

ETHICAL CULTURE and THE INTERNATIONAL CRIMINAL COURT: QUESTIONS and CONFLICTS

Ethical Culture – Peace, Justice and the International Criminal Court

Since its inception in 1876, Ethical Culture has been a staunch defender of both peace and justice. This dual orientation finds its philosophical ground in a central commitment to the intrinsic worth of the person, and the vision of a society of mutually sustaining individuals, emergent from this commitment. Ethical Culture has held that both injustice as well as violence, especially as expressed through war, violate both human dignity and a harmonious social order necessary for human flourishing. Its history reveals its energetic accomplishments in the fields of both social justice and peace undertaken in progressive fulfillment of its ethical ideals.

The early decades of Ethical Culture can be understood as a positive response to the evils wrought by the Industrial Revolution. Its accomplishments in establishing settlement houses, model tenements, and schools for the working poor, as well as its robust defense of the labor movement, bespeak its morally inspired commitment to social justice. This commitment in its reformist temper and reliance on educational transformation has avoided doctrinaire and ideological edges.

Its commitment to peace has been, arguably, more diffuse. While aspiring for international peace and social harmony built on interpersonal respect and interdependence, Ethical Culture has never been a pacifist movement, though pacifism has episodically found a significant voice in Ethical Culture.

The Spanish-American War occasioned the Ethical movement's initial foray beyond domestic pursuits to engage international affairs. Felix Adler, the movement's founder and philosophical luminary, served as vice-president of the Anti-Imperialist League in 1899. William Salter and S. Burns Weston, leaders of the Chicago and Philadelphia Ethical Societies, respectively, became chairs of local branches of the League. In a manner characteristic of his analysis of social and political problems, Adler unearthed the corruption of ethical values lying behind manifest conflicts, however great their scale. In his view, greed propelled imperialism and the war against Spain. In its stead Adler proffered a vision of mutual international cooperation, wherein the more civilized and ethically advanced societies were to play a dutiful role in enabling less advanced ones to emerge toward self-governance. In the broadest view, and commensurate with his philosophy of groups, Adler affirmed that each nation reflected a distinct "type" and that interaction among them led to the development of their respective unique excellences.

His critique of imperialism presaged Adler's analysis of World War I. Not a pacifist, he felt the use of force was justified in self-defense. He assessed the War as essentially a competition over empires and refused to exclusively condemn Germany for its aggression, asserting instead that all the powers were culpable.

The controversies and divisions within Ethical Culture spurred by the War graphically represented Ethical Culture's handling of issues of war and peace. Adler, as implied, supported

America's entry into the War, though belatedly and with reservations. On the other hand, leaders John Elliott, Henry Neumann and, initially, David Muzzey were pacifists. In Chicago, Horace Bridges was a vigorous proponent of American intervention, while George O'Dell resolved to join the Canadian army. Oswald Garrison Villard, a long-time member of the New York Society, prominent editor of the Nation magazine, grandson of the famous abolitionist, William Lloyd Garrison, as well as a founder of the NAACP, resigned his Society membership in the refusal of the Ethical Culture Movement to support pacifism and opposition to World War I.

Adler's position was to protect the smallest minority view and check the Society from taking an official position, while enabling a range of voices to be expressed and heard. In the words of Howard Radest, "The conflict between individual integrity and social ethics was not resolved. Forums, debates, discussions, and declarations could not unify the two."¹²

The war in Vietnam presented another occasion when questions of war and peace were expressed within the Ethical Movement. Though not unanimous, Ethical Culture followed the American Left in its increasing opposition to United States involvement in Vietnam. In 1967, the American Ethical Union passed a resolution calling for the end to conscription. The Fellowship of Ethical Pacifists was formed within the American Ethical Union (AEU), the federated association of Ethical Societies, to provide a venue for those seeking to work out a pacifist position within Ethical Culture. Most notably, the Ethical movement was instrumental in altering selective service rules to allow for the application for conscientious objection on non-theistic grounds. While lending active support to those who pursued such claims, members of Ethical Societies found themselves working on behalf of local and national organizations to end the war. Calls to end American's role in Vietnam were often heard from the platform in New York, Washington and other locales.

In parallel with Ethical Culture's humanistic cosmopolitanism, the Ethical movement has long expressed an international sensibility, skeptical of nationalism and militarism, which has led to a general support for the United Nations and its various agencies. This support has taken the form of AEU resolutions supporting the U.S. payment of outstanding U.N. debt (1998), urging U.S. ratification of the Convention on the Rights of the Child (1997), urging restoration of funds supporting the U.N. Fund for Population activities (1985), and protesting UNESCO's stance of excluding Israel from a place in U.N. regional groupings (1975).³

The National Service Conference of the AEU, recently renamed "National Ethical Service," has been deeply engaged with the U.N. since 1947, and maintains NGO consultative status with the international body. According to its statement of purpose, National Ethical Service is committed to "... promoting and enhancing the highest principles at the United Nations, the AEU Federation and the culture of peace worldwide..."

