
Near, Far, Wherever You Are: Distance and Proximity in International Criminal Law

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Christian De Vos. **Complementarity, Catalysts, Compliance: The International Criminal Court in Uganda, Kenya and the Democratic Republic of Congo.** New York: Cambridge University Press, 2020. Pp. xxxvi + 339. \$125.00. ISBN: 9781108472487.

Phil Clark. **Distant Justice: The Impact of the International Criminal Court on African Politics.** New York: Cambridge University Press, 2018. Pp. xiv + 380. \$34.99. ISBN: 9781108463379.

Kamari M. Clarke. **Affective Justice: The International Criminal Court and the Pan-Africanist Pushback.** Durham, NC: Duke University Press. Pp. 384. \$29.95. ISBN: 9781478006701.

Abstract

As the International Criminal Court (ICC) nears its 20th year in operation, many international criminal law practitioners and scholars are asking: where is the ICC today in relation to its original promise to end impunity for the world's worst crimes? Baked into that question are themes of the court's distance and proximity, temporal and spatial, professional and existential. Where is the ICC located along the historic 'arc of justice' and how might we push

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it further along that path? How does the prosecutor's refrain that the ICC is a 'court of law' that must keep away from political entanglements affect its interaction with domestic actors? What do practitioners and scholars mean when they encourage the ICC to 'get closer' to atrocity situations, whether through better communication, cooperation or in situ proceedings? These questions prompt reflection on the ICC's distance from, and proximity to, the atrocity space through an analysis of three recent monographs on the ICC and Africa. Reviewing these contributions in law, political science and anthropology, this review essay gauges the multiple planes of distance and proximity on which international criminal law advocates operate. These planes turn out to play an important part in ordering global justice, particularly the spaces and subjects of atrocities as sites of anti-impunity work.

1 Introduction

Where is the International Criminal Court (ICC)? For most international criminal law (ICL) commentators today, this is an existential, rather than geographical, question built on years of frustration and dashed expectations. Many ICL practitioners ask: where is the ICC today in relation to its original promise to end impunity for the world's worst crimes?¹ Those expressing concern over the Court's alleged African bias would ask: where is the Court focusing its energies, and is this focus misplaced?² 'Pragmatists' are asking: in which direction must the Court go to regain its confidence and enhance its credibility?³ These questions continue unabated since growing disenchantment with the institution after the *Al Bashir* saga⁴ and with the threat of authoritarian obstructionism. Scholars from a range of disciplines have also not shied away from challenging, reframing and answering these perennial questions.

Many of these 'where' questions are temporal in nature: where is the ICC located along the historic arc of justice, and how might we push it further along that path? Less commonly, these questions point to the ICC's location in other ways: its conceptual, methodological, imaginative and geographical positioning *vis-à-vis* its global

¹ This question has been posed by practitioners, activists and scholars alike. See W. Wakabi, 'The International Criminal Court Gets a Performance Review', *Open Society Justice Initiative* (1 June 2020), available at www.justiceinitiative.org/voices/international-criminal-court-gets-performance-review. For two different scholarly approaches to assessing the International Criminal Court's (ICC) performance, see Jo, Radtke and Simmons, 'Assessing the International Criminal Court', in A. Follesdal *et al.* (eds), *The Performance of International Courts and Tribunals* (2018) 193; Guilfoyle, 'Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis', 20 *Melbourne Journal of International Law* (2019) 401.

² For two different and recent takes on the 'politics' of international criminal justice, see O. Ba, *States of Justice: The Politics of the International Criminal Court* (2020); C. Schwöbel-Patel, *Marketing Global Justice* (2021); see also K.M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009); C. Schwöbel (ed.), *Critical Approaches to International Criminal Law* (2014).

³ ICC Forum Symposium on Performance, July 2017, available at <https://iccforum.com/performance>; Z. Hussein *et al.*, 'The International Criminal Court Needs Fixing', *Atlantic Council* (24 April 2019), available at www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/.

⁴ ICC, *Prosecutor v. Omar Hassan Ahmad AL-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF.

'stakeholders'. How does the prosecutor's refrain that the ICC is a court of law that must keep away from political entanglements affect its interaction with domestic actors? What are the effects of experts' objectivity claims among residents of atrocity spaces who can hardly react so dispassionately to their own suffering? What do practitioners and scholars mean when they encourage the ICC to 'get closer' to such groups, whether through better communication, cooperation or *in situ* proceedings? Each of these questions concern the ICC's distance from, and proximity to, the atrocity space and, to a greater or lesser degree, shape the court's work and its ideas of global justice.

The three books reviewed herein confront the distance/proximity dyad by considering the ICC's relationship to the African continent. They broach that dyad, however, from radically different standpoints and with very different projects in mind. In *Complementarity, Catalysts, Compliance* by Christian De Vos and *Distant Justice* by Phil Clark, the authors take as their primary foil the ICC's 'legalism', a concept they regard as distancing the Court from situation countries, with many damaging effects on accountability efforts. In *Affective Justice* by Kamari Clarke, 'sentimental legalism' is the launch pad for a discussion of the deeply engrained affects and emotions constituting global justice. Reading these three accounts together – by a lawyer, a political scientist and an anthropologist – unearths many of the distancing moves that constitute the ICL field but that often remain hidden in expert analyses. The stakes of the ICC's manoeuvres are the risks associated with all attempts at being distant or proximate: not only miscommunication but also isolation, speculation, invention and re-presentation when perceived as being too far, and meddling, imposition and claustrophobia when perceived as being too close.⁵ Such risks go to many of the recent concerns posed about the ICC's work in (and on) Africa and Africans.⁶

The first part of the review essay considers the three contributions along this distance/proximity dyad, which manifests variously as legalism, complementarity and the work of embodied affects. In the second half, I bring the three books into conversation as points on the near/far spectrum, which converge around the themes of spatio-temporal, methodological and imaginative distance. Through that exploration, I gauge the multiple planes of distance and proximity that ICL practitioners and scholars operate and operate on. These planes turn out to play an important part in ordering global justice, particularly the atrocity spaces and subjects that are the focus of anti-impunity work.

⁵ The images of distance and proximity deployed throughout this review essay draw on M. Foucault, *Of Other Spaces: Utopias and Heterotopias* (1967), and analogically with 'efficiency' and 'equality' in D. Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities* (1985); see also Kendall and Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2013) 235. It has not escaped the author's attention that this review essay has taken the themes of proximity and distance as its foil during the COVID-19 pandemic, characterized by 'social distancing', quarantine and loneliness. It could therefore be read as the author's own attempt to grapple with the curiosities and difficulties of being both too near to and too far from everything in 2020, whether as a physical body or as an institutional construct.

⁶ E.g. Gevers, 'Africa and International Criminal Law', in K. Heller *et al.* (eds), *The Oxford Handbook of International Criminal Law* (forthcoming).

2 Anti-Legalism: Complementarity as Process

Legalism, as Judith Shklar has defined it, is ‘the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules’.⁷ For Shklar, legalism problematically tends to see politics as both ‘something apart from law’ and ‘inferior to law’. Fast forward half a century, and it is a pathology from which the ICC has suffered, particularly in failing to take account of the political realities in which it operates both globally and domestically. As will be discussed later, legalism has implications for the ICC’s location in the professional imaginary. But the first two books by De Vos and Clark make several critical interventions on legalism. Moreover, much can be gleaned from what is left out of their accounts in terms of theory, politics and history, and these limitations I pose as entryway for the subsequent discussion of distance.

De Vos examines legalism as part of the ICC’s approach to complementarity, the principle that has grown into a foundational pillar of the Rome Statute system. In early commentary, complementarity’s scope was considered coterminous with Article 17 of the Rome Statute.⁸ That provision states that a case will be inadmissible before the Court where it ‘is being investigated or prosecuted by a State which has jurisdiction over it’.⁹ The ICC would not take on a case unless ‘the State is unwilling or unable genuinely to carry out the investigation or prosecution’. The scope of ‘unwilling or unable’ continues to preoccupy ICL commentators.¹⁰ Following developments in that debate, though, De Vos articulates complementarity not only as a legal rule but also as a policy tool. In this way, complementarity provides a platform for the ICC to shape and ultimately catalyse ‘progressive change in post-conflict countries’ legal frameworks’ (at 1).¹¹ It is the Court’s jurisprudence, institutional implementation and domestic effects of that catalysing potential that De Vos examines in his study.

