Kamari Maxine Clarke. ***Affective Justice: The International Criminal Court and the Pan-Africanist Pushback***. North Carolina: Duke University Press, 2019. Pp. 384. $ 29.95. ISBN: 9781478006701

1. Introduction

The International Criminal Court (ICC) has famously encountered sustained pushback over the past several years from governments, in particular from African states. This has been accompanied by a growing literature seeking to make sense of these developments, often within the context of a (so-called) backlash against international tribunals and institutions more generally.[1] Set against this backdrop, Kamari Maxine Clarke's new volume provides a rich and thought-provoking perspective on the African tribulations of the ICC.

[1] See, e.g., Alter, Gathii, and Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', 27 *European Journal of International Law* (*EJIL*) (2016) 293; Caron and Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences', in A. Follesdal and G. Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (2018) 159; Contesse, 'Judicial Backlash in Inter-American Human Rights Law?', *I·CONnect* (blog) (2 March 2017), available at https://bit.ly/3gsPzBU; Helfer and Showalter, 'Opposing International Justice: Kenya's Integrated Backlash Strategy against the ICC', 17 *International Criminal Law Review* (2017) 1; Krisch, 'The Backlash against International Courts', *Verfassungsblog* (16 December 2014), available at https://bit.ly/3oFr3QK; Lovat, 'International Criminal Tribunal Backlash', in K. J. Heller et al. (eds), *Oxford Handbook of International Criminal Law* Kevin Jon Heller et al. (2020) 601; Rask Madsen, Cebulak, and Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 14 *International Journal of Law in Context* (*Int'l J. L. in Context*) (2018) 197; Sandholtz, Bei, and Caldwell, 'Backlash and International Human Rights Courts', in A. Brysk and M. Stohl (eds), *Contracting Human Rights* (2018) 159; Soley and Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', 14 *Int'l J. L. in Context* (2018) 237; Voeten, 'Populism and Backlashes against International Courts', *Perspectives on Politics* (2019) 1; Vinjamuri, 'Human Rights Backlash', in S. Hopgood, J. Snyder, and L. Vinjamuri (eds), *Human Rights Futures* (2017) 114.

At the heart of *Affective Justice*, reflecting what has been termed the 'emotional turn' in international law and cognate disciplines,[2] lie what Clarke refers to as 'emotive narratives about justice' (at xxiii), understood as 'negotiated assemblages of feelings about inequality and power' (at xxii). This conception is then used to 'examine the manifestations of sentimentalized emotions that underlie rule of law assemblages' in the context of the ICC and its relationships with African governments and communities (at xxiv).

The theoretical apparatus deployed in the book is 'conceptually inspired' by Gilles Deleuze and Félix Guattari (at 9). Set out in the book's Introduction ('Formations, Dislocations, and Unravelings'), this centres around the concept of 'affective justice': 'people's embodied engagements with and production of justice through particular structures of power, history, and contingencies' (at 5). Affective justice is in turn constituted by 'three interrelated domains – legal technocratic practices, psychosocial embodied affects, and emotional regimes – com[ing] together messily through the rule of law movement' (at 21). The six chapters of the volume that follow then explore 'various aspects and illustrations of the[se] three dynamic components' (at 41).

These chapters are each wide-ranging and cover considerable conceptual and empirical ground. To do justice to these discussions as well as the volume overall, the following section of this review outlines each chapter in turn, before considering the contribution and implications of *Affective Justice* as a whole.

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[2] See, e.g., Y. Ariffin, J.-M. Coicaud, and V. Popovski (eds), *Emotions in International Politics: Beyond Mainstream International Relations* (2016); R. Brodersen, *Emotional Motives in International Relations: Rage, Rancour and Revenge* (2018); M. Clément and E. Sangar (eds), *Researching Emotions in International Relations: Methodological Perspectives on the Emotional Turn* (2018); M. Greco and P. Stenner (eds), *Emotions: A Social Science Reader* (2008); Simpson, 'The Sentimental Life of International Law', 3 *London Review of International Law* (2015) 3; Solomon, '"I Wasn't Angry, Because I Couldn't Believe It Was Happening": Affect and Discourse in Responses to 9/111', 38 *Review of International Studies (RIS) (*2012) 907; Van Rythoven and Solomon, 'Encounters between Affect and Emotion: Studying Order and Disorder in International Politics', in E. Van Rythoven and M. Sucharov (eds), *Methodology and Emotion in International Relations: Parsing the Passions* (2019) 133.