Furthermore,

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2Radest, p.188

3 AEU website, <http://aeu.org/library/byresolution.php?case=resolutions>

We see our role at the United Nations as advocates for emergent holistic systems such as peace building, universality in human and earth rights, pluralism based in transparency and accountability and the end of inequitable distribution of this world's wealth. While, originally, the UN was founded upon the sovereignty of nation states, we now believe that nation states in order to assert their true sovereignty must cooperate with one another more effectively. They can do more to promote economic and cultural diversity, to promote trust and alliances of civilization. We advocate for our country to adopt and implement those international instruments both binding and non-binding necessary to promote world peace. It is time to ratify the Kyoto Protocol, the Convention on the Rights of the Child, the International Criminal Court, the Convention on the Elimination of Discrimination Against Women (CEDAW), and to adhere to the legal (sic) and spirit of all Resolutions.⁴

The National Ethical Service was a founding member of the American NGO Coalition for the International Criminal Court, and in 2001, it drafted an extensive resolution, passed by the AEU, calling for American ratification of the law (The Treaty of Rome) which established the ICC. Relevant clauses include the following,

RATIONALE:

A CULTURE OF PEACE MUST BE GLOBALIZED TODAY. Only the pursuit of a just peace, which includes the search for truth and justice for victims, will bring about reconciliation and healing in many rural villages, towns, cities, nations and regions of the world that are scarred by conflict and war...

WHEREAS The American Ethical Union as a Humanist Movement, has supported the work of The United Nations, as our best hope for creating world peace, from its inception.⁵

This resolution, as does the preamble of the Rome Statute itself, conjoins the execution of retributive justice with peace⁶suggesting that justice is a precondition for peacemaking and sustaining peace.

This conjunction illuminates a central problem confronting the International Criminal Court, (ICC) almost since its inception, which has become the substance of intense and highly diversified views on the consequences of criminal indictments handed down by the ICC while conflicts are raging. The dilemma has been well stated by Payam Akavan, Professor of International Law at McGill University:

There appears to be intrinsic merit in prosecuting those responsible for mass atrocities. Leaving such crimes unpunished contradicts our intuitive conceptions of fundamental justice. An equally unimpeachable goal, however, is putting an end to such atrocities –as they are happening –through the pursuit of peace. The dilemma is whether, in certain circumstances, the prospect of prosecution creates a disincentive for implicated leaders to

4 National Ethical Service website, <http://nationalserviceaeu.org/aboutUs.php>

5 AEU website, http://aeu.org/library/display_article.php?article_id=1916

6 “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity/Recognizing that such grave crimes threaten the peace, security and well-being of the world” Preamble of the Rome Statute of the International Criminal Court, Schabas, p.167.

end war or surrender power. This debate is embodied in the caricatures of the naïve “judicial romantic” who blindly pursues justice and the cynical “political realist” who seeks peace by appeasing the powerful... (This debate) is of increasing global importance given the frequency of situations in which the international community seeks to end atrocities through negotiation rather than military intervention. It may even be said that contemporary tribunals are most often a substitute for more forceful measures against mass atrocities. In light of this reality, a leading criticism of international criminal tribunals is that they impede peace settlements and thus prolong atrocities. The assumption is that leaders facing threats of prosecution are more likely to prolong conflicts that keep them in power whereas immunity increases the incentives to end atrocities. Beyond ad hoc tribunals, the gradual permanence of global justice through the International Criminal Court has given the so-called “peace versus justice” debate a systematic relevance in global governance.⁷

Indictments against those committing mass atrocities, it is argued, serve to prolong conflicts by providing a negative incentive against peacemaking efforts on the ground, which might include offers of amnesty. In this sense the moral imperative of justice conflicts with the practical pursuit of peace. Rather than work as a precondition for peace, the pursuit of justice undermines peacemaking, leading to the perpetuation of atrocities. In ethical terms, do the demands of justice trump the consequences of protracting hostilities? Or should justice cede to practicalities as they emerge? And if so, to what extent? If justice is sought conditionally, is the moral requirement for justice eviscerated? At some point, the deontological character of the pursuit of just desserts is shaped by politics, presenting a range of theoretical and practical dilemmas for the ICC. Or, is the disjunction between justice and peace presented too starkly? Are there mechanisms by which to bridge the divide?

A secondary question is whether the pursuit of justice through the mechanism of the ICC replaces alternative local approaches, the most salient historical example being the Truth and Reconciliation process executed in post-apartheid South Africa

Before examining these dilemmas confronting the ICC, it is instructive to examine whether Ethical Culture provides insight into a resolution.

