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## *The International Criminal Court and Catholic Social Doctrine<sup>1</sup>*

**Abstract:** The International Criminal Court was the result of decades of postwar pressure to establish a permanent tribunal with jurisdiction over the most heinous crimes against humanity. Despite the noble goals of its architects, the ICC has not been effective in prosecuting such crimes. The author argues that the reasons for the Court's ineffectiveness were apparent from its inception due to the flawed view of the human person and society that is at the foundation of the Court. Using the insights of Catholic Social Doctrine, this article dissects the erroneous social anthropology, which is the basis for the Court's design, and suggests possible correctives based on a correct understanding of the human person and human society.

**Keywords:** International Criminal Court; Catholic Social Doctrine; human person; solidarity; subsidiarity; common good; Rome Statute.

**Abstrakt:** Międzynarodowy Trybunał Karny stanowi rezultat dziesięcioleci powojennej presji, aby ustanowić stały trybunał właściwy dla najbardziej odrażających zbrodni przeciwko ludzkości. Pomimo szlachetnych celów jego architektów, MTK nie był skuteczny w ściganiu takich przestępstw. Autor twierdzi, że przyczyny nieskuteczności Trybunału były oczywiste od czasów jego powstania z powodu stanowiącego fundament Trybunału błędnego poglądu na osobę ludzką i społeczeństwo. Korzystając ze spostrzeżeń katolickiej doktryny społecznej, ten artykuł analizuje błędną antropologię społeczną, która jest podstawą projektu Trybunału, i sugeruje możliwe korekty oparte na prawidłowym rozumieniu osoby ludzkiej i społeczeństwa ludzkiego.

**Słowa kluczowe:** dobro wspólne; katolicka doktryna społeczna; Międzynarodowy Trybunał Karny; osoba ludzka; pomocniczość; solidarność; Statut Rzymski.

<sup>1</sup> A version of this article was delivered on October 16, 2019, at the Stefan Wyszyński University in Warsaw, Poland.

## Introduction

The International Criminal Court (“ICC”) came into existence on July 1, 2002, the result of decades of effort to establish an international court to prosecute the most heinous crimes against humanity. In this article I will examine the ICC through the insights of Catholic Social Doctrine (“CSD”), in order to understand the experience of the ICC and to make suggestions for its improvement.

In 1993, I and my coauthor, Ronald J. Rychlak, wrote:

The quest to end impunity in human affairs and to punish those who commit gross violations of human rights is a noble cause that will, hopefully, one day bear fruit. History teaches, however, that the devil can dwell in the details of the most nobly intended institutions. The ICC, as it was designed..., is a flawed institution that contains the seeds of the Court’s eventual [withering away from disuse], or worse, of causing greater harm than the crimes it was intended to redress. [Czarnetzky & Rychlak 2009: 125-26].

Unfortunately, it is clear in retrospect that our prediction was prescient. Despite the ample resources devoted to the court, and the financial support of most European nations including Poland, and Japan, the ICC has had limited success in bringing people to justice. Moreover, the ICC’s docket to date has caused African nations to unite against what they perceive to be a Court which has focused disproportionately on their continent and ignored other parts of the world.<sup>2</sup> Finally, where it has acted, the existence of the ICC arguably has been an impediment to peaceful settlement of conflicts in some instances.

I argue that this is because in their zeal for justice the architects and proponents of the ICC started with a flawed understanding of the human person. That misunderstanding in turn results in a flawed legal institution in the form of the ICC. Such errors in social or philosophical anthropology inevitably lead to gaps in the system of justice which derives from such models. In short, good law and legal institutions can only derive from the truth about human beings.

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<sup>2</sup> The frustration of African countries with the ICC has led to sometimes wildly overwrought rhetoric regarding the Court: “The ICC, despite being called international criminal court, is in fact an international Caucasian court for the persecution and humiliation of people of colour, especially Africans.” [Allison 2016] (statement of Gambian Information Minister).

The social anthropology which is the foundation of CSD provides the necessary corrective to the flaws of the ICC. There is much at stake -- as the ancient maxim states: *summa ius, summa iniuria*. The highest law can lead to the greatest injury. In designing an institution to ensure punishment of the very worst criminals, the architects of the ICC instead have ensured that a potentially worse injustice – the subsequent deaths of innocent human beings in needless civil strife – would be inevitable in many cases. As Professor Rychlak and I predicted at the time, the flaws in the ICC could have been remedied at the outset had its designers paid attention to the truth about the human person and human society.

