Commissioner for Human Rights, for instance, has stated that "because the criminal waiver is contingent on community service or payment, and is overseen by a local court, it is more akin to a negotiated plea bargain, and is not considered an amnesty" (Office of the United Nations Commissioner for Human Rights 2006: 12).[15] Mark Freeman and Louise Mallinder demur, however, considering it an amnesty (Freeman 2009: 169; Mallinder 2014: 154, 160). Which is the correct view?

One salient consideration is whether the acts of reconciliation participating perpetrators were required to carry out count as punishment. That these acts were reconciliatory in aim does not preclude their counting as punishment since reconciliation can be among the goals of punishment; for some, indeed, the goal of reconciliation between offenders, on the one hand, and their victims and the rest of society, on the other, can *only* be achieved through legal punishment (Duff 2001: 109-112; Bennett 2003: 67; Metz 2022). Furthermore, the fact that they are reparative does not rule out their being punishment, for reparative measures may count as, and are endorsed as, punishments on several prominent accounts of punishment, and they are sometimes imposed by courts as punishment (Duff 2001; Duff 2003).

Enforced performance of reparative acts may count as punishment under the standard definition of legal punishment as the intentional imposition and administration by the state or other entity possessing the requisite authority of a burden or deprivation on offenders as a direct consequence of their transgressions of the law (Hart 2008: 4-5). In Timor-Leste, the acts of reconciliation that perpetrators of less serious crimes were eligible to perform were burdensome; even public verbal apologies, and even if they be insincere, are liable to be

humbling when not painfully humiliating, and acts of community service and compensation harm offenders by setting back their interests in property or liberty.

In Timor-Leste, a panel was responsible for determining which act(s) would be fitting for each perpetrator to perform. But were acts of reconciliation *imposed* on offenders, as they must be if they are to count as punishment? On the one hand, perpetrators were not forced to accept the acts of reconciliation the panel considered fitting for them.[16] On the other hand, perpetrators could not simply choose to walk free: the alternative to consenting to perform acts of reconciliation was exposure to prosecution, potentially resulting in punishment. Perpetrators were thus required to choose between carrying out specified acts of reconciliation and exposing themselves to the possibility of the imposition of proportional punishment if found guilty at trial. There is, I submit, good reason to consider the acts of reconciliation to have been imposed in a way requisite to legal punishment. We would not want to deny that the reduced punishment offenders receive as a result of plea bargains is punishment simply because offenders who accept these bargains could have chosen instead to take their chances with trials. Similarly, we should not deny that the Timor-Leste acts of reconciliation count as punishment simply because participating perpetrators could have elected to take their chances with prosecution and trials.[17]

Were the acts of reconciliation, once imposed, *administered* by the state or other authorised entity? Yes, to an appreciable extent, since the District Court and police oversaw acts of reconciliation. CRAs were required to be registered with the District Court, which was obliged to register them as Orders of Court and send them to the police. Perpetrators' failure to complete acts of reconciliation timeously, deemed a criminal offence for which the prescribed sentence was a term of imprisonment, could be reported by victims and others to the police for referral to the Office of the General Prosecutor.

Someone might object that acts of reconciliation cannot be punishment because treatment of an offender will count as punishment only if it intentionally harms the offender (see, for example, Boonin 2008: 24-25), and acts of reconciliation are not intended to harm offenders, being instead aimed exclusively at ensuring that they repair the harm they have caused (even though offenders may foreseeably be harmed in the course of making amends). But even if it be accepted that the definition of legal punishment includes as an element that the hard treatment imposed on offenders must be intended to harm them – the standard definition of legal punishment set out above requires only that the hard treatment be *intentionally imposed* – there is reason to think that the acts of reconciliation imposed in Timor-Leste *were* intended to burden offenders. They were not aimed merely at making good the harm caused to victims, but at reconciling offenders, at least to the extent of fostering acceptance and respect requisite to fellowship in the polity, with their direct victims and members of the broader community. They were intended to promote reconciliation by providing offenders with an opportunity to express their recognition of their wrongs as wrongful, their repudiation of their wrongful acts, and their remorse and apology for their misdeeds. This intention is signalled by acts of reconciliation also being referred to in the Regulation as "act[s] of contrition".[18] Reparations aimed at expressing or giving force to remorse and apology are intended to be burdensome. Remorseful and apologetic reparations *must* be burdensome if they are to symbolize the injury done to victims and the wrongdoer's burden of remorse (Duff 2002: 90; Duff 2001: 53).

