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Book Review

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BOOK REVIEWS

KAMARI MAXINE CLARKE, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press 2009)

Over the past two decades, the response to violence in sub-Saharan Africa has been to hold the perpetrators accountable in international or internationalized tribunals. Indicative of this phenomenon is that all four of the situations that the Office of the Prosecutor of the International Criminal Court (ICC) is currently investigating involve armed conflict situations in states in sub-Saharan Africa. Moreover, the ICC Prosecutor's recent application to the ICC to initiate an investigation into a fifth situation concerns crimes committed in the course of post-election unrest in Kenya. The overwhelming attention that the ICC has given to situations in sub-Saharan Africa makes Kamari Maxine Clarke's book *Fictions of Justice*¹ a timely exposé on why Africa has seemingly become the experimental ground for the new system of international justice and what difficulties lie in the attempt to achieve legal pluralism on the continent.

In *Fictions of Justice*, Clarke challenges conventionally accepted Western notions of the victim, perpetrator, and appropriate justice mechanisms for sub-Saharan Africa. Part I of Clarke's book uses case studies from the International Criminal Court's case against Thomas Lubanga Dyilo and traditional justice practices in Northern Uganda to illustrate an example of and challenge to liberalist notions of justice. Part II uses several case studies from the Islamic Sharia penal system in Nigeria to illustrate that strict Islamic legal norms have re-emerged that do not neatly fit the international criminal law mold. Clarke theorizes that international jurists, NGOs, and donors have worked together to construct specific concepts of the African victim and perpetrator that further the ICC's command responsibility-centered approach to justice and hinder legal pluralism in Islamic societies.

Clarke suggests that these international actors can more easily justify their involvement in the affairs of African states if their efforts are in the name of universalism and directed at punishing "barbaric Muslims" in Nigeria or warlords in the Democratic Republic of Congo (DRC) who force "child soldiers" to commit heinous crimes. Clarke's theory points out the inability or unwillingness of those who champion the international legal and human rights regime to address the root causes and dynamics of violence in sub-Saharan Africa. Among the issues undergirding the violence are: the reasons, apart from abduction, why children become involved in conflicts; the way that access to resources and spheres of political power often initiate or fuel armed conflicts on the continent; and the legal and moral obligation felt by many Muslims to maintain the integrity of Islam.

By simplifying the perpetrator of "African violence" to an adult rebel commander or radical Islam as a whole, the international human rights regime can more easily reinforce its own premise that Africans are helpless to mete out justice themselves. Thus aptly titled, *Fictions of Justice* highlights the process through which the institutions and NGOs that have mobilized in the justice-making process attempt to compartmentalize and manage "African violence" on behalf of African states.

At first glance, Clarke's theory appears flawed because the ICC Prosecutor's cases concerning the situations in northern Uganda, the DRC, and the Central African Republic came about because the states themselves referred the situations to the ICC Prosecutor for investigation. However, Clarke carefully explains how the global NGO movement creates epistemic communities of local civil society actors who proliferate liberalist human rights language and advocate for international criminal justice.

By utilizing case studies from Uganda and Nigeria, *Fictions of Justice* shrewdly illustrates the danger of having those who are removed from the affected community monopolize justice processes that do not take into account the affected commu-

nity's own conceptions of justice. In the Acholi sub-region of Northern Uganda, for example, emphasis is placed on restorative justice than on retributive justice. Clarke asserts that traditional justice and clan reconciliation practices in Acholi challenge the international criminal law structure because they give the victim a voice and direct participation as a political being in the justice process. Therefore, proponents of international justice would even be skeptical of traditional justice operating alongside the ICC proceedings. Clarke emphasizes that, by simplifying the African victim to an apolitical figure who is only concerned with basic survival needs and confining victims' participation to that which is done through a representative, the ICC creates the "ghost victim."² The victims' plight and evidence of the crimes themselves become overshadowed by a quest to prove the command responsibility of a single individual.

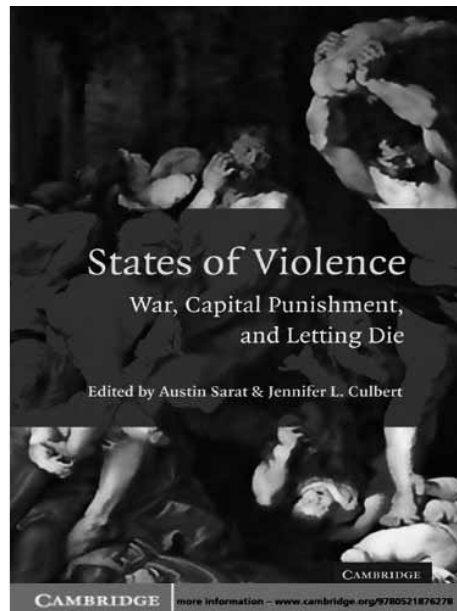
Clarke analyzes the Amina Lawal case in Nigeria to demonstrate how international NGOs galvanized global support for their campaign against what they incorrectly and often prejudicially characterized as the imminent death by stoning of a woman in a barbaric and ancient Islamic law system in Nigeria. Considering that Western audiences view stoning through Judeo-Christian biblical imagery, the Amina Lawal case study vividly illustrates how international NGOs have the potential to hyperbolize injustice in Africa. In other words, they can further their own advocacy agendas by feeding into pre-existing ideas about justice and misconceptions of non-Western, non-adversarial proceedings.

