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## Book Reviews

Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics*. Cambridge: Cambridge University Press, 2018. Pp. 392. £26.99. ISBN: 9781108474092.

For much of its 20-year existence, the International Criminal Court (ICC) has focused its investigations and prosecutions almost exclusively on 'Africa'. It is often noted – but bears repeating – that of the 11 situations currently under investigation, 10 are located in Africa.<sup>1</sup> This has prompted much criticism: perhaps most emotively expressed in the statement that the 'the ICC is hunting Africans'.<sup>2</sup> The tense relationship with Africa represents 'one of the most serious challenges for the ICC'.<sup>3</sup> While these criticisms are frequently made, there is still insufficient research into the exact nature of the ICC's practices in, and with, African states. Phil Clark's *Distant Justice: The Impact of the International Criminal Court on African Politics* addresses the structure of the relationship between the ICC and Africa: in particular, the way the Court invokes values of 'complementarity' and 'distance' to guide the way it relates to African states. Clark demonstrates the deeply flawed ways in which the Court interacts with African states, and shows that this has negatively affected the Court, and the local populations in different African polities.

Clark aims to 'assess critically the politics of the ICC in Uganda and the Democratic Republic of Congo (DRC) – and Africa more broadly – focusing on the Court's impact on national politics and the lives of everyday citizens' (at 4). Clark has pursued this project with determination, over a long period of time: his research took place over 11 years, and included 19 field trips to Uganda and the DRC (as well as seven trips to the Hague and interviews conducted in several other countries), and a staggering 653 interviews. Of these interviews, 426 were conducted with 'everyday people', and the lengthy timeframe of his research allowed for follow-up interviews to be conducted with participants, sometimes many years apart (at 8–9). This is what constitutes one of the book's major strengths and forms its key contribution: a hugely significant data set, on which to build arguments. To complement this extensive primary source material, Clark has usefully been able to meld various literatures, particularly transitional justice and international criminal law. For example, he draws extensively on Paul Gready's concepts of distance and 'embeddedness' (at 34);<sup>4</sup> in the international law field, he engages usefully with Darryl Robinson's work on the values and objectives of the ICC (at 23–25)<sup>5</sup> and the contemporary critiques of international

<sup>1</sup> See International Criminal Court (ICC), 'Situations Under Investigation', available at [www.icc-cpi.int/pages/situation.aspx](http://www.icc-cpi.int/pages/situation.aspx) and ICC, 'Cases', available at [www.icc-cpi.int/Pages/cases.aspx](http://www.icc-cpi.int/Pages/cases.aspx).

<sup>2</sup> 'African Union Accuses ICC of "Hunting" Africans', *BBC News* (27 May 2013), available at [www.bbc.co.uk/news/world-africa-22681894](http://www.bbc.co.uk/news/world-africa-22681894). On this point, see Mutua, 'Africans and the ICC: Hypocrisy, Impunity, and Perversion', in K. M. Clarke, A. S. Knottnerus, and E. de Volder (eds), *Africa and the ICC: Perceptions of Justice* (2016) 47, at 47–48.

<sup>3</sup> Clarke, Knottnerus, and de Volder, 'Africa and the ICC: An Introduction', in Clarke, Knottnerus, and de Volder (n 2) 1.

<sup>4</sup> P. Gready, 'Reconceptualising Transitional Justice: Embedded and Distanced Justice', 5(1) *Conflict, Security and Development* (2005) 3.

<sup>5</sup> D. Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win', 28 *Leiden Journal of International Law* (2015) 324

criminal law. This positions Clark as well able to speak to a variety of audiences, making the book of use to different disciplines.

The central concept in the book is that of ‘distance’, which Clark defines as encompassing physical, philosophical, and personal aspects (at 5). First, the ICC, based in The Hague, is physically far removed from the scene of the affected communities, the crime scenes, and the investigations. Secondly, the Court sees itself as a dispenser of ‘neutral and impartial’ justice (at 4), and in this way, it seeks to distance itself from the communities. Finally, the Court’s mostly non-African staff are personally removed from the communities, often working with only very limited understandings of the places they work on. Rather than seeing it as a problem, the Court views this distance as a virtue (at 37). Distance suggests impartiality, neutrality, and professionalism; moreover, it is viewed as an insurance against being implicated in local politics and subject to interference and politicization (at 22). Clark’s analysis complicates this idea by showing precisely how this distance has soured the relationship between the ICC and Africa and how – ironically – it has opened the Court to interference and politicization, as the Court has little understanding of local politics (at 22–23). This has left the Court vulnerable to manipulation by states – for example, the Kabila government in the DRC has ‘effectively instrumentalised the ICC to paint his government as law-abiding despite continuing state atrocities’ (at 85). This type of state manipulation has ultimately even resulted in reduced incentives for peace negotiations, and increased militarization in some areas (at 303).

