



AMICC'S ANALYSIS OF THE NEW HUMANITARIAN ORDER BY MAHMOOD MAMDANI

Mahmood Mamdani's article *The New Humanitarian Order* (The Nation, September 10, 2008, available at <http://www.thenation.com/doc/20080929/mamdani>) is based on a theory of what he characterizes as the 'new humanitarian order.' This new order 'claims responsibility for the protection of vulnerable populations.' Mamdani asserts that this responsibility is effectively monopolized by the 'great powers' through the Security Council. As a consequence, he states that sovereignty remains in some parts of the world but is suspended in countries in Africa and the Middle East. The result is a system which 'once again is bifurcated,' that is, the West retains rights for its citizens through sovereignty, and states in Africa and the Middle East become 'failed' states whose citizens are passive beneficiaries of humanitarian intervention. Mamdani argues that it is through humanitarian intervention that the West is gaining control over 'failed' states. Thus, he claims, we are approaching a system somewhat reminiscent of early twentieth-century colonialism. He then presents an argument that the International Criminal Court is an instrument of the West in the advancement of this 'international humanitarian order.' This argument exhibits misunderstandings of the fundamental purpose of the Court which is to punish originators of atrocity crimes: those with ultimate responsibility.

Mamdani specifically claims that the US eventually used the Court as a 'useful tool.' He submits that the US now uses the Court through the Security Council, and the Court itself. This misunderstands the nature of the International Criminal Court and its relationship with the Security Council. Finally, throughout Mamdani's proposed theory there are specific criticisms of the Court and the case against Bashir.

The Rome Statute is a self-contained treaty which, among other things, instructs the ICC judges. It did not confer on the Security Council any additional powers in the creation of the ICC nor is the ICC accountable to the Security Council. The Security Council's relation to the Court is limited by the Rome Statute to two possible actions. Firstly, if the Security Council chooses to refer a case the Prosecutor may accept it or reject it (Article 13(b)). Secondly, the Security Council, under Chapter VII of the UN Charter powers, may request that the court defer action on a case for 12 months and the judges have to accept that request (Article 16). It is most peculiar to claim that the US 'uses' the Court as under the Bush administration the policy towards the ICC was one of hostility. While outwardly hostile actions have generally subsided, current policy remains to be one of detachment from the Court. When the question of a referral on the situation with Darfur was raised the US abstained from the decision altogether. It is hardly the case that, as Mamdani claims, the US aims to 'capture the ICC' when the most it did was abstain from this decision.

Further to this, the Court's accountability is not to the Security Council but to its own Assembly of States Parties (ASP) to which the US does not belong. Accountability is firmly established in the Rome Statute: the ASP is composed of the States Parties to the Rome Statute and exercises oversight over all aspects of the Court's work.

Mamdani also considers that the Court, in the cases before it, has become subservient to US interests. He argues that, as all the cases before it are from Africa, the Court is turning into a 'Western court to try African crimes against humanity.' Looking at the Court and its foundations proves this is not the case. A substantial number of people within the Court are from African states, including the Deputy Prosecutor and the First Vice President who is the presiding judge over Bashir's case in the Pre-Trial Chamber. Furthermore, the ICC has 139





signatories, 108 are full states parties and around one third of these are African states. The majority support the court in its dealings with the cases presented before it.

Darfur, as Mamdani notes, was a visible point of concern internationally for many years. Its referral by the Security Council was, therefore, not entirely arbitrary nor was it generally opposed by African countries. The other three of the four situations before the Court were referrals by the governments of the countries concerned and therefore they were not brought about by the Security Council or the Prosecutor. These three countries in question, Uganda, The Central African Republic and the Democratic Republic of the Congo, Mamdani labels as ‘US adversaries.’ He argues that they are before the Court because they were ‘targeted.’ They all, however, have good relations with the US. There is no evidence that the acceptance of the referrals by the ICC represent accommodation with the US.

