

International Justice in Africa - Debate Summary

Lydia Kemunto Bosire
10 March 2010

This debate is organized by [Oxford Transitional Justice Research \(OTJR\)](#), working in partnership with the [International Center for Transitional Justice – Africa](#), and the [Darfur Consortium](#). For PDF documents of the debate please go to www.csls.ox.ac.uk/otjr.php. To participate please follow the [submissions guidelines](#) below and send an 800-1500 word contribution to the debate editor: lydia-kemunto.bosire@politics.ox.ac.uk.

**

This debate aims to gather the ongoing discussions about the limits and possibilities of international justice ahead of the Review Conference of the Rome Statute scheduled for June 2010. The essays in this collection include views from scholars analyzing the clarity of different provisions of the Rome Statute, practitioners interrogating the contribution of prosecutions to stability and its balance with local reconciliation efforts, and activists advocating for more support for transitional justice measures in general and the International Criminal Court (ICC) in particular.

[Professor Larry May](#), a scholar who has [written widely](#) on war crimes, launches the discussion by highlighting fundamental aspects of the Rome Statute that are still in need of clarification. He points out that it remains unclear whether the two elements of war crimes – systematicity and widespreadness – have the same requirement in terms of "state or organizational policy". Responding to the recent request for further information to demonstrate state policy by the judges of the Pre-Trial Chamber (PTC) in the Kenyan case, May suggests that systematicity may need more evidence of state policy more widespreadness. He explains:

It might be that the State policy requirement of crimes against humanity that is associated with widespreadness is considerably easier to meet than that for systematicity. If there is police involvement or the involvement of various politicians, this might be sufficient in and of itself to establish the weak State involvement associated with widespread attacks, whereas such involvement by police or politicians would have to be linked to a specific policy of the State to satisfy the more stringent State involvement associated with systematic attacks. Yet, the Pre-Trial Chamber II Decision seems not to accept the weaker State policy requirement since it appears that evidence supporting this has already been offered by the Prosecutor and acknowledged but rejected as insufficient.

In discussing the issues likely to pre-occupy the PTC judges as they decide how to respond to the Prosecutor's *proprio motu* request in Kenya, [Lionel Nichols](#) adds a different perspective to this discussion on the state policy requirement for war crimes. In his view, the state policy requirement is linked with the identities of alleged perpetrators. This, he suggests, may be why the judges requested from the Prosecutor a list of alleged perpetrators. He also highlights other issues of concern to PTC judges, including admissibility (whether the truth commission and

Oxford Transitional Justice Research Working Paper Series

ongoing discussions about a special tribunal can be seen as constituting complementarity, and whether there is sufficient gravity), and the interests of justice (whether ICC investigations would destabilize the country). Similar to May, he sees the Kenyan case as one that will help illuminate critical sections of the Rome Statute.

[Okechukwu Oko's](#) essay is less concerned with the contribution of ICC cases to the development of international law. Rather, his focus is on the broader contribution of prosecutions – of which the ICC is the most visible form – to what he calls “social equilibrium”. His essay expresses concern about the limits of prosecutions: if root causes of human rights violations include ethnic distrust and economic marginalization of communities, prosecutions do not address these issues. Violence in Africa is “considerably different,” he argues. Violence does not result from “deviant behavior of citizens but from...ethnic distrust...The traditional criminal process fails to address the broad range of ways in which situational cultural pressures exacerbate violence.” He concludes that, with this core difference between Africa and elsewhere, “concerns for accountability offer no license for the international community to arrogate to itself the right to determine what is best for Africa.”

[Comfort Ero](#) disagrees with this “African exceptionalism” that Oko outlines. In a critical analysis of the responses of African leaders to calls for accountability, she criticizes their view that Africa has its “own brand of justice that espouses reconciliation over sanctions or punishment.” This is inaccurate, she argues. “It is ... discriminatory to claim that African victims do not deserve to seek criminal accountability for serious international crimes with standing equal to that of other victims of grave abuse.” Ero further characterizes the relationship between the ICC and African states as “awkward” and one that must be disaggregated rather than presented as monolithic. The overall tension she sees is between the need to prevent future Rwandas and the fact that such preventive measures seem to originate externally to African states. In this context, the upcoming ICC Review Conference provides an opportunity to address these tensions.

[Valentina Torricelli](#) also sees the review conference as an opportunity for Africa to re-engage with the ICC. In her view, suggestions such as giving the African Court of Justice and Human Rights jurisdiction over international crimes would result in a “huge cost to the African Union, distract the African Court from an effective pursuit of its mandate , and duplicate the work of the ICC”. Instead, she urges Africa to rediscover its earlier enthusiasm for the Court and actively support it. She further warns against other efforts to seek alternative avenues to the Rome system:

The Rome Statute is not perfect. It represents a delicate compromise, balancing many unrelated articles and provisions. However, at this early stage in the ICC’s history, any attempt to make substantive changes would be very risky and could destabilize the architecture designed in Rome. We should therefore reject the recent submission by South Africa on behalf of the AU to amend Article 16 of the Rome Statute in order to allow the UN General Assembly to defer cases for one year when the Security Council had failed to take such decision within a specified deadline. Any proposal of this nature

sense must be opposed as it would allow the General Assembly to stand in the way of international justice.

