III. INTERNATIONAL CRIMINAL COURT

'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers

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Abstract: The powers accorded the prosecutor by the Rome Statute have been the subject of much recent debate. Critics contend that the ex officio powers for triggering jurisdiction allow for abuse. This however ignores the rigorous requirements of the Statute for the appointment of the Prosecutor. Moreover the limited danger posed is far outweighed by the need to provide for an independent, credible Prosecutor. The Prosecutor's power to forego investigation and prosecution where this serves the interests of justice has also been widely critiqued for inadequately accommodating amnesties in democratic transitions. It is argued that amnesties which adhere to internationally accepted guidelines are consistent with the interests of justice and that the prosecutor may therefore defer to domestically enacted amnesty processes.

1. INTRODUCTION

Increasingly international law embraces a dichotomy. It recognises that genocide, crimes against humanity and war crimes are properly concerns of an international community and that perpetrators of these crimes may be prosecuted by any member of that community. Yet alongside this recognition has been an appreciation of and acclaim for societies in transition which have foregone prosecutions and instead put in place some alternate mechanism such as a truth and reconciliation process.

Two trends seem discernable: one which favours prosecutions; the other truth and reconciliation and although these choices are not necessarily mutually exclusive they are frequently presented as such. Transitional justice operates at both a domestic and an international level and thus the dichotomy has both horizontal and vertical dimensions. The star state in the domestic firmament of transitional justice is South Africa which has institutionalised a process whereby individualised amnesty is exchanged for truth. And yet at an international level,

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endeavours have firmly favoured prosecutions as evidenced by the establishment of the Rwanda and Yugoslav Tribunals.

The signing of the Statute for an International Criminal Court (the Rome Statute) in Rome in July 1998 appeared to represent the apotheosis of the international insistence on prosecutions. Impetus for the establishment of the International Criminal Court – a court for all time – was provided by the determination to "put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] and thus to contribute to the prevention of such crimes."[1] The prosecutor for the International Criminal Court (the ICC), emblematic of an international commitment to prosecute those responsible for atrocities, has been awarded an extraordinary power: The power to refer a situation in which humanitarian abuses are suspected to investigation,[2] independent of any Security Council or state party instigation. Equally exceptional is the provision permitting the prosecutor to forego investigation or prosecution where these "would not serve the interests of justice."[3]

Both provisions have been the subject of intense debate. Critics contend that the former allows too much (an unchecked prosecutor) and the latter does not sufficiently provide (for amnesties). Each, according to these detractors potentially presents the same spectre – the ill-advised machinations of the prosecutor trumping the carefully-crafted, circumstance-specific processes of a domestic state. We argue that these fears are unfounded. The Rome Statute does not provide scope for the appointment or activities of a 'bad faith' prosecutor; it does, however allow for the accommodation of amnesties where these are consistent with justice. And it is submitted that there are contexts in which the award of amnesty will comport with the 'interests of justice' provided that these adhere to internationally prescribed guidelines. Where they do not, the prosecutor may initiate investigation. Together, these two unprecedented powers allow the prosecutor to successfully negotiate the dichotomy of transitional justice.

1. Preamble to the Rome Statute for the International Criminal Court (the Rome Statute), UN Doc. A/Conf.183/9 (1998).
2. Art. 15(1) provides that "[t]he prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court."
3. Art. 53 provides: "1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: [...] (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. [...] 2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: [...] (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion."

2. THE PROSECUTER'S *PROPRIO MOTU* POWER

Both Statutes establishing the ad-hoc tribunals afford the prosecutor significant powers and independence. Investigations may be initiated and indictments issued by the prosecutor on the basis of information received from any source.[4] He or she is thus largely free to determine which acts and individuals are to be subject to judicial scrutiny. Yet the context in which the ad hoc tribunals' prosecutor operates is circumscribed – determined by the Security Council[5] – and the prosecutor is not free to look beyond these parameters. The Rome Statute represents a fundamental departure from this state of affairs. By its provisions, the Security Council acting under its Chapter VII powers and state parties may initiate referral of a situation to the jurisdiction of the ICC, but so too may the prosecutor.