I conclude that the Timor-Leste acts of reconciliation count as punishment. It might seem to follow from this conclusion that the Timor-Leste immunity scheme cannot be an amnesty dispensation since amnesty exempts perpetrators from prosecution and punishment. But this does not follow: if the granting of amnesty is understood as the conferral through a legal mechanism of immunity from criminal and sometimes civil liability upon a group of

perpetrators, the Timor-Leste scheme is a conditional amnesty, for as the Regulation provides, "A person who has fully complied with all obligations arising under a CRA shall have no criminal liability for acts disclosed therein"; and it expressly immunises such persons against civil liability too.[19] That this immunity is granted conditionally upon perpetrators having undergone punishment in the form of completed acts of reconciliation means that it is a *conditional* amnesty and not that it does not count as an amnesty.

That the Timor-Leste immunity scheme was an amnesty dispensation does not rule out its closely resembling or even counting as a plea bargain. For it to be a plea bargain arrangement, the punishment exacted under the head of 'acts of reconciliation' would have to have been lenient compared to the punishment perpetrators would have received at trial if convicted. As it happens, while the Regulation did not expressly provide for sentence discounts or leniency in punishment in return for a guilty plea and disclosure of wrongdoing, the acts of reconciliation were almost certainly less severe than perpetrators' presumptively deserved punishment. Most offenders were required only to apologize publicly, with others having in addition to perform community service "such as four days of labour to build a community hall" or "the planting of trees for ten days on church land" (Combs 2007: 221). It is unlikely that the CRP process would have been as popular as it was, receiving "in the end … more than fifteen hundred [statements from perpetrators], a 50-percent increase over projections", had it not offered leniency in punishment (Combs 2007: 221). Freeman, one of the foremost commentators on amnesty, refers to the Timor-Leste immunity scheme as a "leniency" scheme (Freeman 2009: 169).

The Timor-Leste immunity scheme was both an amnesty and, very probably, a kind of plea bargain. It must be conceded, however, that relative to other amnesties granted heretofore it was extraordinary: amnesties have not often been bestowed subject to conditions more burdensome to perpetrators than admitting guilt and confessing, and no amnesty

covering serious human rights abuses has ever been granted conditionally upon perpetrators' being required to carry out reparations. Nonetheless, it is possible that amnesties covering serious human rights abuses that are conditional on perpetrators not only confessing but also making reparation could in future become more common given the increasing international condemnation, by the United Nations and other human rights and quasi-judicial organizations, of amnesties allowing perpetrators of serious human rights violations to escape punishment entirely (Engle 2015). I will in section 4 consider whether retributivists could consider amnesties like the Timor-Leste immunity that are, or very closely resemble, plea bargains, to be justified by reason of their being or closely resembling plea bargains. I will also consider whether retributivists could consider amnesties that resemble plea bargains without being plea bargains, that is, amnesties conditional upon perpetrators' admitting guilt but not upon their carrying out reparations, to derive justificatory support from that resemblance. First, though, it is necessary to determine whether retributivists should consider plea bargains to be justified, the subject of the next section.

