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*Elisa Orrù*

### Power, law and consent

The relationship between power, law and consent is a key feature of the Western debate on criminal law. On the one side, defining the legitimate ways of exercising the punitive power has been a critical question since the Enlightenment thought onwards and especially as to the rule of law doctrine. On the other side, the role played by public punishment in shaping consent and its communicative potential have been crucial questions for critical, as well as non-critical approaches to criminal law in contemporary thought.

These questions gain in strength and radicalism when it comes to international criminal law (ICL). In this case the filter of the state is not present anymore to mediate between power, law and consent, and the power to punish individuals is directly exercised by international institutions.

This means, on the one hand, that traditional justifications of the power to punish and which are elaborated on in the domestic sphere are not useful anymore in legitimating international punishment. International criminal norms are not framed by an international democratically elected parliament, and their exercise is not controlled by the complex system of checks and balances typical of the rule of law. On the other hand, having not being created by a sovereign, international criminal law cannot be conceived as an instrument to build or consolidate consent around the sovereign. A double-sided dilemma therefore arises: traditional explanations are no longer apt to answer the question whether ICL is legitimate, while ICL itself can no longer be considered an instrument to build consent around the traditional power exercising it, namely the state.

Although I consider both sides of the dilemma equally interesting and stimulating, I will focus here only on one side of the coin: the ability to build consent of the ICL institutions, and in particular the International Criminal Court (ICC)<sup>1</sup>. In other words, instead of asking whether the consent around the ICC is broad enough for the Court to be considered legitimate, I shall ask whether the ICC is able to build consent around the world order it embodies.

The concept of hegemony, I will argue, is a useful heuristic tool to apprehend the relationship between power, law and consent as to the ICC. This does not mean, however, that the existence of a hegemonic function of the ICC can be easily affirmed.

I will first clear the meaning of “hegemony” I will refer to, as it has been developed by neo-gramscian and post-colonial thinkers. I shall then focus on contemporary international criminal tribunals in order to contextualise the concept of hegemony relating to them. Finally, I will ask whether international criminal tribunals are effective in producing consent.

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<sup>1</sup>I have dealt with the question of the justification of international criminal tribunals elsewhere, see E. Orrù, *Il tribunale del mondo. La giustificazione del diritto internazionale penale: analisi, critica, alternative*, con Prefazione di Danilo Zolo, Libri di Emil, Bologna, 2010 and E. Orrù, M. Ronzoni, *Which Supranational Sovereignty? Criminal and Socioeconomic Justice Compared*, in “Review of International Studies”, XXXV (2011), 7, pp. 2089-2106.



## Hegemony

One can distinguish between a ‘weak’ and a ‘strong’ meaning of the term “hegemony”.

The ‘weak’ meaning corresponds to the common use of the word and means a dominance of one entity over others. In this sense it is sometimes used in reference to international relations when referring to the dominance of one state over the others, such as Robert Keohane's theory of hegemonic stability, or as a euphemism for “imperialism”.<sup>2</sup>

The ‘strong’ meaning of “hegemony” relates to the use first made by Antonio Gramsci and later developed by Gramscian interpreters and post-colonial scholars. This second meaning refers to a sort of political direction which implies consent from the part of those who are directed. In the ambiguous use of the term made by Gramsci himself, hegemony may or may not also imply the use of force, but it always refers to a form of power in which consent prevails over force. A critical function needed by hegemonic direction in its strong meaning consists of organising, widening and consolidating consent towards the dominant forces. This function aims at presenting their world view as universal, and is exercised through public institutions such as schools, the judicial system, other official state powers, as well as through organisations of the civil society such as trade unions, cultural organisations, the press etc.<sup>3</sup>

Here I will refer to hegemony in this second strong meaning, for the relationship it underlines between power, institutions and consent, enables one to apprehend critical features of the ICC.

Scholars such as Robert Cox and Bhupinder S. Chimni have elaborated on Gramsci's concept of hegemony in order to apprehend supranational relations and have stressed the role of international law and international institutions in performing the hegemonic function at the supranational level.