The allocation of this power generated much controversy at the Rome Conference and was ultimately one of the major issues which evoked the United States' opposition to the Statute.[6] Despite the opposition of a major power, the proposal received substantial support at the Rome Conference.[7] Accordingly it was not a term on which the Committee for the Whole was prepared to compromise.

3. WHY THE DISSENT TO A INDEPENDENTLY EMPOWERED PROSECUTOR?

Those who oppose the new power entrusted the prosecutor hold up a figure to be feared, a Kenneth Starr writ large. The trope of over-zealous prosecutor becoming witch-hunter triggers real suspicion and antagonism. Less alarmingly it triggers derision – derision which a commentator like John Bolton seeks to deploy when he titles his essay: "The Global Prosecutors: Hunting War Criminals in the name of Utopia."[8]

Utopias, like unicorns, and the end of the rainbow are the stuff of fairy-tales and charging after these phantoms in the real world of compromise and cost may prove hugely destructive. Certainly for societies undergoing the processes of reconstruction – and these generally are the sites of the crimes which fall within the ICC's jurisdiction – no utopias present themselves. Often the optimal outcome in these situations is an intricately wrought peace, a fragile balance of power. A "politically motivated prosecutor targeting, unfairly or in bad faith,

4. *See* Art. 18(1) of the Statute of the International Tribunal for the Former Yugoslavia, 32 ILM 1192 (1993), and Art. 17(1) of the Statute of the International Tribunal for Rwanda, 33 ILM 1598 (1994).
5. Acting under Chapter VII of the UN Charter, the Security Council established the tribunals for the former Yugoslavia and Rwanda.
6. D. Scheffer, *The United States and the International Criminal Court*, 93 AJIL 12, at 15 (1999).
7. M. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AJIL 22, at 27 (1999).
8. 78 Foreign Affairs 157(1999).

highly sensitive political situations"[9] may destroy the finely balanced peace, destabilise the society and unleash repressive forces.

But the portrayal of the bad faith prosecutor as a likely eventuality is a gross exaggeration and ignores the rigorous procedures and demanding qualifications which must be met before a prosecutor is appointed. It is hard to imagine a prosecutor of high moral character, highly competent and experienced in the prosecution and trial of criminal cases, who has been elected by an absolute majority of the members of the Assembly of states parties, who will deploy his or her powers for prejudicial purposes.[10] But even if, against all odds, a politically-motivated prosecutor were to be appointed, the Rome Statute is fitted with provisions for the removal from office of a prosecutor who has "committed serious misconduct or a serious breach of his or her duties."[11] The Statute provides that any person being investigated or prosecuted may at any time request the disqualification of the prosecutor where his or her impartiality may reasonably be doubted on any ground.[12]

Against the unlikely threat the bad faith prosecutor presents must be weighed the real advancement which the enlarged prosecutorial power represents. Far from allowing political motivations to determine investigation and prosecution, the increased power of the prosecutor enhances the autonomy and credibility of the Court as a whole. In the view of the "like-minded" states, "subordinating the Court's activity to the decisions of political actors such as States or the Security Council could lead to selective justice , discrediting the Court."[13] States ensnared in the web of global diplomacy, dependent on particular economic and political alliances, are apt to act or not act as their interests dictate. The infrequency with which states have lodged complaints against nationals of other states through the reporting mechanisms of various human rights instruments inspires doubts as to the willingness of individual states to act as referees. Nor can the Security Council be expected always to act against perpetrators: it may be unwilling to act in situations which involve the nationals of its members and may be prevented from doing so by the use of the permanent members' veto. It was the resolve to introduce a less tendentious referee that inspired support for a newly equipped prosecutor.

