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A Pretext for War: Do We Really Need an International Criminal Court?

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> A little over four years ago, CounterPunch ran an article I wrote based on my presentation at an international conference held in Tripoli on the International Criminal Court. At a moment when the ICC is being used, predictably, to justify the NATO aggression against Libya, including the targeted assassination of Moammer Qaddafi, or a ground invasion ostensibly to capture him, I think it would be appropriate to rerun this article.–DJ

Year after year, people in the Arab countries are helpless spectators to the ongoing destruction of Iraq and Palestine by the United States and Israel. They see families wiped out by bombs in Afghanistan, Iraq and Lebanon. They see Arabs tortured and humiliated in Abu Ghraib and in Guantanamo. They see Israel regularly carrying out "targeted" assassinations in the Occupied Territories (splashing death around the target) while extending its illegal settlement of land belonging to Palestinians. Probably no people have greater cause to yearn for an equitable system of international justice. But where are they to look for it?

Well, what about the International Criminal Court (ICC)? The ICC is supposed to punish perpetrators of war crimes and crimes against humanity. It has been in operation since July 2002, but seldom gets as much attention as it received during a symposium in mid-January at the Academy of Graduate Studies in the Libyan capital, Tripoli. Underlying the two-day discussion on the "ambition, reality and future prospects" of the ICC was the question: is the ICC a first baby step toward international justice? Or is it just another element of Western "soft power", imposed on small countries?

Although Libyan leader Moammer Gadhafi has expressed the second view, on balance most of the legal experts and academics — from Libya and other Arab countries, but also from Europe, China and South America — tended to lean toward the first view. Although nobody denied the evident shortcomings of the ICC, lawyers and jurists generally see it as "better than nothing" and point out that democratic legal systems have evolved from institutionalized power relations toward greater justice.

Selectivity

Meanwhile, a new war front was opening up. Urged on by the United States, Ethiopia invaded Somalia to restore disorder. U.S. war planes bombed fleeing members of the Islamic Courts Council that only recently managed to end the clan fighting that had ravaged Mogadishu for some fifteen years. The newly installed, U.S.-backed president, Abdulli Yusuf Ahmed, 73, announced that there would be "no talks" with the defeated Islamists, who were to be wiped out as they fled.

Now it so happens that among the war crimes listed in the Statute of Rome that governs the ICC is this one (Article 8.2.b.xii): “Declaring that no quarter will be given”. This is exactly what the Ethiopian-U.S.-backed conquerors were doing. But there was no chance that the ICC would deal with this latest outburst of international criminal behavior.

Indeed, after four and a half years of existence, the ICC has taken just one suspect into its custody: Thomas Lubanga Dyilo, head of a rebel militia in the impenetrable Ituri forest in the eastern part of the Democratic Republic of Congo (ex-Zaïre). He is held under Article 8 (war crimes), section 2.e.vii on charges of recruiting children under the age of 15 to fight in his militia.

This is certainly bad behavior, but considering all that is going on in the world today, it hardly seems to rank among “the most serious crimes of concern to the international community as a whole” (Article 5, defining the crimes within jurisdiction of the court). A French judge working as an investigator in the ICC Prosecutor’s office, Bernard Lavigne, acknowledged that since it is clearly unable to deal with all the crimes in the world, the Court is necessarily selective. He defended the selection of this lone suspect by the need to start off with an air-tight case that the Prosecution was sure to win.

Therein, however, lies one of the ICC’s more subtle and insidious vices. Although the Statute formally upholds the “presumption of innocence”, all the details point to a Court whose job is not meant to sort out the innocent from the guilty, but to punish the (presumed) guilty. Politically, the creation of the ICC responds to demands of various NGOs, given great resonance by Bosnia and especially Rwanda, to “end impunity” and to comfort victims. The underlying political assumption is that both the criminals and the victims can be easily identified prior to trial — the trial being more a demonstration of the concern of the international community for justice than the search for a justice, and a truth, that may be elusive or seriously contested.

Like the ad hoc tribunals for Yugoslavia and Rwanda, the ICC, despite its title, is not essentially set up to deal with international conflicts, but rather to administer “international” justice to internal conflicts, in countries too weak to resist its authority.

The total impotence of the ICC to deal with the most dangerous crimes truly “of concern to the international community as a whole”, those that outrage public opinion not only in the West but in all parts of the world, those that seriously threaten world peace, is most strikingly due to:

> — the fact that the crime of aggression is not covered;
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> — the fact that the United States and its citizens are immune to prosecution, first of all because the United States has not ratified the ICC Statute, and secondly, because the United States has used its unprecedented economic and political clout to pressure countries into signing Bilateral Immunity Agreements (BIAs) that exempt Americans from prosecution. One hundred and two countries have signed BIAs with the United States.