Fictions of Justice poses relevant questions about who determines that a certain type of violence is "just" while others deserve punishment. Her criticism is not aimed merely at international actors, but also at domestic actors who use religion or appeals to traditional justice to oppose liberalist or international influence. Although Clarke adopts Nigerian human rights lawyer Hauwa Ibrahim's position that legal reform is needed in both the Islamic and secular spheres in Nigeria, Clarke fails to detail exactly how those reforms would

take shape. Particularly when reformers would be working with the same international institutions that have dictated the “justice” vernacular up to this point, why would donors not also dictate the education of judges, court officials, and police officers, or advocate a Westernized reform of the Sharia Penal Code?

As donor funding moves increasingly from directly supporting states to funding African NGOs, *Fictions of Justice* calls for domestic and international actors to look beyond merely “sensitizing” local communities to support justice mechanisms that assign criminal responsibility based on liberalist human rights notions, and instead empower local populations to participate in the political processes that shape international criminal legal institutions and non-secular legal institutions.

Eleanor Thompson, a J.D. candidate at the Washington College of Law, reviewed *Fictions of Justice for the Human Rights Brief*. Prior to law school, Thompson worked with war-affected communities in northern Uganda and with the Coalition for the International Criminal Court on international justice campaigns in sub-Saharan Africa.



**STATES OF VIOLENCE: WAR, CAPITAL PUNISHMENT, AND LETTING DIE
(AUSTIN SARAT & JENNIFER L. CULBERT EDS., CAMBRIDGE UNIVERSITY PRESS 2009)**

In *States of Violence: War, Capital Punishment, and Letting Die*,³ Austin Sarat and Jennifer L. Culbert present scholarship on three areas of state violence: war, capital punishment, and the act of letting die. Their exploration rests on a fundamental philosophical analysis of the functioning and purpose of the state's use or threat of violence. Sarat and Culbert's thesis is that, because the state is by necessity inherently violent, its violent acts may not be so easily challenged as many critics suspect. Put another way, a state must threaten its citizens with actual or implied force in order to exist. Because the state is by nature violent, determining when it has abused its license is often more complicated than simply identifying violence.

To do this, Sarat and Culbert establish violence as inherent to the existence of the state through a deeply philosophical discussion of social contract theory. They rely most notably on Thomas Hobbes to explain the state's need to keep “all in awe.”⁴ In *The Leviathan*, Hobbes contrasts the “state of nature” — complete freedom and condition of war — with the creation of the state, requiring individuals to sacrifice certain freedoms in the name of greater security. The source of that security is the overwhelming power of the state to destroy any who challenge its rules. Thus, Sarat and Culbert conclude that violence

is “intimately connected with ideas of sovereignty.”⁵

By bringing together essays on the diverse forms of state violence, Sarat and Culbert complicate the concept of state violence and include within it actions that appear justified or even nonviolent. From the Iraq War to capital punishment and the abrogation of indigenous rights, each of the eleven essays in *States of Violence* presents an example of state violence connected with seemingly non-violent state action. The essays then explore how the state's violence is couched in nonviolent action or justified as the prevention of greater violence: the Iraq War was billed as a “pre-emptive strike” in the name of defense; capital punishment is justified as crime prevention; and the destruction of indigenous identity is often the result of treaties alleging to create indigenous rights.

While each of the essays carefully presents the acts of violence and the victims themselves as textured and nuanced, the state is often portrayed as a homogenous, one-dimensional entity with little complexity. This imbalance makes it difficult to apply the concept of the inherently violent state to the real world. Such a philosophical concept may be difficult to use directly as a foundation for any criticism of state violence. Nevertheless, it may still inform the discourse on the proper limits of state violence. It seems likely that this is the project that Sarat and Culbert mean to undertake, because at no point does the book suggest that the inherently violent state should be free from critique.

The essays in *States of Violence* are divided into two sections. The first section, entitled “On the Forms of State Killing,” explores the various ways that state violence manifests itself throughout the world, and the second, “Investigating the Discourse of Death,” looks specifically at capital punishment as a form of state violence. The following synopses highlight several different forms of state violence addressed in the book and provide a glimpse of the implications of Sarat and Culbert's thesis in action.