Cox picks up on Gramsci's intuition that hegemonic institutions and ideologies are “universal in form. i.e. [sic!], they will not appear as those of a particular class, and will give some satisfaction to the subordinate groups while not undermining the leadership or vital interests of the hegemonic class”.<sup>4</sup> This implies, according to Cox, that hegemony at the global level not only relies on the organisation of inter-state relations, but also involves the global extension of a particular mode of production and the emergence of a global civil society, i.e. a global net of the social classes which profit from the dominant mode of production. In other words, a hegemonic world order not only encompasses a political structure, but an economic and social structure as well. In a global hegemonic order, the dominant state(s) do not deliberately exploit the others; on the contrary most of the latter find the global order convenient for them too. Accordingly, the norms which regulate the hegemonic global order are expressed in universal, not particularistic terms.

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<sup>2</sup>Robert O. Keohane, *After Hegemony. Cooperation and Discord in the World Political Economy*, Princeton, Princeton University Press, 2005<sup>2</sup>.

<sup>3</sup>See Antonio Gramsci, *Quaderni dal carcere*, Torino, Einaudi, 2007<sup>3</sup>, a cura di Valentino Gerratana, Q 1 §§ 44, 46, 48, Q 4 § 49 and Q12 §1, Q 6 § 81 and Q 12 § 1; Giuseppe Cospito, *Egemonia*, in Fabio Frosini e Guido Liguori (a cura di), *Le parole di Gramsci. Per un lessico dei Quaderni del carcere*, Roma, Carocci, 2004, pp. 74-92 and Robert W. Cox, *Gramsci, Hegemony and International Relations: an Essay in Method*, in Stephen Gill (ed. by), *Gramsci, Historical Materialism and International Relations*, Cambridge, Cambridge University Press, 1993, pp. 49-66.

<sup>4</sup>R. W. Cox, *Gramsci, Hegemony and International Relations*, cit., p. 58.



Cox is particularly interested in explaining how international institutions can sustain a particular world order through universal norms. In his opinion, international organisations are at the same time a product and an instrument of a hegemonic world order. On the one hand their creation is generally sustained, if not directly initiated, by the hegemonic state(s), who also secure the consent of other states. International organisations at the beginning tend to reflect existing power relationships and to present a world image consistent with them. On the other hand, international organisations embody and legitimate the norms of the world order. They apply and function according to norms which are favourable to the dominant economic, political and social forces, but also make subordinate forces accept them as legitimate. They attain this goal by making concessions to subordinate interests without questioning core power relationships and by presenting the dominant forces as serving the general interest.<sup>5</sup> In Cox's own words: "In the hegemonic consensus, the dominant groups make some concessions to satisfy the subordinate groups, but not such as to endanger their dominance. The language of consensus is a language of common interest expressed in universalist terms, though the structure of power underlying it is skewed in favour of the dominant groups".<sup>6</sup>

Chimni is likewise concerned with explaining the hegemonic potential of international institutions and of international law generally.

In accordance with Gramsci's and Cox's analyses, Chimni argues that "dominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised [...]. The language of law has always played, in this scheme of things, a significant role in legitimizing dominant ideas for its discourse tends to be associated with rationality, neutrality, objectivity and justice".<sup>7</sup> This is true also at the global level: "International law is no exception to this rule. It legitimizes and translates a certain set of dominant ideas into rules and thus places meaning in the service of power".<sup>8</sup>

According to Chimni, international law today is undergoing a set of transformations which are reshaping its relationship with states. Such processes are, for instance, the intervention of international law in defining the internal organisation of the state; the international regulation of property rights, commodities exchange and currencies policy; the association of the internationalisation of the human rights discourse with the property rights discourse; the internationally prescribed deregulation of the labour market; the increasing complexity of the jurisdiction concept and the proliferation of international courts; the affirmation of non-state subjects involved in international law making; and, finally, the refusal to consider development inequalities among states as relevant factors in defining international norms.

According to Chimni, these transformations perpetuate power relationships because they sustain the dominant coalition of social forces and states and have a different impact

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<sup>5</sup>R. W. Cox, *Gramsci, Hegemony and International Relations*, cit. and Cox, *Social forces, States and World Orders: Beyond International Relations Theory*, "Millennium – Journal of International Studies", 10 (1981), 2, pp. 126- 154, 137

<sup>6</sup>R. W. Cox, *Labor and Hegemony*, "International Organization", 31 (Summer, 1977), 3, pp. 385-424, p. 387.

