

Chapter Ten

Forgiving Terrorism: Trading Justice for Peace, or Imperiling the Peace?

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Introduction

Despite the unflinching public policy of some states never to negotiate with terrorists, realpolitik sometimes forces states to adopt a less strenuous path. Negotiating with terrorists is sometimes thought necessary to peacefully or humanely end particular terrorist incidents. One example is the *Achille Lauro* cruise ship hijacking in 1986, where Egypt and Italy attempted to negotiate an end to the crisis (and save the lives of the hostages), while the United States (US) used military force and declared itself 'completely averse to ... any form of negotiation'.¹ In contrast, in 1986, US President Reagan secretly agreed to sell arms to Iran in return for promises to seek the release of US hostages.² It is a perennial humanitarian dilemma of governments whether to pay ransom to save hostages,³ in light of fears that negotiation may encourage others to resort to political violence to secure a seat at the bargaining table. Since 11 September 2001 (9/11), there have been frequent abductions of journalists, humanitarian workers, employees of international reconstruction efforts, and military personnel by terrorist organisations in Afghanistan, Pakistan, Iraq and Palestine, often accompanied by political demands on the hostages' national governments — for example, to withdraw from occupied territories or Muslim lands.

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¹ A Cassese, *Terrorism, Politics, and Law* (Cambridge: Polity, 1989) 127. See also G Gooding, 'Fighting Terrorism in the 1980s: The Interception of the Achille Lauro Hijackers' (1987) 12 *Yale Journal of International Law* 158. Paradoxically, Abu Abbas, organiser of the Achille Lauro action, was apprehended in Iraq in 2003 and died in US custody in 2004, even though the US had earlier revoked his international arrest warrant, and Israel had granted him immunity from prosecution in 1999: R Tait, 'Hijacking Mastermind Dies in Iraq', *The Guardian* (UK), 10 March 2004; J Risen and D Johnston, '85 Hijacker is captured in Baghdad', *New York Times* (New York), 16 April 2003.

² E McWhinney, *Aerial Piracy and International Terrorism* (Dordrecht, Boston: M Nijhoff, 1987) 171.

³ See G Sacerdoti, 'States' Agreements with Terrorists in Order to Save Hostages: Non-Binding, Void or Justified by Necessity?' in N Ronzitti (ed), *Maritime Terrorism and International Law* (1990) 25; J Hooper, 'Italians Ready to Pay Ransom for Release of Hostages Held in Iraq', *The Guardian* (UK), 21 April 2004; M Baker and C Banham, 'Arroyo Pulls Out Troops to Save a Life', *Sydney Morning Herald* (Sydney), 15 July 2004; J Miller, 'US Plans to Act More Rigorously in Hostage Cases', *New York Times* (New York), 18 February 2002; J Forero, 'Colombia President Ready for Hostage Talks' *New York Times* (New York), 15 December 2005.

Negotiating with terrorists is also sometimes judged necessary by governments to resolve longstanding terrorist campaigns, beyond specific negotiations to end particular terrorist acts. Three iconic figures — Yasser Arafat (of the Palestine Liberation Organisation), Gerry Adams (of the Irish Republican Army (IRA)) and Nelson Mandela (of the African National Congress) — were at some point arguably responsible for or complicit in 'terrorism' by their organisations. Although there is still no internationally accepted definition of terrorism,⁴ the deliberate, instrumental killing of civilians by at least some of the groups represented by these leaders as a means of political struggle counts as terrorism on even the narrowest definitions of the term. While the degree of responsibility of each of these figures differs (particularly in organisations with ostensibly separate political and military wings), it is startling how persons once regarded as terrorists were later embraced as legitimate representatives of political movements, entitled to a share of state power, entry into the world of international diplomacy, and even Nobel Prizes (Arafat in 1994, and Mandela in 1993). All were absolved of, or immunised from criminal responsibility for terrorism, as a necessary condition of full participation in political settlements.

In Northern Ireland, under the 1998 *Good Friday Agreement*, over 500 political prisoners were released by Britain and Ireland by July 2001,⁵ while amnesties were conferred for the decommissioning of armaments. Ahead of the IRA's renunciation of armed struggle in July 2005, Britain released the convicted 'Shankill Road bomber', Sean Kelly, although the broader question of amnesties remains controversial,⁶ as it does in Spain following a unilateral ceasefire by the Basque separatist group Euskadi Ta Askatasuna in March 2006.⁷ In contrast, the leader of the Liberation Tigers of Tamil Eelam (LTTE), Velupillai Prabhakaran, was sentenced to 200 years in prison, *in absentia*, while simultaneously negotiating a Norwegian-brokered peace settlement with the Sri Lankan government.⁸ Some foreign governments continue to treat the LTTE as a terrorist organisation,⁹ despite its position as a party to a non-international armed conflict under international humanitarian law. Even so, the ceasefire agreement between Sri Lanka and the LTTE suspends search operations and arrests under the

⁴ See B Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006).

⁵ UK and Irish Governments, *Good Friday (Belfast) Agreement*, 10 April 1998, 'Prisoners', [1]-[5]; UK and Irish Governments, 'Achievements in Implementation of the Good Friday Agreement', 14 July 2001.

⁶ 'IRA's Shankill Bomber Released From Prison', *Sydney Morning Herald* (Sydney), 28 July 2005; J Button, 'Barricades Fall as British Troops Pull Back', *Sydney Morning Herald* (Sydney), 30-31 July 2005, 13; A Chrisafis, 'After 35 Years of Bombs and Blood the IRA Ends its War', *Guardian Weekly* (UK), 5-11 August 2005, 1. Amnesties were included in the 1962 *Evian Agreements* settling the conflict between France and Algeria.

⁷ 'Basque Ceasefire Brings Hope to Spain', *Sydney Morning Herald* (Sydney), 24 March 2006.

⁸ A Waldman, 'Rebel Leader Sentenced to 200 Years' Jail as Talks Start', *Sydney Morning Herald* (Sydney), 2 November 2002.

⁹ 'EU Terrorism Ban Will Shake Peace Process, Warn Rebels', *Sydney Morning Herald* (Sydney), 31 March 2006.