This article will briefly outline the elements of CSD concerning political institutions, law and justice, and then apply those principles to discern how the ICC might be reformed to repair its flaws.

### **Catholic Social Doctrine<sup>3</sup>**

CSD begins with the proposition that each human being is unique and unrepeatable, entitled to infinite, inherent dignity because humans are made in the image of God. Such dignity requires that a human being is always a subject, not an object. Any social doctrine or institution that treats the human being as a mere object of other human beings or institutions will fail. The person is the end of society and social institutions, never a mere cog of a greater social whole.

The Church recognizes that human beings are social creatures who form bonds with others naturally. Such bonds are necessary for the human being to develop fully as a human. The nature of those bonds depends upon the nature of the human relationship involved. There are many examples. Human beings form families out of conjugal love in which parents are called to radical service of their spouse and their children. The self-giving within the family, which is the fundamental unit of society, is the means by which its individual members achieve their good. In friendships, which are based on a different type of love than the family, individuals desire and work toward the good of their friends, and in so doing achieve their own, personal good.

The Church defines the common good of society as “the sum total of social conditions which allow people, either as groups or as individuals to reach their

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<sup>3</sup> The summary of CSD in this article is based on the account of CSD found in the Compendium of the Church published by the Pontifical Council of Peace and Justice. [Pontifical Council of Justice and Peace 2004].

fulfillment more fully and more easily.” [Second Vatican Council 1966: 26]. The common good lies in the totality of social conditions that permit each human being to become, through the exercise of virtue, what they can and ought to be.

Thus, the twin doctrines of the dignity of the individual and the common good are the foundation of the Church’s social doctrine. It is crucial to note that these theories are reciprocal and intertwined. They do not stand alone. The common good is achieved through pursuit of the good of individual persons, and vice versa. And, once again, it is always the good of the individual which is paramount.

Two further principles flow from Catholic social anthropology: subsidiarity and solidarity. All the myriad components of civil society – from the sports club to the local literary club, to political parties and national government – are crucial to the development of the person. The Catholic doctrine of subsidiarity<sup>4</sup> requires that the numerous and diverse social groups be given leeway to perform their appropriate roles in society without inference, but with assistance from institutions at a higher level of society, though only where absolutely necessary. Importantly, just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and give it to the community, so also is it a grave injustice to assign to a greater and higher association what lesser and subordinate organizations can do.

The term “solidarity,” the fourth pillar of Catholic social philosophy, is potentially a source of misunderstanding given its different connotations in modern social theory. In Catholic thought, solidarity is the principle that “highlights in a particular way the intrinsic, social nature of the human person, the equality of all in dignity and rights, and the common path of individuals and peoples towards an ever more committed unity...” [Pontifical Council for Peace and Justice 2004: 192]. Solidarity is not a vague call for compassion, but rather the “firm and persevering determination to commit oneself to the common good.” [John Paul II 1988: 38].

Thus, subsidiarity and solidarity also are intertwined. In a society, all individuals and institutions strive through solidarity for the common good of the whole. However, the requirement of solidarity cannot be an excuse for higher level institutions to usurp the functioning of legitimate, lower level institutions without harming the individuals who are part of those lower institutions.

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<sup>4</sup> For a discussion of subsidiarity in this context, see [Rychlak and Czarnetzky]

Society is made up first of human persons, and then families, who form communities in order to foster the good of the families. Those communities then form the state, which is the highest level of a society responsible for the common good. However, the political state does not completely subsume society. The state is not the same as the nation, which is made up of the state, and all the other social, cultural and religious institutions that are part of the nation.

Legal institutions must, like all political and social institutions, be directed to the common good. Law, therefore, is not superior to the common good, but rather an instrument by which society achieves the good. Law itself is not an end; rather, it is a means to the end, which is the common good.

### **The International Criminal Court**

The twentieth century was the bloodiest in history. Most of the bloodshed was at the hands of governments armed with modern technology, and thus the means to kill efficiently on an industrial scale. The horrors of two world wars and the Holocaust led to widespread calls, on the model of the Nuremberg trials, for an international tribunal to punish the worst perpetrators of crimes against humanity.

