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The Role of International Criminal Justice in Peace Negotiations

Ambassador Herbert Okun

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PROFESSOR DEL DUCA: Our next distinguished speaker, Herbert Okun, is a former Ambassador to the United Nations, and to the former German Republic, and a very special participant in the Yugoslav crisis. He has also served as a mediator of the controversy between Greece and Macedonia. After his distinguished career in the foreign service, he voluntarily took on responsibilities in facilitating development of the free enterprise system in the former communist Eastern Bloc countries, the former Soviet republics and in parts of Asia. We are privileged indeed to have this gentleman who has served so ably and enthusiastically. I ask you to give him a very warm welcome.

AMBASSADOR OKUN: Thank you, Professor Del Duca. Good morning, ladies and gentlemen.

Of all the issues surrounding international criminal justice, none is more contentious than the arguments involving the related issues of peace and reconciliation on the one hand and justice and accountability on the other. Even the manner in which the problem is posed is open to dispute. Shall we speak of peace *and* justice, or is the problem better posed as peace *or* justice? These are not merely terminological minutiae. The fact is that even in its broadest, least contentious formulation, there can be a dilemma between the competing demands of peace and justice.

Growth of International Justice

The problem is hardly new. Every system of justice, every philosopher of ethics has wrestled with it. What is relatively new is that international criminal justice and law have come increasingly to grapple with these dilemmas as international justice has grown and developed, particularly in the last two decades since the end of the Cold War.

From Impunity to Accountability of Leaders

Today I would like to examine some of the conundrums generated by these issues. In doing so, we will look at some specific cases to see if valid conclusions can be drawn. In the modern era, impunity for leaders tended to be the operating principle. Napoleon, after all, died on St. Helena and not on the gallows or under the guillotine. The dangers faced by leaders, military and civilian alike, who engaged in armed conflict ended with the end of hostilities. That began to change, however, in the twentieth century.

Post World War I

At the end of World War I, the victorious Allied powers sought to put alleged war criminals on trial. The Versailles Treaty of 1919, in Article 228, actually demanded that the German government recognize the right of Allies, “to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.” It also called for the German authorities to hand over all persons accused and the main accused person, of course, was former German Emperor, Kaiser Wilhelm II.

Indeed an international commission was set up in 1919 to propose and set up the facilities for what was called the High Tribunal—composed of judges drawn from many nations. The Allies also demanded that the Dutch Government hand over the Kaiser, since he had fled to the Netherlands after his abdication. The Dutch Government, however, refused this demand pointing to its neutrality during the war.

In truth, the Allied leaders did not pursue the Kaiser very vigorously as they had other fish to fry. While the British Prime Minister Lloyd George did seem interested in bringing the Kaiser to justice, the French leader Georges Clemenceau was much more interested in squeezing reparations out of Germany, and Woodrow Wilson was more interested in setting up a League of Nations. So the idea of an international trial faded.

It is interesting to note, however, that even then—immediately after World War I—the United States was skeptical about international justice.

Foreshadowing future U.S. attitudes, the then Secretary of State Robert Lansing in 1920 objected to the proposed prosecution of the Kaiser on the grounds that a chief of state was entitled to immunity and that the “principle of humanity was too vague to justify a criminal charge.”

The Nuremberg Trials

With respect to the Nuremberg Trials and our subject of peace and justice, it is worth noting that demands of peace with justice were met in this case. To this day, except for the minuscule neo-Nazi right, the German public has never disavowed Nuremberg, nor its judgments, nor have they disavowed the German national trials of their own war criminals that followed and still continue. The same, however, cannot be said for Japan.

The project of establishing a system of international justice was raised very soon after the end of the World War II. A committee of the United Nations General Assembly actually completed two draft statutes in 1952 and 1954, but the proposals went nowhere and the idea slumbered for the next 30 years. In the 1980s, some consideration was given to the idea of a permanent court to handle international narcotics trafficking, but that idea also did not progress.