2. Mapping *Affective Justice*

In Chapter 1 ('Genealogies of Anti-Impunity: Encapsulating Victims and Perpetrators') Clarke focuses on the dominance of a 'narrative construction of justice as law invok[ing] the mission of protecting survivors against powerful "perpetrators" of violence' (at 50). She emphasizes that 'these legal developments could not take root without particular emotional assertions about the form of morally driven interventions articulated as being on behalf of "victims/survivors" and "perpetrators" at play' (at 75). She also underlines that the international focus on individual criminal responsibility associated with this construction 'can result in the obscuring or erasure of the structural underpinnings of institutional violence' (at 72).

The following chapter ('Founding Moments? Shaping Publics through Sentimental Narratives') turns to 'the way that feelings of alliance and compassion are generated through political speeches and legal narratives that not only make various anti-impunity ICC and Pan-Africanist justice discourses real, but also constitute social alignments through which emotional regimes play out' (at 91). Clarke considers, for example, the anti-impunity 'Road to Rome' narrative associated with the establishment of the ICC, illustrating how the Court 'gained popular traction as a symbol of protection for victims and as a means of ending impunity' (at 96). This is contrasted with the manner in which Uhuru Kenyatta's and William Ruto's 2013 Kenyan election campaign 'tapped into . . . emotional sensibilities related to anticolonial struggle and postcolonial Pan-Africanism in order to mobilise the sympathies of the Kenyan people' (at 92), including casting the ICC as an institution of 'external (read colonial) domination' (at 94).

Chapter 3 ('Biomediation and the #BringBackOurGirls Campaign: Making Suffering Visible') examines 'how in public activism emotional manifestations of human suffering have become decoupled from lived spaces' (at 118). Reflecting on the manner in which, as it became progressively more international in scope, the #BringBackOurGirls campaign 'erase[d] the bodily representation of African girls and replace[d] it with justice messaging' (at 118), Clarke observes that the centrality in this discourse of the 'victim to be saved' distracted from 'the larger structural forms of victimhood caused by conditions of economic or political marginalization' (at 119). She concludes that: 'the legal encapsulation of the victim and perpetrator has successfully created an international community that has internalized the responsibility to protect' (at 139). However, 'the type of community of action that this generates is rooted in the temporality of the now . . . negat[ing] the relevance of

inequality embedded in much deeper histories of violence, and instead focus[ing] on justice demands as urgently actionable' (at 139).

Drawing a contrast with #BringBackOurGirls (and the #Kony2012 campaign), Chapter 4 ('From "Perpetrator" to Hero: Renarrating Culpability through Reattribution') focuses on Kenyatta and Ruto's 2013 'UhuRuto' election campaign. In a sophisticated campaign, Clarke observes, Kenyatta and Ruto were able to 'deflect blame, protest ICC indictments, and win elections' (at 144) by 'rais[ing] the importance of articulating Kenya's [previous post-election 2007–2008] violence in the context of the country's history' (at 140). As she goes on to note, the 'campaign tapped into pro-Kenyan desires for post-colonial justice and succeeded in turning the electoral conversation away from the ICC trials and toward the need for a new agenda for change that addressed the historical roots of inequality in Kenya' (at 142).

Part of the reason that such 'reattribution' of culpability was possible, Clarke points out, is that 'legal developments . . . may not map well onto how affected communities understand the causes of violence' (at 148). Reflecting tension between the 'limits of legal time' (at 151) and the 'longue durée of structural violence' (at 155), she highlights that 'for some, the law falls short . . . because international courts cannot situate crimes historically,' and are seen as overlooking 'proximate' perpetrators (at 162).

In Chapters 5 and 6, discussion shifts to the 2014 Malabo Protocol and the criminal jurisdiction of the proposed African Court of Justice and Human and Peoples' Rights.[3] In Chapter 5 ('The Making of an African Criminal Court as an Affective Practice') Clarke utilizes the African Union's (AU) 'making of an African court with international criminal jurisdiction . . . as a lens through which to explore new cartographies of African justice as a symbolically Pan-African question concerned with the particularities of justice on the African

[3] The Malabo Protocol proposes a set of amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. The latter instrument is intended to merge the African Court on Human and Peoples' Rights and the (itself not-yet established) Court of Justice of the African Union to form the African Court of Justice and Human Rights (ACJHR), which would then be retitled the 'African Court of Justice and Human and Peoples' Rights'. At the time of writing the Malabo Protocol remains unratified by any states. See Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, Doc. AFR 01/3063/2016, 22 January 2016.

continent' (at 183). The Malabo Protocol, from this perspective, is seen as part of a 'Pan-Africanist' initiative 'to gain authority over the sequencing of peace and justice interventions by discursively recalling the deep inequalities in Africa's histories and infrastructures, while innovating new ways for political actors to navigate judicial contexts' (at 183).