Mamdani suggested that accountability for ‘genocide’ is a further factor which favors the West, arguing that other crimes which occur in ‘insurgencies’ and civil wars may go unpunished. The latter sort of violence, he claims, has been labeled as ‘normal violence’ whereas genocide is ‘bad violence’ which calls for ‘humanitarian intervention.’ This intervention, in line with the theory, leads to a form of ‘indirect rule.’ In the Rome Statute, however, war crimes are emphasized as much as genocide and, in fact, most cases have tended to charge crimes other than genocide.

Mamdani’s suspicions about the crime of genocide are shown through his criticism of Prosecutor Moreno-Ocampo’s request for an arrest warrant for Bashir. He argues that the language of genocide was first employed in the conflict in Darfur and that the Prosecutor used this language as an opportunity to submit insufficient evidence to the Court. He accuses the Prosecutor of attributing too much responsibility over everything that occurred in Darfur to Bashir. The Prosecutor’s arrest warrant request presents voluminous and substantial evidence of Bashir’s individual responsibility for specific acts. The Prosecutor, therefore, is not charging Bashir for the historical circumstances, but for these specific acts which constitute crimes. This evidence must convince the judges and they will determine if there is something inadequate in the evidence.

Furthermore, factors such as the drought in Darfur or historical situations that occurred before the court came into being are not immediately relevant to the guilt or innocence of the accused. It is important to note that historical or ecological factors may lead to friction between groups, but this alone cannot necessarily be used as evidence of a person’s individual criminal responsibility. In the case put forward by the Prosecutor it is stated that Bashir exploited ‘real or perceived grievances between the different tribes.’ There was most certainly conflict between Muslims and Christians in the former Yugoslavia before Milosevic, as was there anti-Semitism in Germany before the Nazis. There may have been racialization in Darfur before Bashir came to power, but that does not relate to the question the court must consider which may be whether he exploited this racialization to pursue a criminal aim.

The familiar international law principle that only signatory countries are bound to a treaty they have signed is raised by Mamdani to challenge the legitimacy of the Court. This principle, however, does not shield a non-signatory’s nationals from the treaty’s provisions on the territory of a State Party. When an individual commits a crime within a state’s territory, that state has jurisdiction over the individual. A state’s ability to bring to justice individuals within its territory is central to state sovereignty. A state may, therefore, decide justice would





best be served by passing a case on to the ICC. Thus, it follows that limiting this ability would be limiting a state's sovereignty.

Mamdani's view of the role of the court has led to the adoption of two false conceptions of the Court. Firstly he sees the structure of the court from a 'victor's justice' model rather than reconciliation. Although the Court focuses on formal trials, it is confined to dealing with those bearing the greatest responsibility, leaving the rest of those involved to what Mamdani calls 'survivor's justice,' but might more accurately be described as peace and justice processes. Secondly, the court is not an instrument of humanitarian intervention. It deals with crimes that the international community has agreed are some of the most serious crimes of concern to mankind. These crimes may result in human rights violations. It is important to make this distinction, because not all human rights violations are the result of crimes within the jurisdiction of the court. Mamdani states that the ICC would not have been suited to dealing with situations surrounding the human rights violations which occurred in apartheid South Africa. Not all aspects of the human rights violations, however, would have been under the jurisdiction of the court. In spite of this, the Chairman of the South African Truth and Reconciliation Commission, Archbishop Desmond Tutu, and Deputy Chairman Dr Alex Boraine agreed that it was a mistake not to prosecute senior people involved in the apartheid regime. Ultimately, for Sudan, there has been no use of such alternatives or indeed any viable alternatives for justice.

To conclude, Mamdani has misrepresented the role of the Court in describing it as an instrument of the West, and a model of 'victor's justice.' This leads to false assumptions of the powers of the Security Council and the Court itself which can be corrected by considering the relevant provisions of the Rome Statute and the make up of the Court and its signatories. Specifically, although the case in Sudan is undoubtedly complex, the Prosecutor has presented evidence for the individual responsibility of Bashir. This evidence will be evaluated through the Court proceedings. This does not preclude the option that further perpetrators of violence in Darfur whose crimes may not be under the jurisdiction of the Court may be brought to justice through other means should they be established. The ICC represents an internationally agreed method of bringing perpetrators of the most serious crimes to justice. This, alone, is its scope and its mandate.

*Researched and drafted by Veronica Glick
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