The ICTY

As regards the issue of justice and peace, it was the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) that faced these issues from its inception in 1993. The conflict in the Balkans was continuing, suspect individuals were very much in evidence, and the issue of the Tribunal’s impartiality was raised, particularly by the Serbian side. Some observers even charged that the Security Council had established the Yugoslav Tribunal as a fig leaf to cover up its unwillingness to intervene militarily in Bosnia and Herzegovina.

In any event, the ICTY overcame all these difficulties and its success has contributed directly to the renewal of serious interest in the permanent court. The activities of the ICTY, its indictments and trials, did not hinder in any serious way the negotiators who sought the peace agreement. I was one of them, and can personally attest to that. Indeed, the Dayton Framework Agreement, in its Bosnian constitution, implicitly commended the work of the Tribunal by stipulating that “no person who is serving a sentence imposed by the ICTY and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear may stand as a candidate or hold any appointed, elective or other public office in the territory of Bosnia and Herzegovina.”

The issue of the Tribunal’s impartiality was resolved positively by

its indictments and by the exhaustive fairness of the trials themselves. I have testified in three separate trials in The Hague and could observe the fairness of the trials.

Individuals from the three warring communities, the Bosnian Serbs, the Bosnian Croats, and the Bosnian Muslims, have been indicted and brought to trial in The Hague. We should remember that the Tribunal was also trying a chief of state for the first time in history when Slobodan Milošević died in his prison cell. It is also worth noting that, while Bosnian Serb leaders Radovan Karadžić and General Ratko Mladić still remain at large, two of the three members of the Bosnian Serb presidency have already been tried and found guilty of war crimes and crimes against humanity. One pleaded guilty and received a reduced sentence. The other recently received a sentence of 27 years.

Major cases are still being tried. The Muslim military leader in Eastern Bosnia is on trial, so are the Serbian Army perpetrators of the 1991 massacre at Vukovar, and the Bosnian Croats, civilian and military, who were responsible for the ethnic cleansing and worse in central Bosnia. They all stand now before the bar of justice at the Yugoslav Criminal Tribunal in The Hague.

Location of the Tribunal

Some persons have raised questions about the Tribunal's location, distant as it is from the wars of the former Yugoslavia. The argument is heard that the Tribunal is remote from the peoples of the former Yugoslavia and that its educative and reconciliation function is thereby diminished. I do not agree.

Several points can be made in this regard. First, the Tribunal has an excellent website and anyone with a computer can follow the trials that are held in open court. Second, while the trials are hardly the stuff of constant coverage in the Western European and American press, they are thoroughly reported and commented upon in the involved countries of the former Yugoslavia. And, finally, the Tribunal has an active outreach program in those countries.

In addition, it is also worth noting that the Yugoslav Tribunal, like its sister tribunal for Rwanda, is an *ad hoc* organization. It had a beginning and it will come to an end in a couple of years. Pending cases, and there will surely be some, will be transferred to the relevant national courts.

In sum, I believe it can be said that the International Criminal Tribunal for the former Yugoslavia has powerfully advanced the concept of peace with justice. History will be the judge, but all indications point in that direction. In this connection, it is only right and proper that we

recognize the brilliant pioneering work of the Tribunal's First Chief Prosecutor, the person who set the Tribunal on its path to success, Judge Richard Goldstone.

Uganda and the ICC

Turning to Uganda and the International Criminal Court, the longstanding civil conflict in northern Uganda between the Lord's Resistance Army [LRA] and the armed forces of the Government in Kampala offers the clearest window into the dilemmas of reconciliation and peacemaking on the one hand, and justice and accountability on the other.

Impunity has become a real issue in the Uganda situation and resolution is not yet in sight. The basic facts of the conflict may be summarized briefly and are not in dispute. Almost immediately upon the accession to power of the administration of President Museveni in 1986, an insurgency broke out in northern Uganda led by an erratic, brutal commander, Joseph Kony. The LRA thus has engaged in sporadic fighting for 20 years.