The Court’s admissibility rulings begin to evince the damaging effects of legalism. Through their admissibility jurisprudence, ICC judges have opted for a ‘strict’ approach by converging around the need to determine whether domestic proceedings pertain to ‘both the person and the conduct which is the subject of the case before the court’.¹² Domestic proceedings must therefore be assessed in relation to the prospective ICC case, which has produced standards of admissibility essentially requiring domestic proceedings to mirror the Office of the Prosecutor’s (OTP) case. De Vos is concerned about the limited leeway that these standards leave for domestic actors as

⁷ J. Shklar, *Legalism: Law, Morals, and Political Trials* (1964), at 1.

⁸ Holmes, ‘The Principle of Complementarity’, in R. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 41.

⁹ Rome Statute of the International Criminal Court 1998, 2187 UNTS 38544, Art. 17(1)(a).

¹⁰ See, e.g., Labuda, ‘The Flipside of Complementarity: Double Jeopardy at the International Criminal Court’, 17 *Journal of International Criminal Justice (JICJ)* (2019) 369.

¹¹ Building on Burke-White, ‘Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo’, 18 *Leiden Journal of International Law* (2005) 557; S. Nouwen, *Complementarity in the Line of Fire* (2013).

¹² Decision on the Prosecutor’s Application for a Warrant of Arrest, *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Pre-Trial Chamber I, 24 February 2006, para. 31.

well as the additional procedural and evidentiary obstacles that the Court has placed on states attempting to prove admissibility. Such obstacles, as symptoms of legalism, create competition and prevent the Court from taking proper heed of domestic accountability efforts.

Against legalism, De Vos advocates an approach that ‘underscores the primacy of process, and of political context’ (at 12). He seeks to reveal the impossibility of transcending domestic politics for the simple reason that the Court’s interventions are ‘constituted by them’ (at 12). This perspective prompts three reconfigurations of complementarity. First, it draws attention to complementarity’s ‘polysemous ... meanings ... and dimensions’ (at 67). Whether as a legal rule, policy tool or other formulation, complementarity is ‘an argumentative practice’ (at 67) that allows different stakeholders ‘to summon different versions of complementarity, for different purposes’ (at 101), as when political leaders ‘performed’ complementarity during the implementation campaigns in Uganda and Kenya. Second, De Vos points to complementarity’s ‘social production’ by anti-impunity actors since 2002 (at 58). Not only the court but also influential and well-financed ‘norm entrepreneurs’ such as Human Rights Watch have turned complementarity into an instrument for catalysing domestic reform. Norm entrepreneurs have shifted complementarity from its original design as protector of sovereignty into ‘a means of extending the ICC’s authority’ (at 57). They have also been pivotal to implementation campaigns, exerting pressure and offering Rome Statute model laws as a ‘global script’ (at 150) from which implementing states need only read. Norm entrepreneurship illustrates just how much complementarity work takes place in the court’s shadow.

Third, De Vos interprets complementarity as embodying a Hohfeldian ‘duty-based approach’, which not only grants states the primary right to prosecute atrocity crimes but also imposes duties of cooperation, implementation and, indeed, prosecution. This approach manifests in two strategies – coercion and cooperation – and the interaction between these strategies drives much of De Vos’ book. Coercion is the OTP’s power to threaten intervention in atrocity situations unless some action that it deems appropriate is taken domestically. Cooperation re-characterizes complementarity as a law and economics-type strategy, ‘allow[ing] for the most efficient sharing of competencies between the national and international level’ (at 45). The ICC has deployed both strategies at various times, and the OTP’s preliminary examinations, among other activities, exemplify the distinction. Prosecutor Luis Moreno Ocampo attempted to leverage the OTP’s coercive power in Kenya in a bid to establish a domestic criminal tribunal for post-election violence. That strategy failed, though, because the OTP failed to appreciate a local preference for broader domestic proceedings over ‘big fish’ ICC prosecutions (at 124). The length of the preliminary examination may also have prolonged the Kenyan government’s ‘masquerade’ of being committed to criminal prosecution (at 125). These problems precipitated a shift towards cooperation through domestic influence and more resources for country visits. The fate of these different strategies reveals the need to deploy both carrot and stick at various times.

For De Vos, complementarity’s principal effect is to create an ‘enabling environment in which broader anti-impunity advocacy [can] flourish’ (at 185). Non-governmental

organizations (NGOs), rather than the ICC, therefore appear as the entities doing much of the anti-impunity work before, during and after ICC intervention. Indeed, between NGOs and the ICC, which one is operating in whose shadow is often unclear. Even where the ICC has been the prime mover, its power has been limited, as when promoting a Special Tribunal for Kenya. Through this subtle reading, De Vos succeeds in muddying the waters of how complementarity works and for whom. He also exposes uncomfortable truths about the anti-impunity movement's proximity to repressive state power. Such horse trading is often described as a necessary evil by court officials, even while they claim to be acting under their legal mandate. Yet how far can this denial be tolerated when the success of complementarity not only permits, but also requires, state fragility? Often, NGOs frame the conditions of a hollowed out and absent state in the eastern Democratic Republic of Congo (DRC) as the 'opportunity structures' (at 245) that allow military courts to proliferate. State fragility is deemed a necessary component of local anti-impunity efforts, which in turn allows NGOs to commandeer essential state functions. De Vos' process lens brings these ambiguities of complementarity into focus.

3 Anti-Legalism: Complementarity as Anti-Distance

Reading Phil Clark's *Distant Justice* alongside De Vos reveals many of the same underlying concerns, particularly in relation to the enactment of complementarity, the contested nature of ICC intervention and legalism. Clark is particularly concerned with legalism as the Court's imagination of itself, and this ties in with his notion of distance.¹³ In summarizing the book, I focus primarily on Clark's concept of distance and the damage that it does to the Court.

The key pillars of Clark's book are complementarity and distance. Clark approaches complementarity as a political, relational and developmental discourse. It reinforces respect for national sovereignty, invokes partnership and cooperation between the ICC and states and assists domestic reform and accountability efforts. Opposing complementarity is the attitude of distance. Distance is less about geographical remoteness than a 'political and philosophical separateness' that the Court retains when interacting with states (at 34). Political distance reflects the court's image of itself as operating impartially above the messy fray of domestic politics. Philosophical distance reflects the Court's detachment from the space that it is investigating in keeping with its commitment to objectivity and fairness. Clark aims to show that the ICC, despite its distance, still occupies a "view from somewhere" and an often highly contested, contradictory and counter-productive one at that' (at 305).

Based on these two approaches, Clark reveals how the ICC's distant justice has damaged the anti-impunity project. For example, in its relations with states, the ICC's failure to appreciate its own possible manipulation by domestic actors has left the court open to instrumentalization. The Court's methodological distance – relying on

¹³ Clark invokes a 'legalist conception of trial-based justice with deep roots in a Western individualist Enlightenment tradition' (at xx).

large population samples – is also the reason for its unresponsiveness to local settings and needs. In contrast, Clark reveals that ‘most everyday Ugandan and Congolese interviewees express either ignorance or criticism of the ICC’ (at 124). Distance prevents the Court from recognizing the diverse models of accountability preferred by local communities compared to the dominant model of institutionalized trials that the Court is offering. Often, as in the case of the Ugandan amnesties, the Court simply defies local preferences despite its reliance on statistics to evince approval.

Despite these arguments, though, Clark’s major contribution is to reveal the damage caused by the ICC’s distanced approach, both to its reputation and to the situations it encounters. To be sure, some of the Court’s obstacles, like non-cooperation, are just the entry costs of operating in a world of *realpolitik*. And, yet, Clark’s evaluation of distance at multiple levels reads as a litany of failings by a still-infant institution. These are worth repeating, both to give a sense of the magnitude of Clark’s study and of what is at stake when the ICC comes knocking: the Court has entrenched executive power, contributed to the militarization of African governments, facilitated the breakdown of peace talks, helped to legalize violence, complicated community responses to injustice, suppressed new legalities, competed with and usurped domestic cases, undermined judicial reforms and ignored domestic choices and needs. The charges mount. But Clark’s conclusions are clear: ‘[T]he ICC has generally failed to deliver justice and associated goods in ways that resonate with local populations’ experiences of conflict, conceptions of justice and expressed needs after violence’ (at 102).