Felix Adler on Deontology, Consequentialism and Internationalism

Felix Adler, as Ethical Culture’s leading philosophical figure, no doubt confronted the theoretical tensions between the claims of justice and how justice relates to empirical circumstances in what he referred to as the “actual” realm. Strongly influenced by Immanuel Kant’s epistemology and ethics, Adler, especially in the middle phase of his career, invoked the primacy of “The Moral Law.” Though Kant was assuredly an ethical absolutist, Adler, I would argue, mitigated the deontological force of Kant’s Categorical Imperative by reworking it in a more social and organic direction.

Clearly Adler’s thought is animated by a powerful sense of justice, as behooves his loyalty to the Kantian precept that each person is an end per se, possessing an inviolable dignity. Yet, despite this assertion, it is notable that Adler’s thought manifests a paucity of “rights talk.”

⁷Akhavan, Payam, “Are International Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism With Political Realism,” *Human Right Quarterly*, Vol. 11, number 3, August 2009, p.625

This absence results from the fact that for Adler the person as an ethical unit exists within a social matrix, and ethics both individually, and moreover socially, is an evolving phenomenon. For Adler the self is simultaneously both individual and social. Hence, the measure of justice is not solely rooted in its application to individuals, but by the degree to which society as a whole reflects the ideal of justice, and even more importantly, the extent to which society is evolving toward the ideal. For Adler, ethics is pulled by the future and is a dynamic concept. Just treatment of persons, in his scheme, is simultaneously a precondition for the maturing of a just society.

This latter focus opens space in Adler's thinking to the involvement of empirical concerns in the project of constructing a just society. As he is wont to assert, we are to use the empirical world instrumentally to create the universe, that is, to employ the ideal as a spiritual model of perfection.

On the international level, the ideal, as noted, is characterized by the nations of the globe relating to each other out of a position of equal rights and dedicated to the project of the mutual evocation of the distinct excellence of each. As he asserts, "The spiritual rule as enunciated is applicable alike in the family, in the vocation, in the state, in international relations."⁸

Three basic observations are germane to Adler's vision of international relations. The first is that Adler affirms an essentialist view of national identity. Each nation reflects a "type" which manifests its respective, distinctive excellence.⁹ This allows for Adler to affirm nationalist loyalties while orienting himself to an emergent transnational commonwealth of states. This suggests the second notion, namely, that nations have a reciprocal duty to enable each other in the project of mutual elicitation of their excellences. In short, Adler rejects isolationism. Lastly, when it comes to the international arena, Adler apparently places himself in the camp of political realists. Whereas treatment of how individuals need to be addressed within national polities is more or less a matter of settled law, and internalized within the conscience of their inhabitants, the realm beyond the nation state is an untamed wilderness. The project of humankind is, therefore, to build civilization through the progressive creation of a rational international order. For our purposes, there is much empirical and practical work to be done. Adler is clear in his conviction that the creation of this international order cannot be effectuated by force, but only through education resulting in an expanding conscience for humankind.

A few examples of the task are in order. It is noteworthy that Adler deals with specific ethical and political issues which are in the forefront of contemporary concerns. In an untitled lecture given on April 13, 1902, Adler addresses the following questions: "Is it treason to condemn a war waged by our country while the war is still in progress?" And, "Are civilized nations justified in adopting uncivilized methods in warfare?"

In response to the first question, Adler differentiates between defensive wars wherein the survival of the nation is at stake and aggressive wars in which it is not. In the case of the former,

⁸ Adler, 1924, p. 189.

⁹ Adler's affirmation of national "types," a "German" type, an "American" type is an application of his ethics of groups. In my view, his theory raises questions that elude explicit resolution. Adler seems to identify nations as political units with ethnic groups. Yet, even in his day there was scarcely a political nation that did not possess minority cultures within it. So when he speaks of an "American" type, is his point of reference the dominate culture within the nation state? Or, a homogenized ideal, characteristic of the polity taken as a whole? This question remains open. Furthermore, each "type" as a transcendental ideal is static. Interaction among them requires that empirically types are mutable. Indeed, cultures and nations die. We are to assume therefore that their "type" endures, to assert its influence through history and memory. But what occurs when the history is lost to time or memory fades?

criticism which would serve to divide the nation, and as such threaten its survival, can legitimately be suppressed and punished. With regard to the latter, criticism can be appropriately rendered as one's highest duty toward the preservation of national honor.