The warfare has been characterized by gross violations of international humanitarian law. Credible reports by international nongovernmental organizations and the media have detailed cases of abduction of children, forced enlistment in the military, summary executions, mass rape, torture, forced labor, and mutilations committed by the LRA. And the behavior of the Ugandan Government's troops has also been notable for their violations of human rights.

In December 2003, the Ugandan Government referred the LRA situation to the Prosecutor of the International Criminal Court. To highlight the referral, which was the first ever by a state party to the ICC, President Museveni and Prosecutor Moreno-Ocampo held a joint press conference in London in January 2004. That was understandable because of the novelty, but may not have been the wisest course of action, since it immediately allowed the prosecutor to be accused of partiality in the case.

The prosecutor announced the opening of a formal investigation in July 2004. And one year later, in July 2005, sealed warrants for the arrest of Joseph Kony and four other LRA leaders were handed down, accusing them of committing crimes against humanity and war crimes. The warrants were unsealed in October 2005. In addition, warrants were also served on the governments of Sudan, the Democratic Republic of Congo, and Uganda; that is to say, warrants to cooperate with the ICC in apprehending the accused criminals.

There have been many twists and turns in the Ugandan situation in

this past year, but the essential narrative of the twenty-year conflict has not changed. Fighting has continued in northern Uganda in spite of occasional cease fires and truces. Atrocities continue to be committed. A somewhat fitful peace process has been underway but without much, if any, success. Despite a flurry of international interest when the referral to the ICC was announced three years ago, the world's attention has come to be focused on the humanitarian problems in Darfur. In short, Uganda, the LRA, and the indictments pending before the ICC are on the back burner.

In part, this can be explained by the fact that Joseph Kony and his fellow indictees still remain at large. Unlike the Nuremberg and the Baghdad Tribunals, but like those of the former Yugoslavia and Rwanda, the International Criminal Court has no police or military at its disposal to enforce its arrest warrants. Under the Rome Statute of the ICC, the states parties to the Statute, in this case Uganda, Congo and Sudan, have a legal obligation to search for, arrest, and transfer the accused to the ICC. This obligation, however, has been honored in the breach by all three states.

Amnesty Not Permitted for Serious International Crimes

Nonetheless, whether because of the indictments, as the prosecutor would claim, or in spite of them, as many NGOs and others claim, Joseph Kony and some of his fellow LRA leaders have emerged from the bush. Another round of peace talks resumed in July 2006 in Juba in southern Sudan. While the prospects for success are no more promising than in past peace talks, this time the situation has been complicated by the LRA leaders' demands for amnesty; and they want the ICC indictments quashed. Under the Rome Statute establishing the ICC and in accordance with international law principles, however, amnesty cannot nullify prosecution for serious international crimes, genocide, and crimes against humanity.

It would appear then that the ICC case against Kony and his accomplices is on a collision course with peace. In addition, President Museveni of Uganda has muddied the waters further by appearing to offer amnesty to the LRA leaders if they sign a peace accord and end their rebellion. Hence an impasse seems to have developed, which has led most concerned parties to speak out on the dilemma of peace or justice.

Some examples: South African Archbishop Desmond Tutu took a middle road stating, "ultimately it is the Ugandans who have to decide what is best for them. Whatever they choose, it should not hinder reconciliation and healing and yet it should not encourage impunity and

hurt the victims yet again.” Most outside observers, however, have come down either on the side of accountability and justice, or peace and reconciliation.

Humanitarian NGO Position in Amnesty

The humanitarian NGOs working in Uganda generally favor some form of amnesty, arguing that the first priority has to be to relieve the decades-long suffering of innocent people. They believe the correct procedure should be peace first, then justice. The British Ambassador to the UN has supported them. Other NGOs, including major international organizations, such as Human Rights Watch and Amnesty International, are of the strong opinion that the ICC case against Kony and company should proceed without hindrance.