What we are expected to make of all this is presaged by the book’s title. It is precisely the desire to stay at arm’s length that has made the Court susceptible to governmental capture. For example, the Court’s ‘naivety, complacency and lack of expertise on Africa’ (at 52) has left it ill-prepared to engage with the Ugandan government as it effectively manipulated the Court for its own ends. And a local sense of abandonment has deeply coloured long-term prospects for local court support. These problems could be mitigated by the Court, according to Clark, if it abandoned distance and became ‘politically savvy’ (at 99). The ICC should practise what Clark calls ‘prudent politics’ based on an ethic of ‘humility and caution’ that involves a ‘careful and reasoned calculation of the ICC’s impact’ (at 309–312).

Clark’s account does much to sophisticate the discussion on complementarity. In particular, he reveals that the ICC itself often fails to meet the admissibility standards it sets for states. The DRC cases ‘suggest that the Court has struggled to conduct robust proceedings and, in some instances, even to match the judicial performance of the domestic courts in Ituri’ (at 182). Many such frustrations are voiced by the Ugandan and Congolese residents themselves, and it enriches the discussion to have these voices guide parts of the book. Commenting on the ‘tragedy’ of the ICC’s intervention in the DRC, one local stated: ‘The ICC stole these cases from us and has done a worse job. What was the point of sending these suspects to The Hague, to face a lower standard of justice?’ (at 183). In Uganda, residents commonly voice a sense of abandonment: ‘For years all we heard was “ICC, ICC”. When the talks were happening in Juba, it was still, “ICC, ICC”. Then the ICC lost interest’ (at 128). In drawing out these problems of distance, Clark seeks to replace distant justice with a reinvigorated ‘core principle

of complementarity’, which would ‘make [the ICC] a more effective intervention in African conflict zones, with greater benefits for African polities’ (at 305).

4 Theory, Politics, History

In analysing these contributions, theoretical, political and historical questions emerge to preface the distance discussion below. On theory, the binaries that De Vos and Clark articulate occasionally strike one as overdetermined. De Vos retains a distinction throughout between complementarity’s coercive and cooperative dimensions. But the division occludes factual complexity. Labelling interactions between the OTP and states as ‘cooperative’ belies the leverage that the OTP and NGOs wield behind the scenes to narrow the range of political options open to national decision-makers. Similarly, even in the most convivial of ICC–state relations, as in the Court’s ‘burden-sharing’ with Ugandan courts (De Vos, at 208), the threat of ICC intervention still hangs over proceedings, making cooperative decisions look much less consensual. Likewise, how to speak of ‘coercion’ when the threat of intervention very often only works within the consent-based system of the Rome Statute?¹⁴ Coercion and cooperation are not sealed-off categories, then, but ‘managerial’ strategies that the Court adopts to frame situations as more or less inhibiting and thus deserving of different gradations of pressure. Both are concerned with how far to turn the screw.

Clark’s complementarity/distance divide occasionally runs into the same issue. His main concern is that the ICC’s self-imposed distance has been costly for the Court’s reputation and for the domestic settings locked into a relationship with it. For Clark, the Court has not paid enough attention to domestic contexts, priorities and local needs. The solution, then, is to get closer. Clark proposes a ‘deep and sustained dialogue with domestic actors’ (at 312); hiring more nationals from potential situation countries; maintaining local contact throughout proceedings and opening regional hubs and more *in situ* hearings: ‘Together these legal, personnel and geographical reforms would enable the ICC to embody complementarity fully [and] avoid the pitfalls of distance’ (at 318). However, might the Court’s problem be not remoteness from the domestic but, rather, the opposite? The Court has relied on the overweening executive power of the state to build its docket and often casts a shadow over subnational and local processes that might otherwise have incorporated a broader range of problems and responses. Clark’s study often creates the sense that the ICC already meddles too much in domestic affairs, making his recommendations about how the Court should ‘get closer’ appear ill-suited. If both distance and proximity are part of the Court’s justice work, more might have been done to combine them rather than framing them as opposites.

The question of politics looms large for De Vos and Clark. They both argue that the ICC should acknowledge politics as a relevant factor in its interventions, whether in admissibility rulings or coordinating with domestic actors. This may be preferable to the Court’s current practice of denying politics, but what these authors place within

¹⁴ Kennedy, *supra* note 5, at 956.

the scope of the 'political' remains narrow.¹⁵ Domestic politics, for De Vos, covers the major political judgments of state actors, such as referring a situation to the Court, introducing implementing legislation or deciding to prosecute internally. What the authors are looking for when analysing complementarity's effects, then, corresponds with this thin definition of politics based on liberal institutions and centralized decision-making.

Yet, as De Vos also acknowledges, complementarity's effects on the domestic go beyond the political so defined. Complementarity also affects the distribution of power within situation countries as well as the bargaining power that state leaders hold between themselves, their constituents, political rivals and allies, external donors and international entities.¹⁶ The ICC does not merely shape outcomes such as parliamentary bills or peace settlements but also rearranges the internal and political priorities of the state in favour of criminal accountability, whether in the form of new institutions, reallocating legal expertise or rescheduling the parliamentary timetable, all in the name of producing a domesticated version of ICL. De Vos acknowledges this point but not the crucial next step: that these rearrangements come at the expense of other political priorities. In Kenya, the Commission of Inquiry into Post Election Violence 'sought to leverage domestic criminal prosecutions through The Hague' by threatening to send a list of named suspects to the OTP unless the government established a special tribunal (De Vos, at 117). This approach replaced the prior method of 'focus[ing] on more straightforward legal, policy or institutional reforms' (at 117). Those reforms may have garnered greater local ownership due to their domestic pedigree. But in choosing accountability as more pressing, such reconciliation options were temporarily foreclosed as the anti-impunity agenda was prioritized.¹⁷

Beyond acknowledging politics, De Vos and Clark both note that politics should also be accommodated into the ICC's strategy.¹⁸ By their separate readings, if the ICC is to engage in a necessarily political world, it must necessarily embrace political judgment. Yet underlying the seemingly universal concept of 'political judgment' (De Vos, at 276) is a normative stake in the ICC's good politics that contrasts with the African state's bad politics. Both De Vos and Clark repeatedly critique manipulative African state leaders such as Yoweri Museveni or Joseph Kabila, whose politics allegedly subvert the anti-impunity project. One concern, then, is that De Vos is inserting his own normative values into the discussion on political judgment without acknowledging it, meaning that whether one wishes to account for political judgment at all will depend on who is deploying it rather than on the basis of a universal sensibility. In this post-legalist vision for the ICC, the category 'political judgment' risks reimporting a pro-ICC politics.

Finally, both books reproduce the mainstream's partial histories. Clark begins with a crucial fact: that the ICC exists in a long line of external interventions in Africa. Yet with that admission, colonialism (and neo-colonial forms of domination in the

¹⁵ For a discussion of the 'political', see Nouwen and Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21 *EJIL* (2010) 941, at 944–946.

¹⁶ Kennedy, 'The Stakes of Law, or Hale and Foucault!', 15 *Legal Studies Forum* (1991) 327, at 328.

¹⁷ R. Unger, *False Necessity* (2004).

¹⁸ De Vos: '[T]he exercise of political judgement ... must also become a more explicit, acknowledged part of assessing the wisdom and conduct of ICC engagement' (at 275).

mode of development, rule of law and anti-impunity interventions¹⁹) are relegated to facts of only historical importance. Readers are left with the impression that colonialism and its legacies have little bearing on the ICC's interventions in Africa or on how African actors interact with the Court today. It is only relevant as either a historical backdrop to the current shape of the post-colonial state (the DRC's military courts) or as part of local 'perceptions' of injustice (Clark, at 240). De Vos' non-treatment of colonialism is also perplexing given the frank allusion to his own complex relationship to the Belgian Congo (see discussion later in this article). It is difficult to justify going back only as far as intra-state African violence since the new millennium, as both De Vos and Clarke do, rather than extending further back into the economic violence of past International Monetary Fund (IMF) programmes or laterally to the contemporary eruptions of colonial injustice. In De Vos' case, the newness of the gently incentivizing norm of global accountability is of questionable novelty when placed alongside other incentivizing practices such as the IMF's cash incentives to privatize state functions in the 1980s (at 269). Likewise, how valuable are characterizations of African leaders as manipulative and instrumentalizing when such characterizations omit the historical and contemporary pressures that have created the post-colonial milieus they now rule and that in turn leave them with a choice between the certain ruin of isolationism and the powerlessness of external governance?

