

No Peace without Justice?

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This conference has been characterized by a surprising phenomenon: while some debate and even controversy have taken place in the meetings of states parties, the civil society deliberations—where we would expect to hear multiple voices, arguments, and contestation—have been characterized by a silencing of dissent. Realistic political and social analysis of the International Criminal Court has been refused, and in its place we hear only declarations of faith, repeated mantras, and invocations of a putative consensus on the universal benefits of international criminal justice. In an effort to challenge this emerging fundamentalism, these remarks will briefly consider some issues around the politics of ICC interventions, in particular some problems that I think we need to honestly assess and address if we want to further the cause of justice, however we understand it. The three themes I will consider are: the politics of enforcement; the politics of peace; and the politics of global justice.

Politics of Enforcement

The ICC, like any international mechanism intended to promote human rights, faces the impossible task of acting morally in a political world rent by power inequalities, domination, and violence. Because the ICC depends upon coercion to carry out its investigations and prosecutions but lacks its own independent enforcement capacity, in its quest for efficacy, the ICC must often *accommodate* itself to political power instead of *challenging* political power. This accommodation occurs globally and locally.

On the global level, the ICC’s decision to prosecute only Africans, rather than being a neo-colonialist conspiracy, derives from international power relations, relations that make Africa the only region weak enough so that international intervention can take place here without accountability, and unimportant enough so that the West will allow the ICC to act as its sub-contractor here as a substitute for more direct forms of intervention. Furthermore, the way the ICC has intervened

within Africa has also been influenced by political power. For one thing, we have seen the ICC accommodate itself to US power. Ironically, it was precisely because of the Bush administration's hostility that the ICC responded by aligning itself with US interests. That is, the ICC realized that alienating the US could easily spell disaster, so the ICC appears to have decided that its best path is to avoid challenging the US or its allies, and to welcome any form of US cooperation. As a result, we have seen the ICC prosecute US enemies in Africa and ignore crimes committed by US allies.

This accommodation to US interests stands to increase further as the Court tries to convince the US to lead the way in enforcing arrest warrants. In June 2009, Moreno-Ocampo called for US-led "coalitions of the willing" to enforce arrest warrants, calling upon the "rare and expensive capabilities" possessed by US special forces. Earlier this year, the Prosecutor's special adviser declared that the ICC has a "shopping list ready of requests for assistance from the US government," because the US "has to lead on one particular issue: the arrest of sought war criminals." The ICC's appeals for US military support are a response to an apparent re-assessment of US-ICC relations undertaken by the Obama administration, which has declared its interest in working more closely with the ICC—not with the intent of becoming a party to the Rome Statute, but to help execute certain arrest warrants. As Ambassador Rapp made clear yesterday, the US may cooperate, but only on its own terms.

The consequences for peace and justice could be disastrous if the ICC comes to rely on the military capacity of the US—which has its own economic and political interests in Africa—as its enforcement arm, in particular when the US declares itself above the very law it claims to enforce. The ICC appears to be willing to trade its independence in return for access to coercive force, a Faustian bargain that will be made at the price of the Court's legitimacy and impartiality. But the price paid by the ICC will be trivial compared to the very dangerous consequences this alliance could have for peace in Africa.

Indeed, if the US convinces the ICC to pursue certain cases and disregard others, ICC arrest warrants could provide justification for the direct use of US military force in the name of capturing war criminals. It could also justify increased militarization of US-allied African states in the name of building their capacity to enforce international justice. Finally, it could allow the US and US allies to use violence with impunity, sanctified as being in the name of international law enforcement. This highly partial, politicized prosecution could, instead of ending

impunity, expand and entrench impunity in the name of enforcing international law. This proposed alliance deeply threatens the credibility of the ICC, as the Prosecutor's pandering to the US military is an affront to all those around the world struggling to hold the US military accountable or who have suffered at its hands.

The ICC also cannot avoid accommodating itself to political power on the local level, in particular in cases of state self-referrals, in which the ICC depends upon the referring state to assist in investigations and prosecutions. In the Uganda case, for example, the ICC has enjoyed a close working relationship with the Ugandan political and military authorities. For example, ICC investigators have been accompanied by UPDF officers when carrying out interviews with potential witnesses. The current Review Conference and even Sunday's football match, in which President Museveni led a team of war victims, are further testament to the ICC's close relationship with the Ugandan government.