Prevention of Terrorism Act,¹⁰ in a pragmatic recognition that concessions of this kind may be necessary. In another mixed example, on the thirtieth anniversary in 2007 of the 'German Autumn', some convicted members of the Red Army Faction (or Baader-Meinhof Gang) received pardons from the German President for serious terrorist acts committed in the 1970s, while others have been refused clemency.¹¹

As these brief examples indicate, there has been considerable ambivalence in the response of the international community and different national governments towards the problem of how to respond to individual terrorist acts and sustained campaigns of terrorist violence. Responses vacillate between a desire to punish and deter terrorists through the strict application of the criminal law, and counter impulses to temper or even suspend the application of the law to mitigate the potential harm from exceptional threats of extreme violence. This chapter first outlines how international law has responded to the question of amnesties for serious international crimes, before extracting and elaborating some basic guidelines for their use. It then specifically examines whether terrorist acts raise similar or different considerations in relation to amnesties than other serious international crimes, before focusing on the impacts of terrorism amnesties on international security and justice issues.

The Lawfulness of Amnesties for International Crimes

While domestic legal systems are infused with discretionary political concepts such as immunities, amnesties and pardons, the availability of (domestic or international) amnesties for *international* crimes is an unsettled question.¹² The issue is not directly addressed in the 1998 *Rome Statute*¹³ in relation to international crimes within the jurisdiction of the International Criminal Court (ICC).¹⁴ State practice on the availability and conditions of amnesties is variable,

¹⁰ Agreement on a Ceasefire Between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam, February 2002, cl 2.12.

¹¹ 'Red Army Faction Guerrilla to Stay in Jail, German's President Decides', *The Guardian* (UK), 8 May 2007.

¹² See generally, R Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2003) 43 *Vanderbilt Journal of International Law* 173; D Cassel, 'Lessons From the Americas: Guidelines for International Response to Amnesties for Atrocities' (1996) 59 *Law and Contemporary Problems* 197; K Henrard, 'The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law' (1987) 8 *Michigan Yearbook of International Legal Studies* 595; A Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) 312-16; C Stahn, 'United Nations Peace-Building, Amnesties and Alternative Justice: A Change in Practice?' (2002) 845 *International Review of the Red Cross* 193; J Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty still an Option?' (2000) 12 *Leiden Journal of International Law* 1001; W Burke-White, 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 *Harvard International Law Journal* 467.

¹³ *Rome Statute of the International Criminal Court*, open for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

¹⁴ On amnesties in the ICC, see C Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International*

while international organisations have similarly rejected and endorsed amnesties in different contexts.¹⁵ There is no explicit customary rule against amnesties.¹⁶ Amnesties have also featured prominently in peace agreements (including those brokered by the United Nations (UN))¹⁷ for ending protracted non-international armed conflicts and terrorist campaigns, as a mechanism helping to bring peace and to restore or aid the transition to democracy.

International human rights law does not expressly preclude amnesties, although they may be incompatible with human rights law where they result in impunity for serious rights violations.¹⁸ Of course, criminal prosecution is not the only means of avoiding impunity for serious rights violations, and a variety of methods outside the criminal justice system may effectively remedy such violations. In addition, in exceptional cases, amnesties that would confer impunity (where there are no alternative means of accountability) may still be lawful where, for instance, other branches of international law (such as the enforcement powers of the UN Security Council under Chapter VII of the *UN Charter*) provide a basis for suspending human rights to secure international peace and security.¹⁹

There is, however, a trend in practice towards the restriction of amnesties for serious international crimes. In the *Lomé Amnesty Case* the Special Court for Sierra Leone suggested that there is a 'crystallizing international norm that a government cannot grant amnesty for serious violations of crimes under international law'.²⁰ For example, in 2005, Argentina's Supreme Court declared unconstitutional two laws of 1986-87, which effectively conferred amnesties on

Criminal Justice 695; J Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly* 91; D Majzub, 'Peace or Justice: Amnesties and the International Criminal Court' (2002) 3 *Melbourne Journal of International Law* 247.

¹⁵ Cassese, above n 12, 312-16.

¹⁶ *Prosecutor v Morris Kallon and Brima Buzzy Kamara (Jurisdiction) (Lomé Amnesty Case)*, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, 13 March 2004, [82]; Cassese, above n 12, 315. Some writers suggest that there is a trend and presumption against national amnesties: Gavron, above n 14, 116-17.

¹⁷ R O'Brien, 'Amnesty and International Law' (2005) 74 *Nordic Journal of International Law* 261, 264, 270.

¹⁸ See, eg, *Chumbipuma Aguirre et al v Peru (Barrios Altos)* (2001) Series C, No 75, [41]-[44]. In particular, self-amnesty laws were found to violate arts 1(1) and 2 (general obligations to guarantee rights), 8 (right to a fair trial) and 25 (right to an effective remedy) of the Inter-American Convention on Human Rights; see also the concurring opinions of Judge Trindade, [10]-[11] and Judge García-Ramírez, [9]-[17]; *Barrios Altos (Interpretation of Merits Judgment)*, IACHR (3 September 2001); *Castillo Páez (Reparations) Case* (27 November 1998) Ser C, No 43, [103]-[108] and concurring opinion of Judge García-Ramírez, [6]-[9]; see also UN Human Rights Committee, General Comment No 20 (1994).

¹⁹ Pursuant to art 103 of the *UN Charter*, states' obligations arising under the *Charter* including enforcement measures imposed by the Security Council take precedence over other international obligations, including those arising under human rights conventions. A recent example is the English case of *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, where it was accepted that a Security Council resolution authorising the detention of terrorist suspects by a multinational force in Iraq lawfully suspended the procedural guarantees in detention provided for under the European Convention on Human Rights.

²⁰ *Lomé Amnesty Case*, above n 16.

those responsible for violating human rights in Argentina's 'Dirty War' of 1976-83.²¹ The Court reasoned that amnesty laws conferred by alleged human rights violators upon themselves while still in government violated both international human rights law as well as the duty to prosecute serious international crimes under international law.

