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Responsibility to Protect or Right to Punish?

Mahmood Mamdani

This essay argues that the new global regime of R2P bifurcates the international system between sovereign states whose citizens have political rights, and de facto trusteeship territories whose populations are seen as wards in need of external protection. Under the direction of the UN Security Council, the International Criminal Court has become an integral part of the international R2P regime by allowing for the legal normalization of certain types of violence (such as Western counterinsurgency efforts), while arbitrarily criminalizing the violence of other states as 'genocide'. In place of this unequal global regime, the essay concludes by arguing for an internally-driven process of political reform and legal reconciliation, as pioneered in South Africa.

Keywords Darfur; genocide; humanitarian intervention; International Criminal Court (ICC); sovereignty

On 27 August 2009 the United Nations (UN) military commander in the Sudanese province of Darfur, General Martin Agwai, controversially declared that to all intents and purposes, the war in the region was 'over'. According to Agwai, 'Banditry, localised issues, people trying to resolve issues over water and land at a local level' were persistent problems. 'But real war as such, I think we are over that.' (BBC 2009) Yet since the conflict in Darfur started in 2003, the international debate on Darfur has focused less on the dynamics driving the violence than on how to name it: should it be termed genocide or not? The debate between the US and the UN over Darfur was over whether to characterize the violence against civilians as genocide or counter-insurgency. The preoccupation with naming follows from the legal implications of how a thing is named: 'genocide' goes with an international responsibility to intervene. In the post-cold war era, that responsibility has been defined as 'the responsibility to protect' and broadened to include three crimes in particular: genocide, crimes against humanity and war crimes. Arranged in order of gravity, these crimes are said to justify a 'humanitarian intervention' and the jurisdiction of an International Criminal Court – the first based on a right to protect and the second on a right to punish – both overriding claims of sovereignty.

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Humanitarian Intervention and its Critics

When the Second World War broke out, the international order could be divided into contradictory parts: on the one hand, a system of sovereign states in the Western Hemisphere and, on the other, a colonial system in most of Africa, Asia and the Middle East. Post-war decolonization embraced state sovereignty as a universal principle of relations between states. The end of the cold war has made for another basic shift, heralding an international humanitarian order that promises to hold state sovereignty accountable to an international human rights standard. Many believe that are we are in the throes of a systemic transition in international relations.

This new humanitarian order claims responsibility for the protection of 'vulnerable populations'. That responsibility is said to belong to 'the international community', to be exercised in practice by the United Nations, and in particular the Security Council whose permanent members are the great powers (Lloyd 2006, Pawson 2007).[1] The new order is sanctioned by a new language that departs markedly from the older language of democracy and citizenship. It describes as 'human' the populations to be protected, and as 'humanitarian' the crisis they suffer from, the intervention that promises to rescue them, and the agencies that seek to carry out intervention. Whereas the language of sovereignty is profoundly political, that of humanitarian intervention is profoundly apolitical, and sometimes even anti-political. Looked at closely and critically, what we are witnessing is not a global, but a partial, transition. The transition from the old system of sovereignty to a new humanitarian order is confined to those states defined as 'failed' or 'rogue' states. The result is a bifurcated system whereby state sovereignty obtains in large parts of the world but is suspended in more and more countries in Africa and the Middle East.

The Westphalian coin is still the effective currency in the international system. It is worth looking at both sides of this coin: sovereignty and citizenship. If one side reads 'sovereignty', the password to enter the passageway of international relations, the other side upholds the promise of 'citizenship' as the essential attribute of membership in the sovereign national political (state) community. Sovereignty and citizenship are not opposites, but go together: the state, after all, embodies the key right of citizens, the right of self-determination.

The international humanitarian order, in contrast, is not a system that acknowledges citizenship. Instead, it turns citizens into wards. The language of humanitarian intervention has cut its ties with the language of citizen rights. To the extent the global humanitarian order claims to stand for rights, these are residual rights of the human and not the full range of rights of the citizen. If the rights of the citizen are pointedly political, the rights of the human pertain to sheer survival; they are summed up in one word, protection. The new language refers to its subjects not as bearers of rights – and thus active agents in their own emancipation – but as passive beneficiaries of an external 'responsibility to

protect'. Rather than rights-bearing citizens, beneficiaries of the humanitarian order are akin to recipients of a charity. Humanitarianism does not claim to reinforce agency, only to sustain bare life. If anything, its tendency is to promote dependency. Humanitarianism heralds a system of trusteeship.[2]