Referencing the war in the Philippines, Adler employs the notion of the appropriate rules of war for which he provides ethical sanctions. This is clarified as follows:

War is a struggle in which physical forces are used. Arms and shot and shell and swords and the muscular strength that wields swords, but physical forces are used under the direction and guidance of mind. A battle between human beings is after all not like a battle between tigers, but moral and mental elements enter in; courage, bravery, self-sacrifice, solidarity, chivalry and mental foresight, alertness and calculation. Now, all those means are considered fair in war in which it is possible for the moral and mental forces to act, and all those means are considered unfair which make it impossible for moral and mental forces to act, where the courage is powerless and where the mind is paralyzed or is incapable of dealing with the methods used.¹⁰

This standard leads Adler to condemn the killing of non-combatants. It is also interesting that Adler invokes, with approval, the Hague Convention (of 1899) which forbids combatants from wearing the uniforms of the enemies. Adler, in addition, unequivocally condemns the use of torture and makes explicit and extended references to the use of water boarding, referred to as the "water cure torture."¹¹

There is no doubt that in his condemnation of deception and the use of torture in warfare, Adler affirms a deontological commitment with regard to the treatment of persons. Yet throughout his discussion, his guiding principle is not focused on individual protection as it is folded into the question of whether the conduct under review propels or impedes the more comprehensive project of building civilization. Indeed, it is the march toward civilization that not only undergirds the right to self-determination of peoples, but also justifies war. He notes, "War is a public act. It is permissible on the ground that it serves the real or supposed interests of civilization...The idea of civilization is never in the background."¹²

In his *Reconstruction of the Spiritual Ideal*, Adler reconfirms his view on the ethical relations among nation states. In that discussion he cites his criticism of the League of Nations. His objection to the League rests on its implicit presumption of the use of force in the service of preserving international peace, a presumption that, according to Adler, cannot stand. Adler also opposed the League on the grounds that it was a product of the winning powers and was established as vehicle to preserve their global hegemony.

It of considerable relevance that Adler, in his discussion of the shortcomings of the League of Nations, comments on the Permanent Court of International Justice, headquartered in The Hague. The Court, established by the League, was set up to adjudicate international disputes on a voluntary basis. It heard its first case in 1922 and its last in 1940, when Germany invaded the Netherlands. It is clear that an international tribunal would, in principle, cohere with Adler's commitment to evolving international consciousness and his sympathy for international institutions. Yet Adler opposed the court on pragmatic grounds. Though domestic courts, including the U.S. Supreme Court, work within the context of settled law with regard to the

10 Adler, 1902, p.11

11 Ibid, p.18

12 Ibid, p.14

rights of individuals, the salient issues which circumscribe the context of the new International Court of Justice remain open and unresolved. On this, Adler states the following:

A world court to decide justiciable cases, those cases, namely in which the gain from a settlement of any kind outweighs the loss to be sustained by an adverse settlement, is no less a distinct step in advance.

But when we face the nonjusticiable cases, those in which what is called national honor, national sovereignty, questions of supreme national interest are involved, in respect to which each nation reserves to itself the right to independent decision without appeal, we come to the real crux both of the present and future situations.¹³

Adler cites several examples in which the questions of international sovereignty remain unresolved. Issues such as the rights of minorities, how to assess when the life of a nation is threatened, how to properly assess national boundaries, rights to the sea and raw materials, still so greatly elude the consensual conscience of humankind as to make an international court impractical. Adler also calls into question the impartiality of such a court, given, as he avers, that the real power of the court will remain vested in the ruling nations.

Two points of observation here: Adler's idealism encourages him, at least as they pertain to an expanding global consciousness, to conclude that institutions can be viable only if the appropriate mental and moral groundwork has been laid. He doesn't seem to take seriously that the institutions themselves can help create, and thereby precede the emergence of such consciousness. Secondly, a question arises as to how Adler's critique of the international court created out of the League would inform his position on the current ICC under discussion. While "what if" modes of assessing history are always speculative at least and dangerous at most, we might nevertheless conclude that Adler's criteria for opposing the International Court of Justice would not pertain to the ICC, which, I conclude, by the lights of his philosophy would find him approving. We might hazard that this is so in that the ICC is established to try and punish individual perpetrators of mass atrocity crimes. More importantly, international law has greatly ripened and matured between Adler's day and our own. Human rights law, humanitarian law, especially as encoded in the Geneva Accords and the Genocide Convention, however imperfectly they are enforced, all comprise established law in the current era.

Adler's philosophy of idealism, its dynamic and future-directed orientation, presupposes that practical work needs to be done in the temporal sphere for the ideal to be realized. This conjoining of the practical and the ideal, if applied to the peace versus justice dilemma confronting the ICC, would suggest that the latter could find room to concern itself with both the deontological demands that justice be served while providing space for peace making strategies within its mandate.

In conclusion, in contrast to Kant, for whom individualism is discretely and sharply drawn, Adler broadens the ethical treatment of individuals to incorporate their role in the creation of a civilized global order. This, in my view, opens space in Adler's system to the reworking of the temporal realm in order to include the interests of society as coextensive with the interests of the individual in certain circumstances.