Similarly, while the 1999 *Lomé Peace Agreement* in Sierra Leone conferred an 'absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives' between 1991 and 1999, the Statute of the Special Court for Sierra Leone precludes amnesties for crimes within its jurisdiction.²² In the *Lomé Amnesty Case*, the Special Court for Sierra Leone found that while the conferral of amnesties is within the sovereign discretion of states, a state cannot exercise that power to deprive other states of universal jurisdiction over international crimes.²³ Thus, an amnesty conferred in one jurisdiction (in that case, by a peace agreement that was held not to comprise an international treaty) may not necessarily hold in other jurisdictions, particularly when the tribunal examining the amnesty is an international or a hybrid tribunal and is thus invested with an international mandate on behalf of the international community, rather than merely reflecting the criminal justice interests of one state.

Some recent instruments to prosecute mass violence have expressly excluded the possibility of amnesties. The Agreement between the UN and Cambodia to establish Extraordinary Chambers to prosecute the Khmer Rouge's abuses forbids the Cambodian government from requesting 'an amnesty or pardon for any persons who may be investigated for or convicted of crimes'.²⁴ However, the Agreement leaves to the Extraordinary Chamber the question of the scope of the one pardon already granted in 1996 for a genocide conviction in 1979. While UN negotiators have sometimes endorsed amnesties in the past, the UN recently signalled a shift away from supporting amnesties for any serious international crimes.²⁵

²¹ *Simón Case*, Argentine Supreme Court, causa No 17.768 (14 June 2005) S.1767.XXXVIII. The decision upheld the findings of lower courts on this issue and confirmed that Argentina's Congress had validly annulled the amnesty laws in 2003; see C Bakker, 'A Full Stop to Amnesty in Argentina' (2005) 3 *Journal of International Criminal Justice* 1106.

²² *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, 7 July 1999, Lomé, UN Doc S/1999/777, art 9 (and a freedom from any 'official or judicial action'); Statute of the Special Court for Sierra Leone, art 10.

²³ *Lomé Amnesty Case*, above n 16, [66]-[74]; see also S Meisenberg, 'Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone' (2004) 856 *International Review of the Red Cross* 837.

²⁴ *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, Signed at Phnom Penh, 6 June 2003, article 11 (Amnesty), available at <<http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf>>.

²⁵ UN Secretary-General's Report on Transitional Justice and the Rule of Law in Conflict and Post-Conflict Societies, tabled in the UN Security Council, 6 October 2004, UN Doc CCPR/C/56/D/540/1993, [10]-[11];

Amnesties and International Policy Considerations

Policy objections to amnesties include that they conflict with obligations to prosecute international crimes; thwart victims' rights to a remedy; and undermine the rule of law.²⁶ In some cases, far from promoting peace or reconciliation, amnesties may counter-productively foster perceptions of injustice and accentuate grievances, destabilising efforts to re-establish order or democracy in the aftermath of violence. In part, this is why some amnesties have later been overturned, often many years later (as in Latin America) where short-term gains are gradually overshadowed by the long-term implications of failing to remedy structural violence across society. On one view, prosecutions can be validly suspended in the short-term to ensure security, as long as there is the prospect of accountability at some point, and as long as the exceptional suspension of justice does not destroy the rule in favour of prosecution.²⁷

In a recent example, in 2006 former Liberian President Charles Taylor was apprehended fleeing Nigeria, where he had earlier been granted asylum in an agreement to end 14 years of vicious civil war in Liberia. While his surrender to the Special Court for Sierra Leone for prosecution (including on terrorism charges) can be viewed as a victory for his victims, a prospective danger of not honouring amnesties is that strongmen may never agree to surrender power. Insistence on criminal justice over all else may carry a price in many more lives lost in the perpetuation of conflict.

Amnesties need not be a capitulation to power politics, but can be, depending on their form and mode of adoption, a necessary, pragmatic and principled concession to the political realities that bound the operation of law. Their importance lies not only in inducing the immediate end of conflict, but in establishing the conditions for a lasting peace. In some situations, promoting (if not necessarily achieving) 'a forgetting, an oblivion, so that thoughts of revenge or reprisal would not reopen the conflict'²⁸ may be preferable to criminal justice.

Indeed, a criminal justice model, with its emphasis on punishment and retribution, is not always the most appropriate way of dealing with international crimes or serious human rights abuses, including for cultural reasons in some circumstances. Alternative forms of truth-telling, such as reconciliation processes combined with amnesties, may contribute more effectively to peace building.²⁹ Even where prosecutions are necessary, they may carry other costs which ought to be recognised. The individualisation of guilt may also fail to capture the

UN Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, February 2005, UN Doc E/CN.4/2005/102 (18 February 2005).

²⁶ Slye, above n 12, 182-201.

²⁷ See, eg, D Orentlicher, 'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency' (2007) 1 *International Journal of Transitional Justice* 10.

²⁸ O'Brien, above n 17, 264.

²⁹ For a useful analysis of some of the key developments in the area, see Orentlicher, above n 27.

structural nature of violence across society. While a failure to individualise may create a culture of personal impunity, conversely too much individualisation of guilt can atomise responsibility in a way which fails to explain why violence occurred and how it might best be prevented from reoccurring,

At a pragmatic level, criminal justice systems may simply be unable to cope with systemic, large-scale violence, where individual prosecutions would overwhelm the capacity of regular courts — as in Rwanda, where 100,000 suspected *genocidaires* languished for many years in pre-trial detention, without realistic prospects of coming to trial, until the *gacaca* system of village-based justice (adapted from local dispute resolution techniques) was brought into play (which itself raises distinctive questions of procedural fairness). In addition, societies recovering from conflict may have other priorities: reconstruction, development, rehabilitation, administrative and governmental reform and so on, which may have to be balanced against the availability of resources for investment in individual criminal trials.

Conditions of the Legitimacy of Amnesties

Any amnesty process must, however, satisfy minimum conditions if it is to carry and maintain its legitimacy. First, conferring amnesties or immunities, or exercising a discretion not to prosecute or extradite,³⁰ must be necessary as a last resort, to secure fundamental objectives such as the preservation of a fragile peace agreement or the survival of a transitional government,³¹ national reconciliation, or to save lives. Allowing prosecution in such circumstances would imperil vital countervailing public interests. A corollary of this first condition is that if the preconditions for the grant of amnesties have disappeared — for example, where a party in a civil war resumes the use of violence — then agreement on amnesties must also dissolve.³² The cost of these approaches is that criminal justice — including punishment, retribution, deterrence, and satisfaction for victims — is rationally traded for, or weighed against, other more pressing public goods.