5 Anti-(Sentimental) Legalism: An Ethnography of Affect

Kamari Clarke's *Affective Justice* could be read as filling gaps in the De Vos and Clark studies, particularly in mapping capillary power relations and incorporating the affecting condition of colonialism. But, beyond these correctives, *Affective Justice* is nothing less than a rethink of international criminal justice and its world-making effects. International criminal lawyers are familiar with Clarke's opener: how does the ICC remain effective despite transient political support and patchy funding? But Clarke's answers begin to upset some of the ICC supporters' fundamental givens. For her, the power of the anti-impunity movement lies in affective justice or the production and legitimation of imaginaries of justice through technocratic knowledge, embodied affects and emotional regimes.

These moving parts require some prefacing, by understanding what Clarke is writing against, 'sentimental legalism'. Sentimental legalism is a 'victim-saving discourse' built into the familiar legalist project of equating justice with law. It drives the anti-impunity project by supplying it with the powerful narrative of 'protecting "victims" against powerful perpetrators who have enjoyed impunity for too long' (at 26). Clarke sees sentimental legalism as driven by an 'alliance between economics, politics, morality, and the law' (at 57), typical of the post-Cold War neo-liberalism that has become preoccupied with the individualized images of 'perpetrator' and 'victim'.

¹⁹ Nesiha, 'Doing History with Impunity', in K. Engle and Z. Miller (eds), *Anti-Impunity and the Human Rights Agenda* (2016) 95.

According to Clarke, such images erase politics and the material conditions of those caught up in violence. By inserting emotional meaning into the frame, Clarke seeks to show how the maldistributive anti-impunity movement is powered.

Although De Vos' study is informed by an ethnographic sensibility, Clarke's is a thick description of the 'emotional contours of international justice' (at xxvi). Clarke's ethnographic methods allow her to 'preserve traces of the past into the present as potentials' (at xxiii). They also allow Clarke to capture the 'meta-formations' (anti-impunity and/versus the 'Pan-Africanist Pushback') and 'micro-practices' (at 8) that constitute international criminal justice. Moreover, and as with other transnational ethnographies, Clarke's methodology allows her to move beyond legal texts and the state as analytical categories. These various liminalities allow Clarke to, in her words, begin and end her study 'in the middle of things' (at xxvi).

With this ethnographic lens, Clarke begins to scope out the work that emotions do. In conventional accounts of ICL, emotions are placed outside the realm of the professional project, only occasionally surfacing as things people express, whether in (or in response to) hate speech, the suffering of victims or the demagoguery of despots.²⁰ The component parts of affective justice that Clarke articulates in her initial chapters reveal a more pervasive, subterranean role for affect. The first component – 'legal technocratic practices' – includes norms such as removing head of state immunity for international crimes that 'eras[e] the political and economic realities of violence by judicializing them' (at 51). Another component is embodied affects that 'both structure fields of expression and are conditioned by history and individual emotional responses' (at 91). The American missionary who Clarke met on a plane to Addis Ababa, and whose story she recounts in the initial pages of the book, embodied not only the excitement of embarking on a church-building project but also anxiety about acclimating to local life and hope about improving the lives of Africans. In the missionary's fears and aspirations, one finds the structures of expression – historically constituted and individually emoted – that align like-minded actors around victim saving.

A final component of affective justice are emotional regimes or 'the emotional display of embodied responses through particular discursive tropes' (at 19). These responses underpin conceptions of justice through 'icons, words, utterances, colour deployment, and hashtags' (at 19). Indeed, one of Clarke's many insights is her retelling of the #BringBackOurGirls Twitter campaign for the 300 Nigerian schoolgirls abducted by Boko Haram in 2014.²¹ That campaign made suffering visible and encoded meaning through 'viral expression' (at 118). But it also dislocated the suffering of the Nigerian schoolgirls from sites of violence, relocating it to the international community, thereby erasing 'enabling histories of violence' (at 136). Kenyan President

²⁰ R. Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (2017); France 24, Interview with Fatou Bensouda, 2 July 2020, available at www.france24.com/en/20200702-us-sanctions-against-international-court-staff-an-act-of-revenge-says-icc-s-fatour-bensouda.

²¹ In December 2020, a similar online campaign operating under the banner of #BringBackOurBoys was launched in the wake of the abduction of over 300 schoolboys from the Government Science Secondary School in Kankara, Nigeria.

Uhuru Kenyatta's 2013 Heroes Day speech is another example of the alliances that emotional regimes produce. For Clarke, Kenyatta sought to align the Kenyan public by transferring the emotional affinities with his freedom-fighting father, Jomo, to his own neo-colonial struggles against the ICC's prosecution.

According to Clarke, knowledge, affect and emotional regimes messily mobilize affective justice 'through the production and combination of the figures of "perpetrators", "victims/survivors," and the "international community"' (at 21). Here, they 'nest' ideas of justice to produce an 'emotional domain of action around which the rule of law, human rights, and humanitarianism have come into being' (at 54). The outcomes of (not the reasons for) this rhizomatic assemblage are law, institutions and ideas of justice. By appreciating how affect 'constitutes law's power' (in ways that political or financial backing cannot), we can appreciate how mass atrocities are managed. We can also explain the most consequential saga for the ICC to date, the African backlash. Without valorizing the figures of Kenyatta or Ruto, Clarke shows how their attempt to deploy affect differently to the ICC's victim-saving discourse sought to work against legal encapsulation. They worked to rearrange narrow notions of criminal culpability and open up 'historical and experiential senses of collective culpability' (at 145).²² In the last two chapters, Clarke continues in this vein by exploring the African Criminal Court and its regional norm protecting head of state immunity²³ as 'affective practices' offering forms of resistance that make structural inequality visible and provide new 'opportunities for justice' (at 228).

Clarke has shown 'how the idea of suffering can exceed itself and become something else' (at 139) in ways that mainstream ICL commentators often ignore. She reveals the emotional regimes deployed in the name of justice and the social worlds they conjure. Emotions turn out to do a lot of work: recalling history and reprising its themes in variation, forming unlikely alliances, setting up distinct geographies, identifying hegemon and rebels and providing a programme for alternative futures. Even if one were to reject Clarke's premises, affect still explains much about the anti-impunity movement. Affect is a base material for experts and publics, an engine or a brake on action and an oven for baking histories into the liberal account of international justice. The rhetoric deployed by the ICC's prosecutors and African leaders alike appears not as mere flourish but, rather, as crucial subsoil for contemporary narratives of justice that are anything but cold and dispassionate.

Having erected this affective scaffolding, how far does it extend in Clarke's view? How far does the bio-politics of sentimentality extend, for example: only into questions of culpability and punishment or also into De Vos' non-coercive aspects of anti-impunity work such as outreach, capacity-building and victim participation? This might be a

²² Clarke calls this process 'retribution'.

²³ 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AU Doc. No. STC/Legal/Min. 7(1) Rev.1 (14 May 2014) Art. 46A *bis*.

fruitful place for further inquiry. Moreover, Clarke disrupts the fallacy that the anti-impunity movement deals in facts and reason while African dissenters are passionate falsifiers. Both imaginaries of justice turn out to have very similar features as emotionally propelled discourses that produce one another. But this conceptualization occasionally reads too close to symmetry or at least disappears the hegemonic disparities between them. The combination of affect, economic subjugation, historical revision, cultural difference and racial constructions leads us to ask whether some actors might be able to deploy affect and emotional regimes to better effect than others. That deployment might also include the capacity to reserve for oneself the legitimating quality of cool dispassion while tarring the other in a gendered and racialized way as quick to vituperative anger.

As a result, Clarke's historical account of affect is less convincing than its sociological potential. In keeping with the affect lens, Clarke recalls that what 'is often left out of the road to Rome trajectory is the narrative that highlights the way that the moral responsibility to protect those victimized by violence led to the viability of the ad hoc tribunals and eventually the ICC' (at 102). For many ICC supporters, though, the moralism of the project is precisely its driving force. The real difficulty appears when attempting to incorporate the project's 'hidden histories' in ways that reveal its illiberal past and its will to govern alongside rule of law and development discourses.²⁴ Granted, this is not the story Clarke seeks to tell, but it would perhaps be too much to say that 'the paradigm shift from forgiveness to legal accountability laid the foundations for the institutionalization of the anti-impunity movement' (at 67) when, as Clarke admits, there were other discursive manoeuvres shaping that movement at the same time.