Alongside ‘distance’, complementarity – the partnership with domestic institutions and actors – is articulated as another virtue of the ICC’s practice. Although complementarity is most often simply understood as enacting the provisions of Article 17 of the Rome Statute,<sup>6</sup> Clark demonstrates that it is better appreciated in four distinct expressions: he sets out legal, political, relational, and developmental aspects of complementarity (at 26–34). The legal aspect determines the admissibility of situations and cases before the Court; here, Clark provides a clear explanation of the Rome Statute framework (at 27). The political understanding of complementarity ‘emphasises deference towards domestic institutions’ (at 28) and ‘respect for national sovereignty’ (at 26), with states being primarily responsible for prosecutions. The relational part of complementarity focuses on the partnerships, relationships, and cooperation between the ICC and other domestic bodies (at 29), which is understood to ‘share the burden’ of cases, with the ICC prosecuting ‘those most responsible’ (at 29–30). Finally, the developmental concept of complementarity emphasizes the ICC as a catalyst for domestic investigations and prosecutions (at 31). Under this conception, the ICC should also be able to support these domestic proceedings. Yet despite these four aspects of complementarity, Clark argues that while the Court tends to describe its work in terms of complementarity, in reality the Court ‘adopts a fundamentally distanced approach to justice’, because it sees ‘itself’ as superior to the domestic realm’ and indeed even actively undermines the domestic sphere (at 17). This is the ‘complacency of complementarity’, whereby the Court is unable to ‘withstand the distancing tendencies’ that are present in the Court (at 17–18).

The book moves from the broad conceptual framework – the ‘twin poles’ of complementarity and distance, and the tense relationship between these ideals, examined in chapters 1 and 2 – to deploy this in the specific case studies of Uganda and the DRC. While there have been other significant examinations of the situation in Uganda, this is the first book-length analysis of the ICC’s operations in the DRC (at 12). Over the course of five chapters, the book examines five main issues: the ICC’s relationship with the two states; the ICC’s relationship with the affected communities; the ICC’s relationship to national courts; the question of amnesties and peace processes; and finally, community-based responses to mass atrocity. In these chapters, there is a great deal

<sup>6</sup> Rome Statute of the International Criminal Court, UN Doc. 32/A/CONF 183/9, 17 July 1998, 37 ILM 999 (‘Rome Statute’).

of detail and information on the two particular case studies. Clark has undertaken an impressive examination of the issues, from the so-called 'self-referrals' of the Uganda and Congo situations – which he shows were in fact led by 'sustained lobbying' on the part of the ICC (at 56–65) – to the ways in which the ICC 'complicates' the work of a variety of community-based responses to violence in parts of Uganda and the DRC (at 233–265). This wealth of information and analysis ensures the book is a necessary reading for anyone with an interest in Uganda and DRC cases.

The book then expands its focus, using the arguments and information from the two case studies, to examine the ICC's broader work across Africa (chapter 8). Clark points out there has been consistency in the ICC's failures throughout its operations in Africa. This chapter is significantly different in method and style from the previous detailed examinations of the two particular case studies. However, it is an important addition because it shows the problems of the ICC are not limited to Uganda and Congo, but rather are structural and endemic. Clark sets out four particular structural problems (at 298–299) and their effects (at 299–300). The structural problems include the fact that the Court often investigates and prosecutes cases in the context of recent or on-going conflict; that resourcing issues have shaped all the Court's African interventions; that as a consequence of these resourcing issues, the Court has had to rely heavily on states; and finally, the Court has 'intervened in – and exacerbated – situations of immense political volatility' (at 299). The effects of these problems are that, first, the Court is unable to deal with cases involving 'sitting members of government because of the Court's fundamental reliance on state cooperation' (at 299); and, second, the quality of evidence in the cases has frequently been called into question. Clark reiterates that in response to these issues, throughout Africa, the ICC has moved from its stated objectives of complementarity, to enacting a more 'distant' position.