3. Are Plea Bargains Consistent With Retributivism?

A number of retributivists consider plea bargains to be objectionable (see, e.g., Duff 1986: 141; Zaibert 2021: 108). Certain other retributivists, however, have been persuaded by a justification commonly advanced in support of plea bargains. According to this justification, because the resources at the disposal of prosecutors and other state officials involved in the process of criminal investigation and prosecution are finite, criminal law enforcement having to compete for limited resources with other social goods such as education and social welfare, state officials will be unable to investigate and prosecute all individuals they reasonably suspect of having committed crimes. Allowing defendants to plead guilty (and confess,

potentially) in exchange for sentence discounts facilitates their receiving at least some of the punishment they deserve (on the assumption that they are guilty) while at the same time allowing resources conserved through the avoidance of trials to be used to facilitate the prosecution and punishment of other deserving miscreants. In this way, the justification continues, plea bargains not only enable more deserving miscreants to be punished than would otherwise be possible, but also, as long as sentence discounts are kept relatively modest, ensure that those punished receive most of the punishment they deserve. Plea bargains, in other words, facilitate the expansion of deserved punishment.

A version of retributivism sympathetic to this line of justification for plea bargains is consequentialist. According to Michael Moore, we should concede the possibility of a version of retributivism which understands the desert norm in consequentialist terms: deserved punishment is to be maximised. On a consequentialist retributivism, imposing on offenders less severe punishment than they deserve where necessary to maximise deserved punishment is the right thing to do (Moore 1997: 155-159).[20] There are also deontological versions of retributivism which accept that some sacrifice of retributive justice may be justified where necessary for the expansion of deserved punishment. On Richard Lippke's version of retributivism, it is "permissible for state officials to trade off desert claims – to give some offenders less punishment than they deserve in order to use the resources conserved to give other, and presumably more serious offenders some of the punishment they deserve" (Lippke 2011: 74). Lippke considers plea bargains offering sentence reductions in exchange for offenders' pleading guilty to be acceptable on the ground that the resources conserved by avoiding trials could be used to increase deserved punishment overall. He also considers certain plea bargains providing sentence reductions to secure the co-operation of defendants in the form of their supplying incriminating evidence, including testimony, against their accomplices and associates, to be justified (again, to expand deserved punishment) (Lippke

2011: 146-166). For Lippke, plea bargains' acceptability is in most cases conditional upon their offering only *modest* sentence discounts in exchange for guilty pleas and/or confessions, ensuring that offenders who accept them receive a high proportion of the punishment they deserve. For by keeping sentence discounts modest, non-comparative and comparative injustices are minimised.[21]

4. Does the Plea Bargain Analogy Assist Retributivists to Justify Amnesties?

I want now to enquire into whether the analogy between amnesties conditional, at the minimum, on perpetrators admitting their guilt and disclosing the details of their crimes, and plea bargains, could lend such amnesties justificatory support in the view of plea bargain-defending retributivists. (Amnesties not conditional in this way are too remote from plea bargains to derive justificatory support from the plea bargain analogy.) An amnesty conferred on the terms of the Timor-Leste amnesty/plea bargain could be considered justified in the perspective of Lippke's version of retributivism. While aimed at reconciliation, the Timor-Leste CRP ensured that more perpetrators received some proportion of their deserved punishment than would have otherwise been possible. For not only would trials have been expensive and time-consuming, Timor-Leste's criminal justice system was "underdeveloped, [and] under-resourced", as is often the case in transitional justice settings (Combs 2007: 222). And even if retributivist defenders of plea bargains would balk at the degree of leniency some recipients of the Timor-Leste amnesty were shown, we can easily imagine an amnesty dispensation which, as a condition of amnesty, requires perpetrators to perform as punishment reparative acts whose burdensomeness is only moderately less than the burden they deserve to suffer. In these circumstances, I see no reason why plea bargain-supporting retributivists should not consider such an amnesty arrangement to be justified. However, the

plea bargain analogy cannot assist retributivists to justify the post-apartheid South African amnesty, which, be it remembered, was conditional solely upon perpetrators admitting guilt and confessing their crimes. Since perpetrators were not required to carry out reparative acts as a condition of being granted amnesty, it did not result in a maximisation or expansion of deserved punishment.[22]