Aggression exempted

Article 5 of the Rome Statute limits the jurisdiction of the Court to:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

However, it goes on to specify that the Court "shall exercise jurisdiction over the crime of aggression once a provision is adopted […] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime." In short, the crime of aggression is for the time being exempted from the Court's jurisdiction.

The formal reason is that aggression is "not defined". This is a specious argument since aggression has been quite clearly defined by U.N. General Assembly Resolution 3314 in 1974,

> which declared that: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State", and listed seven specific examples including:
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> — The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
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> — Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the :territory of another State;
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> — The blockade of the ports or coasts of a State by the armed forces of another State…

The resolution also stated that: "No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression."

The real reason that aggression remains outside the jurisdiction of the ICC is that the United States, which played a strong role in elaborating the Statute, before refusing to ratify it, was adamantly opposed to its inclusion. It is not hard to see why..

This went against the nearly unanimous opinion of most of the world, which recalls that the Nuremberg Tribunal condemned Nazi leaders above all for the crime of aggression, as the "supreme international crime" which "contains within itself the accumulated evil of the whole".

It may be noted that instances of "aggression", which are clearly factual, are much easier to identify than instances of "genocide", whose definition relies on assumptions of intention.

Defenders of the ICC stress that "aggression" may be defined, and thus come under the active jurisdiction of the Court, at the Review Conference which should be held in 2009 to consider amendments. Even so, an amendment comes into force only one year after ratification by seven eighths of State Parties to the Statute, and applies only to State Parties

(which so far notoriously do not include the United States). And should the United States turn around and choose to ratify the Statute, it may still declare that for a period of seven years it does not accept the jurisdiction of the Court for its nationals (Article 124). All this means that the earliest conceivable (but highly improbable) date when U.S. crimes, including aggression, might be brought under ICC jurisdiction would be 2017. Even then, there is scarcely any possibility that an American citizen, or any person acting on behalf of the United States, would end up in the dock at the ICC.

For one thing, the ICC must turn over jurisdiction to any State which proves “willing and able” to try the case in its own courts.

Moreover, Article 16 allows the Security Council to suspend any ICC investigation or prosecution for a period of 12 months. The suspension can be renewed indefinitely. These days, the Security Council is generally viewed throughout the world as an instrument of U.S. policy.

The BIAs would still apply.

And incidentally, employing poison gases counts as a war crime, but not the use of nuclear weapons.

In short, the ICC is established according to double standards to deal with small fry.

A court for “failed states”

Indeed, it is hard to see how the ICC can deal with any but extremely weak or “failed” States. According to Article 17, a case is not admissible unless the State concerned is genuinely “unwilling or unable” to investigate and prosecute it. The Court itself can determine whether the State concerned is “unwilling or unable”.

At this point, the scene grows very murky. The Democratic Republic of Congo cooperated in turning over the case of Thomas Lubanga Dyilo to the ICC because he was a rebel against the State, and that troubled State has reason to want to be in the good graces of the ICC. But what if a State refuses, or shows itself “unwilling or unable” to pursue a case? What then? The ICC has no police force of its own. Will it then call on the Security Council to authorize arrest — meaning military action on the territory of the “unwilling” State?

The preamble to the Rome Statute emphasizes that “nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State”. But this seems to be contradicted by the provisions of the Statute itself in regard to “unwilling” States.

Rather than a Court to keep the peace, the ICC could turn out to be — contrary to the wishes of its sincere supporters — an instrument to provide pretexts for war.

“If you can’t beat them, join them.”

It appeared from the Tripoli symposium that Arab intellectuals have an ambivalent attitude toward the ICC. On the one hand, many fear that the ICC can be instrumentalized to serve what they see as the long term U.S.-Israeli policy of breakig up Arab States and fragmenting the Middle East along ethnic or religious lines, as a way of “divide and rule”. In such a strategy, ethnic conflicts over territory and resources can be depicted by Western media

and NGOs as one-sided cases of “genocide” requiring urgent international intervention. The trial run was Yugoslavia, and Iraq is the prime example.

Jurists themselves, professionally attached to the construction of a new legal institution, may be oblivious to strategic aspects. But the very emphasis on applying criminal law to political conflicts tends to reinforce the Manichean view (typical of the Bush administration and of Israel) that the world’s troubles are due to “bad guys”, “terrorists”, criminals that must be rooted out and punished. This precludes analysis of underlying causes of conflicts.