Second, amnesties tailored to the specific circumstances of particular individuals following a fair and transparent determination procedure (such as a national reconciliation process) are more acceptable than blanket amnesties that immunise

³⁰ Historically, selectivity in international prosecutions has been based on unstated or opaque reasons, undermining perceptions of legitimacy: D Zolo, 'Peace through Criminal Law?' (2004) 2 *Journal of International Criminal Justice* 727, 730; A Garapon, 'Three Challenges for International Criminal Justice' (2004) 2 *Journal of International Criminal Justice* 716, 717.

³¹ Y Naqvi, 'Amnesty for War Crimes: Defining the Limits of International Recognition' (2003) 85 *International Review of the Red Cross* 583, 624; R McCarthy, S Goldenberg and N Watt, 'Amnesty for Iraqi Insurgents', *The Guardian* (UK), 5 July 2004; 'Putin Sets Chechnya Amnesty in Train', *The Guardian* (UK), 15 May 2003.

³² See, eg, *Prosecutor v Kondewa* SCSL-2004-14-AR72(E) (25 May 2004) (concurring opinion of Judge Robertson); see also O'Brien, above n 17, 276.

whole classes of people, irrespective of their individual responsibility.³³ There should also be alternative forms of accountability for perpetrators and redress for victims, for example, through civil claims, compensation schemes and rehabilitation programs, and broader efforts to prevent violence through disarmament, social integration of ex-combatants, and institutional restructuring.³⁴

Further, amnesty processes are more legitimate where they do not foreclose the prosecution of the most serious crimes, whether for offenders who fail to fully disclose their crimes (as in post-apartheid South Africa) or for more serious crimes (as in independent East Timor).³⁵ This was the approach in Iraq in 2006, when the Iraqi Prime Minister offered amnesties to insurgents who had not targeted civilians or committed war crimes.³⁶ By 2007, however, Iraq's (Shi'ite) Prime Minister was deeply opposed to amnesties being offered to Sunni insurgents by the US military commander in Iraq (in exchange for those insurgent groups ceasing hostilities against US forces) due to concerns about their potential impact on sectarian violence in Iraq.

An amnesty offer by Indonesia to members of the Free Aceh Movement (GAM) in 2005, along with the release of more than 1500 prisoners, was similarly limited in scope, by encompassing only political offences (such as rebellion) and excluding ordinary criminal offences such as rape, murder and arson. The agreement between Indonesia and GAM provides for the Aceh Monitoring Mission to decide on amnesty disputes,³⁷ which is essential given that it is unclear whether some offences, such as the illegal possession of weapons, will be classed as political or non-political. Amnesties are also connected with the establishment of a Commission for Truth and Reconciliation and are conditional in that the continuing use of weapons by GAM members disqualifies them from amnesties. Limiting amnesties to purely political offences (such as treason or sedition), and not extending them to 'blood' crimes, was advocated by the

³³ Cassese, above n 12, 316.

³⁴ O'Brien, above n 17, 276.

³⁵ R Goldstone, 'Past Human Rights Violations: Truth Commissions and Amnesties or Prosecutions' (2000) 51 *Northern Ireland Legal Quarterly* 164; see, eg, *Promotion of National Unity and Reconciliation Act 1995* (South Africa), ss 3(1)(b), 4(c), 16-22; UN Transitional Administration in East Timor, Regulation 2001/10 on the Establishment of a Commission on Reception, Truth and Reconciliation in East Timor (13 July 2001); note that the Report of the East Timorese Reception, Truth and Reconciliation Commission recommended prosecuting perpetrators of rights violations during the Indonesian occupation prior to 1999, but then President Xanana Gusmao recommended suppressing it in the public interest: J Aglionby, 'Timorese Truth May Stay Hidden', *Sydney Morning Herald* (Sydney), 30 November 2005. A constitutional challenge to the South African amnesty laws was dismissed in *Azanian People's Organization & Others v The President of the Republic of South Africa and Others*, Constitutional Court Case No CCT17/96.

³⁶ 'Iraq Reconciliation Deal Unveiled', *The Australian* (Sydney), 26 June 2006; 'US Furious at Pardon Plan for Insurgents', *Sydney Morning Herald* (Sydney), 27 June 2006.

³⁷ Memorandum of Understanding Between Indonesia and the Free Aceh Movement, Helsinki, 15 August 2005.

International Bar Association in relation to Fiji,³⁸ although it may not be practical in higher intensity armed conflicts, particularly where violence by combatants generally complies with humanitarian law.

Third, amnesties granted by democratic parliamentary processes (as in Angola in 2002), or through consultative processes that engage victims and the community, are more likely to produce more appropriate amnesties than those conferred by national leaders upon themselves prior to leaving office. As Judge García-Ramírez found in the Inter-American Court of Human Rights case of *Castillo Páez (Reparations)*:

a distinction must be made between the so-called “self-amnesty laws” promulgated by and for those in power, and amnesties that are the result of a peace process, with a democratic base and reasonable in scope, that preclude prosecution for acts or behaviors of members of rival factions but leave open the possibility of punishment for [these] kind of very egregious acts ...³⁹

Claims to democratic legitimacy underlying amnesty offers must, however, be carefully scrutinised. In February 2007, ostensibly to promote reconciliation, the Afghan Parliament passed legislation giving legal and judicial immunity to ‘[a]ll political parties and belligerent groups who fought each other during the past two and a half decades’.⁴⁰ The legislation expressly doubted the credibility of reports by Human Rights Watch about atrocities committed by senior jihad and national leaders. Afghan politicians were free to pursue this approach because the Bonn Peace Accord of December 2001 did not address transitional justice issues or establish mechanisms for dealing with them, not least because ‘all parties to the peace agreement were involved in serious human rights abuses during the course of the conflict’ there.⁴¹ Indeed, the UN Secretary-General’s Special Representative, Lakhdar Brahimi, seemingly promoted peace over justice in the immediate political stabilisation of Afghanistan, paradoxically undermining peace and security by encouraging further violence by regional warlords and allowing serious rights violators to take up positions in the government and the judiciary.⁴² A number of suspected war criminals hold positions in the Afghan government and military, with the support — purportedly in the interests of stability — of some foreign governments involved in the multinational force stabilising Afghanistan.⁴³

³⁸ International Bar Association, Comments on Fiji’s Promotion of Reconciliation, Tolerance and Unity Bill, 2005, 13.