Though there have been ad hoc tribunals and national prosecutions of criminals who have committed genocide and other crimes against humanity, the impetus for a permanent international tribunal with jurisdiction over such crimes culminated in an unprecedented international agreement, the 1998 Rome Statute of the International Criminal Court (“Rome Statute”), which in turn led to the ICC.

The ICC was established in 2002 after extended negotiations which led to 60 nations ratifying the Rome Statute. The ICC is thus a multilateral treaty organization which functions as international court with jurisdiction over grave international crimes defined by the Rome Statute – genocide, crimes against humanity, war crimes, and the crime of aggression.

At present, there are 123 signatories of the ICC.<sup>5</sup> Two countries, Burundi and the Philippines, were member states, but have withdrawn. Thirty-one countries have signed but not ratified the Rome Statute. Four countries – Israel, Sudan, the

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<sup>5</sup> General information about the ICC can be found at the Court’s website <https://www.icc-cpi.int/>. The United Nations maintains a database with the status of countries who are or have been signatories or state parties to the ICC, and their current status. See [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en#2](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#2).

United States, and Russia – had signed the Rome Statute, but have informed the UN Secretary General that they no longer intend to be bound in any way by the treaty. Forty-one member states of the UN have neither signed nor ratified the treaty, including China and India.

For a prosecution to take place, the ICC must have jurisdiction over the person of the defendant and the subject matter of his alleged crimes. Such crimes may be prosecuted if they happened in the territory of a member state, were perpetrated by a citizen of a member state, or if the situation is referred to the Court by the United Nations Security Council. [Rome Statute: arts.12-14].

The ICC's jurisdiction is defined in the Rome Statute as "complementary" to that of individual nations. [Rome Statute: art. 17]. This means that if the individual nation is either unable or unwilling to prosecute malefactors who have committed crimes within the Rome Statute, then the ICC's prosecutor must prosecute.

What flows from this principle, crucially, is that the Rome Statute provides that amnesties provided by the nation concerned are not binding on the ICC. The idea behind the ICC, therefore, is that the international community must end the impunity with which horrible human rights violations have been perpetrated and, if such impunity cannot be deterred effectively in every instance, it must always be punished.

To be clear -- the idea of an international court with jurisdiction to prosecute such crimes is not inherently misguided or dangerous. [Czarnetzky and Rychlak 2003: 59-60]. The problem arises, however, when such a tribunal is the only method to deal with a society's transition from a previously criminal regime. In such instances, it is possible that the best course to achieve the common good of the human beings who make up the polity will not include prosecution, but rather an amnesty. As painful as this is for victims of crimes, establishing peace and preventing further bloodshed sometimes are also vital goals. Indeed, they are goals that might trump legal justice.

With its commitment to prosecution alone, the ICC is therefore the apotheosis of "legalism" -- a term for the ideology grounded in the belief that "moral conduct [is] a matter of rule following, and moral relationships to consist of duties and rights determined by rules." [Czarnetzky and Rychlak 2003: 61] (quoting [Sklar 1986: 1]). In this case, the rules to be followed are defined in the Rome Statute.

**Solidarity and Justice: CSD as the Corrective to the Flaws of the ICC**

For the zealous legalists who were the founders of the ICC, law is inherently and morally superior to the sordid compromises and squabbles of politics. Rather than an instrument of politics, law is viewed as a distinct, and therefore must be insulated politics. Christof Royer has characterized the disavowal of politics by the ICC and its architects as a “noble lie.” [Royer 2019].

Nevertheless, the ICC enshrines the idea of legal justice alone constituting the common good in all situations. Having defined crimes against humanity and determined that such crimes always must be prosecuted, the ICC and its drafters have taken out of the hands of politics the ability to craft alternative means to heal their societies. The ICC, and the ICC alone, is the solution in all cases.

The Catholic Church’s understanding of human beings and human institutions demonstrate why such an institution will over time either be rendered useless or will cause great harm. The reason is easy to identify. The ICC is an attempt to place law above all else. It is a free-standing court which does not emerge from any one polity. There is no political check on the court whatsoever. As enshrined in the Rome Statute, law is not, as Catholic Social doctrine would have it, an instrument which is directed, to the common good. Rather, law by itself defines the common good.