This language came into its own in 2006 when 150 Heads of State and government met as the General Assembly of the UN in its 60th Anniversary year and unanimously resolved:

> Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity ... We accept that responsibility and will act in accordance with it ... The international community, through the United Nations, also has the responsibility to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII ... should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. (Evans 2007, pp. 1–2)

This declaration enshrined 'the responsibility to protect' as a doctrine integral to the new post-cold war international order. In a flush of enthusiasm, the new African union (AU) overturned the principle of non-interference of its predecessor, the OAU, declaring that Africans can no longer be 'indifferent' to war crimes or gross abuses taking place on their continent, and that claims of sovereignty should not be a barrier to addressing them (Mepham and Ramsbotham 2007, pp. 6–7). Not surprisingly, there were afterthoughts. The ex-president of the International Crisis Group laments: 'There has since 2005 been some backsliding from this highpoint. One doesn't have to spend too much time in the UN corridors, or in some Asian capitals in particular, before hearing expressions of regret, or even denial, that so far-reaching a doctrine could possibly have been agreed by national leaders' (Evans 2007, p. 1). What could have been the grounds for these afterthoughts?

The era of international humanitarian order is not entirely new. It draws on the entire history of modern Western colonialism. At the very outset of Western colonial expansion in the eighteenth and nineteenth centuries, leading Western powers – UK, France, Russia – claimed to protect 'vulnerable groups'. When it came to countries controlled by rival powers, such as the Ottoman empire, Western powers claimed to protect populations they considered 'vulnerable', mainly religious minorities such as specific Christian denominations and Jews. The most extreme political outcome of this strategy can be glimpsed in the confessional constitution bequeathed by France on independent Lebanon.[3]

When it came to lands not yet colonized by any power, such as South Asia and large parts of Africa, the practice was to highlight local atrocities and pledge to protect victims against rulers. It was not for lack of reason that the language of modern Western colonialism juxtaposed the promise of civilization against the reality of barbaric practices. In India, for example, the focus was on practices

such as sati, child marriage, infanticide, etc., whereas in Africa the focus was on slavery in the nineteenth century, female genital mutilation (FGM) in the late twentieth century and, now, genocide. The atrocities colonial archivists catalogued were not mere inventions, but real and abhorrent practices. But all were cited to serve a particular political purpose. Whereas the crimes they denounced were real, the technique of power was to turn victims into so many proxies whose dilemma would legitimate colonial intervention as a rescue mission.

From this history was born the international regime of trusteeship exercised under the League of Nations. The League's trust territories were mainly in Africa and the Middle East. They were created at the end of the First World War, when colonies of defeated imperial powers (the Ottoman Empire, Germany) were handed over to the victorious powers, who pledged to administer them as guardians would administer wards, under the watchful paternal eye of the League of Nations. One of these trust territories was Rwanda, administered as a trust of Belgium until the 1959 Hutu Revolution (Mamdani 2001). It was under the benevolent eye of the League of Nations that Belgium hardened Hutu and Tutsi into racialized identities, using the force of law to institutionalize an official system of discrimination between them. Thereby, Belgian colonialism laid the institutional groundwork of the genocide that followed half a century later. The Western powers that constituted the League of Nations could not hold Belgian accountable for the way in which it exercised an international trust for one simple reason: to do so would have been to hold a mirror to their own colonial record, for Belgian rule in Rwanda was but a harder version of the same indirect rule practiced – to one degree or another – by all Western powers in Africa. This system did not simply deny sovereignty to its colonies; it redesigned the administrative and political life of colonies by bringing each under a regime of group identity and rights. Though one could argue that Belgian practice in Rwanda made for an extreme version, it certainly was not exceptional. Given the record of the League of Nations, it is worth asking how the new international regime of trusteeship would differ from the old one. What are the likely implications of the absence of citizenship rights at the core of this system? Why would a regime of trusteeship not degenerate yet again into one of lack of accountability and responsibility?

On the face of it, these two systems – one defined by sovereignty and citizenship, and the other by trusteeship and wardship – would seem to be contradictory, rather than complementary. In practice, however, they are two parts of a single but bifurcated international system. One may ask how this dual bifurcated order is reproduced without the contradiction being flagrantly obvious, without it appearing like a contemporary version of the old colonial system of trusteeship. A part of the explanation lies in how power has managed to *instrumentalize* the language of violence and war, so as to subvert its meaning to advantage.