In exchange for this cooperation, the ICC appears to have guaranteed that no members of the Ugandan government will be prosecuted by the ICC. Instead, the ICC has left the prosecution of government crimes to the government itself. This accommodation to Ugandan government interests simply does not make sense to many people in northern Uganda. Why, people ask, should the ICC not hold the government equally accountable for war crimes, including the long-term mass forced displacement and internment of over a million people in squalid camps? They do not share the ICC's faith in the government's capacity to impartially prosecute itself, and so it appears that the ICC has granted the Ugandan government impunity for its violence in northern Uganda. This appears to many to be a clear example of double standards, whereby international mechanisms are used to deal with the government's enemies, while the government is allowed to prosecute—and absolve—itsself. This accommodation to political power in Uganda and elsewhere cannot but threaten the ICC's credibility.

When confronted with its apparent selectivity and politicization, whether its refusal to prosecute US allies or its cooperation with certain African governments, the ICC tends to respond by declaring that global justice is evolutionary, and that we shouldn't expect it to be perfect yet—but that someday—for our grandchildren as William Pace of the CICC put it—its work will truly be universal. We are asked to have faith ourselves that one day we will all be redeemed by the ICC. This is a faith that many of us find hard to share.

Politics of Peace

Critics have argued that ICC interventions can undermine peace. The response, heard endlessly at this conference from NGOs, current and former Secretary Generals, and state delegates, is the mantra that there is “no peace without justice,” where justice is assumed to be fulfilled through ICC interventions. But what does this claim mean? Is it a factual claim or a moral claim? That is, does it mean that “There can be no peace without justice” or “There should be no peace without justice”? Either way, it merits attention.

If it is a factual claim, then, yes, it is true that criminal justice procedures have helped bring about peace in certain cases, and the failure to hold violent actors criminally accountable has undermined sustainable peace. Thus, it is true that ICC interventions can, in certain cases, help bring about sustainable peace. But there are also cases in which peace is established sustainably without prosecuting those who committed violence in the lead-up to that peace. It is also a fact that the insistence on criminal justice can derail peace processes. We even have the disturbing spectacle of the Chief Prosecutor actively trying to undermine or foreclose the possibility of peace talks with the LRA through repeated declarations dismissing the LRA’s genuine commitment to negotiations. More broadly, the blanket claim of no peace without justice can be dangerous for peace because it categorically refuses and closes off the kind of often distasteful political compromises that may be necessary to establish peace.

But the admission of even the *possibility* that immediate pursuit of criminal justice might close off peace processes has been systematically silenced and denied here in this conference. Those bringing it up are accused of being apologists for dictators or of trying to ensure their own impunity for international crimes. The mere suggestion of sequencing, for example, has been condemned as a “code-word” for impunity.

My argument is simply that the impact of criminal prosecutions, including those of the ICC, upon peace is dependent upon the political context in which those proceedings take place. Which is not to say that political contexts never change—indeed, rejecting criminal prosecutions now because they are damaging to peace does not mean rejecting them in the future, when the political context may have changed and prosecutions can be part of a politically constructive process. Indeed, even

amnesties can be revoked when the political context changes. The formula “Justice delayed is justice denied” sounds nice but is wrong and, if pursued in certain cases, can itself end up denying justice.

The moral claim, that there *should be* no peace without justice, is based upon the idea that criminal justice is what victims demand and that the ICC responds to victims, fulfilling their rights. This determination is often based upon qualitative or quantitative studies, which have incontestably demonstrated that in many cases victims demand criminal prosecutions and welcome the ICC. But it is also incontestable that people in many cases, especially in the midst of ongoing conflict, are not in favor of criminal prosecutions, and, for a host of reasons, may not be in favor of ICC intervention.

By taking what the victims say seriously, and not simply assuming that everyone will or should support justice, it is apparent that in every situation there will be some people who are demanding criminal justice, others who are not, others who are demanding different kinds of justice, others who would rather not get involved. There are political debates on justice and peace within every conflict-affected society—different concepts of justice between men and women, youth and the old, rebel and government sympathizers. It is this internal debate within conflict-affected societies that the ICC rejects. The ICC instead sees people as helpless, voiceless victims, sees the community as uniformly victimized and voiceless, and sees itself as representing the true interests of the victims, even if the real live victims reject the ICC.