9. S. Fernández de Gurmendi, *The Role of the International Prosecutor*, *in* R. Lee (Ed), The International Criminal Court: The Making of the Rome Statute 175, at 181 (1999).
10. Art. 42 of the Rome Statute sets out particularly rigorous criteria for the selection of the Prosecutor and Deputy Prosecutor.
11. Art. 46 of the Rome Statute.
12. Arts. 42(8)(a) and 42(7).
13. *See* Fernández de Gurmendi, *supra* note 9, at 178.

4. ACCOMMODATION OF AMNESTIES

Perhaps more serious a complaint than the politically motivated prosecutor is the charge that the Rome Statute makes no accommodation for domestically enacted amnesty processes. Without an express recognition of these arrangements, the prosecutor may by initiating investigation and prosecution trample on and destroy politically sensitive arrangements. Operating within the parameters of an international institution, the prosecutor may be immunised from the political realities pertaining in the particular society and, even if cognisant of these dynamics, may be powerless to take them into account.

This is particularly so if one considers that factors influencing the decision domestically to prosecute or not to prosecute are not necessarily replicated at an international level. Proponents of prosecution and punishment, within the domestic context, subsequent to transition argue that they strengthen the new state by rooting the democratic order and clearly and unambiguously delegitimating the past. Prosecution and punishment are said to advance "the society's political identity in transition as a democratic rule-of-law-abiding state."[14] Within the transitional society, these processes are advocated for their ability to deliver state good, to strengthen and support the political processes.[15] The paradigm of transitional justice writings, makes paramount that which may be afforded the nascent democracy. Thus the significance of punishment transcends the retributory value to victims and the deterrent effect to perpetrators.

In contrast the decision to prosecute and punish in the context of the ad hoc tribunals has not been entered into on the basis of these strengthening any new emerging order, of legitimising domestic groups arrayed against the repressors. Nor were these tribunals established explicitly to end the atrocities, for tribunals cannot in themselves accomplish this. Rather the tribunals were established on the basis that prosecution and punishment would end the impunity of perpetrators. Prosecution and punishment might conceivably bring with them the other objectives but it was the need to halt the widespread impunity within these particular societies that triggered the establishment of the Yugoslav and Rwanda tribunals.

When transitional societies forego prosecutions, they do so again with the state in mind – to avoid unleashing destabilising forces which threaten the new order itself. It is grand political considerations of this sort which impose constraints. For the prosecutor of the ad-hoc tribunals, qualifications are only imposed by effective prosecutorial policy. An example would be the policy objective of indicting the most senior officials responsible for atrocities. From the

14. R. Teitel, Transitional Justice, 29 (forthcoming 2000).
15. D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 Yale Law Journal 2537, at 2548 (1991).

above, it is evident that factors influencing prosecution strategy at a domestic and international level are discreet.

Amnesty processes, such as South Africa's are context-specific, entered into at a time when the new dispensation cannot afford to take up the reigns of governance threatened by the opposition of the old order. It is said South Africa "faced the risk that to test the limits of the political balance of forces in order to punish individuals would result in what has been called 'justice with ashes'."[16] So instead it put in place "innovative procedures for reconciliation"[17] designed to prevent the fall-out.

The forcefulness of the amnesty objection to the Rome Statute stems from a scenario in which a society, similarly positioned to South Africa, would not be able to follow its example once the Rome Statute has entered in to force. Instead its choices may be circumscribed by a prosecutor, initiating investigations and prosecutions from an international level, who is immune to the power of the repressors. Ignorant of the context-specific considerations, the prosecutor may unwittingly wreck fragile agreements to hand-over power or where such arrangements have already been entered into, undermine the authority and credibility of the new democratic regime.[18]

But concerns for a future in which societies' real chances of democratisation are scuppered by the interventions of a global prosecutor are misplaced. The Rome Statute is not an inflexible instrument compelling investigation and prosecution in each and every instance. Nor does it require that the prosecutor disregard particular societal choices even if no express mention of amnesties is made in the text of the Statute.