While Adler is by no means an ethical consequentialist, in that he affirms a survey of consequences as the motive for ethical conduct, he is nevertheless keenly committed to the pragmatic effects of behavior -- political, organizational, as well as personal -- to the extent that

¹³Adler, 1924, p.173.

it brings the actual realm into greater congruence with the ideal. This lends to his ethical philosophy what I would call a “tempered deontology,” wherein ethics ineluctably blends the requirements of duty with a strong pragmatic commitment to changing facts on the ground. It is this concept of tempered deontology in a broad sense that can generally frame an ethical approach to the dilemma of justice versus peace confronting the International Criminal Court.

The International Criminal Court: The Search to Incorporate Both Justice and Peace

The creation of the ICC can trace its origins to 1948 when the General Assembly of the U.N. instructed the International Law Committee to study the possibility of creating such a court. The Cold War occasioned a hiatus in the development of the court until 1992, when the General Assembly requested the Commission to draft a law for a permanent criminal court. A conference was held in Rome in 1998, which led to the adoption of the Statute for the International Criminal Court. In 2002, the ICC treaty entered into force when it was ratified by the required 60 nations. As of January, 2007, 104 states had ratified the treaty. Among the major nations that have not ratified are China, India and the United States.

While the Nuremberg Trials of 1945-1946 served as an inspiring precedent for the ICC, for our purposes there is a critical difference between the Nuremberg prosecutions and the work confronting the ICC. Whereas the Nuremberg Trials prosecuted members of the Nazi leadership after the War had concluded and peace had been established in the European theater, the ICC takes on cases in the midst of active hostilities, thus giving rise to the dilemma under examination. Further inspiration for the ICC was the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY, 1993). A similar court was established in 2003 to try the genocidaires in Rwanda. Though it is beyond the scope of this essay, both these efforts at international justice have not been free of political motives both in their creation and their execution of justice.

The development of the ICC has been met with a great deal of excitement in sectors of the human rights community. Clearly the major purpose of the ICC is to end a culture of impunity for the perpetrators of mass atrocity crimes. It had long been observed that if a man kills a single individual he will face punishment, but the slaughter of a million human beings might bring the perpetrator a comfortable retirement on the Riviera or other secure locale.

The statute of the ICC is lengthy and complex. The jurisdiction of the Court involves prosecution of the crimes of genocide, crimes against humanity, war crimes and aggression. Judges are elected by states that are party to the statute and sit as individuals. There is an independent prosecutor who is attached to the Court. Among the provisions of the ICC most pertinent to the current discussion is the principle of complementarity. This means that the ICC will only invest itself in prosecutions if the state in question is unwilling or unable to prosecute the case on its own. Hence the ICC is a “backup” court -- a court of last resort. The initiative to prosecute can come from three sources: a request from a state party, the Security Council or the prosecutor. The prosecutor can go forward with a case if the crime was committed in a state which is a party to the statute or is the state of the defendant. The prosecutor must obtain approval of a pre-trial chamber of the court, whose decision to approve prosecutions is subject to

appeal by another chamber. This is designed to prevent political or other improper action by the prosecutor, who is elected to the court by the state parties. “The U.N. Security Council...can delay proceedings for up to a year, renewable. This latter provision is to allow for diplomacy to trump prosecution – to allow pragmatic liberalism to trump criminal justice.”¹⁴ For our purposes it is also important to note that, under article 53 of the statute, the prosecutor may decline to investigate or prosecute if there are “substantial reasons to believe that an investigation would not serve the interests of justice.”¹⁵ This opens the door to the court deferring to other mechanisms clearly of a political nature such as amnesties, truth and reconciliation processes, or local forms of justice.

The primary role of the court is to do justice, and, as mentioned, end a culture of impunity. “...thus to contribute to the prevention of such crimes,” as the preamble to the statute reads.¹⁶ Clearly the salient purpose and function of the court is built upon a deontological ethics. This side of the “peace versus justice” dilemma was powerfully stated by Eric Blumenson in a paper drafted in 2005, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, which is worth citing at length.

Crimes against humanity and genocide, typically committed by means of mass murders, dismemberments, kidnappings, and gang rapes, are subject to universal jurisdiction because they are crimes against all humankind. To allow Pol Pot, Pinochet, and others guilty of such crimes to go unpunished is a form of legal amnesia that appears to excuse the most egregious deeds, betray the victims who endured them, and encourage similar crimes against others. Consequently, there are many who believe that the ICC and its prosecutor should adhere to a strict agenda of bringing such criminals to justice, without allowing their doomsday threats, even if credible, to derail their mission.