War has long ceased to be a confrontation between the armed forces of two states. As became clear during the confrontation between the Allied and the Axis

powers in the Second World War, in America's Indochina War in the 1960s and 1970s, its Iraq War in 1991 and then again in its 2003 invasion of Iraq, states do not just target the armed forces of adversary states; they target society itself: war-related industry and infrastructure, economy and workforce, and, sometimes, as in the aerial bombardment of cities, the civilian population in general. The trend is for political violence to become generalized and indiscriminate. Modern war is total war.

This particular development in the nature of modern war has tended to follow an earlier development of counter-insurgency in colonial contexts. Faced with insurgent guerrillas who were none other than armed civilians, colonial powers targeted the population of occupied territories. If Mao Ze Dong wrote that guerrillas must be as fish in water, the American counter-insurgency theorist, Samuel Huntington, writing during the time of the Vietnam War, responded that the object of counter-insurgency must be to drain the water and isolate the fish, i.e., ethnic cleansing. But the practice is older than post-Second World War counter-insurgency. It dates back to the earliest days of modernity, to settler colonial wars against American-Indians in the decades and centuries that followed 1492. Official and settler America pioneered the practice of interning entire civilian populations in what Americans called 'reservations' and the Nazis would later call 'concentration camps'. Often thought of as a British innovation during the late-nineteenth-century Boer War in South Africa, the practice of concentrating and interning populations in colonial wars was in origin an American settler contribution to the development of modern war.

The distinction between war, counter-insurgency and genocide is blurred in practice. All three tend to target civilian populations. In the era of nationalism and nation-states, power as well as its adversaries tends to be identified with entire national communities, whether defined racially, ethnically or religiously. Yet, the regime identified with the international humanitarian order makes a sharp distinction between genocide and other kinds of mass violence. International legal norms tend to be tolerant of counter-insurgency as integral to the exercise of national sovereignty and war as a standard feature of international politics – but not of genocide. The point of the distinction is to reserve universal condemnation for only one form of mass violence – genocide – as the ultimate crime and thus call for 'humanitarian' intervention only where 'genocide' has been unleashed, but at the same time to treat both counter-insurgency and war between states as *normal* developments, one in the internal functioning of nation-states, the other in the international relations between them. Even if not made explicitly, the point is clear: counter-insurgency and inter-state violence is after all what states do. It is genocide that is violence gone amok, amoral, evil. The former is normal violence, only the latter is bad violence.

But what is genocide, and what is counter-insurgency and war? Who does the naming? To consider this question is to focus on the question of power. The year 2003 saw the unfolding of two counter-insurgencies. One was in Iraq and it grew out of war and invasion. The other was in Darfur (Sudan) and it grew as a response to an internal insurgency. If you were an Iraqi or a Darfuri, there was little to

choose between the brutality of the violence unleashed in either instance. Yet, much energy has been invested in how to define the brutality in each instance: whether as counter-insurgency or as genocide. We have the astonishing spectacle whereby the state that has authored the violence in Iraq, the United States, has branded an adversary state, Sudan, one that has authored the violence in Darfur, as the perpetrator of genocide. Even more astonishing, we have a citizen's movement in America calling for a humanitarian intervention in Darfur, while keeping mum about the violence in Iraq. I have already discussed estimates of excess mortality in Darfur. They focus on the most violent period that followed the 2003 insurgency (2003–5) and range from 70,000 to 400,000; according to the panel of experts put together by the Government Accountability Office of the US government (on advice of the US Academy of Sciences), the lower end estimates are the more reliable. There are three estimates of excess deaths in Iraq following the US invasion of 2003. We may notice three contrasts. One, the figure for Iraq is far higher than those for Darfur, ranging from a low of 400,000 to a high of 1,033,000. The lowest estimate, from the Iraqi Health Ministry Survey, published in the *New England Journal of Medicine*, is of 400,000 'excess deaths due to the war' of which 151,000 are said to be 'violent deaths'. A second, higher, estimate comes from an article published in the British medical journal *The Lancet*: 654,965 excess deaths of which 601,027 are said to be violent deaths. The highest estimate comes from Opinion Research Business Survey: 1,033,000 violent deaths as a result of the conflict. The first two estimates cover the period from the 2003 invasion to June, 2006. The third survey extends to August 2007. Two, the proportion of violent deaths of the total excess mortality is also far higher in Iraq than in Darfur: 38 to nearly 90 per cent in Iraq, but less than 20 per cent in the case of Darfur (Alkhuzai *et al*. 2008, G. Bernham *et al*. 2006, Beaumont and Walters 2007).

