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Discussant, in response to Justice Richard J. Goldstone, 1998 Otto L. Walter Lecture: International Human Rights at Century's End

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Professor Stephen Ellmann

PROFESSOR ELLMANN:^{*} It's an honor to be on this panel with my colleague Ruti Teitel, with whom I share many interests and concerns, and, of course, with Justice Goldstone, whose role in South Africa and in the world exemplifies what a single person can do against injustice and also reflects an odd but not novel fact—that there are times when grotesque oppression breeds tremendous human creativity. We've seen that, I suppose, in the Russian novels written under the Czar; more recently, we've seen it in the struggle for human rights and equality in South Africa over the past decades. So it is an honor to be with one of the leaders of an extraordinary group.

I also think it's appropriate that we are here today, in a week when many of us have been celebrating Easter or Passover stories of redemption, of reconciliation, and of new hope. There is indeed hope, as Justice Goldstone has said, and the progress toward an International Criminal Court is one reason for it. This afternoon, however, I want to talk about another of the possible lessons of the tremendous creativity of the South African human rights struggles — the lesson embodied in the amnesty granted in South Africa for the wrongs of the past — and to ask how that lesson intersects with the lessons about the need for the International Criminal Court.

I agree completely with what Justice Goldstone has said about the tremendous human achievement in the rise of international human rights law. I agree just as completely that converting that law from elaborate expressions of principle to enforceable norms and duties is essential; and I agree, as well, that an International Criminal Court would be a tremendous asset in achieving that conversion of good talk into good action.

Yet, of course, what international criminal courts, like domestic criminal courts, do is to prosecute and punish. In the course of the negotiations to frame the international criminal court statute, there has evidently been some consideration of the possibility of pardons after conviction and sentencing, but I take it there is no

^{*} Professor Ellmann wishes to thank Paul Dubinsky and Nancy Rosenbloom for comments on an earlier draft of these remarks.

reason to doubt that the point of having the court is not to achieve the pardons.³²

So I want to talk about a country, again Justice Goldstone's country, where pardons, or rather amnesties, have become a central part of policy. Now I talk about this, of course, as an American, and I very much hope that Justice Goldstone will speak as he can to these events himself.

But given that caveat, let me turn to what other South Africans have said about amnesty. The South Africans I have in mind are Justice Goldstone's colleagues, the other judges of the Constitutional Court, who addressed the constitutionality of South Africa's amnesty law in the case of *AZAPO v. President of South Africa*.³³ (Justice Goldstone did not sit on this particular case). The Constitutional Court was called upon in *AZAPO* to decide whether amnesty could be constitutional under a constitution which rightly and appropriately guarantees all victims access to courts—precisely what an amnesty denies.

In one sense, this was actually an easy question, because the South African interim constitution, and now its final constitution, provides that there shall be an amnesty. Neither text, however, specifies exactly what the amnesty shall be. The harder question, therefore, was whether the particular amnesty law written in South Africa was constitutional.

What this law provides is that when the conditions set for getting amnesty are satisfied, then the wrongdoer will receive amnesty.³⁴ This amnesty confers on the wrongdoer complete immunity from criminal or civil liability, and the state itself is immunized from civil liability for the past wrongdoings of its agents.

³² The statute as finally adopted does not provide for pardons. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 17, 1998), available in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (visited March 23, 1999) <<http://www.un.org/law/icc/n9828144.pdf>>.

³³ *Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others*, 1996 (4) SALR 671 (CC). Also available in Wits Law School Constitutional Law Archive, University of the Witwatersrand, Johannesburg (visited March 23, 1999) <<http://www.law.wits.ac.za/judgements/azapo.html>>.

³⁴ Promotion of National Unity and Reconciliation Act 34 of 1995, § 20(1).

That's a thoroughgoing amnesty. And it's fair to say that it denies a lot of people at least the aspiration to go to court to address the wrongs done to them.

Yet the Constitutional Court unanimously held that this law was constitutional.³⁵ The reasons for that judgment are many, and I don't mean to cite chapter and verse, but I want to try to give at least a brief account of what the court viewed as the reasons for this departure from the principle of punishment for wrongdoing.³⁶

One consideration was that part of what victims want is something they need before they can get punishment or vengeance. They want knowledge. They want to know what happened. As the Constitutional Court said, given the realities of the human rights abuses of the country's past, finding out what happened is very difficult and indeed may be impossible unless the perpetrators know that when they admit what they did, they get off scot-free.

A second consideration, and in a sense a much more pragmatic one, is that amnesty was the price for a peaceful transition from apartheid to democracy. South Africa's new constitution empowers its people. But those who surrendered their power or much of their power did not do so altogether joyfully and might not have done so at all had they known that they were surrendering power not just to people who had assumed their offices but who would in due course send them to prison.