To this point I have been concerned only with the first of the two kinds of plea bargains introduced at the beginning of section 2, sentence reductions in exchange for guilty pleas aimed at convicting and punishing offenders without the expense and other burdens of trials. I want now to (a) consider whether an analogy can be drawn between plea bargains consisting in sentence reductions in exchange for offenders providing evidence incriminating accomplices and associates and amnesties granted with the aim of eliciting incriminating evidence against third parties, and (b) assess whether that analogy could help to retributivists to justify these amnesties. Mallinder suggests that amnesties "could be like plea bargains" if offered to low-level perpetrators in return not only for admissions of guilt but also perpetrators' "'point[ing] the finger across and up the chain of command' by providing evidence on who ordered them to commit the crimes" (Mallinder 2008: 102). Amnesties conferred on this basis could, she thinks, be viewed with favour by plea bargain-defending retributivists: "although at first glance, amnesty laws seem to be [the] antithesis of retributive justice … where amnesty or other leniency measures result in admissions of guilt or offenders testifying against their former superiors, they could contribute to the goals of retribution by speeding up complex trials and facilitating the gathering of evidence" (Mallinder 2012: 38).

While historically few if any amnesties have been granted with the aim of securing the conviction of third parties (Freeman 2009: 15), if immunity from criminal liability *was* to be granted conditionally on low-level perpetrators co-operating in the form of testifying, or otherwise providing incriminating evidence against their superiors, these grants of immunity

would count as both amnesties and co-operation-inducing plea bargains. Amnesties conferred on these terms could derive justificatory support, from the standpoint of plea bargain-defending retributivists, from their being plea bargains. Consequentialist retributivists are committed to imposing less than a perpetrator's deserved punishment where necessary to maximise deserved punishment. So long as amnesties conferred to induce perpetrator co-operation ensure that deserved punishment is maximised, consequentialist retributivists ought to support them. Deontological retributivists who defend plea bargains could likewise support amnesties conferred on these terms. As adumbrated in section 3, Lippke thinks that plea bargains for the purpose of eliciting testimony or other evidence necessary to secure the conviction of an offender's associates and accomplices could be permissible where they significantly expand deserved punishment overall. What he considers to be the disadvantages of plea bargains that reward co-operation with a degree of leniency in punishment – primarily their non-comparative and comparative injustice and the possibility of their eliciting unreliable evidence – are in his view be outweighed in cases in which the offenders whose prosecution is enabled by that co-operation are numerous and have committed serious wrongs (Lippke 2011: 157). But the justifiability of such plea bargains, in Lippke's view, is ordinarily contingent upon the sentence reduction being kept modest; only in exceptional cases in which a modest sentence reduction will be ineffective in inducing a witness to co-operate, as when the perpetrator is "fiercely loyal to or fearful of their former associates", does he think that a more substantial reward could be justified (Lippke 2011: 164).

Amnesties offered to low-level perpetrators on condition that they plead guilty and provide incriminating testimony or other evidence enabling the conviction and punishment of their superiors, but which are *not* also conditional on perpetrators undergoing (lenient) punishment, would not count as plea bargains. They would, to an extent, *resemble* co-operation-inducing plea bargains, but they would more closely resemble general witness

immunity of the kind that may be offered to criminals in exchange for co-operation under section 71 of the United Kingdom's Serious Organised Crime and Police Act 2005. Consequentialist retributivists could support co-operation-inducing amnesties foregoing punishment entirely so long as they maximise deserved punishment overall. Plea bargain-defending deontological retributivists could also support such amnesties in cases in which forbearing punishment is *strictly necessary* to enable the conviction and punishment of perpetrators great in number or whose crimes are very serious (so that deserved punishment is significantly expanded overall).[23]

5. Does the Plea Bargain Analogy Assist Consequentialists to Justify Amnesties?

Could the plea bargain analogy assist non-retributive consequentialists to justify amnesties that are, or are relevantly similar to, plea bargains? Certain consequentialists have defended plea bargains by invoking their potential to reduce crime (see, for example, Easterbrook 1983; Easterbrook 1992). Their argument is that in contexts in which there are a high number of criminal defendants and scarce resources, plea bargains, by increasing the number of cases that can be processed (prosecutions and trials being time-consuming and resource-devouring) and ensuring that more offenders receive some punishment, *deter* more effectively than if fewer offenders are punished more severely (through conviction and sentence at trial). This argument is supported by empirical studies that have consistently shown that increases in sentence *severity* are not correlated with crime reduction, while increases in the '*certainty*' of punishment – the probability that offenders will be apprehended and punished in some way – are associated with marginal deterrence (see, e.g., Paternoster 2010). Consequentialists could potentially enlist this crime-reduction justification in support of amnesties that, like the Timor-Leste amnesty/plea bargain, are conditional upon guilty pleas and the performance of