The debate over how to name the mass violence in Sudan is instructive. For anyone familiar with the documentation that came out of the debate between the US and the UN/AU on how to name the violence in Darfur, it is clear that the real disagreement was not over the scale of the violence and the destruction it had wrought, but over what to call it. It will help to look at another African example to underline the politics of naming. This example comes from the counter-insurgency against the Lords Resistance Army (LRA) in northern Uganda (Branch 2007). The counter-insurgency in northern Uganda developed through different phases. The first phase opened with Operation North against insurgent groups connected with two regimes – that of Obote II and of Okello – overthrown at different points in 1986. Operation North involved civilian massacres and other atrocities, now widely acknowledged among both official and civilian circles in Uganda. A second phase of the counter-insurgency opened in 1996 with a new policy designed to intern practically the entire rural population of the three Acholi districts in northern Uganda. It took a government-directed campaign of murder, intimidation, bombing and burning of entire villages to drive the rural population into IDP (internally displaced persons) camps, complete with enclosures and soldiers. The government called the camps

'protected villages'; the opposition called them 'concentration camps' with enclosures guarded by soldiers. The camp population grew from a few hundred thousand by the end of 1996 to nearly a million in 2002. By then, nearly the entire rural population of the three districts that comprised Acholiland had been interned in official camps. According to the government's own Ministry of Health, the excess mortality rate in these camps was approximately 1,000 persons a week. Olara Otunnu, Uganda's ambassador to the UN under the former regime and later the UN Secretary-General's Special Representative for Children in Armed Conflict, himself an Acholi, broke his long public silence over the 'war' in northern Uganda to point an accusing finger at the Museveni government: genocide!

> What is going on in northern Uganda is not a routine humanitarian crisis, for which an appropriate response might be the mobilization of humanitarian relief. The human rights catastrophe unfolding in northern Uganda is a methodical and comprehensive genocide. An entire society is being systematically destroyed – physically, culturally, socially, and economically – in full view of the international community. In the sobering words of a missionary priest in the area, 'Everything Acoli is dying'. I know of no recent or present situation where all the elements that constitute genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (1948) have been brought together in such a comprehensively and chilling manner, as in northern Uganda today. (Otunnu 2005)[4]

It is difficult to think of these three instances of mass internment and violence – Iraq, Darfur and Acholiland – and not notice that only one is the subject of a debate as to whether or not it is a genocide, leading to a call for an internationally-directed humanitarian intervention. Labelling is important, most obviously for legal reasons. Where mass slaughter is termed genocide, intervention becomes an international obligation; for the most powerful, the obligation presents an opportunity. But if genocide involves an international obligation to intervene, war and counter-insurgency do not – I will discuss below the ICC's claim to punish individual perpetrators of war crimes – for they are understood as part of the exercise of sovereignty by states. They give expression to the *normal* violence of the state, the reason why states are said to have armies and armed forces. Labelling performs a vital function. It isolates and demonizes the perpetrators of one kind of mass violence, and at the same time confers impunity on perpetrators of other forms of mass violence.

My point here is not to enter the debate around the definition of genocide, but to show that the depoliticizing language of humanitarian intervention serves a wider function; 'humanitarian intervention' is not an antidote to international power relations, but its latest product. If we are to respond effectively to a humanitarian intervention, we need to understand its politics. The discourse on rights emerged historically as a language of resistance to power. Its political ambition was to turn victims into agents. Today, the tendency is for the language of rights to become the language of power. The result is to subvert its very purpose, to put it at the service of a wholly different agenda, one that seeks to

turn victims into so many proxies. It justifies interventions by the big powers as an antidote to malpractices of newly independent small powers.