5. SCOPE FOR THE PROSECUTOR

Crimes falling with the jurisdiction of the ICC may be referred to the Court by the Security Council, state parties or the prosecutor. Theoretically individuals might attempt to lobby either of these three potential referees in order to secure a referral. However, for victims suffering atrocities within a particular state the most direct, accessible route will be through the prosecutor. Appreciation of this prospect has led to fears that the role of the prosecutor will be one of inundated ombudsman.[19]

On the basis of information received from victims, the prosecutor may, under the Rome Statute, initiate the procedural processes required for authorisation of

16. K. Asmal, L. Asmal & R. Roberts, Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance 18 (1997).
17. P. Kahn, *The End of the Post-War Compromise?* (on file with the authors).
18. Carlos Menem recently vociferously attacked Spanish prosecutor, Garzon's indictment of former Argentinian military officials.
19. *See* Arsanjani, *supra* note 7, at 27.

investigation. Before doing so, the prosecutor is entitled to collect additional information from states, United Nations organs and other organisations and sources, he or she believes relevant for the purposes of analysing the seriousness of the information received.[20] If convinced of a reasonable basis for investigation, he or she may submit the request for authorisation of investigation to the Pre-Trial Chamber – a stage at which the victims themselves may make representations.[21] Only if the Pre-Trial Chamber shares the prosecutor's determination of a "reasonable basis" for investigation is authorisation afforded.[22]

No investigation or prosecution may be commenced or proceed for a period of twelve months after the Security Council, acting under its Chapter seven powers, passes a resolution to that effect.[23] State parties too, may force a deferral of investigation and prosecution – a power afforded them which starkly contrasts the primary jurisdiction given the two ad-hoc tribunals. Under the Rome Statute, once the prosecutor and the Pre-Trial Chamber have determined that a reasonable basis for investigation exists, the prosecutor shall notify all state parties and all states "which would normally exercise jurisdiction over the crimes concerned."[24] Within one month of receiving notification from the prosecutor, a state may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction suspected of committing the criminal acts. At the state's request, the prosecutor shall defer to the state's investigation.[25]

Here then is the first opportunity for an amnesty process to expel prosecutorial action. Amnesty processes, certainly of the type adopted by South Africa do not entail an absence of investigation or even of prosecution but only of prosecution of those individuals to whom amnesty is granted.[26] Although the prosecutor's deferral is subject to review when a state exhibits an "unwillingness or inability genuinely to carry out the investigation,"[27]that review is predicated on the state of the investigation and not on prosecutions.

After a decision of deferral, the prosecutor may request "that the state periodically inform the prosecutor of the progress of its investigations and subsequent prosecutions."[28] This process of notification ensures that the prosecutor is made aware of the deliberations leading to the particular choice and alive to the

20. *See* Art. 15(2).
21. *See* Art. 15(3).
22. *See* Art. 15(4).
23. Art. 16.
24. Art. 18(1).
25. Art. 18(2). Notwithstanding the request for deferral, investigation by the prosecutor shall be mandated where the Pre-Trial Chamber authorises the investigation on application by the prosecutor.
26. The South African Truth and Reconciliation Commission had extensive investigative powers and resources. For those individuals not granted amnesty, because there has been no full disclosure, their acts have not been of a political nature or there has been a lack of proportionality, prosecutions should ensue.
27. Art. 18(3).
28. Art. 18(5).

dynamics and circumstances compelling that choice. The process enables the prosecutor to ascertain that where an amnesty process is decided upon, that amnesty is not of a self-imposed kind to which no democratic sanction attends. In addition it will prevent the prosecutor from easily disregarding the choices made by the society itself and choosing instead to intervene.

A decision by the prosecutor to forego investigation or prosecution is enabled when he or she determines it to be in the "interests of justice."[29]However one commentator has suggested that "the ambiguity of the provision limited in its language to the demanding word of 'justice', [...] warrants no easy confidence that the matter will be discreetly handled."[30] Certainly, the word 'justice' is demanding. It conveys a concept which is tremendously contested – meaning different things to different people. Yet few would aver that it is 'demanding' in the sense that it is always retributive. Rather that which is central to all forms of criminal justice is official acknowledgment and individual responsibility. Most often these objectives are offered by prosecutions, but where the perpetrators command state power and resources, prosecutions are unlikely to render acknowledgment and responsibility. In their place society may face the chilling spectre of unconscionable criminals acquitted for lack of evidence. This is not justice.