A final query concerns the African Criminal Court and other practices as modes of resisting legal encapsulation. If affect is the primary unit, then the African Criminal Court and other justice cartographies emerge as embodiments of new emotional alignments on the African continent. ICC withdrawals become 'affective alignments of protest', the Malabo Protocol becomes a 'protest treaty' and rule amendments embody 'feelings about inequality and injustice that shape ... how justice is experienced' (at 228). It would be interesting to take not just traditional legal tools but also non-institutional imaginaries of international criminal justice to map the different (or similar) roles of affect there. In this respect, recent peoples' tribunals or transitional justice programmes become prime targets for the kind of anthropology of affect that Clarke pioneers.²⁵

6 Distance and Proximity in ICL

One of the most valuable lessons from *Affective Justice* concerns scholarly positionality. Clarke reflects on this further in a symposium for the book: '[A]t times, our research stakes may be shaped by the pursuit of knowledge regardless of the "side of history" one's praxis takes. Sometimes, the generation of knowledge about violence may not produce liberatory possibilities in the short-term. One hopes that, in the long-term,

²⁴ K. Heller and G. Simpson, *The Hidden Histories of War Crimes Trials* (2013); I. Tallgren and T. Skouteris, *New Histories of International Criminal Law: Retrials* (2019).

²⁵ A. Çubukçu, *For the Love of Humanity: The World Tribunal on Iraq* (2018).

improved knowledge will help us understand and ultimately address, in however modest a way, the core impetus for violence.’²⁶ Clarke achieves these ‘complexities in positionality’ by remaining always *in media res*, which is to acknowledge the impossibility of the researcher’s distance from their object of study. In this second part, I use Clarke’s critical awareness of positionality as a gateway into one of the most prominent themes straddling all three books – namely, distance and proximity. In addressing this theme, I hope not only to further the conversation between the books but also to clarify the fault lines between the stances represented by Christian De Vos and Phil Clark as against that of Kamari Clarke in ways that reveal ICL’s distancing and approximating techniques *vis-à-vis* the African continent.²⁷

Although it is Phil Clark that makes a foil of distant justice as the attitude of remaining above the domestic milieu, both he and De Vos interpret distance as a problem for the ICC to overcome. Analysing the OTP’s implementation of complementarity, De Vos finds that the prosecutor’s DRC investigation ‘underscor[ed] the challenges the office faced in operating at a distance’ (at 105). Poor performance, for De Vos, is attributed to the Court’s ‘lack of proximity to the situations that populate its docket’ (at 279). Likewise, Clark sees distance as a root cause of many court failings, from ignoring domestic priorities during the Juba peace talks to obscuring factors relevant to admissibility decisions. He sees these problems as springing from a ‘detached and invisible court’ (at 136), while De Vos is concerned about the effects of long-term interventions removed from the local context.

For both De Vos and Clark, the solution to distance for the ICC is to be more attuned to local contexts and, more broadly, to move away from its self-designation as being hierarchically superior to the domestic. De Vos uses the metaphor of nesting to describe the Court’s need to envision itself ‘as part of a broader global ecosystem’ (at 289).²⁸ The Court would become a ‘performance-centred, *place-based* ICC’ (at 277).²⁹ For Clark, the solution is similar (even if the proposals are different). He advocates more ‘embedded’ notions of justice and a strong ‘discourse of presence’ in the atrocity spaces that the Court engages (at 149). Despite Clark’s capacious interpretation of distance, this concept embodies a geopolitical vision of both distance and proximity by focusing on the ICC’s attentiveness to national polities through its physical contact with

²⁶ K. Clarke, ‘Affective Justice Symposium: An Anthropology of International Criminal Justice Across Multiple Scales – a Response to Commentaries’, *Opinio Juris* (29 May 2020) <https://opiniojuris.org/2020/05/29/affective-justice-symposium-an-anthropology-of-international-criminal-justice-across-multiple-scales-a-response-to-commentaries/>.

²⁷ The difference may be between reform-minded ‘effectiveness’ criticism and ‘assumptions’ critique. See Schwöbel, ‘Introduction’, in Schwöbel *supra* note 2, 1, at 3–4.

²⁸ This ‘ecosystem’ language is popular among advocates. See Burke-White, *supra* note 11; J. Goldston, ‘Don’t Give Up on the ICC’, *Foreign Policy* (8 August 2019), available at <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/>.

²⁹ The ‘place-based’ terminology appears in De Vos’ previous scholarship. See De Vos, ‘Foregrounding the “Local”: Place-based Approaches to Transitional Justice’, 6 *International Journal of Transitional Justice* (2012) 374; C. De Vos and M. Pena, ‘Electing the Next ICC Prosecutor: A Generational Opportunity’, *Justice in Conflict* (9 April 2020), available at <https://justiceinconflict.org/2020/04/09/electing-the-next-icc-prosecutor-a-generational-opportunity/>.

them. However, in failing to broach the spatio-temporal, epistemic and imaginative dimensions of distance, De Vos and Clark ultimately reproduce images of distance and proximity that are part and parcel of the dynamic of subordination that characterizes the ICC's relationship with Africa and Africans. Against that frame, Kamari Clarke offers a much more sophisticated vision of positionality. I address these distance dimensions in turn.

A Spatio-temporal Distance

Temporal distance is recreated on multiple planes in De Vos and Clark's accounts. One is the jurisdictional plane. Both books take as their starting material the 'intimate violence' of atrocities (Clark, at 111), which arise primarily in circumstances of ethno-nationalist and often tribally informed cross-border conflict between unstable African governments and insurgent rebel groups. The 'facts' considered are those that concern the direct, physical and immediate forms of violence characteristic of such conflict.³⁰ What could be called temporally distant violence, whether the 'slow' violence³¹ of corporate dumping on the African continent or the long violence of structural adjustment, remain unaddressed.³² This is what Kamari Clarke means when referring to legal time, a compressing and de-historicizing violence that treats any form of suffering on the African continent occurring up to 11.59 pm on Sunday, 30 June 2002 as unaccountable 'context'.

A second spatio-temporal plane of distance concerns ICC intervention. The idea that one can distinguish between periods of intervention and non-intervention based on judicial (non-)authorization is difficult to sustain. As De Vos shows, the notion of a Ugandan self-referral in which the Court was 'invited in' is a fiction demystified by intense OTP lobbying over the referral (De Vos, at 142; Clark, at 63). Moreover, the ICC casts a long shadow even when it has no physical presence in the atrocity space. NGOs were citing the Rome Statute to campaign for domestication of international crimes in Kenya, for example, long before the ICC opened its investigation there. Similarly, Phil Clark reports that 'the prospect of ICC investigations was enough to disrupt' community-based justice in the DRC because criminal accountability was 'anathema to open dialogue' (at 262). Even when the ICC is formally out of the picture, its ability to exert influence over local actors is palpable. It is therefore difficult to speak of spatio-temporal distance, whether jurisdictionally or institutionally, without visualizing the narrow sliver of jurisdictional and institutional time fuelling mainstream analysis against the overlapping layers of temporality that evade legal (and scholarly) encapsulation.³³ For these to remain occluded in much of the De Vos/Clark analysis,

³⁰ Mégret, 'International Criminal Justice: A Critical Research Agenda', in Schwöbel, *supra* note 2, 17.

³¹ M. Burgis-Kasthala, 'Rethinking the International Criminal Justice Project in the Global South', *Völkerrechtsblog* (20 January 2017), available at <https://voelkerrechtsblog.org/rethinking-the-international-criminal-justice-project-in-the-global-south/>.

³² Amnesty International, *Trafigura: A Toxic Journey*, available at www.amnesty.org/en/latest/news/2016/04/trafigura-a-toxic-journey/.

³³ Djeflal, 'International Law and Time: A Reflection on Temporal Attitudes of International Lawyers through Three Paradigms', 45 *Netherlands Yearbook of International Law* (2014) 93.

the distributional consequences of choices associated with narrow ‘legal time’ must be entrenched.