The first section begins with an essay by Robin Wagner-Pacifici entitled “The Innocuousness of State Lethality in an Age of National Security.” Wagner-Pacifici analyzes “documents of state” and the use of war as a “variation on a theme of lethality” within the context of the U.S. “War

on Terror.”⁶ Through a close examination of the George W. Bush administration’s National Security Strategy of the United States of America for 2002 and 2006, as well as the 2005 National Strategy for Victory in Iraq, Wagner-Pacifici constructs an image of U.S. foreign policy as an offensive strategy disguised as a defensive one. Further, Wagner-Pacifici illustrates how the rhetoric used in these documents is specifically crafted to legitimize the use of force against other nations by describing it as necessary pre-emptive defense action.

In “Due Process and Lethal Confinement,” Colin Dayan parallels the “legal death” of detainees caught outside any clear legal establishment with the absence of due process for suspected gang members in U.S. prisons. Dayan specifically examines the U.S. Supreme Court’s decision in *Hamdan v. Rumsfeld*, the Military Commissions Act of 2006, and the later U.S. Supreme Court decision in *Boumediene v. Bush*. Dylan makes tangible the tension between the Court’s rulings and the efforts of the George W. Bush administration to maintain the detainees at Guantanamo and other detention facilities around the world as stateless and rightless “illegal enemy combatants.” In poignant contrast, Dayan explores the lack of due process for inmates determined to be gang members when they are placed in solitary confinement in Arizona prisons. Both groups, he contends, exist in a world where they have lost their “right to have rights.”⁷

In the first section’s final piece, Mark Antaki and Coel Kirby discuss the destructive effects of the Canadian government’s

recognition of indigenous peoples in “The Lethality of the Canadian State’s (Re) cognition of Indigenous Peoples.” Kirby and Antaki argue that the state’s recognition of an indigenous people as a legally cognizable group is an integral part of the process that destroys them as a separate people. Because Canada’s legal recognition of indigenous people has consistently required their submission to Canadian authority, the very act of gaining legal identity is the first step towards losing indigenous cultural identity. Kirby and Antaki argue this shows that state violence need not be physical in form, but that “[b]y its very sight and speech, the state kills people *as peoples*.”⁸

The second section begins with “Death in the First Person” by Peter Brooks. Brooks’s essay explores author Victor Hugo’s effort to humanize the act of execution by telling it through the eyes of the condemned in *Le Dernier Jour d’un Condamné*. Brooks seeks to demonstrate the importance of narrative in understanding the death penalty. Rather than focusing on the moral or ideological underpinnings of the death penalty, Brooks suggests that something valuable can be gained by looking at the story of the condemned and of execution itself.

In the third essay in this section, “Ethical Exception: Capital Punishment in the Figure of Sovereignty,” Adam Thurschwell seeks to illuminate the distinction between moral and political arguments against capital punishment. He argues that the political-philosophical reasoning for the state’s right to kill its subjects is far more reveal-

ing of the real basis for the state’s authority to take life than the moral-philosophical arguments so often made. In particular, he notes that anti-abolitionists have effectively argued that, because nearly every decision that states make involves some consequence of life or death to its citizens, capital punishment should not be singled out for abolition. Thurschwell does not put forth an argument for or against capital punishment, but rather aims to find the “issues that really matter today in the field of capital punishment”⁹ While not indicating which way this line of reasoning would move the moral-philosophical debate, Thurschwell makes a compelling argument for the incorporation of the political-philosophical line of thought.

Through the varied examples of state violence that it explores, *States of Violence* succeeds in making the point that the relationship of the state to violence is less susceptible to critique than first appearance would suggest. The wide range of essays support the contention that this is not a limited thesis, but is rather applicable to the various forms of state violence. Implicit in this thesis is a challenge to the reader to incorporate the more informed understanding of state violence into continued critique of that violence. Perhaps, with the knowledge that the state is inherently violent, one can more effectively argue for how that violence can be toned and tempered. **HRB**

Evan Wilson, a J.D. candidate at the Washington College of Law, reviewed States of Violence for the Human Rights Brief.

Endnotes: Book Reviews

¹ KAMARI MAXINE CLARKE, *FICCTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* (Cambridge Univ. Press 2009).

² *Id.* at 92.

³ *STATES OF VIOLENCE: WAR, CAPITAL PUNISHMENT, AND LETTING DIE* (Austin Sarat & Jennifer L. Culbert eds., Cambridge Univ. Press 2009).

⁴ *Id.* at 3 (quoting Hobbes’s *The Leviathan*).

⁵ *Id.* at 5.

⁶ *Id.* at 25-50.

⁷ *Id.* at 128.

⁸ *Id.* at 195.

⁹ *Id.* at 294.