<sup>7</sup>B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, "International Community La Review", 8 (2006), pp. 3-27, p. 15.

<sup>8</sup>*Ibidem*.



on Third World states and peoples. International institutions are playing a key ideological role in legitimating these transformations, for they sustain and promote a particular way of intending international law. Firstly international institutions contribute to the promotion of international norms functional to the realization of their objectives. Secondly, they play a key role in identifying problems that matter and in suggesting solutions to them, through prescribing paths for states' actions as well as for normative developments. Finally, they assess the adequacy of states' policies from their points of view. In doing this, they are directed by the hegemonic forces, express their interests, and perpetuate the North-South divide. Nevertheless, they present their mandate as committed with universal interests.

To sum up, for these authors, an international institution has a hegemonic function when its activity is presented as serving universal interests and perceived as legitimate by subordinate groups, while in fact it perpetuates asymmetrical power relationships.

In the following I ask if this can be considered the case for the ICC.

Before looking at the ICC, however, a preliminary question must be addressed: Which powers can be considered the hegemonic forces in our present international context? This is of course a very complex question that cannot be systematically addressed here. Cox's and Chimni's analysis suggest that contemporary hegemonic forces consist of a mixture of state and non-state actors. On the one level there are Western capitalistic societies guided by the United States; on the other the "transnational capitalist class", based in the advanced capitalist societies and allied with elites in Third World countries. For the particular characteristics of international criminal law, which is strictly intertwined with sovereignty questions, I suggest here to focus only on state actors, leaving open the question whether my analysis can also be extended to non-state actors. I will assume the hegemonic actors in the contemporary international arena are the group of states that can be identified economically as advanced capitalistic societies, culturally as broadly belonging to the Western civilization, and politically as implementing a liberal-democratic system. Geographically, such states are those of the North American and European continents. There are many expressions to refer to them as a whole: Chimni uses for example the expressions "Northern -" or "First World". I will refer to them as the "Western World" or "Western societies".

### **In the name of the international community**

There is no doubt that the ICC claims to operate in the name of the whole international community and to protect its universal interests.

The ICC is conceived not as acting to protect interests of one state menaced in a particular situation, but as concerned with violations that at each time they are committed affect the whole international community. According to the ICC Statute the crimes under the ICC jurisdiction "threaten the peace, security and well-being of the world", and are "of concern to the international community as a whole."<sup>9</sup>

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<sup>9</sup>*Rome Statute of the International Criminal Court* (later on *Rome Statute* or ICC St), UN Doc. A/CONF.183/9, 1998, preamble. This is common also to other international criminal tribunals. The International Criminal Tribunal for former Yugoslavia (ICTY) Annual Report of the year 1997, for instance, affirms that "The Tribunal's mission is [...] to dispense justice [...] in the name of the international community." Similar statements are to be found also in the sentences of the international tribunals. The ICTY Appeal Chamber declared for instance in the *Aleksovski* case that retribution, which the Chamber considers an important factor of the punishment, «is not to be understood as fulfilling a desire for revenge



In accordance with these statements legal scholars identified the core of the universally shared interests and values in goods like the “peace, security and well-being of the world.”<sup>10</sup> International crimes threaten these universal basic values: this is the reason why their punishment is of concern to the whole international community and they ought to be judged by international, possibly universal, courts. As Kai Ambos states it, “the protection of fundamental legal values of human beings and the international community [...] justifies, to a great extent, the recognition of an international duty to punish.”<sup>11</sup>

Accordingly to its universalistic claim, the ICC made efforts in order to encourage the widest participation of states and to present itself as an impartial and independent institution.