The International Criminal Court

The emphasis on big powers as the enforcers of rights internationally is increasingly being twinned with an emphasis on big powers as enforcers of justice internationally. This conclusion is inevitable if we cast a critical eye on the short history of the International Criminal Court (ICC).[5]

The ICC was set up to try the world's most heinous crimes: mass murder and other systematic abuses. No sooner did discussions begin regarding the establishment of the court than Washington registered concern that an international criminal court could provide the opportunity to those with vindictive intentions to prosecute American soldiers or civilians. Washingtons's concerns were spelled out in detail in a scholarly article by its ambassador to the UN, John Bolton: 'Our main concern should be for our country's top civilian and military leaders, those responsible for our defense and foreign policy'. Bolton went on to ask 'whether the United States was guilty of war crimes for its aerial bombing campaigns over Germany and Japan in World War II'. From the point of view of the ICC Statute, he had no doubt that the US would indeed be guilty: 'Indeed, if anything, a straightforward reading of the language probably indicates that the court *would* find the United States guilty. A fortiori, these provisions seem to imply that the United States would have been guilty of a war crime for dropping atomic bombs on Hiroshima and Nagasaki. This is intolerable and unacceptable.' He also aired the concerns of its principal ally in the Middle East, Israel: 'Thus, Israel justifiably feared in Rome that its preemptive strike in the Six-Day War almost certainly would have provoked a proceeding against top Israeli officials. Moreover, there is no doubt that Israel will be the target of a complaint concerning conditions and practices by the Israeli military in the West Bank and Gaza.' (Bolton 2001, pp. 6, 3)

These concerns in turn influenced the treaty that set up the ICC; the ICC was defined as a court of the last instance, meant to step in only when states are 'unable or unwilling' to try the crimes in question. When it came to signing the treaty, Washington baulked, yet again. It first asked the Security Council to approve a complete and indefinite exemption from the court's jurisdiction. It even threatened to veto the renewal of UN peacekeeping operations in Bosnia and elsewhere if it did not get its way. There followed two weeks of bitter negotiations and opposition by the European Union and others. Finally, the Security Council agreed on a compromise: to grant an exemption – but only for one year – to all individuals from countries that had not ratified the treaty. Canada, one of the prime movers behind the court, was so outraged by this move that it denounced the arm-twisting as illegal.

Once it was clear that it would not be able to keep the ICC from becoming reality, the Bush administration made a different move. This was to sign bilateral

agreements with individual countries, whereby both signatories would pledge not to hand over each other's nationals – even those accused of crimes against humanity – to the ICC. The Sierra Leone parliament became the first to ratify such an agreement on 6 May 2003. Amnesty International condemned this as an 'impunity deal': 'This is a completely unacceptable decision especially at a time when [Sierra Leone] is starting the process of dealing with mass human rights abuses that have taken place in the recent past.' The protest achieved little, for by mid-June 2003 the US had signed similar agreements with 37 countries. Except for political clients like Egypt, Israel and Philippines, and India which had an ongoing counter-insurgency in Kashmir and thus its own reasons of state for not agreeing to international oversight, the others were small, poor countries, most of them heavily dependent on US aid.

The Bush administration's third move was accommodation, made possible by the kind of political pragmatism practiced by the ICC's own leadership. The fact of mutual accommodation between the world's only superpower and an international institution struggling to find its feet on the ground is clear if we take into account the three countries where the ICC has launched its investigations: Sudan, Uganda and Congo. All three are places where the US has no objection to the course chartered by ICC investigations. In Uganda, for example, where nearly a million people have been forcibly displaced in the throes of a government-executed counter-insurgency, the ICC has charged only the leadership of the LRA, but not that of the pro-US government. In Sudan, too, the ICC has charged officials of the Sudan Government for what the UN Commission on Darfur alleged were 'crimes against humanity' but not leaders of rebel movements for what the same Commission alleged were 'war crimes'. In Congo, the ICC has remained mum about the links between the armies of Uganda and Rwanda – two pro-US states – and the ethnic militias that have been at the heart of the slaughter of civilians. The ICC's defence is that it used the principle of gravity in deciding who to charge. This is how Louis Moreno-Ocampo justified his decision to charge the LRA but not the political leadership of the government:

> The criteria for selection of the first case was gravity. We analyzed the gravity of all crimes in northern Uganda committed by the LRA and the Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore *started with* an investigation of the LRA. (Louis Moreno-Ocampo, cited in Branch 2007, p. 194, my emphasis)

That was in 2004. Four years have since passed but the ICC has yet to begin an investigation of the Ugandan Army. It would be more correct to say, with regard to both Uganda and Sudan, that the ICC's investigation did not just start with one side, it was in fact limited to investigating accusations against just one side. The ICC's attempted accommodation with the powers that be has changed the international face of the ICC. Its name not withstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. Even then,

its approach is selective: it targets governments which are adversaries of the US and ignores US allies, effectively conferring impunity on them.[6]