Instead, she suggests, African states should embark on constructive engagements such as using the Review Conference as an opportunity to conduct consultations towards a regional mechanism for extradition and mutual legal assistance for international crimes.

[Emmanuel Saffa Abdulai](#) echoes Torricelli that African states should support the ICC, in the spirit of the Constitutive Act of the African Union. He sees African leaders as having reneged on their promises to combat impunity, and in the case of Sudan, “leaders refer to ‘negotiations’ merely to buy themselves time...they hope the ICC net will be broken, and they will thwart its wide sweep that might catch them when they suppress their own people and govern outside the dictates of the rule of law.” If the strongest opposition of African leaders to the ICC is a thinly veiled opposition to the role of the Security Council in international justice, he urges these states to focus on the Ezulwini Consensus, which called for a more representative expansion of the Security Council. This recommendation that African states focus on Security Council reform starts to touch a problem that will hopefully be addressed in future essays: that the anti-ICC mobilization, to the extent there is one, may be a result of a displaced frustration about the unreformed state of institutions of global governance.¹

Less optimistic about all these international processes is [Andrew Iliff](#), who addresses the tension between international justice and local justice through the exploration of a grassroots reconciliation program in Zimbabwe. In a context where the prosecution of Mugabe and other senior officials responsible for human rights violations may not be possible, what are actors to do: hold out for the promise of a perfect justice, or engage in processes to encourage co-existence? His view supports the latter: “transitional justice advocates should bracket international crimes until more propitious circumstances prevail”. Through describing the work of community initiative called ‘Tree of Life’, he suggests that transitional justice advocates should reorient their focus away from state-led processes to other localized measures, lest opportunities for healing be missed.

These essays constitute the beginning of a vibrant debate over the coming months. This forum will welcome multi-disciplinary perspectives that seek to draw attention to opportunities and challenges in addressing human rights violations in Africa, including contributions that may seek to question whether it is useful at all to single out Africa in this discussion of international justice. We invite you to contribute or comment in accordance to the following guidelines:

Comments

Substantive comments to the debate are invited from readers, and will be reviewed by a moderator before they are posted.

¹ Thanks to Brian Kagoro for this point

Linking to debate

If you want to reproduce these essays elsewhere, please contact the editor. Use of essays from this debate elsewhere **must** be accompanied by the following paragraph –

This essay first appeared in the online debate on [International Justice in Africa](#), organized by [Oxford Transitional Justice Research \(OTJR\)](#) in partnership with the [International Center for Transitional Justice](#) – Africa, and The [Darfur Consortium](#). To join the debate, please visit www.africanarguments.org/ijustice. For PDF documents of the debate please go to www.csls.ox.ac.uk/otjr.php.

Contribution Guidelines

This debate is open to all, and scholars, policy makers, observers and practitioners alike are invited to take part. To contribute, please send your essay of 800-1500 words to the debate editor: lydiah-kemunto.bosire@politics.ox.ac.uk.

Submissions must be accompanied by the following statement, or an equivalent: *I assert that this work is my own and that it infringes no copyrights, patents, or trademarks. I also authorise OTJR Working Papers to post it on the internet.*

Please provide us with your institutional affiliation, address for written correspondence, and email address.

The Working Paper has three basic elements: the paper or article itself, an abstract of the paper including keywords, and a short biography of the author. All three elements must be included in the initial submission.

OTJR Working Paper Style Guide

Any system of citation is acceptable, provided it is rational, unambiguous and consistent. The following are examples of one acceptable form of citations:

Books:

Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd edn. (London: Macmillan, 1995), p. 131.

Subsequent mentions: Bull, *Anarchical Society*, p. 282.

C.E. Vaughan, *Introduction to Jean Jacques Rousseau, A Lasting Peace through the Federation of Europe, and the State of War*, trans. C.E. Vaughan (London: Constable, 1917), p. 7.

Subsequent mentions: Vaughan, *Introduction to Rousseau, A Lasting Peace*, p. 15.

Articles:

Adam Roberts, 'Humanitarian War: Military Intervention and Human Rights', *International Affairs*, vol. 69, no. 3, July 1993, pp. 431–2.

Subsequent mentions: Roberts, 'Humanitarian War', p. 442.

Chapters in books:

Andrew Hurrell, 'Brazil and the International Politics of Amazonian Deforestation', in Andrew Hurrell and Benedict Kingsbury, eds., *The International Politics of the Environment* (Oxford: Clarendon Press, 1992), p. 211.

Subsequent mentions: Hurrell, 'Brazil and the International Politics of Amazonian Deforestation', pp. 219–20.

Full guidelines are available [here](#).

Lydia Kemunto Bosire is a doctoral candidate in Politics in the University of Oxford. She works on Kenya and Uganda, and is a co-Founder of Oxford Transitional Justice Research.