³⁹ *Castillo Páez (Reparations) Case* (27 November 1998) Ser C, No 43, [7] (Concurring Opinion of Judge García-Ramírez), [9].

⁴⁰ P McGeough, ‘Atrocity Survivors Still Wait for Justice’, *Sydney Morning Herald* (Sydney), 24-25 February 2007, 13.

⁴¹ A N Nadery, ‘Peace or Justice? Transitional Justice in Afghanistan’ (2007) 1 *International Journal of Transitional Justice* 173, 174.

⁴² *Ibid* 174-75.

⁴³ P McGeough, above n 40.

In response to the legislation, the Afghanistan Independent Human Rights Commission complained that the legislation 'will only promote impunity and leave those with serious human rights violations unpunished'.⁴⁴ The legislation is incompatible with principles in the Afghan government's own 'Action Plan for Peace, Reconciliation and Justice in Afghanistan', which states that the commission of international crimes 'does not fall into the scope of amnesty on the basis of the principles of the sacred religion of Islam and internationally accepted standards'.⁴⁵ The Action Plan itself had been based on widespread consultation with Afghans throughout the country. Moreover, a survey of 6000 Afghans by the Afghanistan Independent Human Rights Commission found that 90 per cent of respondents wanted human rights violators removed from office, and 40 per cent wanted them prosecuted, indicating popular unease about forgiving violations.

Further, amnesties conferred by one group that benefited from the crimes of others should be precluded for bias as in the case of self-amnesties. For example, the Reconciliation, Tolerance and Unity Bill 2005 (Fiji) proposed amnesties following full disclosure of crimes by those involved in a racialised coup by indigenous Fijians against a democratic, ethnic-Indian-led government in 2000.⁴⁶ The Bill was sponsored by an indigenous-led government, which came to power as a result of the coup. The International Bar Association has criticised the proposal for being unilateral rather than negotiated; for immunising acts aimed at overthrowing a democratic government; and for encouraging impunity and a coup culture, not least because amnesties following an earlier coup in 1987 did not prevent the next coup.⁴⁷

In a different example, in Palestine, Irgun leaders such as Menachim Begin, a future Israeli Prime Minister, were never brought to justice for 'terrorist' crimes committed during the violent struggle to establish Israel. Underlying the exclusion of self-amnesties or the beneficiaries of others' violations is a concern for non-discrimination, that is, that if amnesties are part of a reconciliation process, they should be extended equally to all participants in a conflict, without distinction.

Fourth, in most situations, since international crimes are matters of international concern, no single state should be permitted to decide unilaterally whether to confer amnesties. Although the views of the affected state should be accorded significant weight, they are not the exclusive consideration. It may not be

⁴⁴ Said Nader Nadery, Afghan Commissioner for Transitional Justice, 1 February 2007.

⁴⁵ Action Plan of the Government of the Islamic Republic of Afghanistan: Peace, Reconciliation and Justice in Afghanistan.

⁴⁶ 'Fiji's Indigenous Leaders Back Release of Coup Plotters', *Sydney Morning Herald* (Sydney), 30-31 July 2005, 15. The new State of Israel also gave amnesties to 'Stern Gang' members who assassinated the UN mediator in Palestine in 1948.

⁴⁷ International Bar Association, above n 38.

acceptable to the international community, for example, for Afghanistan to offer an amnesty to insurgents fighting against the Afghan government and US forces where they extend to those suspected of serious crimes such as Taliban leader Mullah Mohammad Omar and sectarian 'warlord' Gulbuddin Hekmatyar.⁴⁸

In a different example, Britain's willingness to secretly negotiate with Hamas and Hizballah in 2005 was questioned by Israel, the US and others, although that case is more complex because of the success of those organisations in democratic elections in the West Bank, Gaza and Lebanon in May and December of 2005 and January 2006.⁴⁹ While electing terrorists may be democratic in the thinnest popular sense of democracy, the better normative view is that democracies founded on human rights principles ought to be constrained by rights-based limits precluding terrorism. While human rights law is not pacifist — tolerating the taking of human life in some circumstances (as in self-defence, or under humanitarian law in armed conflict) — it does not permit the instrumental killing of innocent civilians for political purposes,⁵⁰ which is the essence of terrorist action.

Amnesties for Terrorism: Special Considerations?

In light of these general principles, it is important to note that amnesties for terrorism may raise different issues than those applying to existing international crimes. To begin with, there is not yet any general international crime of terrorism, so that acts of terrorism do not automatically trigger the same kind of legal analysis as war crimes, crimes against humanity or genocide, which have well-developed international legal frameworks and institutional responses (including the ICC, which does not, by contrast, have jurisdiction over terrorism).

Certain manifestations of terrorism have, however, been addressed by 13 sectoral anti-terrorism treaties, prohibiting and often criminalising physical acts such as hijacking, hostage-taking, bombings or the misuse of nuclear material. Those transnational criminal law treaties typically establish 'prosecute or extradite' regimes for the relevant offences, but fall short of creating customary international law crimes attracting universal jurisdiction under general international law (with the possible exception of the most well-established sectoral offences of hostage-taking and hijacking, which exist as parallel customary law prohibitions).

⁴⁸ C Gall, 'Amnesty May Include Taliban Leaders', *Sydney Morning Herald* (Sydney), 11 May 2005.