As the above makes clear, it is unhelpful to separate temporal from spatial distance.³⁴ Although ICC officials will often see one as flowing from the other, more often they co-exist messily so that temporal proximity, initiated by judicial or prosecutorial decision, prompts resource deployments near and far in order to realize the Court’s mandate, which then prompts an iterative tweaking of temporal windows. When the Court assumes jurisdiction, it often becomes intimately involved in the life of the atrocity space and its residents, gathering witness testimony, conducting awareness raising and representing victims’ grievances in application forms. At the same time, many components remain at arm’s length, including the legal experts who fashion evidence into a viable case or the suspects removed to the ICC’s Detention Unit. Clark’s and De Vos’ preference for greater spatial proximity, through proposals such as *in situ* proceedings, flows from the temporal proximity intervention enunciates (De Vos, at 280; Clark, at 316). Both books, then, are about how to match the Court’s spatial distance from situations with its *a priori* (and unquestioned) temporal and legal presence. To realign these axes would be to put the anti-impunity project back on track. Yet rather than seeing the ICC over here at headquarters and its situations over there in the field, temporal proximity purposefully combines particular elements of spatial proximity and distance. Distance and proximity are the result of choices and contexts applied by the Court, not immovable concepts that the Court must navigate around. Which combination of distances and proximities the court opts for will thus depend on the designs it has for the atrocity space.

B Epistemic and Methodological Distance

If not a simple division between problematic distance and desirable proximity, there must be other bases on which De Vos and Clark advocate their understandings of both. Although this is partly the work of professional imagination, it is also a matter of professional tools – that is, the authors’ epistemic and methodological choices. Kamari Clarke illustrates the distance/proximity inscribed in epistemologies and methods throughout her study. But Phil Clark also criticizes the ICC’s use of ‘distanced methodologies’ that raise ‘key questions about the effects of more disembodied research methodologies ... on attempts to legitimize the modes of justice delivered by the ICC’ (at 101). In addition, both the OTP’s use of intermediaries and the over use of video footage in the Mali investigation demonstrate a reluctance to get too close or the convenience of remaining afar.

De Vos’ stance best captures the ambiguities of epistemic and methodological distance. Consistent with his offering an ‘interested interpretation’ of complementarity, De Vos prefaces the book by reflecting on his personal proximity to his object of study. This comes in two forms. One is that, by taking up a research post at the Open Society

³⁴ In keeping with the insights of ‘legal geography’, see Blank and Rosen-Zvi, ‘The Spatial Turn in Legal Theory’, 10 *Hagar* (2010) 39; Bennett and Layard, ‘Legal Geography: Becoming Spatial Detectives’, 9 *Geography Compass* (2015) 406.

Justice Initiative, De Vos ‘became a member of the same transnational “community of practice” described in the pages that follow’ (at xxxiv).³⁵ As he makes clear, ‘I sit in the privileged, if complicated, position of having become a participant in my own research’ (at xxxiv). The second of De Vos’ links is familial. He recounts that ‘the Congo’s violent legacy of colonialism [was never] far from my own mind. I thought frequently of my Belgian family’s own particular story with the country (my grandfather worked for many years in the shipyards and rail stations of pre-independence Belgian Congo; my aunt and father were born there), as I engaged in earnest conversations with expats about how to “end impunity” for the atrocities that civilians continued to endure’ (at xxx). Most lucidly, De Vos concludes that ‘many of the same European countries that were now financing the ICC and other judicial reform projects in the [DRC] were the same ones that had been divvying up this continent not so long ago’ (at xxx).

Despite these frank reflections, neither De Vos’ experience as researcher nor his family connections to colonialism are accounted for in the analysis. He focuses almost entirely on the benefits of NGO involvement in situation countries. Any ‘pressure’ that NGOs exert on states is conceived positively (De Vos, at 163). Moreover, he does not acknowledge the troubling patterns between past forms of domination and the catalysing and compliance-inducing forms of domination today. One can assume, then, that De Vos sees his personal connections as having only anecdotal value rather than as conditioning his professional stance. That De Vos can both express his particularity via professional and personal background, while also offering the objective if ‘interested’ interpretation, symbolizes the privilege of his epistemological stance. One can occupy both the international justice ‘view from nowhere’ alongside the ‘view from somewhere’ without being condemned to the particularism of local (read African) knowledge.

Clark’s and De Vos’ methodological distance is also entangled with Eurocentric social science. One of positivism’s core divisions is between the ideal and the real.³⁶ Clark appears to see the myth in this separation, especially when considering the damage caused by the ICC’s idea of distant justice. Yet this insight is not extended to every sphere. Discussing the practicalities of complementarity in Africa, Clark reflects that ‘enacting the high-minded ideals of international justice involves messy political and security machinations “on the ground”’ (at 5). Between the ideal and the real lies the distancing processes of application and scholarship in which the further one gets from the ‘nice, clean, quiet’ Hague the more one must become a pragmatist to overcome sticky situations.³⁷ Herein lies one technique for positioning the self (ideal) in the European centre as against the other (non-ideal) on the ground of the Global South. Because of this separation of ideal self and non-ideal Other, Clark’s reading of the domestic is only slightly more tempered than the ICC’s, ‘where the domestic is viewed as partisan and polluted’ (at 41).

³⁵ M. Horkheimer and T. Adorno, *Dialectic of Enlightenment* (1944).

³⁶ Full disclosure: the present author assisted the Open Society Justice Initiative in their response to the 2020 ICC Independent Expert Review.

³⁷ ICC, Written Transcript of a Speech by Judge Marc Perrin de Brichambaut at Peking University Law School on 17 May 2017, Doc. ICC-01/04-01/06-3451-Anx1 (10 April 2019), at 22. This ties in with the colonial notion of ‘going native’.

The scientific division of reality and perception is another distancing technique, this time between ‘universal’ and ‘local’ knowledges. Both authors frequently categorize their respondents’ experiences as ‘perceptions’. To quote Phil Clark, ‘[i]nterviewees typically perceive the Court as part and parcel of national and community political dynamics’ (at 149). De Vos treats local responses in a similar manner. Discussing Rome Statute implementation efforts in the DRC, he recalls that ‘[t]he involvement of outside actors in advocating for the bill’s passage was both *seen and described as* a form of neocolonialism and a threat to national sovereignty’ (at 178; emphasis added). By deploying this language of perception, the authors take local individual experiences as particular opinions, located in a specific space-time. This is not a failing in itself. Crucially, though, as perceptions, they remain open to contestation or, in the ICC’s case, clarification as misunderstandings that need to be rectified through further proximity – that is, better court communication with locals. In contrast to local perception, the ICC (and the scholar) is the keeper of the ‘real’, which can provide the more accurate and multi-dimensional (universal) view from nowhere. But the ICC’s perception is also a perception which it brings to the ‘reality’ of the atrocity space. That this is unacknowledged reproduces the superior view from nowhere that both Clark and De Vos claim to be refuting.

In contrast, Kamari Clarke acknowledges the impossibility of the objectivity claims on which modern epistemologies are based. She begins and ends her study ‘in the middle of things’, which, though seemingly novel, is more a matter of foregrounding what is always already in the scholarly background: all scholarship begins and ends in the middle of things, as Clark’s and De Vos’ accounts reveal. It merely depends on where one has decided to draw the line between oneself and the ‘data’. Having said that, it is perhaps easier for Clarke to remain in the middle of things when she retains an epistemic distance from the field of law and from empiricism. Although that distance helps to reposition law on the surface (as against the substrate of affect), it also means that law appears one-dimensional at times, encapsulating justice discourses but with few hints as to its distributive or ideological power.

C *Imaginative Distance*

Behind the scholarly tools that regulate the distance between researcher and subject lies the professional imaginary of what ICL is, does and should do.³⁸ That imagination erects its own nears and fars in the mind of the international criminal justice advocate.³⁹ In other words, discursive or imaginative distance is the extent to which ICL images of Africa mediate a series of gaps or distinctions that continue to set the atrocity space apart (culturally, materially, psychologically and so on) from the ICC, and which gaps also provide ICL with its *modus vivendi*. The ICC’s practices often demonstrate what Antony Anghie refers to as the ‘dynamic

³⁸ D. Kennedy, *A World of Struggle* (2016), at 90 (‘[g]enerating a common vision of a world to be governed is both a communicative and performative work of the imagination and a technical institutional project’).