Nor would it be just were the enforcement of prosecutions and punishment to evoke dissent sufficiently strong to threaten the existence of the nascent democracy. Meaningful assessments of justice extend beyond simplistic tallies of prosecution and punishment and encompass an appraisal of those conditions which shore up the standards of justice. Democracy offers the most credible, secure basis for ordering social relations justly – it acts as a safeguard of justice.[31] That this is so is recognised in the 'Agenda for Democratization' issued by the United Nations:

> In some quarters, the charge is made that there can be no democracy in times of trouble or war, that democracy itself leads to disorder, that democracy diminishes efficiency, that democracy violates minority and community rights, and that democracy must wait until development is fully achieved. However, whatever evidence critics of democracy can find in support of these claims must not be allowed to conceal a deeper truth: democracy contributes to preserving peace and security, securing justice and human rights, and promoting economic and social development.[32]

29. Art. 53.
30. R. Wedgwood, *The International Criminal Court: An American View*, 10 European Journal of International Law 93,at 97(1999).
31. *See* C. Villa-Vicencio's exposition of legal theories supporting this view, in particular Ronald Dworkin's "'law beyond law' – a social consensus that inspires us continually to discern the 'best route to a better future'. It has to do with Defining 'the people we want to be and the community we aim to have'." C. Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet* (on file with the authors).
32. Boutros Boutros-Ghali, An Agenda for Democratization, UN Doc. A/51/761(1996).

On occasions the interests of justice might compel that the transition to democracy not be imperilled and that the threat of prosecutions and punishment not be brought to bear.

6. EMBRACING DIVERSITY

Recognition that the prosecutor may defer to a society's choice of amnesty raises the troubling prospect that these decisions will be guided solely by the prosecutor's discretion and that the consistency and even-handedness required of the legal discipline will be imperilled.

> International law seemingly offers a way to circumvent the retrospectivity problem that is endemic to transitional justice. International standards and forums uphold the rule of law, while satisfying core fairness and impartiality concerns. The precedential and binding value of international legal action is frequently deemed superior to efforts undertaken on a state by state basis. Differences in domestic law mean certain crimes will be punishable in some countries and not in others.[33]

Implicit is Teitel's understanding that international law is an exacting discipline; having an even, consistent application, demanding from one party what it demands from another similarly placed. Within its space, no place is given political considerations. And yet within the very document codifying international law's insistence that perpetrators of genocide, crimes against humanity and war crimes should be prosecuted and punished, there appears scope to accommodate and defer to political constraints.

The scope may be born of necessity, a realisation that if the tenets of international law are to be respected and adhered to they must be realisable, not obtained at the cost of self-destruction of the society. Too onerous a demand, even in the sphere of domestic law, with its easily identifiable channels of democratic accountability, invites non-compliance, and for international law, it begs irrelevance. Societies caught between the choice of negotiating peaceful, fluid transitions from periods of atrocity which may entail a breach of international law and compliance which triggers potentially destructive opposition, when the choice is framed as such, will always choose the former.

But political reality and international law need not always sit in opposing corners – obstinately refusing to play each other's game. Transitional justice, traditionally a pawn of politics, is no longer conceived as a homogenous, compromised and thus necessarily deficient form of justice. Within its sphere variations abound. Amnesties of the types awarded in Chile and Argentina remain roundly condemned by international law theorists, yet, amnesty laws enacted in

33. *See* Teitel, *supra* note 14, at 33.