acts of reparation. The sacrifice of incapacitation and reform involved in sentence discounts, if any, could potentially be made up for by an increase in incapacitation and reform achieved through the punishment of a greater number of offenders. The sacrifice of denunciation – the crime-reducing effect of punishment achieved through its affirmation and fortification of citizens' opposition to criminal wrongdoing, its creation of a community identity opposed to such wrongdoing, and its satisfying the desire for revenge on the part of victims and other members of the community – involved in punishing leniently could be minimized by keeping sentence discounts modest, so that the punishment imposed on amnesty recipients still communicates to members of the public the message that the state takes their crimes seriously and condemns them.

The plea bargain analogy could also help consequentialists to justify amnesties granted to low-level perpetrators where necessary to induce them to testify or provide incriminating evidence against their superiors or accomplices. The punishment of more perpetrators, or perpetrators of more serious crimes, such amnesties may facilitate could result in an overall increase in deterrence, incapacitation, reform and denunciation. The sacrifice of deterrence, incapacitation, reform and denunciation occasioned by sentence discounts will, however, be greater in the case of co-operation-incentivising amnesties that forego punishment of their recipients entirely. Nevertheless, the crime reduction effectuated by punishing more perpetrators, or perpetrators of more serious crimes, could outweigh this sacrifice.

Whether the justifications brought forward by consequentialists in support of plea bargains could assist them to justify amnesties granted to elicit guilty pleas or to induce perpetrator co-operation depends on the empirical evidence that can be adduced about the effects of amnesties conferred on these terms. At present, available evidence about the effects of amnesties is too meagre and murky to support confident conclusions about their crime-

reduction efficacy.[24] And the fact that there have been relatively few amnesties resembling plea bargains to date makes drawing conclusions about their effects even more unsafe.

6. Conclusion

I have argued that the plea bargain analogy can assist in justifying certain amnesties from the vantage-point of retributivists who accept that plea bargains which expand deserved punishment overall can be justified. Retributivist defenders of plea bargains can consider justified amnesties that are conditional upon perpetrators not only pleading guilty plea but also making reparations, since these amnesties, which could count as plea bargains, may result in an expansion of deserved punishment. So too can the plea bargain analogy provide retributivists supportive of plea bargains with a ground for regarding as justified co-operation-inducing amnesties conferred selectively on perpetrators who can provide testimony or other evidence necessary to secure the conviction of superiors or associates, some of which may count as plea bargains, because these amnesties too may result in the expansion of deserved punishment. The plea bargain analogy could potentially also strengthen the consequentialist case for amnesties that count as or resemble plea bargains, but that would require appreciably more evidence of the crime-reducing efficacy of such amnesties than is available at present.

I want to conclude by drawing out a normative implication of my argument for the design of the most common amnesties: those bestowed with the aim of bringing an end to violent conflict or inducing authoritarian regimes retaining significant power to relinquish it peacefully. Such amnesties should, where reasonably possible, be granted conditionally not only on perpetrators' admitting guilt and making a full confession, but also upon their making reparations which, while offering perpetrators the lure of leniency relative to their

presumptively deserved punishment, are only moderately lenient. The example of the Timor-Leste amnesty shows how this arrangement could work, even though in that case the 'acts of reconciliation' required of perpetrators in exchange for amnesty were unsatisfactorily lenient in some cases. True, the immunity from legal liability extended to perpetrators under the Timor-Leste dispensation covered only lesser or minor crimes such as petty theft or assault and not serious war crimes, crimes against humanity or other gross human rights violations. Yet in principle an amnesty covering serious human rights abuses could be bestowed conditionally upon perpetrators admitting to and fully confessing their crimes, and making reparations lenient relative to the punishment they deserve.