Like other Arab States, except for Jordan (and two formerly French territories, Djibouti and the Comoro Islands), Sudan is not a Party to the Rome Statute and thus does not fall under ICC jurisdiction. This fact has not prevented the mounting campaign for international intervention to stop what is described as “genocide” in Darfur. Some observers on the ground contend that this campaign is characterized by a limitless inflation of the number of casualties, to upgrade massacres to the status of “genocide”. Whatever the reality, the call for “intervention”, implying military intervention, is not accompanied by any clear explanation of how this would solve the underlying problems of religious identity and claim to scarce resources that have caused the crisis in Darfur. The well-financed and (largely) well-intentioned campaign to “save Darfur” actually tends to eclipse any effort to find genuine political and economic solutions by way of negotiation carried out by parties familiar with the history and culture of the region.

As can be seen in Afghanistan and elsewhere, the armed “rescue” of a country or region tends to be followed by a sharp drop in interest, and above all of the economic and practical aid promised at the outset.

In Tripoli, some argued that Sudan would be better placed to defend itself from impending military intervention if it were Party to the ICC. As a Belgian lawyer put it, for small countries the problem is to “avoid being entrapped”, and for this purpose it is better to join the ICC than to stay out of it.

Many Arab and Third World intellectuals are tired of standing on the sidelines and “complaining”. Joining the ICC might be a way to “join the world” and improve their own countries. This viewpoint seems particularly frequent among women lawyers and human rights NGOs.

But as one participant put it, “Inside or outside; the small countries are on the sidelines”.

The view from Tripoli

To conclude with a subjective note, from the peaceful atmosphere of Tripoli the rabid Bushist-Blairist fantasies about the deadly threat from “Islamo-fascism” seem particularly grotesque. The semi-socialist regime installed 37 years ago by Colonel Moammer Kadhafi has widely redistributed oil revenues, educating the population and creating a large middle class thanks to a service sector (largely bureaucratic) that employs some 80 per cent of the population. This makes it a singularly tranquil society — some bureaucrats may be superfluous, but they are not homeless, begging or thieving. Colonel Kadhafi is eccentric, sleeping in tents instead of palaces, but it is hard to avoid the feeling that he has been demonized not for his faults but for his support to Arab unity (which failed), to the Palestinians and to other liberation causes — which was natural for a country like Libya that had been the victim not so very long ago of a ruthless colonization by Mussolini’s forces,

which subjected the local population to summary executions, mass deportations and concentration camps. Looking around, one may conclude that Kadhafi's "soft" dictatorship could well be the best transitional modernizing regime that exists in the Arab world.

In any case, the ICC symposium followed its own ambivalent course without interference from the government. The overall impression was of a great thirst for peace, development and justice — all under threat from the fanatic Western "war on terror". Islamic extremism is a problem to be dealt with in a growing number of Arab countries (not Libya, apparently, where the devout but moderate Muslim practice seems to preempt the extremists), but which is clearly aggravated by U.S. aggression and Israeli persecution of the Palestinians.

Justice and globalization

I give the last word to excerpts from the contribution of a retired Libyan gentleman who has held high positions in the past, but now prefers to remain anonymous:

> "The dominant system is oriented towards an international business law considered as the supreme reference overhanging all national law and of course international public and private law. The WTO has defined in this context an arsenal of principles and procedures all the way to and including a juridical system based on the negation of the elementary principles of separation of powers that characterize democracy.
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> "This is totally unacceptable. We need exactly the opposite. We need a business law that is respectful of the rights of nations, people and labor, and respectful of the environment, rights of communities, women, while ensuring the conditions for further progress of democratization of societies.
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> "We have to advocate an International Law of the Peoples, which should combine:
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> "– The respect of national sovereignty, allowing people to choose their future according to their wishes.
>
> "– The respect of Human Rights, not only political rights but also social rights and the right to development and peace.
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> "No solution is reached through abolishing one of the two terms of the equation. We can neither abolish sovereignty nor can we abolish human rights.
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> "The principle of respect for the sovereignty of nations must be the cornerstone of international law. The fact that this principle is violated today with so much brutality by the democracies themselves constitutes an aggravating, rather than mitigating circumstance. […] The solemn adoption of the principle of national sovereignty in 1945 was logically accompanied by the prohibition of recourse to war. […] With the militarization of the globalization process, which is closely associated with the neo-liberal option and with its predilection for the supremacy of international business law, it has become more imperative than ever that priority be given to this reflection on people's rights."

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