

Burundi Exits the ICC: An Interview with David Paul Jacobs

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Last year the African Union resisted Western pressure to intervene militarily in Burundi. On October 26, Burundi officially completed its withdrawal from the jurisdiction of the International Criminal Court (ICC) without being indicted. The next day the Non-Aligned Movement of 120 member nations rejected the UN Commission of Inquiry's report accusing Burundi of human rights crimes within its own borders. That's quite a list of anti-imperial accomplishments for a tiny East African nation that's always ranked among the 10 poorest in the world.

Burundi is the first African nation to withdraw from the ICC's jurisdiction. Neither the US, Russia, China, nor Israel have ever accepted its jurisdiction, and it has prosecuted Africans almost exclusively. In 2011, it indicted Libyan **President Muammar Gaddafi** for alleged human rights crimes and issued an arrest warrant that became part of NATO's case for bombing Libya. Other African nations have said they plan to withdraw from the ICC as well, but they haven't yet filed formal notice.

Western powers, NGOs, and press have accused Burundi of human rights abuse within its own borders but not of invading another country. I asked Canadian lawyer **David Paul Jacobs**, an expert in international law, to contextualize this distinction:

David Paul Jacobs: The context of this is that none of the ad hoc international criminal tribunals that sprang to life after the end of the Cold War had the power to indict any state or any other party for the crime of aggression. And that's really important in this case because Burundi has made very credible claims that it's been attacked by agents of neighboring Rwanda, but the attackers have escaped back into Rwanda, where they have state protection.

At the ICC, Rwanda is absolutely immune from prosecution for the crime of aggression against Burundi. The problem is that without a mechanism for trying crimes of aggression, what you're left with is simply violence and problems going on within a state without the context. The fact that the violence and the problems within the state can be instigated by aggression from an outside state is outside of the court's purview.

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To understand this, you have to roll the clock back to look at what should be our lodestone for understanding international law, and that is the Nuremberg Tribunal. And the Nuremberg

Tribunal declared fairly famously that:

“War is essentially an evil thing, and the consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime. It is a supreme international crime differing only from other war crimes in that it contains within itself the accumulative evil of the whole.”

Within the Nuremberg Principles drafted after World War II there are three types of war crimes. One is the crime against the peace, which is initiating a war of aggression or a war contrary to international treaties. The other two subordinate crimes are crimes against humanity and war crimes, but it's only those two subordinate crimes that the international criminal court, or any international criminal court, has the power to look at. So powerful states can and do accuse other states of those two crimes when they want to initiate “regime change.” Aggressor states such as Rwanda, or the United States, can thus wage war against other states with impunity at the ICC, as Rwanda has done in Burundi and the Democratic Republic of the Congo, or as the US has done in Yugoslavia, Libya, Syria, etc. These aggressor states enlist the international criminal courts to indict the leaders of their target states, and then these courts become accomplices in the supreme international war crime, which is the crime of aggression, also known as a crime against peace.

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Ann Garrison: So if an army invades another country, even with armed forces, fighter bombers, drones, and the other country captures and tortures some invading soldiers, the torture may be a crime that the ICC could prosecute, but the invasion would not.

DPJ: Yes, at the International Criminal Court.

However, invasion is in fact a war of aggression subject to judicial process at the International Court of Justice (ICJ), which was created by the UN Charter and which codified the Nuremberg Principles drafted after World War II. The ICJ did try the United States for supporting the contra terrorists in Nicaragua, and the US argued that it was a humanitarian intervention. The ICJ responded that international law doesn't recognize the legality of any such intervention and then found the US liable for its unlawful actions, but of course the US just ignored it.

The Nuremberg Principles, the UN Charter, and the International Court of Justice all preceded the international criminal tribunals which weakened the law which they codified. What's called the “responsibility to protect” then weakened international law further and made the world a very dangerous place.

AG: Okay. Some African people, including Archbishop Desmond Tutu, have said that despite the ICC's failings, it should continue to exist in the hope that it can be reformed because Africans living under dictatorship have no other legal protection from the human rights abuse of their own leaders. What's your response to that?

DPJ: My guess is there are few Africans who say that. Burundi is the first country to formally withdraw from the ICC, but it's not the first country to complain about it. South Africa's

withdrawal seems to be on hold at the moment because of technical issues. South Africa's Deputy Minister of Justice wrote:

"The International Criminal Court isn't the court we signed up for. It's diverted from its mandate, and allowed itself to be influenced by powerful non-member states. We signed up for court that would hold human beings accountable for their war crimes regardless of where they were from. We perceive that it's turning out to be a proxy instrument for these states. We see no need to subject ourselves to its persecution of African leaders and its regime change goals on the continent... . Given this continent's history of colonialism, the problem is obvious."

And the problem, of course, is the selective nature of prosecution before the ICC. Nobody can be confident that the ICC is going to punish what you described as dictators who are inflicting human rights abuses on their own country. One need only look at the examples like President Kagame of Rwanda, who is widely considered to be running a murderous dictatorship. Not just that, but he is guilty of violating the sovereignty of the Democratic Republic of the Congo. As you know, the UN has said that Rwandan forces have been responsible for the death of literally millions of people. How do we look at that? You say "Well, OK" to Kagame who has absolute immunity, as do the successive presidents of the United States and prime ministers of Britain who are complicit in illegal wars, and the death of hundreds of thousands of people in places like Iraq, Syria, Libya, and the list could go on and on.

"What's called the 'responsibility to protect' weakened international law and made the world a very dangerous place."

AG: Okay, but we still have African people who imagine that the court could change. A Congolese author told me this week that he hoped the court would survive and be reformed, because Africans have no recourse if they're living under dictatorship without a judicial system that could offer them any legal protection. And that's even though the US and its Western allies have put many of those dictators in place.

DPJ: I think it's quixotic to rely on a court with colonial roots and selective prosecution to punish their own leaders. To be fair, such a court would have to prosecute violations of sovereignty, which the ICC does not do. At the end of the day, one of the great things that happened at the end of World War II was the enactment of the UN Charter to prevent future wars. It said that each nation in the world was sovereign and equal. The idea that an extra-sovereign power has the power of life and death over your nation and your people, whether that's the US military or a court, violates those principles. Another argument against the ICC is that the African Union itself is trying to create an international court that all African nations will join.

AG: That's the African Court of Human and People's rights that is hearing Victoire Ingabire's appeal of her conviction and 15-year sentence in Rwanda, right?

DPJ: Yes.

David Paul Jacobs is a lawyer and an expert in international law practicing in Toronto.

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