Support for the viability of such an amnesty is provided by the 2016 Colombian Final Peace Agreement.[25] Under this agreement, belligerents who had committed serious war crimes, crimes against humanity and (other) gross human rights violations were ineligible for amnesty. Nevertheless, these perpetrators did qualify to receive 'alternative sentences' enabling them to avoid terms of imprisonment in exchange for an admission of responsibility for, and comprehensive disclosure of, their crimes at the beginning of their hearing before a special tribunal. Alternative sentences consisted of five to eight years of reparative labour that could include building and repairing schools, public roads or community centres or the clearing and disposal of anti-personnel mines. Although not an amnesty – perpetrators of serious crimes were tried by a special tribunal and received criminal sentences imposing alternative punishments – the Colombian dispensation resembled the Timor-Leste amnesty/plea bargain insofar as perpetrators were punished leniently in return for publicly admitting guilt and telling the truth about their serious wrongdoing (Close 2019: 99-101).

Amnesties conforming to this model will admittedly not always be viable. The stringency of the terms on which amnesties are granted will often depend on what representatives of outgoing regimes or rebel groups or perpetrators themselves are prepared to accept in

exchange for surrender or peaceful relinquishment of power. These representatives and perpetrators will foreseeably sometimes be unwilling to accept an amnesty conditional not only upon admission of guilt and confession, but also burdensome reparations. However, the Colombian example suggests that an amnesty conditional on truth and reparations covering serious human rights violations may sometimes be viable. Governments have self-interested reasons to condition amnesties on both truth and reparations: members of the public in countries in which they are bestowed are more likely to consider such amnesties acceptable; and because they subject perpetrators to punishment, the international community is less likely to heap dispraise on their conferral (the Colombian alternative sentence dispensation having, in fact, attracted considerable support from the international community). There are also moral reasons to condition amnesties on reparations in addition to truth. Such amnesties may be justified from the standpoint of plea bargain-defending retributivists, while, because these amnesties subject perpetrators to punishment, other retributivists will be committed to considering them morally superior to amnesties that are unconditional or conditional only perpetrators making full disclosure. And consequentialists who insist on prosecution and punishment of perpetrators of serious crimes in post-conflict settings on deterrence grounds, ought to consider such amnesties preferable to unconditional amnesties, or amnesties conditional only on truth, by reason of their greater deterrent (and, more generally, crime-reduction) potential.[26]

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[1] Transitional justice encompasses the range of practices and mechanisms employed with the aim of achieving accountability, justice, peace and/or reconciliation in the aftermath of violent political conflict. For an important book-length philosophical treatment of this topic, see Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge University Press, 2017).

[2] References to the contentiousness of amnesties proliferate throughout the transitional justice literature. See, for instance, Freeman (2009: 1): "There are few issues of law and policy as complex and divisive as the question of when and whether to grant amnesties for atrocities". See also Mallinder (2012: 9): "contemporary amnesty laws are often the most contentious aspect of peacebuilding and reconciliation programmes".

[3] Those who favour prosecution and punishment in preference to amnesty in post-conflict settings most often argue for this course on retributivist grounds. Mark Drumbl writes: "Retribution is the dominant stated objective for punishment of atrocity perpetrators" (Drumbl 2007: 150). Louise Mallinder and Kieran McEvoy affirm that retributivism is the most commonly advanced rationale for punishing perpetrators in transitional justice contexts (McEvoy and Mallinder 2012: 416, 422).

[4] And for some at second glance. Berel Lang, for instance, concludes that the amnesty granted to perpetrators of gross human rights violations in post-apartheid South Africa is "straightforwardly inconsistent" with retributivism (Lang 2009: 609).

[5] In fact, matters are more complicated than this because retributivists typically accept both the requirement of commensurateness, sometimes called cardinal proportionality, which demands that the severity of punishment, conceived of in absolute terms, must fit the seriousness of the wrongdoing for which it is imposed and (ordinal) proportionality, which requires there to be a tariff of punishments that aligns lesser crimes with less severe punishments and more serious crimes with more severe punishments.