That such a philosophy is a grave mistake is clear in practice. An example which predates the ICC is South Africa’s transition away from its apartheid regime.<sup>6</sup> The white minority in that country had held political power for centuries. The minority had maintained that power through criminal action by the government against political dissent. Some in the majority black population fought back through acts of violence.

It was unlikely that the white minority would simply give up power if members of the government could be prosecuted for crimes committed in support of the government. Moreover, there was a great deal of concern about what the society would be after the transition, and whether it could continue as a multiracial society.

Led by religious leaders, South Africa’s solution was the Truth and Reconciliation Commission (“TRC”) process. Any person, black or white, in the government

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<sup>6</sup> For a summary of South Africa’s transition from apartheid and its Truth and Reconciliation process, see [Czarnetzky and Rychlak 2003].

or opposed to the government, could come forward and confess to their politically motivated crimes. In exchange for telling the absolute, entire truth about those crimes to the TRC, the perpetrators were granted amnesty from prosecution.

The idea was twofold – society required the truth about such crimes in order to repair itself and move forward; and, the transition away from apartheid was very likely to be violent and bloody without the possibility of the amnesty provided by the TRC process. These were prudential, political judgments that were difficult to validate with scientific certainty, but it is important to recognize that these judgments emerged solely and, perhaps, surprisingly, from South Africa and its polity.

The history of South Africa since its transition lends support to the idea that the TRC solution was a success. Although there are significant social problems in South Africa today, the TRC mechanism, at a minimum, has prevented a bloody civil war for the past thirty years.

Had it existed at the time, the ICC would have been required to prosecute anyone who had committed crimes within its jurisdiction regardless of the TRC settlement in that country. Although it is true that the ICC prosecutor has normal prosecutorial discretion to decide whether to bring a case over which the ICC would have jurisdiction [Davis 2015; Greenwalt 2007; Lepard 2010], it is difficult to believe the ICC would have declined to act in South Africa, given the political pressure that would have existed.

According to CSD, human relationships cannot be governed solely by justice. Rather, the Church recognizes that justice exists alongside solidarity, and that solidarity is the way to peace. As we have seen, however, the Rome Statute elevates legal justice over solidarity in all instances. That is the fatal flaw of the ICC.

As St. John Paul II wrote in his encyclical *Dives in Misericordia*,

The experience of the past and of our own time demonstrates that justice alone is not enough, that it can even lead to the negation and destruction of itself... It has been precisely historical experience that, among other things, has led to the formulation of the saying *summa lex, summa iniuria...* [12].

It is true that peace is, as is often asserted, the fruit of justice. However, John Paul II wrote that “today one could say, with the same exactness and the same power of biblical inspiration: *opus solidaritatis pax*, peace as the fruit of solidarity.” [John Paul II 1988: 39].

Thus, the goal of peace, in fact, will certainly be achieved through putting into effect social and international justice, but also through “the practice of the virtues which favor togetherness, and which teach us to live in unity, so as to build in unity, by giving and receiving, a new society and a better world.” [John Paul II 1988: 39].

According to CSD, therefore, the path to peace and true justice requires solidarity. The two are not mutually exclusive. Normally, justice and solidarity are reciprocal values in a society. Indeed, that is one of the classical justifications for criminal punishment, and the reason prosecution of crimes is normally left to the state, not to the victims of crime. Crimes are against individual victims who are entitled to just retribution through punishment of the criminal, but they are also acts which tear at the fabric of the society – they threaten solidarity. Criminal punishment therefore is not just for retribution, but also necessary to reestablish solidarity and, therefore, peace in the society.

The damage to victims of the heinous crimes within the jurisdiction of the ICC is nearly incalculable, but likely so too is the damage to solidarity within that society. It is difficult to imagine a society emerging from a genocide, for example, with its solidarity among citizens intact. Such societies are rent with political and moral conflict. There is no other avenue to reestablish solidarity in such societies than some political resolution. Prosecuting wrongdoers might simply not be enough; indeed, it might lead to greater rifts. Though there is no way to prove it with certainty, South Africa is an example where such prosecutions likely would have caused more harm than good. Such was the judgment of the South Africans themselves.

Other examples of transitional societies, past and present, reinforce the truth of CSD’s insight regarding the relationship between solidarity and justice. Indeed, the Nuremberg solution at the end of World War II (“WWII”), which serves as a model for the ICC, is not inconsistent if properly understood.