America's dogged opposition to the ICC contrasts with its embrace of international tribunals with a limited mandate in limited contexts, such as the international tribunals on Rwanda, Bosnia and Cambodia. The Cambodian case well illustrates the politics behind this preference. The International Tribunal on Cambodia was established following the end of the war in Indochina. The flagrant selectivity of international oversight is clear if we keep two facts in mind. One, whereas the US successfully supported the call for an international tribunal to try Khmer Rouge leaders for war crimes, no international tribunal was set up to try US war crimes in Vietnam or Laos. The only tribunal to try the crimes of official America was a people's tribunal, set up under the leadership of the British philosopher Bertrand Russell. Second, when it came to drafting the terms of the tribunal, Washington demanded a restricted mandate for the court, from 1975 to 1979. Had the mandate included the period before 1975, the US would most likely have been charged with war crimes. Similarly, had the mandate stretched beyond 1979, there is little doubt that the US would have come under international scrutiny for providing the Khmer Rouge with political cover at the UN, at a time when the very crimes in question were being exposed.

My point is not that those tried by the ICC or the International Tribunals have not committed crimes, including mass murder: the law is being applied selectively. Only some perpetrators are being targeted, and not others. The decision as to who to target, and who not to, is inevitably a political decision. When the law is applied selectively, the result is not a rule of law, but a subordination of law to the dictates of power so flagrant that the outcome is more reminiscent of feudal privilege than of a bourgeois rule of law.

Not only has the ICC stooped to embrace a partisan notion of justice, it has also not hesitated to do so at the expense of peace. The quest for peace in northern Uganda pitted the country's parliament against its president. In pursuit of peace, Parliament passed a bill offering amnesty to the entire leadership of the LRA. Opposed to the amnesty offer, the President invited the ICC to charge the political leadership with crimes against humanity – even if the pre-requisite was to declare Uganda a failed state unable to bring violators of human rights to justice. The ICC Prosecutor obliged, joining the Ugandan President in bypassing both the legislature and the courts and thereby declaring both incompetent and Uganda a 'failed' state![7] At the same time, it did so without holding the top leadership in government responsible for arraigning practically the entire rural Acholi population. The terms of the resulting debate in Uganda on the role of the ICC pitted justice against peace. In this debate, the civilian population of Acholi districts often demanded peace, even if this would mean conferring immunity from prosecution to the LRA leadership. The President demanded justice – and wielded the ICC as a hammer.[8] The ICC, in turn, prioritized a particular form of justice – criminal justice.

If peace and justice are to be complementary, rather than conflicting, objectives, we need to distinguish victor's justice from survivor's justice: if

one insists on distinguishing right from wrong, the other seeks to reconcile different rights. In a situation where there is no winner and thus no possibility of victor's justice, survivor's justice may indeed be the only form of justice possible. If Nuremberg is the paradigm for victor's justice, the post-apartheid transition in South Africa is the paradigm for survivors' justice. The end of apartheid in South Africa was driven by two terms – forgive but do not forget – agreed upon at Kempton Park. The first part of the compact was that the new power will forgive all past transgressions of the law, so long as these are publicly acknowledged as wrongs. There will be no prosecutions. The second was that there will be no forgetting, why henceforth rules of conduct must change, thereby ensuring a transition to a post-apartheid order. Clearly, if an ICC had existed then, we would not have had an anti-apartheid transition in the mid-1990s.[9] It was South Africa's good fortune that its transition was in the main internally-driven.

South Africa is not a solitary example. It is actually a prototype for conflicts raging across the African continent, conflicts about the shape of political communities in post-colonial Africa and the definition of membership in each of these. Mozambique is another example where peace and criminal justice appeared as alternatives. Had there been an ICC when the terms of the compromise were worked out in Mozambique, it is doubtful that that these terms could ever have been realized – for the ICC would surely have insisted that the place of the Renamo leadership was not in parliament but in jail. Such, indeed, is the dilemma that bedevils the search for peace in northern Uganda: the main external obstacle to a peace agreement between the LRA and the Government of Uganda is indeed the determination of the ICC to criminalize the leadership of the LRA in the name of pursuing justice. The challenge for South Africa – as for Mozambique, Uganda and Sudan – is not to shun justice but to explore forms of justice that will help end, rather than prolong, conflicts. The search for survivor's justice needs to be two-pronged: prioritize peace over punishment; and explore forms of justice – not criminal but political and social – which will make reconciliation durable. From this point of view, the conflict in Darfur is not an exception but an illustration of the African dilemma.

