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

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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.

Consider how the stories Justice Goldstone has told, and the narrative he has put forth actually involves two stories. One could be thought of as a millennial vision, and the other as anti-millennial. Let us unpack this a bit. The millennial vision might go this way: the suggestion is that in this century, the international community has been in a process of moral development, a process that has come to a culmination in a normative consensus regarding international criminal law. Whereas in the anti-millennial view Justice Goldstone has also alluded to, one salient to this panel, how do we make sense, given the appreciable increase in normative law of the upsurge in political violence seen at the end of the century. On this account we may be on the brink of a dark ages to come; accordingly, we ought to establish processes and structures that might allow us to prepare for that reality.

The highly paradoxical vision Justice Goldstone has introduced is evident in the context of the contemporary legal debate being waged this week in New York in Prep Comm deliberations concerning the proposed permanent International Criminal Court.[48]

Let us return to the question of the narrative, and the extent to which this could be thought of as a millennial vision, a culmination of the International Human Rights movement, the historical legacy's genesis in the postwar period, and in the international community's response to the war-time atrocities.[49] If the narrative begins there, at mid century, then the normative human rights scheme commences in the legal response to the World War II atrocities, and in the now familiar corpus of international human rights instruments: the Nuremberg Charter,[50] the Universal Declaration of Human Rights,[51] the conventions such as various other international covenants,[52] the Genocide Convention,[53] and subsequently many others.[54]

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[48] Rome Statute of the International Criminal Court, U.N. Doc.A/CONF.183/9 (July 17, 1998).

[49] *See generally* Ruti Teitel, *Human Rights Genealogy*, 66 FORDHAM L. REV. 301 (1997).

[50] Charter of the International Military Tribunal, concluded at London, Aug. 8, 1945. 84 U.N.T.S. 279; 1946 U.K.T.S. 27; Cmnd. 6903, 145 B.F.S.P. 872, 59 Stat., 1544 E.A.S. 472; 1 *reprinted in* 2 Weston II.E.1.

[51] Universal Declaration of Human Rights, G.A. Res.217A, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71, U.N. Doc. A/810 (1948).

[52] *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *reprinted in* 6 ILM 368 (1967);

If we begin the story there, what emerges is a historical normative continuity that is reflected in contemporary developments, particularly in the attempt to institutionalize and entrench the accepted legal response. This particular conception of human rights, and, impliedly, its view of the right response to human rights violations, is a primarily judicialized and procedural model of rights.

The ongoing force of the postwar legacy is evident in the salience of an international court entrenching the Nuremberg tribunal, and its paradigmatic form, the criminalization approach to the enforcement of human rights protection. As in the judicial model, because the relevant offenses are considered the most heinous, the proposed Tribunal's jurisdiction, at least in theory, is deemed "universal." This view of rights also implies a certain view of the self, of the individual as responsible agent, and of human rights adjudicated best by a court, competent to make individualized case by case deliberations.

This conception of human rights is appealing to us, chiefly because it is highly compatible, if not entirely derivative from our understandings of rights in American constitutionalism. Indeed, this confluence of traditions goes some way towards explaining the substantial support human rights advocates and constitutional lawyers in this country have lent to this conception of human rights. There is an analogy dating back to the postwar period of international human rights to the domestic scheme. Thus, going back to the beginnings of the human rights movement, the attendant wave of constitutionalism at that time[55] may help to explain the direction since that period, and the ultimate entrenchment of the postwar judicial model.

To some extent, it is the postwar judicial model of international human rights that prevails, and is being entrenched in the proposed permanent international criminal court. Yet, the

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International Covenant on Economic, Social and Cultural Rights, (1996), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *reprinted in* 6 ILM 360 (1967).

[53] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; 1951 A.T.S. 2; 1949 Can. T.S. 27; 1970 U.K.T.S. 58, Cmnd 4421, 151 B.F.S.P. 682; S. Exec. Doc. 0 818-8, at 7-12.

[54] *See, e.g.*, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331; 1969 U.N.J.Y.B. 140; 1980 U.K.T.S. 58, Cmnd. 7964; *reprinted in* 8 I.L.M. 679 (1969).

[55] LOUIS HENKIN, AGE OF RIGHTS (1990).

engendering circumstances of the post war period no longer abide, raising the question of, given the conceded changed political circumstances and legal developments, to what extent ought there to be an attendant transformation of the conception of human rights.[56] In the contemporary political context, can the intended model meet normative expectations? The problem goes beyond the problem of enforcement to the abiding sense that there is a failed rights regime. Indeed, the gap between the current political realities and the normative scheme that explains the tension in the contemporary rights model.

In light of this genealogy, let us reconsider the paradoxical account outlined by Justice Goldstone, for it elucidates the undeniable sources of tension in the human rights narrative. This century is denoted by the expansion in the development of humanitarian law—but also and concededly the repeated attempts at genocide: Cambodia; the Iraqi campaign against the Kurds, "ethnic cleansing" in Rwanda and Bosnia. At some level, these would appear to be failures of international criminal justice and political will. Until the present moment, there had been discussion, but few meaningful developments towards an International Criminal Code. No International Criminal Tribunal had been convened since Nuremberg, until recent years, the ad hoc tribunals convened at the Hague, and the newly proposed permanent International Criminal Court (I.C.C.).