Chapter 6 ('Reattributions: The Refusal to Arrest and Surrender African Heads of State') narrows in on the Malabo Protocol's inclusion (as Article 46A *bis* of the proposed revised Statute of the African Court of Justice and Human and Peoples' Rights[4]) of a provision granting heads of state and government immunity from the international criminal jurisdiction of the putative court. Here, Clarke surveys debates over head of state immunity at the AU, ICC Assembly of States Parties, and in other contexts, including the initiative for collective AU withdrawal from the Rome Statute.[5] Drawing on these accounts, she portrays Article 46A *bis* not as 'an objective legal doctrine, but [as] an emotionally relevant statement about inequality in global affairs' (at 251), reflecting AU stakeholders' view of 'the judicial process as part of a larger political process that needed to also involve peace negotiations and legal accountability sequencing' (at 242). While recognizing the challenges in 'articulating immunity as a pro-justice act' (at 242), she nevertheless highlights how 'Pan-Africanists committed to rethinking justice in terms of structural inequality and those who are engaged in reattributions of justice within and outside of African countries are celebrating this move as a welcome restorative action that responds to inequality in the international system' (at 217).

In the Epilogue ('Toward an Anthropology of International Justice'), Clarke reiterates her principal claims. Analytically, she notes that 'justice is constructed through affective formulations that are tied to various component parts that interact, converge, and diverge' and that within the 'international criminal law assemblage that comes together within that which is loosely called international justice . . . are the production, uses, and rethinking of justice as well as the emotions and regimes that propel its meanings' (at 258). She then turns to normative issues, noting that:

> [T]he story of justice in the African postcolony . . . is a story about . . . political and economic restructuring made to align earlier forms of effective

[4] Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, available at www.refworld.org/docid/4937f0ac2.html.

[5] See Rome Statute of the International Criminal Court, UN Doc. 32/A/CONF 183/9, 17 July 1998, 37 ILM 999 (hereinafter 'Rome Statute').

> colonial control to the contemporary management of an international domain within which Africa's violence can trigger ICC action . . . not because the court and its actors are targeting Africa . . . [but] because of the conditions of inequality in contemporary modernity. (at 258–59)

3. The Potential of *Affective Justice*

These claims are worthy of note. Everyday understandings and practices of justice – domestic and international – are indeed likely to be produced as well as imbued by emotion. Equally, it is indeed critical not to overlook the historical and continuing post-colonial conditions shaping armed violence in Africa and the role of these conditions in shaping how international responses to atrocity crimes are experienced.

The manner in which international law and legal institutions are shaped by, reflect and perpetuate power differentials and inequality is well-trodden ground, emphasized in critical legal scholarship, particularly in the third-world approaches to international law (TWAIL) tradition, as well as in realist accounts of international law and politics.[6] In *Affective Justice*, however, Clarke goes beyond conventional accounts articulating the tendency of law to reflect and reproduce power imbalances.

This section highlights a number of *Affective Justice*'s particularly noteworthy contributions. The review then closes by considering some of the volume's broader implications.

A. Learning from *Affective Justice*

To this reader, two contributions of *Affective Justice* stand out. First is Clarke's conceptualization of the manner in which understandings of justice – and in turn of international law and legal institutions – are shaped by affect: that is, by 'embodied engagements with and production of justice through particular structures of power, history, and contingencies' (at 5). This move enables *Affective Justice* to look beyond the doctrinal

[6] See, e.g., A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005); Gathii, 'The Agenda of Third World Approaches to International Law (TWAIL)' (20 December 2018), available at https://papers.ssrn.com/abstract=3304767; Mearsheimer, 'The False Promise of International Institutions', 19 *International Security* (1994) 5; Strange, 'Cave! Hic Dragones: A Critique of Regime Analysis', 36 *International Organization* (1982) 479.

and policy debates around which disparate understandings of international legal regimes and institutions often revolve, by situating these regimes, institutions and debates within affective contexts. In illustrating the role of affect in informing and structuring understandings of international justice and legal institutions, Clarke adds a valuable dimension to scholarly understanding of African backlash against the ICC as well as of international justice more generally.