## I.

Since the time of its creation, the ICC was presented as a universal body. Its creation was not decided in a closed circle of states, but was discussed in an international conference convoked by the UN General Assembly in 1998 in Rome, which was open to all states, of which 160 participated in . It was the UN codification conference with the highest number of participating states. This was also made possible by a trust fund at the disposal of the delegations with limited budgets. Consistently with the universalistic aspiration of the Rome Conference, the states parties created the ICC “conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage”.<sup>12</sup>

## II.

The Rome Statute provides also for election mechanisms of the judges sensitive to legal pluralism. Article 36 (7) and (8) require that the judges' election by the Assembly of States parties must allow the principal legal systems of the world to be represented in the ICC, and that there must be an equitable geographical representation as to the judges' provenance. Similar criteria should be also respected in the employment of staff at the Prosecutor's and Registrar's offices.<sup>13</sup>

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but as duly expressing the outrage of the international community at these crimes». Similarly, the ICTY Trial Chamber in the *Erdemović* case, stated that «One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole» In the *Kambanda* case, the International Criminal Tribunal for Rwanda (ICTR) expressed the meaning that international punishment should show “that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights”. *Pros. v Aleksovski*, IT-95-14-1/A, 24 March 2000, par. 185; *Pros. v Erdemović*, IT-96-22-T, Trial Chamber, Sentencing Judgement, 29 novembre 1996, par. 64; and *Pros. v Kambanda*, ICTR 97-23-S, 4th September 1998, par. 28. See also *Pros. v Babić*, IT-03-72-S, cit., e *Pros. v Obrenović*, IT-02-60/2-S, Trial Chamber Section A, Sentencing Judgement, 10 December 2003, par. 50.

<sup>10</sup>*Rome Statute*, cit., preamble.

<sup>11</sup>See Kai Ambos (with the assistance of Christian Steiner), *On the Rationale of Punishment at the National and International Level*, in Marc Henzelin and Robert Roth (ed.), *Le droit pénal à l'épreuve de l'internationalisation*, Paris, Lgdj-Georgéd-Bruylant, 2002, pp. 305-323.

<sup>12</sup>*Rome Statute*, cit., preamble.





The Statute, quite obviously, affirms also the need for the ICC itself, the judges, the prosecutor and the other personnel of the court to be of “impartiality” and “integrity” and dispose that they are not allowed to engage in other employment or activities which could interfere with their impartiality.<sup>14</sup>

Officially, the ICC is not subordinated to any other organisation, including states, the ONU and its Security Council. The regular financing of the Court is assured by contributions of the states parties;<sup>15</sup> every state's financing quota is fixed according to an assessment scale that take into account the differing levels of economic development. It seems, then, that the ICC is financially dependent only on those states that are themselves subjected to the Court's jurisdiction.

### III.

The ICC seems moreover to recognise the equal sovereign right and duty of every state to deal with the cases it has jurisdiction over. The principle of complementarity, stated in the preamble and in art. 1 of the ICC Statute and regulated by art. 17, establishes that the ICC is a last-resort court, and that it will not intervene if a state is already conducting investigations or prosecutions on a particular case, unless the state is unwillingly or unable to conduct the trial. Such a principle might be seen as intended to protect states against “imperialistic” interventions by the Court.

### IV.

Finally, as to the area submitted to the ICC jurisdiction, formally the ICC Statute admits inequalities based only on the will of the interested states. In the “standard” case according to the Rome Statute, the ICC can exercise its jurisdiction only over crimes allegedly committed by persons who are citizens of a state party, or committed on the territory of a state party. In this sense, the ICC Statute seems to put all states on the same level, and to be able to intervene only when the states who have naturally jurisdiction on a case have ratified the court's Statute<sup>16</sup>. However, as we will see in the next paragraph, this is only a part of the story.

Are the mentioned features of genuine universalistic characters, or are they rather “concessions” made to weak states in a hegemonic perspective, which in no way diminish power inequalities and the privileges of the “strong” states?

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<sup>13</sup>Art. 44 (2) ICC St. Art. 112 (3)(b) provides for similar criteria for the election of the members of the Assembly of States Parties' Bureau.

<sup>14</sup>Preamble, art. 36 (3)(a), art. 40, art. 42 (5) and (7), art. 44 (2) and art. 45 ICC St.

<sup>15</sup>Art. 115 (a) ICC St.

<sup>16</sup>Art. 12 ICC St.