South Africa[34] and Guatemala[35] have been tailored to the demands of international law. In South Africa, the Truth and Reconciliation's Amnesty Committee is empowered to award amnesty to individuals when they have made a full disclosure of their crimes, those crimes are proportional to the ends sought and are deemed to be political acts. Guatemala's courts may grant amnesty to individuals found to have committed political and related common crimes during the internal armed conflict provided those acts do not constitute forced disappearances, torture, genocide, or crimes that have no statute of limitations.[36] In El Salvador, the UN, itself sponsored the Truth and Reconciliation process.

While the early part of the decade was dominated by vigorous academic exchanges of the type best demonstrated by Orentlicher[37] and Nino[38] as to the existence of a non-derogable obligation to prosecute those responsible for crimes against humanity, current academic endeavour is directed at articulating those qualifications, truth commissions must meet if they are to serve as acceptable alternatives to prosecutions. Although the guidelines proposed by a number of academics[39] vary in their degree of elaborateness, the following criteria are consistently enumerated:

1. the process is adequately resourced to undertake a thorough investigation of the abuses committed;
2. It is the result of a democratic decision making process;
3. individual perpetrators are made to account and held publicly accountable for their acts even if ultimately they are spared prosecution;
4. ample scope is provided for participation of victims in the process; information obtained from the process is public and widely disseminated; and the process is independent of the government although it may receive funding from the state.

Academic attempts at codification have been mirrored in the "Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity" articulated by the UN Subcommission for Prevention of Discrimina-

34. Promotion of National Unity and Reconciliation Act 34 of 1995.
35. Ley de Reconciliation Nacional, 18 Dec. 1996, Decreto 145-96, Congreso de la República.
36. N. Roht-Arriaza *Combatting Impunity: Some Thoughts on the Way Forward,* 59 Law & Contemporary Problems 87, at 88 (1996).
37. *See* Orentlicher, *supra* note 15.
38. C. Nino, *Response: The Duty to Prosecute Past Abuses of Human Rights Put in Context; The case of Argentina, in* N. Kritz (Ed.), Transitional Justice 435 (1995).
39. J. Dugard, *Reconciliation and Justice: the South African Experience* (on file with the authors), at 26; S. Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecutions and Truth Commissions* 59 Law & Contemporary Problems 75, at 84, (1996); D. Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities,* 59 Law & Contemporary Problems 191, at 213 (1996); P. Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal,* 59 Law & Contemporary Problems 168, at 173 (1996).

tion and Protection of Minorities.[40] All these principles provide objectively verifiable standards by which to assess the establishment of truth commissions and the granting of amnesty – standards the prosecutor will need to employ when exercising his or her prerogative not to initiate investigation or prosecution where these would not serve the "interests of justice." Working within internationally sanctioned parameters, the prosecutor in deferring to a particular society's choice, need not jettison the even-handedness and consistency of international law.

7. AN END TO AMNESTIES

The establishment of the ICC and the role of the prosecutor will have an effect which goes beyond the decision to respect or ignore a society's amnesty process. Together they will have a very real impact on the conditions which compel the award of amnesties. The conflicts of this century have been horrifying for the scale of the atrocities committed and have been additionally tragic for the prolonged periods people have been forced to suffer before any action is taken. An anachronistic deference to state sovereignty, fears of provoking diplomatic antagonism and indifference or aversion to that which has no impact upon their citizens, has left states reluctant to intervene. Moreover even when a decision to intervene is taken, often long after the atrocities have been initiated, deliberations as to the apposite actions mean further time lapsed, more lives lost and scarred.

The ICC was envisaged as a bulwark against that spectre, a court ready to act from the time the Statute enters into force against any who commit crimes falling within its jurisdiction. Amnesties traditionally cover acts committed over a prolonged period. These arrangements are entered into when the repressors understand that their power is no longer sustainable and choose to negotiate their end from an effective position of power. Those who stand to receive amnesty are usually state agents, upholding state interests or policies and populating key positions within the society. For repressors, recognising their imminent end in power, immunity can no longer be guaranteed by their control of the state and so they must demand it as a legal act from the new regime. Implicit in this is a realisation that the new regime too negotiates from a position of power, albeit not sufficiently powerful to afford the dissent of the previous repressors should amnesty be refused, but sufficiently powerful to be able to make good on a promise of amnesty – the award and adherence thereof.

