

Power, Justice & Peace

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The title of this panel is 'Balancing Law and Politics: What are the tensions between peace and justice'. If law and politics are to be balanced as a means of reconciling the tension between peace and justice, then power must also be inserted into the equation. My theme is the tension between ground and global realities of power, on the one hand, and local and international justice, on the other: two essentially normative concepts; and how they connect to peace. For example, in the Middle East – the region with the highest conflict intensity and the most Nobel peace prizes – no peace agreement will be possible without accommodating the reality of Israel's dominant power backed by US might; but no peace agreement will endure without justice for the dispossessed Palestinians.

Such light and easy topics – no wonder they have allocated us only 15 minutes each! Let me make four key points, briefly.

I. Norm and Power Shifts

First, my talk lies at the intersection of two major trends. The first is a long-term shift from the power end of the spectrum towards the normative end as the pivot on which history turns. The second is the contemporary realignment of the global power equations as the pendulum of history swings back to dilute the relative role and influence of the West in structuring world order.

Throughout history strategists have been cognisant of the stern admonition from Athens to Melos that questions of right and justice apply only to relations among equals in power, while for others 'the strong do what they can and the weak suffer what they must'. Yet subsequent history has modified the thesis.¹ Over the centuries the pendulum of human behaviour has swung surely, albeit slowly and in a jagged rather than linear trajectory, from the 'pure' power towards the normative end of the arc of history.

The West is losing its ability to impose its will, policy preferences, values and double standards on the rest who are demanding their rightful due in setting the standards, writing the rules and designing and controlling the institutions of global governance to ensure compliance. A much needed global *moral* as well as geopolitical rebalancing is in train.

¹ See Steven Pinker, *The Better Angels of Our Nature* (New York: Viking, 2011).

II. Contradictory Logics of Peace and Justice

Second, the logics of peace and justice can be contradictory. Peace is forward-looking, problem-solving and integrative, requiring reconciliation between past enemies within an all-inclusive community. Justice is backward-looking, finger-pointing and retributive, requiring trial and punishment of the perpetrators of past crimes. The ethic of conviction would impose obligations to prosecute people for their past criminal misdeeds to the full extent of the law. The ethic of responsibility imposes the countervailing requirement to judge the wisdom of alternative courses of action with respect to their consequences for social harmony in the future.

However: It is also possible to build a case for international criminal justice as a *solution* to the problem of peace and reconciliation after mass crimes in fractured societies. Allied powers and Germany are at peace not *despite* Nuremberg but *because* justice cleared the path to reconciliation.

ICC = Power over Justice?

The African Union collectively and several key African states – but by no means all and certainly not all of African civil society – have challenged the operation of the ICC on two main grounds: that it has been obsessively Africa-centric while ignoring other cases worthy of its attention; and that it has ignored politics in privileging law and in the process undermined the efforts to seek peace by focussing exclusively on the pursuit of justice – the very tension I have just canvassed. On the big picture canvas, the controversy intersects with both the major overarching trends I have sketched.

Are the most powerful countries using the UN and ICC as instruments of control to keep the leaders of non-deferential weak countries in line -- pay us the respect due to us, or we will make you pay for your lack of respect?

The UN Security Council is not just a quintessential but the world's supreme political body. Therefore when international criminal justice is administered by the Security Council, how can it but be politicized justice? It would be very damaging to international criminal justice as a political project if in Africa and more widely around the world, many conclude that crimes were committed in Iraq but that George W. Bush and Tony Blair will get away with it. The social purpose of the ICC will then be seen to be to provide the ideological justification for the current geopolitical order.

III. Double Standards

Third, the tension between power and justice typically is manifested in double standards with the powerful brushing aside the demands of justice, with deleterious consequences for sustainable peace as opposed to temporary truce.

IIIA. Nuclear

The powerful have pushed aside any conception of justice to protect and promote their interests, thereby endangering peace. The NPT was meant to reconcile power and justice: those without forswore the option in return for promise by those with to negotiate ND in good faith. Over time however the NPT was subverted from a prohibition into a non-proliferation regime. Not one of the nine nuclear armed states has made elimination the central organizing principle of its nuclear policy. On the contrary, all nine foresee indefinite retention of nuclear weapons and a continuing role for them in their security policies. Their non-policy on nuclear disarmament recalls St Augustine's possibly apocryphal lament: 'O Lord, make me chaste – but not just yet'.