In the final chapter, the book advances more general theoretical claims about what might constitute appropriate responses to mass atrocity crimes. Here, Clark makes the normative call to return complementarity 'to the heart of the ICC' (at 21), in order for it to be 'a more effective intervention in African conflict zones, with greater benefits to African polities' (at 305). He advances three particular practical suggestions for how to do this. First, the ICC must 'return' to the original idea of the Court being 'a subsidiary institution that only engages in the most exceptional of circumstances' (at 312); second, the ICC should change its personnel profile and 'hire nationals from the states where it is considering intervening' (at 315); and third, the ICC should decentralize its operations from The Hague and open regional offices, following the recent model by Amnesty International (at 316).<sup>7</sup>

As Clark rightly points out, the idea that 'distant justice' is the ideal form of justice is not restricted to the ICC. The ad hoc tribunals and special courts have often been criticized for their 'distance' from the affected communities,<sup>8</sup> although there has also been the suggestion that this

<sup>7</sup> It is worth noting (which unfortunately Clark does not) that this move by Amnesty International has been accompanied by profound problems. The KonTerra report on Staff Wellbeing at Amnesty International – following the suicides of two staff members, Gaëtan Mootoo and Rosalind McGregor – states that 'as Amnesty has undergone the restructuring process associated with the Global Transition Programme (GTP) in recent years, staff have experienced organisational change and turmoil and those living regionally are now more often finding themselves directly impacted by civil unrest and conflict'. See The KonTerra Group, 'Amnesty International Staff Wellbeing Review' (January 2019), at 12, available at [www.amnesty.org/en/documents/org60/9763/2019/en/](http://www.amnesty.org/en/documents/org60/9763/2019/en/). The report found that 'there was a widespread and deeply-held perception . . . that staff wellbeing was vastly disregarded and neglected during the GTP process' (*ibid.*, at 13). Any such move by the ICC – as advocated by Clark – should engage with the issues faced by Amnesty International and place staff wellbeing as a priority during the process.

<sup>8</sup> For a particularly robust criticism of the International Criminal Tribunal for the former Yugoslavia (ICTY), see Verovšek 'Against International Criminal Tribunals: Reconciling the Global Justice Norm with Local Agency', 22 *Critical Review of International Social and Political Philosophy* (2019) 703. Even in 1999 the President of the ICTY, Judge Gabrielle Kirk McDonald, queried: 'The Tribunal is founded

is a benefit and a demonstration of their impartiality.<sup>9</sup> Indeed, these conceptions of justice being something ‘higher’ than the particular affected community, that can be dispensed by judges embodying ‘the international community as a whole’, is fundamental to the entire ethos of international criminal law. Clark has usefully shown, at length in chapter 2, how these ideas are linked to liberalism and liberal cosmopolitanism. In particular, liberalism values ‘autonomy, self-determination, toleration regarding beliefs and practices that one finds objectionable and the fostering of pluralism’ (at 47), and therefore lends itself to the idea of respect for national sovereignty but the possibility of external intervention – in other words, to complementarity. Yet liberalism also values ‘universalism, legalism and a belief in justice delivered according to standard rules and procedures’, all of which ‘underpin the discourse and practice of distance’ (at 48–49). In this way, distance and complementarity are not just particular to the ICC – but as Clark argues, at the ICC the ‘distance’ is perhaps magnified as a structural response to the ICC’s itinerant nature and global focus (at 48–49).

Throughout the book, Clark demonstrates the flaws of the ICC’s approach in Africa, and the implications of these flaws. However, more than this, Clark lays bare the arrogance of the Court. He argues that although the ICC describes its work with reference to the principle of complementarity and as a partner to domestic actors and institutions, in reality it views itself ‘as superior to the domestic realm’, and actively works to undermine the domestic sphere (at 17). He demonstrates how the court practices complementarity in a way that positions itself as ‘the superior institution’ with the power to determine the division of labour between itself and domestic jurisdictions (at 30). Integral to the way the court operates, and the way it uses distance, is the Court’s ‘view of its own innate legal, technical and political superiority to the domestic terrain’ (at 37). The relationships between the ICC and domestic partners are not genuine and instead are competitive (see chapter 5); the ICC sees itself as more capable and positions itself as more powerful. The repeated use of the term ‘superiority’ in Clark’s language is revealing: the Court considers itself supreme over an inferior ‘other’.

Is this arrogance and belief in its own superiority in part due to the particular countries so far addressed? To what degree is it based in racist ideas of African capabilities, justice systems, and political systems? If the ICC is positioning itself as distant because it believes – in Clark’s argument – it needs to be so in order to ‘avoid interference’, to what degree is this based on a view that the legal and political order of the states are corrupt or malfunctioning? Is there a prioritization of liberal Western criminal justice being preferable to other forms of justice? In chapter 7, Clark makes the argument that local, community-level justice processes in affected countries ‘represent fundamentally different understandings of the causes of mass conflict and necessary responses . . . from those espoused by the ICC’ (at 233), which suggests that the ICC does prioritize particular – Western – approaches to justice; but what is the explanation for this?