Someone might argue for this policy on several bases. One is the consequentialist ground that crimes of this magnitude must be punished in order to prevent their recurrence. Punishment is supposed to achieve this through its deterrent, incapacitative, rehabilitative, or norm-reinforcing effects. Second is the retributive justice claim that criminals must be punished as a moral imperative, not because of any social benefits that will result but simply because they deserve it. Many retributivist supporters of the Court believe that bringing war criminals to justice is an absolute moral obligation of the Court, or a non-negotiable right of the victims. Finally, one might derive a strict duty to persecute from a conception of the ICC’s institutional purpose and the ethical prosecutorial responsibilities it generates: war criminals must be prosecuted not because this is a requirement of justice simpliciter, but because it is a requirement that applies specifically to the ICC and its prosecutor as a matter of their institutional roles.¹⁷

As a development of the last argument, it has been posited that as a judicial institution the ICC’s role is to do justice. Politics belongs to political institutions. If political decisions need to be made, the Security Council, as noted, can step in to block or defer prosecutions.

14 Forsythe, p.106

15 Rome Statute, cited in appendix Schabas, p.199

16 Ibid., p.167

17Blumenson, pp.18-19

The conflict in northern Uganda is one most cited in regard to the dilemma under discussion. For more than 20 years a war has been raging between the Ugandan army and a rebel force known as The Lord's Resistance Army (LRA). Atrocities have been committed against the Acholi people resulting in tens of thousands of deaths, the displacement of over a million and half people – approximately 90 percent of the people of northern Uganda. Approximately 85 percent of the soldiers are children (an indictable war crime under the ICC) who have been kidnap victims.

The children are often forced to murder and mutilate their parents, loot and burn, kidnap other children, and undergo deprivation and elaborate rituals. In order to avoid being kidnapped, 30,000 children each night walk from their villages to the town of Gulu, a safe area, and return in the morning.

The LRA is led by Joseph Kony, a self-styled New Testament prophet, whose only demand seems to be to establish the Ten Commandments as the law of the land, but he is also primarily interested in overthrowing the Ugandan government.

In addition to combating the LRA militarily, the Ugandan government had extended a series of amnesties as incentives to LRA rebels to lay down their arms. There have also been efforts at peace negotiations. By early 2005, approximately 14,000 soldiers had fled the LRA or other rebel groups to seek amnesty, but the fighting continues.

In 2003, the government of President Museveni switched course and asked the ICC to prosecute the LRA leadership, which it did, becoming the ICC's first case. But as soon as the prosecutions were initiated, government factions, as well as interest groups announced their opposition to prosecution, arguing that it would short-circuit the amnesty and reconciliation process and thereby prolong the war. Indeed, the LRA leadership has declared that it will not lay down arms as long as it is under indictment. Representatives of the Acholi people themselves have stated that the indictments would not be an effective deterrent to stop the violence, and in addition the indictments coming from afar hold less promise than traditional approaches, known as *mato oput*, which stress forgiveness, reconciliation and reintegration into the community. Surveys have indicated that a wide majority of the Acholi prefer reconciliation over prosecution.¹⁸ President Museveni subsequently asked the ICC to suspend its prosecutions, but the court refused to do so once the indictments were launched.

Though the violence perpetrated by the LRA has diminished in the past few years, while spreading its campaign into the Democratic Republic of Congo (DRC), facts on the ground remain contested, as is the role of the ICC. If justice is an end of the court, there are those who maintain that the government of Uganda also has blood on its hands as it has moved masses of people into camps where they have died of hunger and disease.

There are critics in Uganda and the international community who have solidly concluded that the ICC is a barrier to peace, but this view is by no means unanimous. International Law professor, Payam Akhavan, cited earlier, contends that the ICC indictments against the

¹⁸ In the discussion Uganda, I have relied primarily on Blumenson pp. 8-10

leadership of the LRA have pointed a finger at Sudan which was providing safe haven for the LRA in the South. The indictments weakened the LRA's ability to launch operations, "...which led to a sharp drop in violence in Northern Uganda...Despite a complex range of factors, there is a noticeable link between the ICC's exercise of jurisdiction over the case and the LRA's demise."¹⁹

The ICC is still very much in its formative stages. Its approach, scope and methods remain unsettled. Still unresolved is how dependent the Court should be on nation states to request prosecutions or whether the Court should assert its role as a more forceful and independent agent. To what extent should the Court be committed to the pursuit of justice absent a concern for the consequences with regard to peacemaking, which may involve the granting of amnesties? If the Court concerns itself with such consequences, to what extent, and how? Does the Court undermine or negate its primary commitment to justice by deferring or bypassing the call of justice in the service of other ends? Can the Court foster non-penal approaches such as the truth and reconciliation process and other local means without negating its mandate? In the broadest sense, is partial justice better than no justice at all?

While some critics maintain that the role of the Court is doing justice exclusively and holding to a hard deontological position, most observers of the ICC advocate what I have referred to as a "tempered deontology." In other words they recognize that the Court needs to be cognizant of and engage other approaches when the pursuit of justice alone may cause greater harm than it subverts or deters. In addition, while affirming the Court's mandate to seek justice and establish accountability for mass atrocity crimes, it could be argued that approaches other than the courtroom may allow for the pursuit of justice.