The case of the ICC raises a more general question: that of the relationship between legal and political questions. One may begin by asking: what is a legal issue and what a political issue? In a democracy, the domain of the legal is defined through the political process. Even where there is a human rights regime, both the fact and the content of rights (e.g. the Bill of Rights in the US) is defined in the country's constitution – that is, in its foundational political act. At the same time, its actual operation in any given period is subject to the will of the country's political organs which have the political power to qualify it in light of the changing context (as, for example, with the Homeland Security Act in the US War on Terror).

What happens if one detaches the legal from the political regime? Two problems arise, both related to the question of political accountability. The only formal gathering of the global community today is the United Nations, where the

General Assembly has a full representation of states, but the Security Council is a congress of big powers that emerged from the ashes of the Second World War. To the extent the ICC has any accountability it is to the Security Council, not the General Assembly. It is this relationship that has made it possible for the only superpower of the post-cold war era to turn the workings of the ICC to advantage.

This problem was raised most directly by India. Like the US and Sudan, India also refused to sign the Rome Statute. India's primary objection had to do with the relationship between the Security Council – of which India is not yet a permanent member – and the ICC. The Rome Statute gives the Security Council minimal powers of oversight over the ICC: the Council has the power to require the ICC to look into particular cases, and to forbid it from doing so in other cases. India's 'basic objection was that granting powers to the Security Council to refer cases to the ICC, or to block them, was unacceptable, especially if its members were not all signatories to the treaty' for it 'provided escape routes for those accused of serious crimes but with clout in the U.N. body.' At the same time, 'giving the Security Council power to refer cases from a non-signatory country to the ICC was against the Law of Treaties under which no country can be bound by the provisions of a treaty it has not signed'. (*The Hindu* 2005)

Bolton too sensed that the most likely consequence of the absence of formal political accountability would be the informal politicization of the ICC. His worry, though, was that 'the ICC will be ''captured'' not by governments but by NGOs and others with narrow special interests, and the time and resources to pursue them' (Bolton 2001, p. 5). What Bolton could not foresee or would not foretell was that the ICC would be captured by American governmental power rather than by NGOs. None should be surprised that the US used its position as the leading power in the Security Council to advance its bid 'to capture' the ICC. As summed up by an editorial in India's leading political daily, *The Hindu*:

> The wheeling-dealing by which the U.S. has managed to maintain its exceptionalism to the ICC while assisting 'to end the climate of impunity in Sudan' makes a complete mockery of the ideals that informed the setting up of a permanent international criminal court to try perpetrators of the gravest of crimes against humanity. (*The Hindu 2005*)

But the problem would still not be solved if all members of the Security Council – including the US – joined the ICC. For there is a more general problem involved in detaching the legal from the political regime. Ironically, it was Bolton who pointed out the problems involved in a non-political, strictly-legal approach that insists on detaching war crimes from their underlying political reality – by pointing to the political survival strategy of many post-Soviet societies of Eastern Europe:

> So extensive was the informing, spying and compromising in some societies that a tacit decision was made that the complete opening of secret police and Communist Party files will either not occur, or will happen with exquisite

> slowness over a very long period. In fact, these societies have chosen 'amnesia' because it is simply too difficult for them to sort out relative degrees of past wrongs, and because of their desire to move ahead. (Bolton 1998)

The contrast is provided by Bosnia and Rwanda, two countries where the administration of justice became an international responsibility: 'Bosnia is a clear example of how a decision to detach war crimes from the underlying political reality advances neither the political resolution of a crisis nor the goal of punishing war criminals.' Like Bosnia, justice in Rwanda too has become a ruse for 'score-settling'. The focus of the Rwanda tribunal, says Bolton, has been 'war by other means', so much so that 'it is delusional to call this "justice" rather than "politics"' (Bolton 2001, pp. 9–10).[10] Bolton rightly concludes:

> Many questions are clearly political, not legal: How shall the formerly warring parties live with each other in the future? What efforts shall be taken to expunge the causes of the previous inhumanity? Can the truth of what actually happened be established so that succeeding generations do not make the same mistakes? (Bolton 2001, p. 8)

Those who face human rights as the language of an externally-driven 'humanitarian intervention' are required to contend with a legal regime where the very notion of human rights law is defined outside of a political process – whether democratic or not – that includes them as meaningful participants. Particularly for those in Africa, more than anywhere else, the ICC heralds a regime of legal and political dependency, much as Bretton Woods institutions pioneered an international regime of economic dependency in the 1980s and 1990s. The real danger of detaching the legal from the political regime and handing it over to human rights devotees – shall we say human rights fundamentalists, meaning those who believe that the pursuit of human rights should not be qualified by any external considerations? – is that it will turn the pursuit of justice into revenge-seeking, thereby obstructing the search for reconciliation and a durable peace.