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## **In the interest of whom?**

### **I.**

As to the Rome Conference, although many countries could afford to participate in the conference thanks to the trust fund, they did not take part on an egalitarian foot. During the conference many informal working groups were created to deal with particular topics related to the ICC Statute. Due to the small number of some delegations' members, these were not able to take part in all meetings. Moreover, the informal meetings took place in English without translation services, although the United Nations official languages are, besides English, Arabic, Chinese, French, Russian and Spanish.

### **II.**

The ICC Statute, as we have seen, also provides for rules for the judges election which should guarantee an equal representation of the different juridical systems of the world. However, the means adopted by the ICC to respond to international crimes are expressions of the Western juridical and political culture. Its criminal law norms mix common-law and civil-law elements (with predominance of the former) and require national and international proceedings to conform to the fair trial model.

This judicial system is an expression of a tradition which is deeply rooted in Western culture, and which is inseparable from its theoretical-philosophical presuppositions. Among them are the tradition of political individualism, Enlightenment, the rule of law theory and the Rechtsstaat doctrine. The penal system adopted by the ICC and these traditions are strictly intertwined: the legal norms applied by the ICC are expressions of a particular culture and are not derived from the different legal systems of the world in an equitable manner.

Different ethical and legal traditions are not considered as valuable alternatives to the Western criminal model. Alternative models, however, do exist: procedures inspired by the restorative justice model, for instance, have been applied in response to international crimes in several countries. Restorative justice is a response to crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused, and building peace within communities, without necessarily holding the perpetrator criminally responsible. The South African Truth and Reconciliation Commission is an example of such an approach. South Africa's proposal to recognise this model as an alternative to criminal procedures was however rejected during the negotiations which led to the creation of the ICC. Other options, like the gacaca courts employed in Rwanda in response to the genocide of 1994 which combine penal and restorative elements, were not even taken into account.

In this context, even if the ICC judges come from different world regions, they have no choice but to apply the Western-originated criminal law model.

As we have seen, moreover, the Rome Statute affirms the need to guarantee the Court's and its personnel's independence.

The financing mechanism of the Court seems to handle fairly with economic gaps between nations, and at the same time to make the Court's financial resources dependent





only on those states which are subject to its jurisdiction. This is true, however, only for the cases that are opened after referral of a States party or as a consequence of the prosecutor's initiative.

For the cases referred to the ICC by the Security Council (the third available triggering mechanism for the Court) the Rome Statutes allow the Court to also be financed by funds from the United Nations. Moreover, for all cases the Court can be financed by voluntary contributions from states, individuals and organisations.<sup>17</sup> Firstly, this means that states which are not themselves parties can contribute to finance the court. Secondly, this regulation exposes the Court to the risk of financial dependence on one or more “rich” states, parties or non parties to the ICC that can make over proportioned contributions poor states could never afford.<sup>18</sup>

It is worth mentioning, finally, that states can also offer to the Court gratis personnel to be employed by it.<sup>19</sup>

### III.

The abovementioned factors have important consequences as to the supposed neutrality of the Court towards power differences among states, which could descend from the principle of complementarity interpreted as a principle reaffirming the equal sovereignty of states, i.e. an equal juridical status independent from their power position.

Firstly, the Court's option for a western-style criminal proceeding, considered the standard and unique model to be applied, has a different impact on Western and non-Western states. It is evident that the Rome Statute's preconditions for exercising its jurisdiction - the unwillingness or inability of the competent state to conduct a trial according to the ICC's standards - are more easily fulfilled when a non-Western state is involved. All the more because according to art. 17 of its Statute the Court has the last word in deciding if the requirements are met.

Concerns as to how Indian criminal proceedings would be judged by the ICC, for instance, has played a role in India's decision not to ratify the ICC statute, since the Indian criminal system departs from the Western criminal model adopted by the ICC in many respects.<sup>20</sup>

Secondly, given the financing rules and the enormous costs of the ICC, a big gap as to the impact of Third World and First World States on the Court's founding is to be supposed. The ICC budget for 2011 is 103,607,900 €, almost 6% of the UN regular budget, and 35% of the UN Development Programme net budget estimated for the same

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<sup>17</sup>Art. 13-15, 115 (b) and 116 ICC St.