The second standout element of *Affective Justice* is Clarke's careful ethnographic work. While *Affective Justice* utilizes a range of empirical materials, Clarke's 'drawing back the curtain' on the imbrication of affect in understandings of justice and perspectives on international law and institutions is particularly impressive, especially where she provides first-hand, participant-level accounts. She observes, for example, the differing physical, emotionally expressive responses of African statesmen and civil society members at the 2013 Rome Statute Assembly of States Parties to AU legal counsel Djenaba Diarra's setting out of AU concerns about selective justice at the ICC, highlighting 'the domain of agreement or nuance that . . . clarified how emotional responses constitute international justice formations.' (at 230). Similarly, she notes the forceful convictions associated with the drafters' view of the Malabo Protocol as 'creating possibilities in modern Africa' (at 210). These descriptions not only illustrate the salience of emotions to perspectives on and understandings of international justice, they also underline what is at stake – emotionally as well as politically – in what can often be portrayed as primarily technical, if heated, legal and political debates.

B. *Affective Justice* in Perspective

Affective Justice will doubtless appeal strongly to those already working, like Clarke, towards an 'anthropology of international justice'. The volume is also instructive, however, for broader audiences, including both scholars and practitioners of international law.

There is a risk that those less well versed in the theoretical literature informing Clarke's work here may be deterred from engaging closely with the volume. In particular, elements of the theoretical apparatus Clarke applies in *Affective Justice* may remain opaque to such readers, with terms including 'assemblage', 'rhizome', and 'embodiment' appearing to bear meanings that are not apparent from the manner or context in which they are deployed in the book, despite appearing to be integral to the theoretical apparatus.

This may not be a hindrance for readers already familiar with the work of Deleuze and Guattari. For others, though, it may pose a relatively high barrier to entry.[7] Such barriers are not insurmountable, however, and *Affective Justice* ultimately proves a rewarding read.[8]

As to the broader claims advanced in *Affective Justice*, while Clarke puts forward a strong case, it would also seem likely to remain a matter of debate as to whether '[t]he key to understanding international justice in the contemporary period is to recognize how legal encapsulation produces displacements and how those displacements are leading to the erection of new institutions (in this book described as the Pan-Africanist pushback)' (at 29).

In part this is likely to be because, as Clarke shows, understandings of international justice vary across contexts. Perhaps more critically, though, *Affective Justice* itself forms part of a growing literature on the politics of international justice, various elements of which illustrate how attitudes towards and treatment of international criminal justice institutions by different actors are formed and informed by a myriad of international, transnational, domestic and societal, material, and ideational factors and processes.[9] Publications on the ICC alone, for example, have highlighted the importance of national interests,[10] domestic politics,[11] the

[7] As another reviewer has observed: 'The book is not easy to digest if one is not familiar with anthropological terminology . . .': See Rubin, 'Politicized Justice: Africa and the International Criminal Court', 14 *International Journal of Transitional Justice* (*IJTJ*) (2020) 11.

[8] An insightful *Opinio Juris* symposium on *Affective Justice* also provides a helpful overview of the key theoretical and conceptual advances Clarke seeks to make. See *Symposium*: '*Affective Justice* Under Scrutiny – Introduction to the Forum', *Opinio Juris* (blog) (25 May 2020), https://bit.ly/33U7hJl.

[9] See, e.g., *supra* note 1 for references.

[10] Vinjamuri, 'The International Criminal Court: The Paradox of Its Authority', in K. J. Alter, L. R. Helfer, and M. Rask Madsen (eds), *International Court Authority* Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (2018) 331.

[11] Boehme, '"We Chose Africa": South Africa and the Regional Politics of Cooperation with the International Criminal Court', 11 *IJTJ* (2017) 50.

relative material power of states,[12] international norms,[13] and norm entrepreneurs[14] in shaping state behaviour and attitudes towards the court. That said, even if the processes of 'legal encapsulation' Clarke highlights form only one set of factors amongst others shaping the politics of international justice, *Affective Justice* nevertheless challenges future researchers to consider how affect and emotion interact with other salient factors in producing outcomes in different cases.

C. Beyond *Affective Justice*

Affective Justice also has potentially further-reaching implications for both scholarship and practice. Clarke's highlighting of the underlying structural factors affectively informing African understandings of international criminal justice, for example, invites examination of how the potential for international institutions to reflect and perpetuate structural inequalities may be addressed.[15]

A particular challenge in this regard in the African context is that the Malabo Protocol – a new regime spurred by the processes of legal encapsulation Clarke identifies – itself reflects a Western rule of law paradigm.[16] This in turn raises the issue of whether the architects of the African Court of Justice and Human and Peoples' Rights risk replicating some of the dysfunctions of the ICC's relations with African states. Certainly, given the resistance encountered by the Malabo Court's predecessor, African Court on Human and

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[12] Rodman, 'When Justice Leads, Does Politics Follow? The Realist Limits of Prosecutorial Agency in Marginalizing War Criminals', 17 *Journal of International Criminal Justice* (2019) 13.