Notes

1 John Lloyd, for example, has argued for the West, ideally the UN, to intervene in Africa, even if it smacks of neo-imperialism (Lloyd 2006).

2 The UN Security Council's response to mass violence in Darfur has been to pass resolutions 1590 and 1591. Together, these resolutions have the effect of placing Sudan under foreign trusteeship. Resolution 1593 charged the ICC with responsibility to try the perpetrators of human rights in Darfur.

3 For a detailed account of this, see Makdisi 2000.

4 Otunnu went on to compare the situation in northern Uganda to that in Darfur:

> The situation in northern Uganda is far worse than that of Darfur, in terms of its situation, its magnitude, the scope of its diabolical comprehensiveness, and its long-term impact and consequences for the population being destroyed. For example, Darfur is 17 times the geographic size of northern Uganda and 4 times

> the size of its population, yet northern Uganda has had 2 million displaced persons for 10 years, the same as the number of displaced persons in Darfur today. The situation in Darfur has lasted for 2½ years now; the tragedy in northern Uganda has gone on for 20 years now, with the forced displacement and concentration camps having lasted now for 10 years. I applaud the attention and mobilization being focused by the international community on the abominable situation in Darfur. But what shall I tell the children of northern Uganda when they ask: how come the same international community has turned a blind eye to the genocide in their land?

Finally, he called for a UN intervention in northern Uganda on grounds of 'the responsibility to protect':

> The genocide in northern Uganda presents the most burning and immediate test case for the solemn commitment made by world leaders in September. Will the international community on this occasion apply 'Responsibility to Protect' objectively, based on the facts and gravity of the situation on the ground, or will action or inaction be determined by 'politics as usual'? (Otunnu 2005).

See further, Otunnu 2005.

5 On the ICC, see Leopold 2002, *The Monitor 2003*, Johnson 2004, pp. 12–13; and chapter 4 in Mamdani 2004.

6 If the ICC is turning into a Western court to try African perpetrators of mass crimes, genocide too is becoming a non-Western crime. The official genealogy of genocide excludes the crimes perpetrated against Native Americans, against Africans in the course of modern trans-Atlantic slavery and the colonial era that followed it, as well those perpetrated by the US in the course of the Indo-Chinese and Iraqi wars and counter-insurgencies.

7 This is what the ICC had to say in a press release about the Amnesty Act in Uganda:

> In a bid to encourage the members of the LRA to return to normal life the Ugandan authorities have enacted an amnesty law. President Museveni has indicated to the Prosecutor his intention to amend this amnesty so as to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in northern Uganda are brought to justice. (Cited by Branch 2007, p. 184)

One wonders which is worse: that the ICC had no idea that the Amnesty Law was passed by Parliament in the teeth of Presidential opposition, or that it knew this but did not care about constitutional niceties? Adam Branch questions 'whether the Uganda case was legally admissible according to the principle of complementarity enshrined in the Rome Statute ... that the ICC only take cases in which national courts are "unable" or "unwilling" to undertake investigation and prosecution.' (Branch 2007, p. 184)

8 The collaboration between the ICC Prosecutor and the Ugandan President came to an end when their objectives no longer coincided. Once the demand for peace became overwhelming, Ugandan President Museveni turned away from the ICC and asked that it drop criminal charges against the LRA leadership: 'What we have agreed with our people is that they should face traditional justice, which is more compensatory than a retributive system.' See *The Guardian 2008*.

9 This is not to ignore the fact that in the specific instance of Darfur, the ICC got involved because the matter of Darfur was referred to it by the UN Security Council. When the Security Council refers any matter to it, the Court has no option but to take it up. Indeed, Darfur is the first test of the Security Council's power to refer a case to the ICC.

10 On Bosnia, see Owen 1995, Silbner and Little 1996, Woodward 1995.

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