<sup>18</sup>This is a quite likely possibility, for the same happened to the International Criminal Tribunal for the Former Yugoslavia (ICTY). Although the ICTY statute established that the Tribunal had to be financed through the UN ordinary funds, the UN General Assembly decided later on to finance the tribunal also through voluntary contributions by States and organisations. As a consequence of that the ICTY was overwhelmingly financially and logistically supported by the US, with important negative consequences on its impartiality. See Art. 32 of the ICTY Statute. See also D. Zolo, *Invoking Humanity. War, law and global order*, London, Continuum, 2002.

<sup>19</sup>Art. 44 (4) ICC St.

<sup>20</sup> Usha Ramanathan, *India and the ICC*, “Journal of International Criminal Justice”, 3 (2005), pp. 627-634.



year.<sup>21</sup> And this notwithstanding the fact that nine years after the beginning of the Court's activity, 16 persons are accused by the Court, yet only trials against eight of them can be celebrated, for the remaining accused are still at large. The ICC trials appear then a “justice for the rich”, whose enormous costs can only be sustained by well-off states.

#### IV.

Notwithstanding the claim to respect states' equal sovereignty, the ICC Statute allows the Security Council's members, and the permanent ones in particular, to make the Court function as an ad hoc tribunal. If the Security Council decides to refer a case to the ICC, and if the Court decides to open an investigation on the case, then the preconditions for the exercise of the Court's jurisdiction do not need to be met. This means that the Court can deal with cases involving crimes allegedly committed by citizens of states not party to the ICC Statute, and committed on the territory of a state non-party to the statute. Although the Security Council refers to Chapter VII of the UN Charter in submitting a case to the ICC, , thus claiming to deal to protect international peace and security, it is evident that it perpetuates power inequalities among states. The Security Council members, without themselves having to be subject to the Court's jurisdiction, can decide that other states, which also did not accept the Court's jurisdiction, will be nevertheless subjected to it.

#### The ICC's practice

All the unequal characters of the ICC described above have led to impressive consequences as to the partiality of the Court's activity so far.

The ICC has focused only on cases involving central African states, each of them bordering on at least one of the others, i.e. Central African Republic, Democratic Republic of the Congo, Uganda, Sudan, Kenya and Libya.<sup>22</sup>

On the other hand the ICC refused to open investigations on alleged crimes committed by the “International Coalition” (composed of Australia, Poland, the UK, and the USA) during the war waged against Iraq in 2003. The Court received several referrals, most of which denounced that the use of cluster bombs by the Coalition forces resulted in war crimes. Although the Court had at least jurisdiction over war crimes committed by citizens of the UK, the Prosecutor, Luis Moreno Ocampo, refused to open an investigation. He explained this conclusion arguing that the information he possessed “did not allow for the conclusion that there was a reasonable basis to believe that a clearly excessive attack within the jurisdiction of the Court had been committed”, and that the number of civilian victims of the reported facts would be too low to justify the intervention of the Court.

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<sup>21</sup>*Assembly of States parties Concludes its Ninth Session*, ICC Press Release, 11/12/2010, <http://www.icc-cpi.int/Menus/ASP/Press+Releases/Press+Releases+2010/Assembly+of+States+Parties+concludes+its+ninth+session.htm>, last visited 24/03/2011; UN General Assembly Resolution 64/244, 04/03/2010, <http://www.un.org/en/ga/64/resolutions.shtml>, last visited 24/03/2011; and Executive Board of the UN Development Programme and of the UN Population Fund, *UNDP Budget Estimates for the 2010-2011 Biennium, Report of the Administrator*, DP/2010/3, [www.undp.org/execbrd/pdf/dp2010-3.pdf](http://www.undp.org/execbrd/pdf/dp2010-3.pdf), last visited 24/03/2011.

<sup>22</sup>As to the latter two states, the ICC opened investigations, but not yet a case.