Third, on quite a different note, let me read a very short segment of the first post-apartheid South African constitution. This is from what's sometimes called the epilogue or the post-amble to the interim constitution, a series of paragraphs headed "National Unity and Reconciliation" which include the paragraph calling for an amnesty.³⁷ Right before the amnesty paragraph comes a sentence declaring that the gross violations of human rights in South Africa's past:

³⁵ One justice, the late John Didcott, reached this conclusion for somewhat different reasons than those accepted by the rest of the Court. See *AZAPO*, 1996 (4) SALR at 698 (judgment of Didcott, J.).

³⁶ See *AZAPO*, 1996 (4) SALR at 683-86 (judgment of Mahomed, DP).

³⁷ Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution), Epilogue on 'National Unity and Reconciliation.'

can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu [an African term meaning, very approximately, personhood in community³⁸] but not for victimization.

What this idealistic language teaches us is that amnesty wasn't just a pragmatic surrender to the outgoing holders of power or even a clever response to the problem of discovering the truth. The grant of amnesty was in part a judgment that what was needed in South Africa was not more punishment but more reconciliation.

Now, I should be careful to say that this amnesty, though available, does not come free. To get an amnesty, what the perpetrator of gross human rights abuses must do is to admit those abuses fully. In addition, such a wrongdoer must face his victims at a hearing, ordinarily a hearing held in public.³⁹ This is not necessarily a simple, routine or pleasant experience. The new nation and the individual victims can obtain not just facts but also perhaps some additional measure of retribution or atonement—though not damages, and not jail time, and not even necessarily apologies—in the process.⁴⁰ But with that deal, South Africa has embarked on granting amnesty, I think, in a very wide-ranging way.⁴¹

³⁸ See *S v. Makwanyane and Another*, 1995 (3) SALR 391, 501 (CC) (judgment of Mokgoro, J.) (explaining the meaning of *ubuntu*).

³⁹ Promotion of National Unity and Reconciliation Act 34 of 1995, §§ 18(4) 20(1)(c) & 33(1).

⁴⁰ *Id.* §§ 3(1)(c), 23-27. Though damages are not available, the Act does contemplate payment of reparations by the State. *Id.*

⁴¹ By no means has everyone who has applied for amnesty received it, as my students have emphasized to me. As of December 9, 1998, in fact, only 216 amnesty applications had been granted in full, out of 4,774 that had been dealt with by that time. See Truth & Reconciliation Commission, *Truth—The Road to Reconciliation* (unofficial website on Truth & Reconciliation Commission Work, visited April 23, 1999) <<http://www.truth.org.za/amnesty.htm>>. At least 3,198 of these applications were refused either in whole or in part because the applicants did not show that their acts had a political objective, as the amnesty law requires. *Id.*; for the multilayered criteria for establishing this political connection, see Promotion of National Unity and Reconciliation Act 34 of 1995, §§ 20(2) & (3).

But it is also clear that amnesty has been granted for many terrible crimes, including bombings, murders and torture, where the Amnesty Committee has been satisfied that the offenses have been fully revealed and are genuinely connected to

Even if South Africa's experience provides evidence of the value of amnesties in some circumstances, it might be argued that those circumstances are limited. Perhaps it is only in a country emerging from its own nightmare of past human rights abuses that there is any reason to talk in terms such as those the South African Constitutional Court uses and I've tried to recount. But I think in fact the occasions for amnesty might extend to international wrongs as well as intranational ones.

Consider a situation that I hope is usually only hypothetical: suppose that two opposing armies wage a war which over a period of time degenerates into such savagery that neither side takes prisoners. Vast numbers of people in these armies must be guilty of killing soldiers who had surrendered—at least as long as any soldiers did try to surrender. Now, that's a war crime, and will be punishable before the International Criminal Court.⁴² Yet one might think that possibly in some such wars, at the end the opposing armies and their hopefully civilian leaders might say that the best course for them all is to forgive and if not forget, at least move on, rather than to launch, after the end of battle hostilities, a program of legal hostilities as well.

I don't insist on those conclusions. I don't insist that South Africa should have decided to adopt an amnesty or that warring parties should adopt amnesty. I do think there are a number of cases in the world where conflicting parties have decided to grant amnesty. And that leads to the question of whether there is a way to have an International Criminal Court without preventing countries that want to pursue amnesty instead of prosecution from doing just that.