⁴⁹ E MacAskill, 'UK Ponders Talking with Hamas and Hizballah: Militants' Gains at Polls Persuade Foreign Office to Rethink Policy', *The Guardian* (UK), 20 May 2005; C McGreal, 'Israelis Pressure Straw Over UK Contacts with Hamas', *The Guardian* (UK), 8 June 2005; C McGreal, 'Hamas Election Victory Sets New Middle East Challenge', *Guardian Weekly* (UK), 3-9 February 2006, 1; see International Crisis Group, 'Enter Hamas: The Challenges of Political Negotiation', Middle East Report No 49, Amman/Brussels, 18 January 2006.

⁵⁰ Saul, above n 4, 79.

Since 9/11, the international community has increasingly regulated 'terrorism' directly through the enforcement powers of the UN Security Council, which has required all states to criminalise terrorism in domestic law.⁵¹ Terrorism is, therefore, of significant concern to the international community, and so the question of amnesties for terrorism arguably now attracts the interest of international law and cannot be left to domestic jurisdiction alone. At the same time, isolated or low-level terrorist acts of a purely domestic character may raise different considerations than high-intensity acts of international terrorism, and the latter will inevitably engage more issues of international law and policy than the former.

In many cases, war crimes or crimes against humanity will be typically more widespread and affect larger sections of the population than terrorism, and so amnesties for terrorism may not be justifiable as necessary to achieve national reconciliation or to restore harmony between rival ethnic or religious groups in the community. Indeed, prosecuting terrorism is often necessary precisely because terrorists attack the institutions of the state and the community that the state protects. State practice confirms that the international community considers terrorism wrongful precisely because it undermines the stability of political structures within which the life of the community may take place.⁵² It may be questioned, for example, whether it was proper in 2005 for the King of Morocco to pardon seven Islamists convicted of involvement in the May 2003 terrorist attacks in Casablanca, which killed 45 people.⁵³

On the other hand, amnesties for terrorism may be appropriate where conflict is sectarian and affects significant parts of the population, or in specific cases where life is at imminent risk. In an effort to defuse a violent and widespread Islamist insurgency, in 1999 Algeria passed a Law on Civil Concord, which offered immunity from prosecution for insurgents who demilitarised. Immunity was not available for those who participated in collective massacres, rapes, or public bombings. Claimants were assessed by a three-member panel of judges and officials, and received housing and integration assistance if successful. The law was overwhelmingly approved by 98 per cent of Algerian voters.⁵⁴ As a result, 4500 insurgents laid down their weapons.

By 2005, Algeria estimated that around 1000 insurgents remained. To entice them to demilitarise, the government put a *Charter on Peace and National Reconciliation* to referendum in September 2005, which was endorsed by 97 per

⁵¹ UN SC Res 1373 (2001).

⁵² Saul, above n 4, 35-45.

⁵³ Aljazeera, *Morocco Islamists Get Royal Pardon* (20 August 2005)

<<http://english.aljazeera.net/English/archive/archive?ArchiveId=14430>>.

⁵⁴ On a voter turn-out of 85 per cent: Algerian Embassy (Washington DC), *Algeria Today*, 30 September 2005.

cent of voters.⁵⁵ The *Charter on Peace and National Reconciliation* pardons those convicted or imprisoned for armed violence or support of terrorism. It also offers amnesties to those who renounce violence and disarm; those who were involved in networks of support for terrorism and who declare their activities to the authorities; and those sought in Algeria or abroad who present themselves to the authorities. Pardons and amnesties are not available to those involved in collective massacres, rapes, or public bombings. While human rights organisations have been critical of the *Charter on Peace and National Reconciliation*,⁵⁶ the real concern is not so much its text as the apparent failure of Algeria to seriously attempt to bring to justice those suspected of committing the serious crimes exempt from pardon or amnesty.

International terrorism affecting multiple states may require different analysis than predominantly domestic terrorism of the kind experienced in Algeria. Where terrorist acts affect multiple states, waiving prosecution or extradition should 'only be exercised in agreement between the nation and the states whose citizens and property are the object of the terrorists' acts'.⁵⁷ Illegitimate reasons for failing to bring terrorists to justice might include appeasement, fear of reprisals, or the protection of commercial interests.⁵⁸ The more serious the terrorist acts involved, the stronger the justification must be for waiving prosecution or extradition. Such decisions should not be taken arbitrarily or unilaterally, but should be based on a careful balancing of vital community interests, such as humanitarian needs, justice for victims, long-term peace, or sustainable political solutions.

Amnesties for Terrorism: a Role for the Security Council

Where terrorism threatens *international* peace and security, the Security Council is the natural body in which to consider claims of amnesty or immunity. The historical precedent, a 1937 League of Nations Convention to establish an international criminal court to prosecute international terrorism, did not maintain centralised control over amnesty decisions concerning international terrorism, but instead endowed the state responsible for enforcing the penalty against an offender with a right of pardon, to be exercised after mere consultation with the president of the court.⁵⁹ The drafters of the Convention rejected an

⁵⁵ On a voter turn-out of 80 per cent: *ibid*; see Algerian Ministry of Foreign Affairs, 'Projet de charte pour la paix et la réconciliation nationale', 6 September 2005.

⁵⁶ ICJ, 'Algeria: Amnesty Law Risks Legalizing Impunity for Crimes Against Humanity', Joint Press Statement, 14 April 2005; Amnesty International, 'Algeria: President Calls for Referendum to Obliterate Crimes of the Past', Public Statement, 22 August 2005, AI Index: MDE 28/010/2005.

⁵⁷ T Franck and D Niedermeyer, 'Accommodating Terrorism: An Offence against the Law of Nations' (1989) 19 *Israeli Yearbook on Human Rights* 75, 128.

⁵⁸ S Rosen and R Frank, 'Measures against International Terrorism', in D Carlton and C Schaerf (eds), *International Terrorism and World Security* (1975) 60, 63.