When the ICC is established, it will have jurisdiction over those acts committed subsequent to the Statute's entry into force. It is intended that the prosecutor's attention will be drawn to a situation once Statute crimes have been

40. UN Doc. E/CN 4/Sub 2/1996/18 (1996).

committed – long before the stage at which amnesties are negotiated[41] and long before victims are forced to endure a prolonged period of repressive rule. The objective of the Statute is that the prosecutor intervenes when the society is fractured, not attempting to knit itself together again.

However even if the question of amnesty does arise, the threat of prosecution is brought to bear not by the new, vulnerable regime but by the prosecutor, who, located outside of the specific circumstances and forces of the society, is less susceptible to outside pressure. Those who demand amnesty are less likely to underpin their demand with threats of violent opposition if their target is invulnerable. Nevertheless, it is true that "militaries can still attempt confrontation, holding local democracy hostage, making plain what the cost of any prosecution may be."[42] But where the prospect of prosecution is brought by an international prosecutor, that risk is minimised.

Amnesties might be given in a second type of situation: where an emerging state is faced with insuperable difficulties, such as an impoverished legal infrastructure.[43]Yet if societies choose only to forgo prosecutions because they cannot afford the cost of prosecutions and punishment and so opt for an amnesty process instead, it is unlikely that they would object to prosecutions conducted by the ICC. In both situations then, the existence of the ICC bolsters those forces which curtail the call for amnesty.

8. SCOPE FOR THE ICC

The ICC is fittingly a millennial project – in enormity of vision, energy and effort, in largeness of ambition and in breadth of scope. But it was not and never intended to be a panacea for all internationally criminal ills. It is an institution put in place to operate within those societies where there has been a complete collapse of order, a demolishment of the societal fabric. It is an initiative intended to prevent the architects of such total collapse from escaping accountability. The Court represents a challenge to the spectre of society in which " a person stands a better chance of being tried and judged for killing one human being than for killing a 100 000"[44] and was never intended as an attempt to usurp domestic judicial mechanisms but expressly to complement the national system. It recognises that international law is not best enforced by international institu-

41. There may currently be situations in which atrocities are committed for which amnesties will only be negotiated once the Statute has entered in to force but the ICC would not in these cases have jurisdiction over such crimes. Art. 11(1) provides: "The Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute."
42. *See* Wedgwood, *supra* note 30, at 96.
43. *See* Villa-Vincencio, *supra* note 31, at 13.
44. Jose Ayala Lasso, Former United Nations High Commissioner for Human Rights.

tions but within a domestic context. Where those mechanisms no longer exist, there is then scope for the prosecutor and ICC to act.

In the words of the United Nations Secretary-General, Kofi Annan, the Statute is intended to ensure:

> That mass-murderers and other arch-criminals cannot shelter behind a State run by themselves and their cronies, or take advantage of a general breakdown of law and order. No-one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited the power.

It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.[45]

9. CONCLUSION

It is true that there is no express mention made of amnesties in the Rome Statute. But amnesties are context-specific – not only within their respective domestic societies. They are the product of a particular time: a time before the enactment of the Rome Statute which signals the almost universal consensus that perpetrators of genocide, crimes against humanity and war crimes should be prosecuted and punished. But the ICC is more than a symbol – it will act on and shift the global political dynamics, making these less and less conducive to the award of amnesties. Thus while there is scope within the Statute to deal with the problem of amnesties in a principled fashion, that scope is provided with an eye to longevity. As a court for all time, with a Statute intended to last the course, the Rome Statute does what it has been said not to do[46] – it makes a graceful accommodation of amnesties.

45. Secretary-General of the United Nations, Kofi Annan, Speech delivered at the University of Witwatersrand, Johannesburg, Graduation Ceremony, 1 September 1998.
46. Wedgwood, *supra* note 30, at 96.