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“Slippery Slopes: On Why We Need the ICC”

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“Slippery Slopes: On Why We Need the ICC”

Abstract

Peace, reconciliation, and restorative justice: these are the albatrosses that international criminal law (ICL) must (unfairly) bear. Ian Paisley, MP from Northern Ireland and former United Nations and European Union peace envoy, echoes in a New York Times op-ed contribution the aspirations heaped onto the International Criminal Court (ICC). In March, the ICC convicted Thomas Lubanga for war crimes and the conscription of children as soldiers; justice has been done, Paisley claims. Yet the ICC was “intended as an instrument of peace,” and “there is no peace” in the Democratic Republic of the Congo (DRC). On this ground he concludes, the ICC “has not been a success.”

Keywords

Human rights, International Criminal Court (ICC), Peace, Justice, Reconciliation, Governance, Sovereignty

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“Slippery Slopes: On Why We Need the ICC”

by Matthew S. Weinert

Peace, reconciliation, and restorative justice: these are the albatrosses that international criminal law (ICL) must (unfairly) bear. Ian Paisley, MP from Northern Ireland and former United Nations and European Union peace envoy, echoes in a [New York Times op-ed](#) contribution the aspirations heaped onto the International Criminal Court (ICC). In March, the ICC convicted Thomas Lubanga for war crimes and the conscription of children as soldiers; justice has been done, Paisley claims. Yet the ICC was "intended as an instrument of peace," and "there is no peace" in the Democratic Republic of the Congo (DRC). On this ground he concludes, the ICC "has not been a success."

Paisley does make clear his is not an argument against the ICC's existence. According to him, it is a useful institution in cases where "there is no functioning government, or the government is hostage to one section of society, *or where there is no viable reconciliation process.*" In contrary situations, ICC action is akin to meddling, for it risks derailing peace processes or driving relevant actors apart. Paisley cites Kenya as an example, yet he fails to mention whether or not there is a viable reconciliation process in that country (there is only a coalition government that is *supposed* to promote reconciliation). Where reconciliation is viable, then if the ICC "does not always intervene or deliver justice, it may be a price worth paying."

Paisley's arguments are problematic. First, the aspirational position improperly ascribes to courts functions not granted to them. Think of the 1992 Los Angeles race riots which erupted after a jury wrongly acquitted four police officers for the beating of black motorist Rodney King ([a federal court later found two of the four guilty](#)). Judged from the aspirational position, we must reproach the court (and the judicial system writ large) for failing to reconcile racial tensions and, more directly, failing to halt the looting, violence, and destruction that resulted in fifty-five deaths and over \$1 billion in damage. Yet as important as those functions are, they are not the purposes of courts. Courts, at least criminal ones, are designed to ascertain the innocence or guilt of an accused.

True, international courts and tribunals must be mindful of the contexts within which individual crimes occur, and this mindfulness is reflected in the careful construction of judgments that document with exacting detail events, contexts, chains of causality, and chains of command. Meticulously argued and substantiated judgments may have the added value of defusing myths that, if left unchallenged, could fuel future hostilities (think of Milosevic and the myths of a Greater Serbia and villainous Albanians). Yet even this so-called deterrent function should not be attributed to courts; deterrence is properly construed as a potential benefit of prosecution. Thus, Paisley's criticism of the ICC for failing to create peace in the DRC might, on a most generous reading, be interpreted as a veiled attempt to underscore the necessity of relevant local and international actors to take responsibility and negotiate an end to the conflict. Uncharitably interpreted, Paisley may simply prefer to deflect: it is much easier to blame the ICC (as it is the UN) for failing to save states and peoples from themselves when they aren't willing to do the requisite work.

Second, the peace v. justice dichotomy poses its own problems. Paisley argues that "the foremost challenge facing the I.C.C. is to determine whether its intervention will help or hinder the cause of peace. The wheels of justice must be allowed to turn at their own pace, but that they must not impede the peace process." But who determines what constitutes intervention? The Rome Statute authorizes the UN Security Council to request that the ICC defer any action for a period for twelve months. Thus if reconciliation is truly imperiled, a mechanism exists to protect fragile peace processes. Absent Council action, states with legitimate jurisdictional claims may assume investigations or pursue prosecutions—though the ICC has the authority, under Article 17, to determine when those state efforts retreat, procedurally and substantively, from the standards of justice. Absent either, once the judicial genie is out of the bottle, instituted and engaged, it can hardly be expected to be put back.

So perhaps Paisley's point is really a reflection of the disquiet some have vis-à-vis global governance: presumably unaccountable institutions undermining sovereignty, exposing political failings, or underscoring lack of state will or responsibility to do something. In the case of the ICC, however, judges can be relied upon to maintain the highest standards of integrity, as they have already done; further, an Assembly of State Parties oversees the court. But in the end, global governance is as much local as it is presumably global. So what, we must ask, are states and local actors willing to do to help themselves? In the silence that often accompanies that question we find answers to the question of why we need the ICC.

Matthew S. Weinert is Director of Graduate Studies and Associate Professor of Global Governance and International Law & Organization in the University of Delaware's Department of Political Science and International Relations. His research explores moral and legal dimensions of global change, which he locates in the tensions between, and possibilities inherent in, the relationship between the state (and a state-based international order) and the individual (and a cosmopolitan-conceived world society). He is nearing completion of a book, Making Human: International Organizations and the Global Governance of Human Dignity (University of Michigan Press, under contract), and is the author of Democratic Sovereignty: Authority, State, and Legitimacy in a Globalizing World (University College London, 2007), as well as numerous articles, essays, and book chapters.