Human Rights Watch Case for Justice

In a report issued in July of 2006 entitled “Uganda: No Amnesty for Atrocities—Turning a Blind Eye to Justice Undermines Durable Peace,” Human Rights Watch put forward the case for justice. First, Human Rights Watch noted that the United Nations Secretary-General Kofi Annan has observed that “amnesties cannot be granted for serious crimes under international law and peace agreements endorsed by the United Nations can never provide such amnesties.” HRW also drew attention to the situation in southern Sudan, pointing out that the peace agreement that settled the war in southern Sudan in January 2005 did not include any amnesty.

Human Rights Watch also cited the failure of amnesties to solve the belligerency in Sierra Leone, noting that in 1999 the rebel leader there, Foday Sankoh, who was responsible for a multitude of atrocities, was granted amnesty. Indeed, he was rewarded with control of a government commission in exchange for signing the Lome Peace Accord, but Sankoh soon went on to attack both government forces and UN peacekeepers and the revived conflict was not declared over until more than two years later.

LRH Position the “Mato Oput” Process

The LRA has also been heard from on the issue of peace and justice. According to Reuters, on October 9, 2006, their spokesperson told journalists in Juba that as long as the ICC indictment stands, no soldier is going to come out of the bush. He added that “they should not expect us to sign an agreement and later cage our leaders in The Hague; our leaders are not fools.”

Technical devices have also been suggested to square the circle between justice and peace. Some Ugandan lawyers have proposed using their traditional system of conflict resolution. There is a custom in Uganda called “mato oput,” which means “drinking the bitter root.” This requires perpetrators standing under a tree who admit their crimes to show remorse and to ask the community and the victims for forgiveness. These Ugandan lawyers want to have “mato oput” codified and formally incorporated into Ugandan law. Then, if the LRA leaders undergo “mato oput,” the Ugandan Government would be in a position to tell the ICC that Kony and his colleagues had been fully and fairly tried under Ugandan law in a Ugandan court. And then the Ugandan lawyers maintain that the Rome Statute’s articles on complementarity could be invoked and the ICC could of its own will drop its case against the leaders of the LRA—a complicated procedure.

Escape Clauses in the Rome Statute

Other specialists and scholars have sought to get round the justice versus peace issue in Uganda by invoking some escape-clause articles in the Rome Statute itself. Under Article 16, for example, the UN Security Council can place prosecutions on hold for a twelve-month renewable period. Additionally, Article 53 of the Statute allows the ICC prosecutor himself to suspend an investigation for cause. Be that as it may, both the Court and the prosecutor have thus far been adamant in their insistence on continuing the case against Kony and company.

Reporting to the Court’s trial chamber on October 6, 2006, Prosecutor Moreno-Ocampo struck a defiant note on the execution of his warrants for arrest. He stated that commentators or representatives of states are reported to have raised the possibility of withdrawing warrants of arrest or granting an amnesty. But he went on to say that no state or any other entity has sought withdrawal of the warrants. His submission later noted that the arrest warrants have focused international attention on the conflict and brought additional pressure on the LRA to engage current peace negotiations.

The President of the ICC, Judge Philippe Kirsch, in his address to the United Nations General Assembly on October 9, 2006 was more circumspect than the prosecutor regarding the Uganda case. In an indirect but clear reference to the controversy over the issue of accountability versus immunity, which is raised by the amnesty issue, Judge Kirsch said:

... the court is operating in circumstances of ongoing conflict. The extent of the challenges facing the ICC is unlike anything experienced by other courts or tribunals.

That is where the matter stands for the moment.

Solution to the Impasse

Can a way be found out of this impasse? A number of preliminary factors have to be taken into account before addressing the question. First, the LRA leaders are likely to remain at large as none of the three concerned countries, Uganda, Democratic Congo, Sudan, has shown much disposition to arrest them and turn them over to the Court. Second, the peace process remains quite fragile and the parties correctly accuse each other of acting and negotiating in bad faith. And, finally, the position of President Museveni in offering some kind of amnesty to the LRA leaders has never been adequately explained by the Ugandans.