³⁹ Moyn, ‘Anti-Impunity as Deflection of Argument’, in K. Engle *et al.* (eds), *Anti-Impunity and the Human Rights Agenda* (2016) 68.

of difference' through which international lawyers 'postulate[] a gap, understood principally in terms of cultural differences, between the civilized European and uncivilized non-European world; having established this gap they then proceeded to devise a series of techniques for bridging this gap, of civilizing the uncivilized'.⁴⁰ Sundhya Pahuja extends this lens by seeing not only the 'circular self-constitution of self and Other' but also the 'paradoxical inclusion of the excluded necessitated by the claim to universality'.⁴¹

In surveying the ICC's urge to get closer, it helps to read distance and proximity postcolonially. Techniques of distance operate within a broader trajectory of the impending proximity of the Other: the victim who will receive justice, the eventual rule of law-oriented state, humanity saved. Proximity to the European self is the ultimate (alleged) goal, but distance must always be recreated at the moment of encounter in order that the project of governing the atrocity space can continue. Reading De Vos' and Clark's studies as encounters with 'images of Africa', these techniques of imaginative distance become visible.⁴² Indeed, because these techniques are part of the field's perpetual process of becoming, distance appears not as barrier to, but, rather, as a semiotic prerequisite for, professional success inside the ICL field.

Three techniques of imaginative distance are the images of African semi-development, African semi-agency and ICC semi-effectiveness. The first image – the semi-developed postcolony – has already produced much in the way of global regulation of postcolonial life.⁴³ In the ICC's penal-judicial gaze set upon the situation country, the postcolonial state resides at a prior state of sophistication to the ideal type the court has in mind – namely, the Western liberal democratic model.⁴⁴ The ICC's treatment of domestic evidence in its admissibility rulings is demonstrative. In *Katanga*, Trial Chamber II found that the DRC was unwilling to bring a case, *inter alia*, because its surrender of Katanga was taken to evince unwillingness. Relying on the government's submissions to this effect, the Chamber discounted opposing evidence that the Congolese judiciary was conducting investigations into Katanga's crimes in Bogoro.⁴⁵ De Vos interprets the Trial Chamber's conclusions as resting 'on a prima facie acceptance of the representations of the Congolese executive' and on its treatment of the state as a 'unitary actor' despite infra-state disagreement (De Vos, at 87; Clark, at 180). The episode illustrates the ICC's Eurocentric vision of the postcolonial state as a one-dimensional homogeny

⁴⁰ A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005), at 37.

⁴¹ Pahuja, 'The Postcoloniality of International Law', 46 *Harvard International Law Journal* (2005) 459, at 460.

⁴² Achebe, 'An Image of Africa: Racism in Conrad's *Heart of Darkness*', 18(4) *Massachusetts Review* (1977) 782, at 784. In Achebe, Africa is a Western imagination and a 'place of negations at once remote and vaguely familiar'.

⁴³ Anghie, *supra* note 40, ch. 5.

⁴⁴ A. Kiyani, 'International Crime and the Politics of International Criminal Theory' (2016) (PhD dissertation on file at University of British Columbia, Canada).

⁴⁵ Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *Prosecutor v. Germain Katanga* (ICC-01/04-01/07), Trial Chamber II, 16 June 2009, paras 70–73.

rather than an ‘arena of vibrant agency and contestation’ (Clark, at 7) in the way Western states are frequently viewed.⁴⁶

A related distancing technique employed by the ICC, but also used by De Vos and Clark, is the image of African semi-agency. This operates at both an ‘internal’ and an ‘external’ level. Internally, De Vos and Clark paint a picture of African instrumentalization and politicization of the ICC in the form of the manipulative African leader. Politicians in Uganda, Kenya, the DRC and elsewhere have used the Court to selectively target rebel groups while insulating themselves from the risk of prosecution. Such manipulation, often described as ‘political calculus’ (De Vos, 124), ‘contradict[s] elements of the Rome Statute and the ICC’s stated aims’ (Clark, at 81). Against the agency that such political calculation implies lies a tempered rationality. This is captured by Luis Moreno Ocampo’s genuine surprise expressed over Kenyatta and Ruto’s campaign against the ICC’s ‘neo-colonialism’, noting that ‘I never suspected they were so smart’ (De Vos, at 128). The semi-agency image persists. In an address to Chinese students in 2017, an ICC judge expressed surprise at the French language proficiency of Congolese French speaker Jean-Pierre Bemba.⁴⁷ Hence, the recalcitrant African leader that the Court has in mind is both rational enough to politically manipulate the ICC but not rational enough to make strategic choices in an election campaign or achieve language proficiency.⁴⁸ Within this frame, it is difficult to see the rational actor model of compliance ‘catalysing’ change when these actors are imagined to be only half-rational.

While this idea of internal agency limits rationality too much, the freedom of choice that African states and their leaders are believed to have in their external relations is often cast too wide. As Clark recognizes, ICC officials imagine Africa as an ‘inert space in which [the court] will easily wield its influence, rather than an arena of vibrant agency and contestation, much of which is fundamentally opposed to external intervention’ (at 7). The degree to which global/local actors have been able to resist and shape global governance ‘from below’ should not be underestimated, though it often is in ICL.⁴⁹ However, it is one thing to say that actors can strategically deploy the master’s tools as part of their own project; it is quite another to see African states freely bumping into others like billiard balls. In fact, it is only possible to adopt that vision of the recalcitrant African ‘state’ once one has overlooked other external domains of compulsion and pressure. For example, Clark recalls that the Ugandan judiciary ‘lack[s] the infrastructure and personnel to meet the population’s legal needs. Civilian courts, in particular, have always been under-resourced, and recent decades

⁴⁶ Reynolds and Xavier, ‘“The Dark Corners of the World”: TWAII and International Criminal Justice’, 14 *JICJ* (2016) 959.

⁴⁷ ‘The accused was Mr. Bemba. ... He spoke excellent French, really Belgian, but he did understand French extremely well.’ Brichambaut, *supra* note 37, at 3. This is the same address in which Brichambaut notes that ‘the Africans who are a group of 54 countries [] provide the suspects and the accused’ (at 6).

⁴⁸ Stolk, ‘A Sophisticated Beast? On the Construction of an “Ideal” Perpetrator in the Opening Statements of International Criminal Trials’, 29 *EJIL* (2018) 677.

⁴⁹ B. Rajagopal, *International Law from Below* (2003). For an exception in international criminal law (ICL), see Bowknegt, ‘Beyond “African Solutions to African Problems” at the Extraordinary African Chambers and “Distant Justice” at the International Criminal Court’, 17 *JICJ* (2019) 981.

of conflict have further undermined their capacity, particularly in rural communities' (at 113). Clark neglects to mention that the condition of the Ugandan criminal law apparatus, itself a legacy of British imperial rule, is partly a symptom of government reallocation of funds towards the commercial courts designed to uphold and optimize private property rights.⁵⁰ This and other restrictive measures resulting from the IMF's structural adjustment plans in many ICC situation countries have reduced the sphere of political choice for the state to a Catch-22: either comply with the ICC's desires, which are locally unpopular and siphon funds away from other projects, or suffer the label of being politically manipulative and face the political-economic consequences of ostracization. These are the discursive handcuffs that the imaginary of semi-agency places on the postcolonial state: an agentic paradox in which states are seen as possessing no agency where they have some while possessing agency where they have little. Such techniques of semi-development and semi-agency reify the imagined distance between the ICC (and advocates) and the postcolony while also justifying the ICC's bid to get closer and gently incentivize states.⁵¹

Against the semi-developed, semi-agentic postcolony is posited the semi-effective, though still more sophisticated, ICC. Illustrating self-constitution in terms opposite to the negated Other,⁵² the manipulative realpolitik of the African statesman is juxtaposed against the limited, occasionally fumbling but always benevolent Court. Hence, for Clark, 'the ICC has failed to mitigate states' ability to pull the strings of international justice' due to its 'naiveté, complacency and lack of expertise on Africa' (at 52). Yet all three books reveal that the ICC's complicities in African injustice prevent its downsides from being described any longer as early glitches in an otherwise functional system but, instead, as the result of a system designed unjustly from the outset. If the OTP lacks country-specific expertise, this is not an oversight but, rather, a deliberate labelling of certain knowledges as unnecessary to the global project of managing atrocities. These are not pockets of unexplored knowledge terrain but, instead, a 'studied ignorance' that has by choice set certain knowledges aside.⁵³ The ICC is already less benevolent and more politically savvy than is often supposed.