[6] Joel Feinberg provides as an example of comparative justice "punishment of the guilty when others equally guilty are let go" (Feinberg 1974: 317).

[7] A serious comparative injustice may also result from a politically motivated torturer being granted amnesty, and thereby escaping punishment, while another offender who has contemporaneously committed an act of petty theft purely out of self-interest is subjected to punishment. It is sometimes argued that the political motivation of perpetrators on whom amnesty is conferred justifies granting amnesty to them but not to offenders lacking political motivation but it is not clear why or that this need be so.

[8] Colleen Murphy argues that retributivism is inapplicable to transitional justice settings (Murphy 2017: 84-96). For a rebuttal of Murphy's arguments, see Lenta (2019).

[9] Plea bargains may also involve charge bargaining, that is, dropping certain of the charges against defendants in exchange for their pleading guilty to one or more of the remaining charges, the aim being once again to avoid or shorten trials. These plea bargains are remote from amnesties inasmuch as the latter never involve the dropping of certain charges in exchange for pleading guilty to others.

[10] In the United States, first-time offenders who have committed minor, non-violent crimes may be offered a plea bargain involving a suspended sentence; that is, their sentence of imprisonment is suspended, allowing them to serve probation instead of time behind bars. But as Duff notes, probation is not an *alternative* to punishment. It *is* a punishment in virtue of being "a burden imposed on [the offender] by the court for his offence" (Duff 2001:101).

[11] It is sometimes argued that perpetrators who were granted amnesty by the South African TRC received some punishment by virtue of the adverse consequences for them of admitting to gross human rights violations including societal condemnation, job losses and even divorce. But to the extent that these consequences amount to punishment, they are informal sanctions that do not qualify as *legal* punishment.

[12] See United Nations Regulation no. 2001/10, "On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor", available at https://peacekeeping.un.org/mission/past/etimor/untaetR/Reg10e.pdf (last accessed 24 January 2023, hereafter referred to as 'the Regulation').

[13] "Serious criminal offences" were defined as genocide, war crimes, crimes against humanity, murder, sexual offences and torture.

[14] Oddly, offenders' statements had the potential to incriminate them. The Regulation requires that offenders must be informed that their statements "will be sent to the *Office of the General Prosecutor* and that their contents might be used against him or her in a court of law should the *Office of the General Prosecutor* choose to exercise jurisdiction" (section 23.3 of the Regulation). More justifiable would have been for the content of these statements to be protected by use immunity, disallowing the Office of the General Prosecutor to use them for the purpose of prosecution.

[15] The Office of the United Nations High Commissioner for Human Rights's view that immunity from liability bestowed in Timor-Leste was "contingent on community service or payment" is erroneous insofar as the Regulation specified that acts of reconciliation could include community service, reparation, public apology *and/or* another act of contrition" (s 27(7) of the Regulation) and descriptions of the unfolding of the process agree that in many cases perpetrators were required only to issue a public apology (see, for example, Combs 2007: 221; Mallinder 2014: 160).

[16] The voluntariness of acts of reparation may be viewed as fostering the attainment of reconciliation inasmuch as perpetrators' freely undertaking these acts more readily allows the acts to embody recognition of their wrongfulness, and to express both their apology and remorse and commitment to atoning and repairing the harm they have caused.

[17] But if acts of reconciliation count as punishment, why does not requiring perpetrators publicly to admit guilt and confess as a condition of receiving immunity, the sole condition upon which the post-apartheid South African amnesty was granted, count as punishment? Despite publicly admitting guilt and confessing's being burdensome because they will tend to be painfully humiliating or shame-inducing and to expose perpetrators to social opprobrium, they do not amount to punishment because they are not imposed as *consequences* of what has been established to be an offence on the part of an offender, no offence having been established *until after* they have admitted guilt and confessed (and perhaps also some kind of corroborative verification of their account of their misdoings has been completed).