[13] Mills, '"Bashir Is Dividing Us": Africa and the International Criminal Court', 34 *Human Rights Quarterly* (2012) 404.

[14] Mills and Bloomfield, 'African Resistance to the International Criminal Court: Halting the Advance of the Anti-Impunity Norm', 44 *RIS* (2018) 101.

[15] See in this vein also Clarke, 'Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality', *Just Security* (24 July 2020), available at https://bit.ly/36Ykt22.

[16] As Clarke recognizes, 'though it seems that there is something substantively different about the African Court, the reality is that it is envisioned as operating within a legal realm that is quite similar to other courts elsewhere' (at 212).

Peoples' Rights, it would seem premature to discount this possibility.[17] Indeed, related concerns on the part of African governments may also go some way to explaining why – notwithstanding the treaty's affective hinterland – the court envisioned by the Malabo Protocol remains a 'pipe dream'.[18]

Affective Justice also prompts reflection on more fundamental relationships between international law and justice, including attributions of responsibility and accountability in the context of atrocity crimes.[19] Clarke observes in this vein, for example, that 'justice is not just about addressing theft and violence through the law but that justice is about addressing the larger conditions within which theft and violence happen' (at 263). Downplaying the technical and doctrinal legal issues that are central to much debate about promoting and delivering international justice, however, in turn risks overlooking that – as the Malabo Protocol illustrates – law remains at the heart of such debates.[20] In consequence, while eloquently highlighting failings of existing institutions in realizing justice, *Affective Justice*

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[17] See Daly and Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court', 14 *Int'l J. L. in Context* (2018) 294. Mark Goodale also probes in a similar vein: '[g]iven that "[l]aw operates within unequal fields of power and governance" and can also be understood as a "cultural artifact that embodies inequalities" [*Affective Justice*, at 258], would these critical descriptions also apply to the proposed African Court of Justice and Human Rights?' See Goodale, 'Affective Justice Symposium: "Recontextualizing Justice through Affect, History, and Biopolitics"', *Opinio Juris* (26 May 2020), available at https://bit.ly/2Lbra8j.

[18] Mahdi, 'Africa's International Crimes Court Is Still a Pipe Dream', *ISS Africa* (15 October 2019), available at https://bit.ly/3m3zwf3.

[19] See, e.g., Howard-Hassmann, 'Genocide and State-Induced Famine: Global Ethics and Western Responsibility for Mass Atrocities in Africa', 4 *Perspectives on Global Development and Technology* (2005) 487.

[20] As Clarke has noted elsewhere, she 'oppose[s] narrow technocratic analyses of international law in relation to these Africa–ICC debates precisely because this approach inherently erases both voices of resistance (regardless of the actors) and, more seriously, alternate possibilities for innovation'. See Clarke, 'Affective Justice Symposium: An Anthropology of International Criminal Justice Across Multiple Scales – A Response to Commentaries', *Opinio Juris* (29 May 2020), available at https://bit.ly/3720EXz.

leaves tantalizingly underexplored the potential for international lawyers or policymakers to harness the tools of technocratic legalism – or law generally – to address the shortcomings of these (and *pace* the Malabo Protocol, planned) international justice institutions.[21]

In the final accounting, Clarke is of course doubtless correct that 'legal practices are not simply technical articulations of objective certainty; they are affective and are fueled by histories and assumptions about what one values and presumes, what they mean, and the best steps through which to achieve the goals of justice' (at 224). At the same time, though, as Brent Sasley has observed: '[e]motions cannot, of course, explain everything'.[22]

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[21] As Carsten Stahn has observed: 'International criminal law cannot be expected to solve inequalities entrenched by colonialism, unequal distributions of power resulting from sovereign equality, or discontents about the outdated configuration of the collective security system. It is in need of better safeguards against abuse, however, if it seeks to maintain its vocation.' See C. Stahn, *A Critical Introduction to International Criminal Law* (2019), at 414.

[22] Sasley, 'Emotions in International Relations', *E-International Relations* (12 June 2013), www.e-ir.info/2013/06/12/emotions-in-international-relations/.