Consider the significance of the new institutionalization: for the move towards establishment of the ICC reflects the entrenchment of the Nuremberg model at century's end. The question then is, what do these new normative developments and proposed institutions signify for the direction of human rights? One might think that these developments add little because many of the human rights norms are already in place, such as conventions protecting against genocide and war crimes. Thus, for some time the international system has had a Genocide Convention which, to date, has lacked an implementing body. Moreover, its normative provision has not been adequate, allowing some might say for politicization of the human rights response. For a long time there has been a failure to establish the

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[56] Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM .U. L.REV. 1, 32 (1982).

requisite international machinery. The absence to date of full institutional protection is due to the problem of political will; the very same historical political context that also generated the Genocide Convention with its particular view of atrocity, and relatedly human rights and their protection.[57] This is just to say that the convention is a legal response that is itself situated, and contingent with the political circumstances of the times. Nevertheless, a closer look at political circumstances may shed light on the engendering origins of the dominant model.

Thus the sad undertone to Justice Goldstone's inspiring remarks inheres in the paradoxical status of human rights today, rights understandings deriving from a mythic Nuremberg legacy that is so well entrenched that we tend today to conceptualize the human rights regime in its light. The post war rights regime continues to shape and direct contemporary developments. For it is in its shadow that the existing state of affairs is construed as a diminished narrative. Given changed political circumstances, as well as other human rights developments, entrenching this historical model—despite changes—means that it will, of necessity, operate in circumstances different from those of the foundational precedent. Consider some of the implications: the purposes of and aspirations for the ICC way exceed those of the postwar period, and, yet, are nevertheless subject to the rule of law expectations associated with institutions functioning in ordinary times. This tension, for instance, is clearly evident in the understanding of the International Criminal Courts' jurisdiction. On the one hand, the ICC's jurisdictional principles go beyond those historically associated with international criminal tribunals, whether at Nuremberg or the Hague. Nevertheless, international criminal jurisdiction is conceived as "complementary," meaning its application is limited to instances where states are "unable" or "unwilling" to prosecute their own. The notion of jurisdiction as "complementary" constitutes a contemporary understanding of the plausible relationship of international to national law, a mediating understanding of jurisdiction. As such, the Tribunal's ability to assume jurisdiction transcends the postwar circumstances associated with occupation and

[57] *See* Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259 (1997).

zero sovereignty and attendant rules of jurisdiction. So, the Tribunal is authorized to assert its jurisdiction over certain offenses wherever countries are either unable or unwilling to prosecute. Indeed, one might expect this to occur in transitional circumstances, because of the frequent absence of institutionalization, and the unavailability of a functioning, uncompromised judiciary and other institutions at such times. One might consider this role as the Court's extraordinary transitional function. In these circumstances, in liberalizing regimes following dictatorship, the Tribunal provides an alternative to national courts for the traditional functions of ascribing individual punishment for the most heinous offenses. It redirects attention to the individual in the international system, and underscores individual responsibility at a time when communal violence is being constructed in explicitly ethnic terms. The hope is that such proceedings will provide the deterrence and rule of law associated with criminal proceedings and an idea of accountability consonant with liberal transitions to democracy.

What can it do beyond this? The ICC is clearly more than just another court. There are broader expectations for the role of international criminal justice. Beyond the expected occasional and sporadic prosecutions, the Court's apparent significance lies in its ongoing communicative and educative role. International criminal law codified in the ICC charter comprises a symbol of growing international normative consensus. Though institutionalization and ratification precedes normative consensus—the ICC nevertheless stands as a symbol of shared aspirations. No doubt, this is an unorthodox role for a court, but the International Criminal Court is likely to work in a very different way than our ordinary conception of a national court.[58] It sends a signal, as part of a development of agreement to a minimal procedural rule of law, capitalizing upon the symbolic force of the condemnatory power of the criminal sanction.

Over time, the ICC could perhaps play a role in fashioning a normative consensus of a more enduring sort than that ordinarily constituted by a judicial review. This is not the usual relation politics bears to justice. There are glimmerings of just this sort of

[58] MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

development of political consensus in the ongoing deliberations over the operation and procedures of the International Criminal Court.[59] This may be one of the most promising and significant aspects of the developments in human rights discourse at the end of the century.

Public discussion such as this, itself may make a contribution to that discourse.

JUSTICE GOLDSTONE: I might respond briefly to the suggestion that has come from Professor Ellmann. It was put a slightly different way to me at Yale University earlier this week. It was put to me in this way: If there was a permanent International Criminal Court in existence in 1994, really before that, in 1990, wouldn't it have prevented a peaceful negotiated settlement and the death of apartheid in South Africa? Wouldn't it have prevented a truth commission in the South African form because it would have insisted on prosecuting and no amnesty?

It seems to me that the question and the suggestion really are mixing two different worlds, and I think one must keep them apart. I think we've got to envisage a world where there is an effective, active permanent international court and what the consequences will be on the one hand, and the world we are living in today, the world in which the South African Truth and Reconciliation Commission exists, a world where there is no permanent International Criminal Court.

I hope I'm not being either naive, unrealistic or pipe dreaming, but in a world where there is an effective judicial system, there should be and would be no room to grant amnesties to some of the worst criminals that one can imagine. It's unacceptable, in any real terms, that people come before the South African Truth Commission and admit to murdering people, blowing up bodies, cooking people alive—some of the terrible confessions and admissions that have been made before the South African Truth Commission. In any decent system, those people should not be considered for amnesty. They should be tried and punished.

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[59] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 17, 1998).