All crystal balls are cloudy when it comes to the Ugandan conflict but, if I may hazard a guess, I should expect that if the Juba peace talks show signs of serious, good faith progress towards ending the insurgency, a way will be found to do so without immediately bringing Kony and the others to justice in The Hague and without a formal grant of amnesty to them. Creativity is as valued in diplomacy as it is in the arts. It remains to be seen, however, what such a creative trial-avoiding solution would mean for the ICC and its prosecutor over the long term. Thank you very much.

(Applause.)

PROFESSOR DEL DUCA: Thank you very much. Now, we have approximately 15 minutes for informal discussion, both amongst the panel and from the audience here and remotely. Okay. Judge Goldstone.

JUDGE GOLDSTONE: I'll just make one general point. I think it must be conceded that justice can impede peace negotiations. One must concede that in certain situations it may be more difficult to negotiate a peace with a leader who fears being brought to trial. That can happen, but it seems to me that it's the exception rather than the rule. But even that cost I believe is worth the cost of having an efficient system of international criminal justice. You can't win all the time and in human affairs there's always a price to be paid for anything of value. You get very little for nothing.

The evidence thus far is that peace and justice haven't clashed. In the case of Karadžić and Mladić, the Secretary-General of the United Nations was infuriated when we issued an indictment against them during the war. When I went to see him, he castigated me. He said how can you do this, and he said in any event you should have consulted me. I said to him and you would have told me not to issue it, and he said yes. I said well, I'm very pleased that I considered it to be inconsistent with my duties to consult you. I referred him to the Security Council Statute

which gave me as Chief Prosecutor complete independence and said expressly that the prosecutor may not take instructions from any government or any other person, any other body. He said no, no. He said that's why I didn't contact you. He said you should have contacted me, which was a very unusual interpretation of that independence—what independence means. Then he said and I can't understand why the President of the Tribunal Judge Cassese didn't consult me. I said well, frankly, I don't think it would have been appropriate, but in any event he couldn't because I didn't consult him.

As Ambassador Okun implied, it was the indictment of Karadžić that allowed Dayton to happen. If Karadžić hadn't been indicted, he would have been entitled and free and would have gone to Dayton two months after the massacre at Srebrenica and there's no way that the Bosnian leaders would have entered the same room or sat at the same table as Karadžić. So there it aided the peace.

In the case of Milošević, again the UN and many NATO leaders were infuriated when my successor Louise Arbour indicted Milošević during the 78 days of bombing. They said how can we expect our negotiators Viktor Chernomyrdin, the former prime minister of Russia representing the UN, and President of Finland Martti Ahtisaari, representing the EU to be effective.

I had the privilege of interviewing both of them when I headed the Kosovo Inquiry and both of them said they were horrified when Milošević was indicted. I said did it matter and they said no, to our surprise Milošević never raised it. It was never on the agenda. Why? Politically, Milošević wasn't such a great traveler and he felt secure at home. As long as he remained in Belgrade, there was no way he was going to end up in The Hague. Little did he anticipate a revolution in his own country and the United States pressure impelling his successor to hand him over. Again, it's an example of the importance of the United States' political and economic pressure in having made that happen.

So it's a difficult question, but ultimately on the ICC incidentally, I don't believe it's a prosecutor's job to make political calls. I don't think that's what he or she is employed to do and I don't think he or she has the information as to whether a peace negotiation is likely to succeed or not. By peace, we're talking about enduring peace, not a cease fire. I believe that the Rome Statute sensibly allows the Security Council to call off or force suspensions of investigations.

If President Museveni feels that the indictment of Kony and the other LRA people is impeding the peace, he should approach the Security Council and give them convincing evidence that this is impeding the peace. I have little doubt that all of the members of the Security Council would be sympathetic to a good case being made on it.

PROFESSOR DEL DUCA: Ambassador Okun.