Iran & P5+1 (8,000, 7,300, 300, 250, 225 + 130+ on German soil) sanctioning and threatening (include Israel's 80 nukes) Iran which has: zero. In other words those who worship the most fervently at the altar of nuclear weapons issue the fiercest fatwas against anyone else that might want to join their sect. Power politics? You bet. Justice? Yeah, right. Result? Nuclear peace is imperilled.

The logics of nuclear disarmament and nonproliferation are inseparable. In the Middle East, for example, it simply is not credible that Israel can be permitted to keep its unacknowledged nuclear arsenal indefinitely, while every other state can be stopped from getting the bomb in perpetuity.

IIIB. US Exceptionalism

Exceptionalism as belief in a uniquely virtuous republic with a moral mission to export life, liberty and happiness to the rest of the world is hard-wired into US national identity and likely to endure. Exceptionalism as policy was dependent on the unipolar moment of full spectrum dominance and is fatally undermined by the transformation into a polycentric global order.

Washington's recent attempts to browbeat China, India and Russia with respect to cyber-espionage, maritime territorial disputes, domestic US visa and labour laws, international human rights law, and respect for the national sovereignty and territorial integrity of Ukraine (all within six months of one another), fail the rule of law test: 'a principle of governance in which all... are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated' (Annan 2004). In all three cases, the US held others to standards of domestic or international law that it demonstrably ignores or violates itself, and tried to impose costs for their transgressions that it has refused to pay itself (Thakur 2014).

At West Point on 28 May 2014, President Barack Obama insisted: 'The United States will use military force, unilaterally if necessary, when our core interests demand it'. In his speech to the UN General Assembly on 24 September, Obama insisted that 'all of us – big nations and small – must meet our responsibility to observe and enforce international norms'. The two statements, less than five months apart, are not compatible. The use of force is legally permissible only in self-defence against armed

attack or when authorised by the UN. No country that reserves the right to use military force unilaterally can claim to be committed to obeying global norms.

IIIC. R2P

Now, I'm sure this audience would be profoundly disappointed if I failed to smuggle in a mention of R2P, regardless of the topic.

The state was granted the monopoly on the legitimate use of violence in an effort to limit the violence of anarchy; that is, as a means of achieving peace in domestic affairs. Any resulting injustice was accepted as 'collateral damage' on the grounds that justice was impossible in conditions of anarchy. Over time, the right to intervene in other countries' internal affairs was also progressively curtailed, this time as a means of limiting international violence; that is maintaining international peace.

In the post-colonial era the formerly colonised were interested in pursuing justice among states but, under the impact of an increasingly internationalised human conscience, many Western publics and a few governments began to express interest in promoting justice inside sovereign jurisdictions in accordance with international normative benchmarks. This led to a revival of interest in so-called humanitarian intervention that produced an equally strong adverse reaction from the global South that in the name of levelling the killing fields between brutal thug-rulers and their people, the white man's burden was being resurrected to entrench the writ of the powerful over the weak countries in the global equation.

Humanitarian Intervention: Power appropriating language of justice to serve power

R2P: Harnessing power to the cause of domestic and inter-national justice

But: In Libya (2011), NATO appropriated UN-authorized R2P to pursue power political humanitarian intervention

IV. The Rule of Law

Fourth and finally, the best, most effective and least problematic formula for reconciling power and justice in order to promote sustainable peace – because it will be a just peace – is through deepening the commitment to and institutionalizing the rule of law.

International law, like all law, is an effort to align power to justice. The sense of justice, fairness and equity is deeply ingrained in human beings, and perhaps even in primates.² One of the most powerful refrains in any society is 'That's not fair', leading individuals to resist and disobey and groups to rebel and revolt. The importance of perception as well as the content in the administration of justice is captured in the

² In experiments by primatologist Frans de Waal, capuchin monkeys were trained to trade pebbles for cucumber slices. When one monkey was given the more valued prize of a grape, the others threw their pebbles out of the cage and refused to cooperate any more with the experimenters. Cited in Margaret Atwood, *Payback: Debt and the Shadow Side of Wealth* (Toronto: House of Anansi, 2008), pp. 16-17.

familiar saying that justice must not only be done; it must also be seen to be done. The justice sentiment is expressed in collective norms and, in a general sense, in laws. In particular instances, laws may offend the prevailing sense of justice. If the dominant perception is that law mostly conforms to notions of fairness and justice, the odd anomaly will not pose a threat to the system of law. But if the opposite perception takes hold, that any convergence between law and justice is coincidental and 'normally' law is seen to have marched off on a tangent from justice, then the system of law -- and the principle of a community based on the rule of law -- will be brought into disrepute and collapse under the weight of illegitimacy.

References

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