⁵⁹ 1937 Convention for the Creation of an International Criminal Court, opened for signature at Geneva, 16 November 1937, art 42.

alternative proposal to give the League Council the right of pardon, to be exercised on the motion of the state in which the sentence was to be carried out, the state against which the terrorism was directed, or the state of which the offender was a national.⁶⁰

Under the modern law since 1945, the *UN Charter* posits peace and security as higher values than justice, given its comparatively fleeting references to human rights in Article 1(3) (in contrast to detailed provisions on collective security enforcement under Chapter VII), the extensive preservation of domestic jurisdiction and national sovereignty, and the absence of explicit provisions on humanitarian intervention. *Charter* obligations prevail over other treaty obligations,⁶¹ and the certainty of treaty responses to terrorism may need to yield to exceptional security interests. For example, at the provisional measures phase in the Lockerbie incident, the International Court of Justice (ICJ) accepted that Libya's rights under an anti-terrorism treaty (to prosecute rather than extradite a national) would likely impair the rights enjoyed by the UK and US under Security Council Resolution 748 (which demanded the surrender of the suspects to those countries).⁶² It is clear that the drafters of the *Charter* anticipated exceptional circumstances where the maintenance of peace and security might conflict with efforts to remedy serious violations of human rights, including through international criminal justice processes. While it might be hoped, as former UN Secretary-General Kofi Annan writes, that '[j]ustice and peace are not contradictory forces' but forces that 'promote and sustain one another',⁶³ it cannot be ruled out that exceptions to that rule will arise.

In relation to ICC prosecutions of potential terrorism offences, Article 16 of the *Rome Statute* explicitly recognises the Security Council's competence in security matters by providing that the Council may postpone the investigation or prosecution of an international crime for a renewable 12-month period.⁶⁴ The Council has relied on this provision to preclude temporarily the investigation or prosecution of ICC crimes by personnel from states not party to the *Rome Statute* engaged in UN operations.⁶⁵ While this particular measure has been

⁶⁰ League of Nations Committee on the International Repression of Terrorism, Synopsis of Proposals and Suggestions Contained in the Replies from Governments, Doc CRT 6, Geneva, 1 May 1935, League Archives Geneva Doc R3759/3A/17702/5237.

⁶¹ *Charter of the United Nations* (26 June 1945) [1945] ATS 1, art 103.

⁶² *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom, Libyan Arab Jamahiriya v United States of America)*, [1992] ICJ Rep 3; [1992] ICJ Rep 114 [39]-[41]. See discussion in text below at n 67 and also n 69.

⁶³ Report of the UN Secretary-General Kofi Annan, 'The Rule of Law and Transitional Justice in Post-Conflict Societies', UN Doc S/2004/616 (2004).

⁶⁴ However, under art 103 of the *UN Charter*, the Council may impose obligations overriding states' commitments under any other treaty, which may trump art 16's 12-month limitation period.

⁶⁵ UN SC Res 1422 (2002), [1].

criticised on a number of legal grounds,⁶⁶ it illustrates that a practical mechanism for managing the potentially competing interests of international justice and international security has been built into the ICC. The use of that mechanism may be perceived as legitimate where there is specific justification of the need to postpone the investigation or prosecution of a particular case to meet demonstrated security needs, in contrast to the foregoing example where the Council has given blanket immunity to a whole class of people without an individualised assessment of the relative interests of justice and security at stake.

Council interference with treaty frameworks is not to be lightly presumed, and the discontinuance of the *Lockerbie* case in the ICJ ensured that the question of the availability and conditions of review of Council measures that conflict with other treaty obligations remain undecided. Like political decisions to grant pardons or amnesties generally, Council decisions of this kind are not outside the realm of law; indeed: '[a] discretion can only exist within the law'.⁶⁷ If a duty to prosecute terrorism, or not to confer amnesties for serious crimes, were to emerge as a norm of *jus cogens*, then the Council may be prohibited from conferring amnesties,⁶⁸ if it is accepted that the Council cannot lawfully override norms of *jus cogens*.⁶⁹ Respect for *jus cogens* norms is arguably an outermost limit on the Council's security powers, even in its efforts to confront the serious threat of international terrorism.

The International Criminal Tribunal for the former Yugoslavia has specifically suggested that the *jus cogens* character of the international crime of torture would not permit a national amnesty to preclude an international or foreign prosecution,⁷⁰ although whether it would also displace a Security Council amnesty is less clear, given that the question of conflict of a *jus cogens* norm and a Chapter VII Security Council measure has not been definitively settled by any

⁶⁶ These grounds include failure to first determine a threat under art 39 of the Charter, exceeding the scope of art 16 of the *Rome Statute*, violation of *jus cogens*, inconsistency with UN purposes and principles, and unlawful interference in treaty regimes. See Amnesty International, 'International Criminal Court: The Unlawful Attempt by the Security Council to Give US Citizens Permanent Impunity From International Justice', May 2003, AI Index: IOR 40/006/2003, 42-75.

⁶⁷ I Brownlie, 'The Decisions of the Political Organs of the United Nations and the Rule of Law', in R St J MacDonald (ed), *Essays in Honour of Wang Tieya* (Dordrecht, Boston: Martinus Nijhoff, 1993) 91, 95-96.

⁶⁸ Cassese, above n 12, 316 (referring to international crimes generally).

⁶⁹ *Bosnia Case* [1993] ICJ Rep 440 (Lauterpacht J); A Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* 851, 859; K Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences' (1997) 1 *Max Planck Yearbook of United Nations Law* 91, 99. Concerning *Lockerbie* itself, it has been argued that the Council's actions implicitly supported a breach of *jus cogens* by those states (Britain and the US) that unlawfully threatened force against Libya (contrary to art 2(4) of the Charter and the customary law prohibition on the use of force) if it did not comply with their demands. A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 *European Journal of International Law* 59, 71.

⁷⁰ *Prosecutor v Furundzija* IT-95-17/1-T (10 December 1998).

superior international court. State participation in anti-terrorism treaties may also be less attractive if they do not offer certainty and predictability, due to vulnerability to Council interference. There is the further danger that powerful states may attempt to circumvent treaty regimes by pursuing Council measures. At the same time, the Council's broad discretion under the Charter cannot be unduly fettered in dealing with serious terrorist threats to security, and criminal law responses may not always be the appropriate solution.