[18] Section 27(7)(d) of the Regulation.

[19] Section 32 of the Regulation.

[20] David Dolinko denies that consequentialist retributivism is coherent (Dolinko 1997) while Mitchell Berman contends that there is nothing incoherent in the idea of a consequentialist form of retributivism (Berman 2011).

[21] Lippke persuasively counters several common objections to plea bargains. Opponents of plea bargaining sometimes object that because they exert pressure on criminal defendants to waive their rights not to incriminate themselves and to stand trial, plea bargains are unacceptably coercive. Yet, as Lippke shows, while the plea-bargaining system in the United States and certain other liberal democracies may be unacceptably coercive, plea bargaining need not be so (Lippke 2011: 54-61). Plea bargains can be restricted to making defendants a tempting conditional *offer* "whose effect is to create a net *increase* in a person's open options, giving him or her a choice not previously possible" (Feinberg 1986: 230, emphasis in original): a punishment more lenient than that to which they would be sentenced at trial if convicted in exchange for a guilty plea and sometimes a confession. Defendants, inclusive of those who are innocent, who choose to stand trial instead of accepting a plea bargain, need

not be worse off relative to their baseline position (the post-charge situation, a position that does not violate their rights). Many defendants are made better off by plea bargains which, by reducing their sentences, improve their circumstances. To be sure, plea bargains *may* be unacceptably coercive, as when they are combined with *trial penalties*, that is, more severe punishment consequent upon defendants choosing to stand trial instead of taking a plea bargain. But while the trial penalties commonly employed in the United States do indeed impose a great cost on defendants who elect to stand trial, no such cost is imposed if plea bargains are not conjoined with trial penalties. There may be a residual worry that plea bargain offers place pressure on innocent defendants to plead guilty (Duff 2001: 215, n49). Confronted with the difference between the announced presumptive sentence and the discounted sentence they will receive if they plead guilty, some innocent defendants may conclude that they cannot risk standing trial. Lippke concedes that plea bargains may exert some pressure on innocent defendants, but rightly observes that there will almost invariably be pressure on innocent defendants to admit their guilt arising from the costs of trials, which range from financial expense to the psychological burden of standing trial (Lippke 2011: 60-61). As long as sentence discounts are kept modest, the inducement of sentence reductions may add only slightly to the pre-existing incentives to pleading guilty, ensuring that the pressure on innocent defendants to plead guilty is not overwhelming.

[22] This is not to deny that retributivists could consider certain amnesties to be justified on grounds unrelated to the plea bargain analogy. As I mentioned in section 1, sensible retributivists concede that the obligation to ensure that wrongdoers receive the punishment they deserve is susceptible to being outweighed by conflicting considerations of sufficient import. There could be a number of such considerations.

[23] If this seems implausible, consider the view of Michael Moore, a pre-eminent retributivist, concerning the "the intentional forgoing of any opportunity to punish a guilty offender in

order to obtain the conviction and punishment of an even more guilty offender". Says Moore: "the deontological retributivist might deny the propriety of the practice. More plausibly, if he is a 'threshold deontologist', as am I, he might more qualifiedly disavow the practice except when it is needed to punish some very deserving criminals" (Moore 1997: 158). In Alec Walen's assessment, "*most retributivists* would accept that it is justifiable to forego punishing one deserving person if doing so would make it possible to punish two equally deserving people, or one more deserving person" (Walen 2021: §4.6, emphasis added).

[24] As Geoff Dancy observes, "[i]t remains unclear whether amnesties are effective … Few studies conduct systematic studies of amnesty performance" (Dancy 2018: 389).

[25] Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace, 24 November 2016, available at https://www.peaceagreements.org/wview/1845/Final%20Agreement%20to%20End%20the%20Armed%20Conflict%20and%20Build%20a%20Stable%20and%20Lasting%20Peace (last accessed 15 May 2023).

[26] For a deterrence-based argument for the prosecution and punishment of perpetrators of serious human rights violations in the aftermath of violent conflict, see Orentlicher (1991).