The potency of these techniques – the 'not yet' character of the postcolony and the ICC's benevolence – lies in what they ostensibly require. In order to civilize/incentivize the postcolony through progressive change, the benevolent ICC must not distance itself but, rather, involve itself ever more intimately in domestic life. This deepening

⁵⁰ International Monetary Fund, Enhanced Structural Adjustment Facility Policy Framework Paper, Doc. 1997/98–1999/2000 (22 October 1997), at 19, col. 4A(2) and (3), available at www.imf.org/external/NP/PEP/UGANDA/uganda.pdf. See C. Scott, *State Failure in Sub-Saharan Africa: The Crisis of Post-Colonial Order* (2017), at 153.

⁵¹ 'Incentivizing' approaches share many of the questionable assumptions behind 'nudging'. See S. Moyn, 'The Nudgeocrat: Navigating Freedom with Cass Sunstein', *The Nation* (3 June 2019), available at www.thenation.com/article/archive/cass-sunstein-on-freedom-book-review/.

⁵² E. Said, *Orientalism* (1979), at 1–2.

⁵³ C. Mills, *The Racial Contract* (1997).

language is present in the OTP's post-austerity management. An unimplemented OTP Basic Size model⁵⁴ hints at the OTP's aspirations for future activities, which is to 'do the work with more depth'.⁵⁵ Such aspirations share an affinity with De Vos' and Clark's proposals for 'deep and sustained dialogue' (De Vos, at 283; Clark, at 312), more local hires and regional offices, all of which help the Court to do its predetermined work with more depth. And, yet, as I have shown, the Court is already deeply involved in postcolonial life in myriad ways. What, then, does getting closer spell for residents of Gulu or Bogoro, for whom external intervention in daily life is a historical constant that is already too close for comfort?⁵⁶

By complicating this distance/proximity dyad, one can also reinterpret complementarity, the 'leitmotif of international criminal justice'.⁵⁷ It also encapsulates the Court's desire to govern the atrocity space by being both near to it while also retaining a separation to justify further intervention. In the language of distance and proximity, complementarity and Article 17 are not only a highway through sovereignty and into the domestic realm but also a pole to keep the domestic at arm's length by controlling the standards against which it is to be judged (a reversal of the original presumption of state admissibility). This is evidenced by the 'same person, same conduct' test for admissibility rulings, the jurisprudence that reads as an elaborate game of moving the goalposts for domestic proceedings, very few of which are ever deemed sufficient in the Court's eyes. In both De Vos' and Clark's reading, a supposedly inconsistent jurisprudence turns out to display a consistent pattern of retaining ICC control through proximity to, and distance from, the domestic. Control is realized in other ways too, through the domestication of the Rome Statute, which also doubles as the domestication or 'taming' of the postcolony itself within the anti-impunity project.

Kamari Clarke reappraises this take on distance and proximity. By removing the epistemological division of reason and emotion, global and local, she shows the anti-impunity movement to be dependent on feelings of ebullience, disappointment and hope for its existence. The same vertiginous opportunism that brought the Rome Statute system into existence was, in the process of enactment and transmogrification, experienced by absent others as opportunism of another, more familiar, historical sort.⁵⁸ Down the line, it turned sour. Disappointment curdled into resentment,

⁵⁴ ICC Assembly of States Parties, Report of the Court on the Basic Size of the Office of the Prosecutor, Doc. ICC-ASP/14/21 (17 September 2015). The Independent Expert Review Panel on ICC reform recently advocated for a revival of the model. Assembly of States Parties, Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report (30 September 2020), para. 177, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

⁵⁵ Jakobsson, 'What's the Point of the ICC OTP's Basic Size Document?', *Justice Hub* (26 January 2016), available at <https://justicehub.org/article/whats-the-point-of-the-icc-otps-basic-size-document/>.

⁵⁶ A. Hochschild, *King Leopold's Ghost* (1998); Amone and Muura, 'British Colonialism and the Creation of Acholi Ethnic Identity in Uganda, 1984 to 1962', 42 *Journal of Imperial and Commonwealth History* (2014) 239.

⁵⁷ C. Stahn, *A Critical Introduction to International Criminal Law* (2018), at 223.

⁵⁸ On 'present absence', see Gevers, *supra* note 6.

a familiar embodied affect for many ICC target populations, and a compound to the already bitter struggles against domination waged on multiple 'glocal' fronts.

In this Clarke-inspired reading of ICC history, the binary of present-day distance as against future proximity strikes as ahistorical, even if it remains a powerful ordering myth. For the Court to describe itself as 'in the world but not of the world' reveals the depth of the challenge of placing the ICC in a discursive moment in history while articulating other possible justice forms that do not claim to be speaking from nowhere.⁵⁹ This first requires international criminal justice advocates to understand distance and proximity as effects of the ICC's technocratic knowledge and emotional regimes. But it also requires that one play witness to how the ICC continues to 'invent Africa', taking note of how 'challenges' that the Court describes as inherent to situation countries precipitate political choices by the ICC to reallocate resources, legal arguments and doctrines so that it can continue to manage those spaces through the language of atrocity, law and criminality. In this sense, the OTP's Basic Size model is as much the product of imagined obstacles in the African postcolony as the claim to resource scarcity. The Court is thus conditioned and constrained by its own imaginaries in ways that create the possibility for the postcolony to redefine challenges as well as the terms of distance and proximity.

7 Conclusion

If ICL is not an immovable thing, then neither are the locales that it recruits into its project of atrocity, law and punishment. These locales also disaggregate from the conventionally spatio-temporal to the epistemic to the imaginative. If one were to confront the Court's bid to 'get closer' at a time when it seems to be close enough for many, then one must strip away the many layers of nears and fars to understand what effects anti-impunity work is having on Africa and Africans, not to mention the other places and peoples geographically, methodologically and discursively far removed from the glass construct in Waalsdorperweg. Practitioners, activists and scholars all might consider what it is about our professional tools and imagination, not to mention the place from which we are speaking, where we are speaking to and why we are speaking at all, that prompts and affects that desire to get closer as a will to govern.

Complementarity is a prime target for rethinking the Court's relationship to the domestic in ways that flip notions of distance and proximity. What would it mean for the Court to see itself as peripheral to the central site of atrocity and thus having to comply with the multiple demands of its residents? Some groups have already begun to internalize this shift, albeit partially. In a 2014 policy paper, the International Federation for Human Rights noted in relation to victims' legal representation and the problem of distance that '[w]hat is far is not the victims but the seat of the Court. We believe that this change of perspective is important. The premise must be that the

⁵⁹ John 17: 14–16 (King James Version).

Court needs to adapt to victims; it is not for victims to adapt to the Court'.⁶⁰ What would that flip require in terms of renewed mindsets and redistributed resources? By seeing the multiple configurations of distance and proximity that the present ICL project deploys, one can redirect the discourses of complementarity and anti-impunity much as Clarke suggests. In the meantime, and for the questions posed at the outset, the answer should be to remain cautious about calls to 'get closer', whether to sites and subjects of atrocity or to the very aims of the anti-impunity project.

These three books do much to complicate the story of the ICC's benevolence towards Africa. De Vos' and Clark's studies, in particular, will prove invaluable not only to practitioners seeking to avoid the ICC's 'pitfalls' but also to scholars seeking worthy updates to the early complementarity literature. Kamari Clarke's book is differently oriented towards problematizing the very soil on which ICL practice and scholarship is conducted, sharpening the field's anthropological tools and offering affect as a potent lens. But as a challenge to the universal-particular binary, *Affective Justice* also begins to reposition or 'provincialize' the ICC gaze.⁶¹ This is a beginning because, as De Vos' and Clark's studies reveal about the ICC and its scholarship, distance and proximity are firmly established in the ICL *langue*. Near, far, wherever they are, atrocity spaces continue to be understood – spatially, epistemically and imaginatively – as both remote from and close to the ICC as its north star. Many are left to hope that, when one looks closer, the star does not in fact turn out to be the plane from which the well-meaning missionary gazes down as it descends into Addis Ababa.

⁶⁰ Fédération Internationale des Ligues des Droits de l'Homme, FIDH Comments on the ICC Registrar's ReVision Proposals in Relation to Victims (18 November 2014), at 2.

⁶¹ D. Chakrabarty, *Provincializing Europe* (2000).