AMBASSADOR OKUN: I think that's true. On the question of the trials not impeding peace, they may, but the results don't. I'd like to reinforce what Judge Goldstone said about giving trials in affected countries with one narrative. That's very important. Both blacks and whites in South Africa understand what happened and it is an agreed history. Ditto for Germany after World War II, as I mentioned, and that's very important. It's also happening in the former Yugoslavia. Except for the ultranationalists in the countries, and every country has that bunch, it is now agreed what happened—above all in Serbia, which was the principal instigator of the conflicts in Yugoslavia.

This, again, has implications for the long future. Countries need to understand the truth for their long history. Remember after World War I that it was widespread German anger that they had been badly treated in the Versailles Treaty, (which they called the Versailles Diktat) that allowed the rise of nationalist forces. One of Adolf Hitler's principal arguments, was that his Nazi Party would undo an unfair treaty. These trials of individual perpetrators also do away with the idea of collective guilt because obviously not all of Germany was guilty, not all of Serbia is guilty, not all of Uganda is guilty. Certain people are guilty. Certain people—not entire countries—are guilty of war crimes and they have to be tried and that's very important for the long-term future of both the individual countries and of the relationship with their neighbors.

PROFESSOR DEL DUCA: Professor Crane.

PROFESSOR CRANE: I think the Ambassador brings up a good point related to alternates to justice. We need to begin to ask ourselves when we move into areas of the world which appear to be suffering under mass atrocity, and that is, is the justice we seek the justice they want. In some cases, that may or may not be compatible. Certainly we have to consider cultural alternatives to international justice at a certain level and at a certain time because that's all part of the process. Peace and justice all have to come together for some type of acceptable solution for sustainable peace to begin.

Another note is that we have to be very careful. You may have heard this trite phrase thrown around in the international community, certainly in Africa, it certainly was prominent when I was in West Africa, and that was African solutions to African problems. And being an Africanist myself, I would respect that and certainly would encourage that in many ways, but I'm finding at the international political level that they're using that phrase in some ways to get around the obligations of international norms. In other words, we have our problems, we have a tragedy, let us Africans take care of it and in some ways try to carve an exception to the international norms which all nations have signed up for,

such as the Geneva Conventions. I think all 194 nations now have signed up to do that.

Not all of the Protocols, but certainly to the basic Geneva Conventions of 1949. So I think the Ambassador brings up an excellent point related to alternate justice, which can also provide a peaceful situation that some just solution can also be resolved.

PROFESSOR DEL DUCA: Further questions, comments? Our Carlisle contingent is invited to participate. If you raise your hand in Carlisle if you have a question or a comment you want to make, I will recognize you. Is there somebody in Carlisle? Okay. Please use your microphone.

STUDENT: Okay. Can you hear me?

PROFESSOR DEL DUCA: Yes. Excellent.

STUDENT: Do you think charges should have proceeded only after Kony was in custody and do you think it would be useful for the ICC to have a police force to enforce the indictments that they do bring?

JUDGE GOLDSTONE: The prosecutors did keep the LRA indictments under wraps. They were kept out of the public domain for many months in the hope that they would be arrested during that period when they wouldn't know that they had arrest warrants issued against them. But when after some months that didn't work, the court felt obliged to make them public. There was no point in going on. They weren't going to get arrested and many people, NGOs in particular, were asking what's going on. We want to know that some progress is being made. So the politics of that situation dictated that the indictments should be made public.

As far as a police force is concerned, forget about it. In the foreseeable future, let alone my lifetime, in your lifetime there will never be international police forces allowed to roam into the sovereign territory of foreign states and frankly nor should there be. It has to work on the basis of cooperation of sovereign states with international courts or international organizations.

PROFESSOR DEL DUCA: Anyone else want to comment further?

AMBASSADOR OKUN: I agree thoroughly. We have as a case in point in the United Nations Charter which has very explicit Articles about the creation of an international military force under the direction of the Security Council. It has not happened in sixty years, and almost certainly will not happen.