So when the ICC intervenes, it is not a non-political gesture of solidarity with voiceless victims. Rather, it is a political act, a political intervention into a community in significant upheaval, aligning with or refuting the interests of different political and social forces and actors. This is true of the national and international levels as well. Therefore, the ICC needs to be responsible for the political effects of its interventions, a responsibility it cannot dodge by invoking the mantra of no peace without justice, or the abstract figure of the voiceless victim.

ICC interventions need to be judged based upon their political consequences—are they helping to bring about sustainable political changes? Are they establishing impunity for certain groups? Will ICC intervention strengthen the violent, or be used for anti-democratic agendas? Will it raise the hopes of marginalized groups, only to leave them even more vulnerable when the ICC intervention ends, or the targets of a

backlash the ICC is incapable of protecting them from? In short, is ICC intervention helping to build sustainable, peaceful, just, and inclusive political communities? My feeling is that the political reforms necessary to build such political communities have to be driven chiefly from within, so that external ICC intervention will tend to interfere with this internal process of political change. But in any case, this is the terrain on which we need to ask questions of the ICC if we want to ensure that the quest for global justice does not undermine justice, peace, and democracy.

Politics of Global Justice

The ICC is quickly establishing a monopoly for international criminal justice as the primary form that global justice takes. In so monopolizing the discourse of global justice in Africa, the ICC has restricted those issues that can be addressed and those actors who can be held accountable in the name of justice, it has placed certain problems and issues outside the scope of what can be defined as unjust and thus subject to challenge and contestation through the pursuit of global justice.

This is seen in terms of the ICC's subject matter jurisdiction: the forms of violence, repression, and inequality that can be challenged as "unjust" are restricted to the most spectacular forms of overt violence. Less spectacular but equally deadly forms of violence and repression—such as economic exploitation, Western sponsorship of violent and anti-democratic political forces, internationally-enforced disparities in access to medicines, trade regimes that undermine development and food security, violence against women that takes place during so-called peacetime—none of these can be challenged through the pursuit of global justice when global justice is defined by the ICC. Global justice is exclusively associated with punishing the "most serious crimes of concern to the international community as a whole," conceived of as mass atrocities, while those crimes that *serve* the interests of the "international community" are conveniently outside the ICC's scope.

Personal jurisdiction under the ICC is similarly restricted, focusing as it does on placing the entire blame for violence on a few individuals by reductively representing situations and reducing the wide set of actors and structures involved in violence to one or two individuals. By focusing on those with "greatest responsibility," who always happen to be Africans, the ICC ignores the criminal responsibility of Western states, donors, aid agencies, and corporations even in those episodes of violent atrocity that the Court is willing to investigate. And finally, the

ICC's limited temporal jurisdiction excludes centuries of injustice, an entire history of Western violence in Africa.

Now, if the ICC were conceived as simply a technical mechanism for use in specific circumstances, there would be less of a problem. The problem, however, results from the ICC's effective monopolization of the language of global justice. Thus, there is a vast regime of institutions and organizations engaged in a massive project trying to build support for the ICC as the exclusive arbiter of global justice, putting entire forms of domination, violence, and inequality outside the scope of justice as unquestionable. The irony is that the idea of global justice is uniquely capable of challenging those forms of Western domination and international inequality, and so the ICC ends up impoverishing what should be the radical and emancipatory language of global justice.

This discussion should also lead us to question the distinction between so-called global and so-called local justice: the justice of the ICC can be very partial, parochial, politicized. The justice demanded by supposedly local African victims may itself be truly global, going far beyond the narrow limits imposed by the ICC.

To conclude, I do not know if these problems—the ICC's counterproductive accommodation to power, its refusal of political accountability, and its impoverishment of global justice—can be dealt with through reform of the ICC, if the ICC is capable of change even if pressure is exerted upon it. Therefore, one temporary solution might be to scale down the hyperbolic claims made on behalf of the ICC—that it will end impunity universally, that it will usher in peace, that it represents global justice for all victims. The limitations of the ICC need to be understood, and so perhaps all we should expect is that it enforce international law where it can. Or, perhaps alternative forms of justice need to be articulated and developed that are more democratically accountable, and perhaps an unintended benefit of ICC interventions is to catalyze just this process.