From an ethical perspective an absolute imperative to prosecute war criminals reckless of the harm done to third parties may undermine the imperative to effect justice. It may salve the conscience of moral purists but becomes morally untenable if it generates greater injustice in the pursuit of justice itself. On the other hand, a gratuitous commitment to forsaking justice in the pursuit of an aggregate consequentialism is not only to abandon justice but to destroy the concept of rights and the inviolability of persons. The intuitively correct position seems to lie in between the pole of an absolute deontological view and thoroughgoing consequentialism.²⁰

Blumenson introduces the category of "threshold deontology" which I find useful. "The threshold is that level of aggregate harm (or, alternatively, aggregate injustice) at which deontological rights and duties are overridden "...at some point grave harm to large numbers should count, but in a way that does not destroy the respect for an individual's intrinsic value that rights provide."²¹ In other words, a value can be exceedingly important without being absolute. Clearly, where the threshold lies remains vague. It seems dependent on the idiosyncratic vagaries of respective intuitions. But such gray zones, it may be argued, frequently confront us in moral decision making. It is not inconsistent to initially hold a value as absolute and then qualify that

¹⁹Akhavan, p. 643

²⁰ Kant's ethics is relevant here. Kant was an ethical absolutist, claiming that a lie must never be spoken, even to save the life of an innocent. Most would hold that this view is untenable. Kant, simultaneously rejected utilitarianism as a standard for ethical conduct on the grounds that one can never accurately predict the future. I find this perspective relevant to the complexities under discussion.

²¹Blumenson, pp. 53-54

status when confronted by exigencies of an exceedingly compelling nature. At the same time, this stance remains preferable to the two alternative criteria –deontological absolutism or unremitting utilitarian aggregation.

Incorporating an ethic of threshold deontology would make it permissible for the ICC to withhold and suspend prosecutions, if doing so would result in catastrophic consequences for third parties. Employing the doctrine of complementarity, the Court, as it feels its way, can veer between the pole of pursuing prosecutions independent of political realities unfolding on the ground or work with governments and non-state parties to broker solutions that would fulfill its mandate of ensuring accountability. There may be avenues by which the ICC can avoid either justice without peace or peace without justice. This would entail the ICC promoting mechanisms which could suspend prosecutions while actively proposing and promoting alternative modes of accountability. There are ways other than the courtroom to achieve justice and accountability. Complementarity and an appreciation of moral pluralism as manifested in local approaches can open the Court to non-penal approaches.

The paradigmatic case is the Truth and Reconciliation Commission (TRC) process engaged by South Africa in its transition from apartheid to democracy. The apartheid government demanded blanket amnesty and the African National Congress (ANC) demanded prosecutions for past atrocities. A deadlock between the parties was negotiated, and they ultimately settled on a truth commission empowered to grant amnesty to individual applicants who provided a full account of their crimes during apartheid. Those who did not buy into the process were liable to criminal proceedings. The commission was democratically established and its hearings were publicly and widely broadcast.

The key question and one which in principle pertains to the mandate of the ICC is whether the TRC process served the cause of justice. Clearly some of the families, that of Steve Biko most prominently, did not believe it did and actively challenged the constitutionality of the process. But seven out of ten black South Africans did support amnesty in exchange for truth.

Justice cuts two ways: It needs to be meted out to the perpetrator, but justice is owed to the victim. The state as a stand-in for society must repudiate the victimization that has occurred as well as reaffirm the equal standing and worth of the victim. Arguably the TRC process accomplished this more effectively than criminal prosecutions would have. As Blumenson points out, the TRC was able to “1) reveal the circumstances and perpetrators of many more crimes. 2) obtain recognition among all races that these events happened, and constituted criminal atrocities against oppressed people, and 3) condemn these crimes and censure those responsible, including institutional actors who instigated or were complicit in the atrocities.”²²

With regard to the first point, seven thousand applied for amnesty. Many obliged to respond directly to victims and their families. The success of the TRC approach over criminal prosecution revealed “...the perpetrators of many more crimes, publicized them, and established them as part of an overwhelming oppression. The smaller reach of an exclusively criminal process would have been compounded by the inevitable plea bargains that generally elicit no

22 Ibid., p. 68

testimony, inflict reduced sentences, and receive little public notice.”²³ The TRC uncovered apartheid as widespread, institutional and societal. It also was victim-centered and affirmed the moral worth and social standing of the victims, while it held the perpetrators in disgrace. Such is a far cry from impunity, though some may argue that it is not sufficient when mass atrocities have been committed. In the final analysis, no system of justice can claim perfection and we would do well to shy away from romanticizing either conventional judicial procedures or local forms of justice.