Later on, the Prosecutor stated that the Court's intervention would not be appropriate, because the UK was already dealing with the fact, but he did not supply any further details regarding the national prosecutions.<sup>23</sup>

In March 2011 indeed, the United Kingdom made the largest single voluntary financial contribution so far to the ICC Victims Trust Fund.<sup>24</sup>

The ICC, moreover, has not yet opened any investigation on the facts related to Israel's attack against the Gaza strip in December 2008. Palestine, as well as Israel, is not party to the Rome Statute, but in January 2009 the Palestinian authority accepted the jurisdiction of the Court with an ad hoc declaration, in accordance to art. 12 (3) of the ICC Statute. The Office of the Prosecutor argues that preliminary questions must be cleared, most of which have to do with the uncertain legal status of Palestine statehood and the Palestinian National Authority's criminal jurisdiction on the Gaza strip.<sup>25</sup> It seems likely, however, that the power positions of Palestine and Israel have played a central role in preventing Court's intervention so far.

On this background, the activity of the ICC can be considered an example of what Chimni calls the “language of blame”, through which “the North seeks to occupy the moral high ground through representing the third world peoples, in particular African peoples, as incapable of governing themselves”.<sup>26</sup>

What can serve this aim more than a criminal law which presents itself as impartial and universal, yet in fact concentrates on violence in African states and occults the crimes and human rights violations committed by Western States? The language of blame of ICL has gone as far as to incriminate chiefs of states on duty, such as Omar Hassan Al-Bashir, the current President of Sudan, accused at large before the ICC. On the other side the ICC excluded from its activity every case that could prove the responsibility of Western powers in committing international crimes, such as those in the case of the International Coalition's attack against Iraq.

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<sup>23</sup>See *Report of the International Criminal Court*, A/61/217, 3<sup>rd</sup> August 2006, <http://www.icc-cpi.int/Menus/ICC/Reports+on+activities/Court+Reports+and+Statements/Court+Reports+and+Statements.htm> (last visited on 27<sup>th</sup> May 2009), par. 31. Once again, this has a precedent in the ICTY. The ICTY did not investigate on the NATO bombing campaign over Yugoslavia in 1999, although it received several referrals on killing civilians and bombing civilian targets, like the Chinese Embassy and the TV headquarters in Belgrade. The ICTY had full jurisdiction over the alleged crimes, but the prosecutor, at that time Carla Del Ponte, “concluded that there were no grounds to open an investigation”. *Annual Report of ICTY*, 2000, summary. Extensive documentation on the topic can be found in Michael Mandel, *How America gets Away with Murder. Illegal Wars, Collateral Damage and crimes Against Humanity*, London, Pluto Press, 2004, pp. 177-206.

<sup>24</sup>*United Kingdom Makes Contribution to Trust Fund for Victims*, ICC Press Release 21/03/2011, ICC-TFV-20110321-PR645, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/uk%20kingdom%20makes%20contribution%20to%20trust%20fund%20for%20victims?lan=en-GB>, last visited 25/03/2011.

<sup>25</sup>Office of the Prosecutor, *Situation in Palestine*, 03/05/2010, <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282852/PALESTINEFINAL201010272.pdf>, last visited 25/03/2011 and *Sixth Report of the ICC to the United Nations for 2009/2010*, A/65/313, 19/08/2010, [http://www.icc-cpi.int/menus/icc/reports%20on%20activities/court%20reports%20and%20statements/sixth%20report%20of%20the%20international%20criminal%20court%20to%20the%20united%20nations%20for%202008\\_2009](http://www.icc-cpi.int/menus/icc/reports%20on%20activities/court%20reports%20and%20statements/sixth%20report%20of%20the%20international%20criminal%20court%20to%20the%20united%20nations%20for%202008_2009), last visited 25/03/2011.

<sup>26</sup>B.S. Chimni, *Third World Approaches to International Law*, cit.



The ICC, thereafter, sustains a world representation in which grave human rights violations are a prerogative of non-Western states, while Western states are the promoters of a global rule of law based on respect for human rights.

Europe in particular, with its strong and in-bulk support to the ICC, gains from this world representation, notwithstanding, for instance, the participation of many European States to the wars in Iraq and Afghanistan and the migration politics of the EU and of many of its member states, which have been leading to serious human rights violations.

As to the US, although they refused to ratify the ICC Statute, their position toward the Court is not as negative as it might appear at first sight. The US are not completely against the ICC; on the contrary they support it whenever it can be used as an ad hoc tribunal, i.e. when there are guarantees that it will be concerned with a specific case and will not prosecute US citizens.