War is a tool of politics. At the end of WWII the allies achieved the unconditional surrender of Germany. The importance of that fact cannot be overstated

– a political solution, though involuntary, already had been decided by the war. Germany was going to change completely. There was no need to balance justice and peace as peace in the aftermath of the surrender. [Akhavan, 2009: 626].

However, there were two crucial aspects to reestablishing solidarity in Germany's decimated postwar society. First, the German people, and indeed the world community, had to receive the truth about the Nazi leadership and its crimes. As with South Africa, publicly disseminating evidence of the true nature of the Nazi regime would help promote solidarity by precluding endless disputes regarding the historical record. Second, the fate of the defendants, which was never really in doubt, had to be decided through a fair legal process to temper the inevitable accusation of victors' justice. Though many people, perhaps even most, would argue, as did Winston Churchill, that summarily executing the defendants would have been just, doing so might have impeded the reestablishment of social solidarity in postwar Germany.

The examples of Nuremberg and South Africa demonstrate that neither justice nor solidarity can be a "one size fits all solution" to the problem of how to establish a lasting peace. Both issues must be in play, and the only way to strike the proper balance in most instances is through a political mechanism. That political mechanism might, in some cases, require prosecution. In others, it might require that society move forward with no prosecution. In yet other situations, some combination will be appropriate.

Thus, the absolutist faith of the Rome Statute in prosecution of crimes as the only means to end impunity is mistaken and dangerous, as the contemporary case of Joseph Kony in Uganda illustrates.<sup>7</sup> Kony is the leader of the Lord's Resistance Army which the government of Uganda accuses of committing various crimes against humanity, including the enslavement of children in order to turn them in to soldiers. Kony was indicted by the ICC in 2006 but remains at large. Kony offered to lay down his arms contingent on an amnesty from ICC prosecution, which was denied. Given that the ICC would prosecute despite any local amnesties granted in Uganda, Kony has very little incentive to surrender his fight, though perhaps Kony and the LRA would have waned in power in any event. [Akhavan 2009: 644-45]. The example of Uganda demonstrates that the ICC's absolute faith in legal justice arguably can have the perverse effect of preventing peace.

<sup>7</sup> For a history of the LRA and Joseph Kony, see [Akhavan, 2009; Akhavan 2005].

### **Can the ICC Be Reformed?**

Whether and how the ICC can be reformed in order to accomplish its goals is the crucial question facing the Court today. The starting point is the ICC's lack of a political check. Prosecutors in nations are always subject to some form of direct or indirect political accountability. In the United States, for example, prosecutors in some states are elected officials. In other states and in the federal system, prosecutors are appointed and approved by the political branches of government. In both cases, there is a political check.

There is no similar political check on the ICC prosecutor, other than the court itself. Moreover, given that many of the largest and most powerful nations in the world have not joined the court detracts from its legitimacy as an institution. Perhaps a meaningful political process with universal assent might improve the court. Despite dissatisfaction with the United Nations Security Council, it is the only international organ with even a modicum of legitimacy in assessing and working toward the common good. Perhaps making Security Council referrals the sole means by which the ICC exercise jurisdiction would increase its legitimacy and therefore lead to more nations joining the Court.

Alternatively, perhaps having a standing court is not the proper approach at all. Ad hoc tribunals starting with Nuremberg, and including the Rwanda and former Yugoslavia tribunals, were set up for limited purposes, and importantly included local judges, thus adding to their political legitimacy. Such ad hoc tribunals emerge from political processes.

The ICC also must devise a way to recognize legitimate amnesties granted by a national government in transition. Rather than simply classify such amnesties as an "unwillingness" to prosecute, the ICC must define the term "unwilling" to require prosecution only in cases where an amnesty is entirely a sham. How such determinations are made and by whom are difficult questions, but they surely are not insurmountable. Given the stakes involved, there is no choice but to undertake the task.

There are other potential fixes to the problems with the ICC. However, as I have argued in this article, the source of the ICC's problems, sharply brought into focus through the lens of Catholic social theory, is that the Court provides only one solution to the horrible crimes it was designed to end – prosecution – whereas a much different solution might be required to establish and maintain

peace in a transitional society. The ICC must be removed as an obstacle to such nonlegal solutions, or, sadly, many innocent lives will be lost as a result.

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