Conclusion: Both Justice and Peace

I have examined the “justice versus peace” dilemma confronting the International Criminal Court, taking into account ethical concerns. I have maintained that Felix Adler’s approach to justice which engages deontological ethics together with empirical realities can frame a broad approach applicable to the ICC as it strives to sustain a commitment to justice within the complex context of the harsh realities of active conflict. I have concluded that the Court, which is still in its formative stages, needs to look beyond judicial purity and actively invest itself in strategies which, while retaining its primary commitment to accountability, maintains a flexible posture of engagement with governmental and private actors in order to stave off catastrophic consequences. It needs also, when warranted, to back off from prosecutions and allow for local modes of justice to become operative, recognizing that pursuing penal sanctions is not the only way to exact accountability. This flexibility is rendered permissible through the ICC statute which calls for the cessation of investigation and prosecution on the grounds that they would not serve the interests of the victims, as well as the provision of complementarity, which allows for the state party to pursue justice on its own.

These approaches, if skillfully enacted, will demonstrate that the “justice versus peace” alternative is not a forced choice facing the International Criminal Court. While its development has been long, in the eyes of many, the ICC is a fulfillment of the promise set in motion at Nuremberg. It may well be the most important global institution since the creation of the United Nations. While the complex and lengthy statute which enables it is not perfect, the International Criminal Court is a tool, if carefully employed, can pursue justice while fostering peace in those areas of the global torn by searing conflict and unspeakable crimes.

Endnote on the U.S. and the International Criminal Court

With the drafting of the Treaty of Rome, the United States made clear its position that the ICC would never be used to indict American personnel. President Bill Clinton did, however, sign the treaty, while expressing concerns that the treaty was flawed. George W. Bush explicated his intense opposition to the ICC, a view strongly endorsed by members of the Senate, Senator Jesse Helms most strident among them. The major American argument against the Court was that the U.S., as the major global military power, has special international responsibilities which run the risk of leaving American troops vulnerable to frivolous indictments by the Court, thus limiting the American role overseas. There were other arguments as well, to the effect that the prosecutor has unchecked power and that the Court would interfere with principles of the U.S. Constitution.

²³ Ibid., p. 69

In short, the U.S. opposition to the Court are smokescreen arguments. The principle of complementarity ensures that the ICC would never pick up a case involving American personnel. Cases initiated by the prosecutor would have to be approved by a pre-trial chamber, whose decision could be appealed to another chamber. Those initiated by the Security Council could readily be vetoed by the United States.

When he assumed office, Bush took the unprecedented step of “unsigned” the treaty, and went to extraordinary lengths to threaten and cajole other nations from lending their ratification to the treaty. Legislation was passed to prohibit American cooperation with the ICC in any manner and forbade the use of funds to support the ICC, while prohibiting military assistance to any state cooperating with the ICC. It also announced that the U.S. would not help with U.N. peace keeping operations that might put American forces within the jurisdiction of the ICC.

Despite its claim to leadership in human rights and its support for ad hoc tribunals to try the perpetrators of atrocities in the former Yugoslavia and Rwanda, the U.S. position on the ICC did not find favor in the international community. The causes of American opposition to the Court were not hard to discern, especially after 9/11. The “war on terrorism” occasioned egregious violations of human rights, including torture at Abu Graib, Guantanamo, and co-called “black sites,” all of which provoked intense international notice and criticism. These assaults on human rights no doubt violated U.S. international treaty obligations including the Convention Against Torture and would thus lead to allegations that the U.S. had committed war crimes if not crimes against humanity. According to political scientist, David Forsythe, “Rather than being brutally truthful about its perception of the need to play dirty in a dangerous world, Washington preferred to talk about rogue prosecutors and politicized trials. What it really wanted was international criminal justice for Slobodan Milosevic but not for Donald Rumsfeld.”²⁴

The Obama administration has signaled a dramatic shift of the American position toward the ICC. With the stated desire to end the unilateralism which framed Bush’s foreign policy, President Barack Obama and Secretary of State, Hillary Clinton have pledged American cooperation with the work of the ICC. Secretary Clinton has stated her desire that the U.S. join the Court, and, while Obama’s statements have fallen short of outright endorsement, he averred that the U.S. did support the Court’s indictment of Omar al-Bashir, president of the Sudan. Most significantly, the U.S. was represented at a conference in May and June of this year, in Kampala, Uganda at which the policy making strategies of the ICC were reviewed. The U.S. committed to help build up the judicial capacities of certain countries, as well as assist investigation and prosecution of the leaders of the Lord’s Resistance Army.

As noted, the Ethical Culture movement, and National Ethical Service especially, have resolved that the United States become a member of the International Criminal Court. In light of the Ethical movement’s historic commitment to justice and peace it is an endorsement worthy of vigorous support.

24 Forsythe, p.109

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