The presumed hostility towards the ICC consisted in acts aimed at assuring immunity to the US citizens: they made pressure in the UN Security Council to release resolutions excluding the jurisdiction of the ICC on foreign personnel involved in peacekeeping missions, and persuaded more than 100 states, partly also recurring to economic pressure, to sign bilateral agreements to prevent the extradition of US citizens to the ICC.<sup>27</sup> However they did support the ICC activity in particular cases and when the Court's jurisdiction over US citizens where excluded. For instance they supported both cases referred to the ICC by the Security Council, namely Sudan and Libya, while they could have prevented the referral by their veto. In both cases they made sure the Security Council's resolutions excluded the ICC jurisdiction over personnel of states non-party to the ICC.<sup>28</sup>

It seems then that the US are also profiting from the world view sustained by the ICC.

### **The ICC: a hegemonic institution?**

Given that the ICC attempt to present a particular West-centred world view as a universal one, is then the hegemonic attempt of the ICC successful? Is the ICC accepted as a legitimate institution also by non-Western states?

The geographical distribution of the states which accepted its jurisdiction suggests a few observations. Among the 114 states that ratified the Rome Statute, The European Region is the most represented one, with 41 states being members of the ICC. On the contrary, entire regions of the globe are still hardly represented, such as the North-African and Middle-East regions and Asia, with only two states from these regions, Jordan and Tunisia, having ratified the statute. China, the most populous country of the world, has not ratified the ICC Statute, nor has India.

It seems, then, that the effort of the ICC to build consent around the world view it sustains among non-Western states has not been successful. The only exception to this is South America: almost all Latin American and Caribbean States, indeed, have ratified the ICC Statute.

As to the attitude towards the activity of the Court on particular cases, the fact that three African States (Central African Republic, Democratic Republic of the Congo,

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<sup>27</sup>AMICC, *Chronology of US-Actions Related to the International Criminal Court*, 04/03/2011, [www.amicc.org/docs/US%20Chronology.pdf](http://www.amicc.org/docs/US%20Chronology.pdf), last visited 31/03/2011.

<sup>28</sup>SC Res 1970 (2011), 26/02/2011, § 6, and Sc Res 1593 (2005), § 6.



Uganda) referred their situations themselves to the ICC, can be considered a signal in the opposite direction.

In other cases, however, the opposition to the Court from non-Western states has become open.

For instance, the decision of the ICC to incriminate Sudan's President Al-Bashir provoked in-bulk reactions by the Arab League and the African Union, whose leaders refused to accept the decision of the Court and declared that they would not cooperate with the Court by arresting or extraditing Al-Bashir.<sup>29</sup> At an African Union meeting the Sudanese foreign minister declared: "We think that Africa is now one front against the ICC... Most Africans believe it is a court that has been set up against Africa and the third world".<sup>30</sup> Many African Member States of the ICC, moreover, considered a mass withdrawal from the Court as a consequence of the Court's indictment of Al-Bashir.<sup>31</sup>

The ICC hegemonic attempt seems consequently not to have reached its goal so far.

Will the revolutions in North Africa and the Middle East changes as to the non-Western attitude towards the ICC? The first repercussions are already visible: one of the first undertakings of the new Tunisian government was to ratify the ICC statute.

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<sup>29</sup>*Regional rifts stymie Arab summit*, BBC News, 30/3/2009, [http://news.bbc.co.uk/2/hi/middle\\_east/7971255.stm](http://news.bbc.co.uk/2/hi/middle_east/7971255.stm), last visited 07/05/2009 and *Appeal over Al Bashir Genocide Charges*, Al Jazeera English, 08/07/2009, <http://english.aljazeera.net/news/africa>, last visited 20/07/2009.

<sup>30</sup> *AU Criticised over Bashir Decision*, Al Jazeera English, 04/07/2009, <http://english.aljazeera.net/news/africa>, last visited 20/07/2009.

<sup>31</sup>*African ICC Members Mull Withdrawal Over Bashir Indictment*, Voice of America, <http://www.voanews.com/english/news/a-13-2009-06-08-voa30-68788472.html>, 08/06/2008, last visited 29/03/2011.