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on fine principles but in practice how can it actually render the justice that victims want and deserve? We are in The Hague, the affected communities are in the former Yugoslavia. The process must remain relevant to the people affected by the conflict.’ See Kirk McDonald, ‘The International Criminal Tribunal for the Former Yugoslavia: Making a Difference or Making Excuses?’, Speech given at the Council on Foreign Relations in New York (12 May 1999), available at [www.icty.org/en/press/international-criminal-tribunal-former-yugoslavia-making-difference-or-making-excuses](http://www.icty.org/en/press/international-criminal-tribunal-former-yugoslavia-making-difference-or-making-excuses).

<sup>9</sup> For example, see U.N. Secretary General, Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council, Annex: Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935, UN Doc. S/1994/1125 (1994), which states that ‘for the purposes of independence, objectivity and impartiality, there are advantages in having trials conducted by an international criminal tribunal in a place such as The Hague for the very reason that there would be a certain measure of distance from the venue of the trial and the places where severe atrocities have been perpetrated’ (*ibid.*, at 137).

Clark does argue that the ICC has preferred ‘to imagine Africa as a largely inert space in which it will easily wield its influence, rather than an arena of vibrancy and contestation, much of which is fundamentally opposed to external intervention’ (at 7). Yet the question again arises: what is the cause of this view of Africa as inert?

It would have been useful to have a framework to address the cause of this ‘superiority complex’ and the beliefs that the ICC appears to hold about Africa. In international law literature, a productive intervention would have come from Third World Approaches to International Law (TWAAIL), which increasingly is turning its attention to international criminal law.<sup>10</sup> TWAAIL literature is only mentioned fleetingly in Clark’s book, and in the last few pages (at 307), but could have been used to much more effect if selected as a preliminary frame. Clark’s analysis of liberalism and liberal cosmopolitanism (in chapter 2) perhaps goes some way to address this, but this analysis would have been further bolstered by literature that explicitly addresses race and colonialism.

Clark does raise the issue of colonialism in order to argue that simply seeing the ICC as neo-colonialist is too simplistic. This approach assumes the passivity of African states in the global system and cannot explain the many dynamics of these relationships. Instead, he prefers to use Bayart’s theory of ‘extraversion’, namely that states are able to be active participants in institutions and even use them to their own political ends (at 52, 86). Adopting extraversion has the important advantage of recognizing the agency of African states, which is both consistent with the book’s overall position and argument, and also actively challenges assumptions of African states powerlessness (assumptions which are themselves possibly racist, although this is not something Clark explicitly raises). It is right to complicate the criticism of the Court as neo-colonial, and yet we should not ignore colonialism’s influence – both on the states, and on the ICC itself. In what ways have colonialism and race affected how the ICC views and frames its own operations, particularly in terms of distance and complementarity? If this book aims – as it says it does – to highlight the fact that the ICC is an active ‘generator of its own norms, values, and expectations, against which it is reasonable to evaluate it’ (at 24), then it may have been fruitful to examine not only how colonialism and race frame *states’* actions in relation to the ICC (which explains the use of the ‘extraversion theory’), but also the ICC’s creation of its role and location in relation to these states. As it stands, for this reader, the role of race and racism is a silent question hanging over the book – hinted at, but not fully acknowledged – and it is disappointing that it is not addressed in a more robust way.

*Distant Justice* explains, in detail and with clarity, many of the issues that have increasingly concerned international criminal lawyers (in academia and practice). It is both impassioned and reflective, and its contentions are well supported. Clark has offered a hugely useful intervention in the field. If international criminal justice – more broadly than the ICC – is to be as useful as possible, those individuals associated with it would do well to ruminate on the points made in this book.

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<sup>10</sup> See Anghie and Chimni, ‘Third World Approaches to International Law and Individual Responsibility’, 2 *Chinese Journal of International Law* (2003) 77; Reynolds and Xavier, ‘“The Dark Corners of the World”: TWAAIL and International Criminal Justice’, 14 *Journal of International Criminal Justice* (2016) 959; Burgis-Kasthala, ‘Scholarship as Dialogue? TWAAIL and the Politics of Methodology’, 14 *Journal of International Criminal Justice* (2016) 921. See, generally, *Symposium: Third World Approaches to International Criminal Law*, 14 *Journal of International Criminal Justice* (2016) 915; Chinedu Okafor and Ngwaba, ‘The International Criminal Court as a “Transitional Justice” Mechanism in Africa: Some Critical Reflections’, 9 *International Journal of Transitional Justice* (2015) 90.