This is not a simple matter. If the International Criminal Court had been in existence at the time the human rights abuses now being amnestied in South Africa were committed, then those

politics. See, e.g., *Amnesty Decision: Benzien*, available on Truth & Reconciliation Commission, *Truth—The Road to Reconciliation* (visited April 23, 1999) <<http://www.truth.org.za/amnesty/77.htm>> (granting amnesty to security policeman for torture and other crimes); *Amnesty Decision: Ntamo, Peni, Nofemela & Manqina*, available on Truth and Reconciliation Commission, *Truth—The Road to Reconciliation* (visited April 23, 1999) <<http://www.truth.org.za/amnesty/61.htm>> (granting amnesty to black youths who murdered a white anti-apartheid activist, Amy Biehl).

⁴² Rome Statute of the International Criminal Court, art. 8 (2)(b)(vi) and (xii), U.N. Doc. A/CONF. 183/9 (July 17, 1998).

amnesties might well be of no force. I say this because South Africa's grants of amnesty would seem to demonstrate an unwillingness to prosecute those amnestied, and when a state that is a party to the International Criminal Court statute and has jurisdiction to prosecute is unwilling to exercise its jurisdiction the International Criminal Court would be empowered to act.⁴³ There is good reason to prevent states from simply covering up human rights abuses, or from unjustly protecting abusers from prosecution, but if we do not reject amnesty altogether, then we need a way to protect rightful amnesties from complete international override.

One way to harmonize principles of amnesty and prosecution would be to confine International Criminal Court jurisdiction to a set of crimes so horrible that no amnesty could ever be conceivable for them. Only lesser crimes would be eligible for amnesties granted by the state or states concerned. It might be argued that this is exactly what the Statute has done, since it empowers the Court to act only with respect to genocide, crimes against humanity, war crimes, and aggression.⁴⁴ But this list is not as short as it might seem. For example, it surely includes many of the crimes for which amnesty is now possible in South Africa, for the statute includes among crimes against humanity "the crime of apartheid."⁴⁵ The reach of the statute as it stands is broad enough to include crimes, horrible crimes, for which amnesty could nevertheless be an appropriate response.

The possibility of amnesty may still be preserved by the International Criminal Court Statute's provision for "deferral of investigation or prosecution" on request from the United Nations Security Council.⁴⁶ Deferral lasts for 12 months, and the Security Council can renew its request, perhaps indefinitely. Whether or not it is desirable for the power politics of the Security Council to trump the deliberations of the International Criminal Court, however, deferral is

⁴³ See *id.* art. 17(1) (making cases "inadmissible" before the International Criminal Court if they are being or have been investigated by a state with jurisdiction over them, unless the state is unwilling or unable to genuinely prosecute); *cf. id.*, art. 89(1) (requiring states to cooperate in arresting and surrendering persons in their territory, on request of the International Criminal Court).

⁴⁴ *Id.*, art. 5 (1) (a-d).

⁴⁵ See *id.* art. 7(1)(j) & 7(2)(h).

⁴⁶ See *id.* art. 16.

not explicitly an amnesty system. By its terms, the deferral provision neither authorizes permanent amnesties nor provides any standards for deciding when to do so.⁴⁷

I suggest, instead, that the Statute ought to provide that the International Criminal Court will not pursue cases where doing so would breach a valid amnesty. This proposal, of course, would require distinguishing between “valid” and “invalid” amnesties. This is a difficult task, but not an impossible one. Indeed, South Africa’s example again offers useful guidance. We might fairly say that a valid amnesty is, like South Africa’s, one that satisfies three conditions: first, it has been agreed to by the parties most directly concerned; second, that agreement is not simply an oppressive element of a “victor’s peace”; and third, the amnesty does provide victims of human rights abuses with some meaningful form of recognition, satisfaction and redress.

Perhaps such a proposal would enable these two great modern impulses of human rights law—punishment and reconciliation—simultaneously to achieve recognition.

Professor Ruti Teitel

PROFESSOR TEITEL: It is a pleasure to have the opportunity to engage in this discussion with Justice Goldstone. We are in debt to him for the historical sweep and ethical force of his remarks.

I would like to follow up on some of the thoughts raised in the narrative that Justice Goldstone has put forth here today. In his words, the narrative of justice in this century is “paradoxical.”

⁴⁷ Another route to a form of amnesty lies in the discretionary power of the Court’s Prosecutor to refrain from initiating an investigation or undertaking a prosecution, in light of “the interests of justice,” including such factors as “the gravity of the crime and the interests of victims.” *Id.* art. 53(1)(c) & (2)(c). These provisions can be read simply to authorize familiar acts of individualized prosecutorial discretion, though they could also encompass a prosecutorial decision to forego a wider range of prosecutions in light of considerations including the possibility of reconciliation. The language surely is not intended, however, to authorize—much less require—a program as generous as South Africa’s. On the contrary, the provision for review of such decisions by the Court, *id.* art. 53(3), suggests the drafters’ desire to cabin the prosecutor’s power not to prosecute.