Amnesties for Terrorism: the Role of Prosecutorial Discretion

In addition to the Council's role with respect to amnesties in light of its powers concerning international peace and security, the ICC prosecutor has a discretion not to investigate where, '[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that investigation would not serve the interests of justice'.⁷¹ It is plausible to argue that the existence of a legitimate national amnesty, or amnesty under an international peace agreement, accompanied by alternative forms of justice⁷² could supply a legitimate reason not to prosecute, though much may depend on the degree of latitude accorded to states by the prosecutor. Certainly, in national legal systems, the existence of a (foreign) amnesty may be a relevant factor in the ordinary exercise of prosecutorial discretion.⁷³

Further, the ICC must determine that a case is inadmissible where a state with jurisdiction has decided not to prosecute and the decision does not result from an unwillingness of the state to genuinely prosecute (art 17(1)(b) of the *Rome Statute*).⁷⁴ Acceptance by a national court or prosecutorial authority of a legitimate amnesty arguably does not amount to an unwillingness genuinely to prosecute. However, the ICC will consider whether the national proceedings or decision not to prosecute 'was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court', and whether any proceedings were conducted in a manner 'inconsistent with an intent to bring the person concerned to justice' (art 17(2)(a) and (b) respectively).⁷⁵ While a person may be brought to justice by means outside the criminal justice system, an amnesty does shield a person from criminal responsibility, notwithstanding any benevolent intention to effect justice by other means. The potential contradiction within these provisions may require

⁷¹ Art 53(1)(c).

⁷² W Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2002) 69; O'Brien, above n 17, 271.

⁷³ O'Brien, above n 17, 266.

⁷⁴ Above n 13.

⁷⁵ *Ibid.*

creative interpretation to reconcile them. The Court may also consider amnesties in its inherent judicial discretion to control abuse of process.

The ICC may have to grapple with these issues in the near future. The Lord's Resistance Army (LRA) has entered into negotiations, brokered by Sudan, with the Ugandan government to end the 20-year civil conflict in northern Uganda, and Ugandan President Yoweri Museveni has offered immunity to LRA leader Joseph Kony and to the rebels as a whole.⁷⁶ This is despite Uganda's earlier request to the ICC that the LRA be investigated for war crimes and crimes against humanity, which resulted in the ICC issuing arrest warrants for Kony and others in 2005.⁷⁷ Subsequent pleas by Uganda for the ICC to abandon the case have not been favourably received, despite Uganda's view that this is necessary to stabilise the truce after August 2006. In principle, it may be correct to regard amnesties for ICC crimes as incompatible with the *Rome Statute* other than in exceptional cases where amnesties are conditional and alternative forms of justice are available.⁷⁸ The Ugandan example would not seem to satisfy these principles, but it is nonetheless an extremely hard case; the price of prosecuting the LRA could well be the disintegration of a fragile truce and a return to the vicious and unrestrained attacks on civilians by the LRA.

Conclusion

The Ugandan case is yet another example of the dilemma at the heart of the international community's ambivalence towards amnesties for serious crimes over many years. It may be that no strict legal rules can be formulated to encompass the myriad and complex factors that must be considered in evaluating the propriety of an amnesty in a particular case. Perhaps the best that can be done is to apply a series of guiding principles, such as those outlined earlier, which may assist in balancing the competing interests and in reaching a legitimate result that serves the ends of both justice and security as far as is possible in the circumstances.

These principles include: the existence of a sufficiently important end that amnesties are designed to realise; an individualised amnesty process (where possible); a democratic, participatory or consultative process for determining transitional justice mechanisms; the availability of alternative justice or accountability mechanisms, to prevent impunity and lack of redress for victims; the exclusion of self-interested amnesties; international or multinational participation in amnesty decision-making (where appropriate); and the

⁷⁶ R Dowden, 'African Rebel Cult Offers to Talk Truce', *The Australian* (Sydney), 19 May 2006; 'Uganda: Locals Want Rebel Leader Forgiven', *IRIN*, 1 August 2006.

⁷⁷ See, eg, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53, available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf.

⁷⁸ C Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695.

preservation of a prosecution option for the most serious international crimes (where possible).

Amnesties are sometimes necessary to extricate a society from protracted conflict and to facilitate the immediate transition to peace and the establishment or restoration of democracy. While amnesties may offer immediate gains, the way they are framed and structured has a critical effect on whether immediate gains translate into enduring ones. The wrong kind of amnesties counterproductively destabilise peace and democracy in the longer term, as communal relief at the cessation of hostilities or terrorist violence simmers over, with the lapse of time, into dissatisfaction about impunity and the absence of genuine justice for victims. Even the best practice example of amnesty processes, South Africa, remains controversial. On the one hand, the South African Amnesty Committee concluded that

the amnesty process made a meaningful contribution to a better understanding of the causes, nature and extent of the conflicts and divisions of the past. It did so by uncovering many aspects of our past that have been hidden from view, and by giving us a unique insight into the perspective and motives of those who committed gross violations of human rights and the context in which these events took place.⁷⁹

On the other hand, critics observed that the process failed to secure the convictions of high-ranking perpetrators; most amnesty applicants only revealed what was already known to investigators; and senior leaders did not disclose their involvement in structural violence because amnesties were only available for specific acts, rather than structural participation in organisations.⁸⁰

Some of these defects could be cured by reforming the structure of amnesty processes, and certainly careful attention must be given to formulating the procedures and powers of amnesty and truth commissions.⁸¹ Local agency in the design of processes that are appropriate to cultural and resource conditions is vital,⁸² though not necessarily an exclusive determinant of legitimacy. Ultimately, amnesties should be understood as an outcome of a reconciliation process, rather than merely the vehicle for it — and they cannot be isolated from deeper institutional and structural reforms designed to redress and prevent violence.⁸³ Of necessity, this includes efforts to address the underlying causes that precipitate at least some terrorist violence.

⁷⁹ Amnesty Committee, Truth and Reconciliation Commission of South Africa, 'Some Reflections on the Amnesty Process' *Report* vol 6, s 1, ch 5 (2003) 90.

⁸⁰ J Klaaren and H Varney, 'A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues around Legislation for a Second Amnesty' (2000) 117 *South African Law Journal* 572.

⁸¹ Dugard, above n 12.

⁸² Orentlicher, above n 27, 22.

⁸³ International Bar Association, above n 38, 16.