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Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*. Durham: Duke University Press, 2019. 384 pp. ISBN 9781478006701.

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In February 2020, as part of broader peace negotiations with Sudan's rebel groups in Darfur, Sudan's transitional authorities declared that they were prepared to hand over former president Omar al-Bashir to the International Criminal Court (ICC) to face trial for crimes against humanity, war crimes and genocide. This was a significant development as ICC's warrants against him as well as the Kenyan president, Uhuru Kenyatta, and his deputy, had earlier caused a stir and dissatisfaction leading to accusations of neo-colonialism and interference in domestic affairs of African countries. The African Union (AU), as the major pan-Africanist organization in the continent, took the lead in opposing the ICC's alleged neocolonial interference. The charges against the Kenyan president and deputy were later vacated and at the time of writing this review, al-Bashir has not yet been handed over, and it is not clear whether or when he will be. Professor Clarke's new book is a timely contribution to the debate on ICC and Africa in light of these recent developments and the continued critiques of the international criminal justice system.

In addition to its contribution to the anthropology literature, *Affective Justice* fills an important gap in the politics and international law literature by focusing on emotive narratives about justice. The book is based on extensive field research in the Hague, Addis Ababa, Arusha, Kenya, and Nigeria, during which the research team worked in different capacities to collect and analyze observations to understand the working of international justice assemblages. But what is affective justice and how does it work? Clarke defines affective justice as "people's embodied engagements with and production of justice through particular structures of power, history, and contingencies" (5). Affective justice is constituted by complex assemblages and is materialized through "bodily expressions, verbal utterances, biomediated hashtag campaigns, international laws, and claims about justice" (xxiii). The author identifies three component parts of affective justice practices that shape rule of law assemblages: legal technocratic practices, embodied affects, and emotional regimes. The first domain is mainly concerned with the biopolitical management of life and death through the employment of scientific-legal rationalities. The second component part, embodied affects, is "experienced through bodily impulses yet propelled by particular sustained social sensibilities," while emotional regimes involve "the domain of the social in the manifestation of affects" (18-19). The examination of the various aspects of these components is at the core of the six chapters of the book.

Part I starts with exploring legal technocratic practices and legal encapsulation as its central element. Clarke defines legal encapsulation as the dominance of law in discourses of justice and the displacement of other justice practices as a result. She traces the genealogy and rise of legal encapsulation in the form of the anti-impunity discourse as a component part of the contemporary rule of law assemblages and examines its impact on how justice is experienced. According to Clarke, the anti-impunity discourse follows a liberal legalistic model that uses sentimental legalism

to base its moral authority on the image of the ‘victim to be saved’ and ‘the perpetrator to be stopped’ by an ‘international community’ that has the responsibility to protect those victimized by violence. Although claimed to be objective and fair, liberal legality draws its authority and power from emotional affects that are shaped in a historical context. The adoption of the Rome Statute and the establishment of ICC came as a result of a long-lasting movement for criminal accountability of perpetrators of international crimes, a trend Kathryn Sikkink calls ‘the justice cascade’ and Chandra Sriram ‘a revolution in accountability.’ Critiquing the oversimplification of the norm cascade narrative, Clarke highlights the interrelation between the rise of the anti-impunity discourse, the emergence of the global neoliberal order, and the perpetuation of neocolonial dependency in this new order. The author also points out the “paradigm shift from forgiveness to legal accountability” as laying the foundation for the institutionalization of the rule of law movement in the rise of the liberal legalistic model (67). Her primary example of the forgiveness model is the South African Truth and Reconciliation Commission (TRC). Her account, however, overlooks the critiques of TRC itself as a neoliberal project. Several scholars critique TRC for individualizing the victims of apartheid and ‘de-collectivizing’ the social in line with the demands of post-apartheid neoliberalism (Bowsher 41; Mamdani 33). Moreover, although the number of international criminal courts has indeed risen in the past three decades, we have also witnessed a rise in the use of multiple other TJ mechanisms, including truth commissions, reparations, lustration or vetting, and various memorialization efforts (Sikkink and Kim 270). Clarke, however, does not elaborate how this rise intersects with legal encapsulation.

According to the author, the rule of law’s anti-impunity movement has shifted the justice terrain to individualization of criminal responsibility and delimitation of the ‘sacred space of victimhood’ (50). This has narrowed the definition of victimhood in the international justice assemblage by reducing it to certain physical attacks on the body, thereby, erasing structural forms of victimhood caused by political and economic inequalities from the domain of action. The hegemonic production of legal time also ensures that acts of violence that have a much longer timeline, such as colonial violence and apartheid, are not subject to the jurisdiction of ICC. These are some issues that have been the subject of controversy in the broader transitional justice (TJ) debate, resulting in proposals on alternative frameworks of TJ such as a move to a ‘transformative justice’ framework. In addition, the critique of TJ’s lack of engagement with structural injustices instituted by colonial and post-colonial governance structures has led to limited engagements of TJ mechanisms with colonial violence, especially in settler colonies such as Australia and Canada. The recent experience of the Truth and Dignity Commission in Tunisia whose mandate extended to the colonial period is one such example in the African context. It is true, however, that most of these changes are happening outside the criminal courts and within truth seeking initiatives.

After explaining the working of technical mechanisms of legal order, Clarke turns her attention to how compassion and alliances are formed through political speeches and narratives. Affective transference is at the center of this process and is used by both proponents and opponents of ICC. Affective transference “produces particular forms of sentimental attachments in situations that could be argued to have otherwise unrelated causality” (41). As an example, she discusses Kenyatta’s drawing on the image of the freedom fighter within Pan-African emotional regimes. In a speech on the Heroes’ Day on October 20, 2013, he likened his ICC indictment to the fate of his father at the hands of the British colonial administration during the independence movement. Through the entanglement between colonial violence and contemporary violence in African collective imaginary, Kenyatta’s dialogism shaped “emotional climates through passionate

utterances and narratives about stigmatization” (94). The resulting emotional climate led to a ‘collective effervescence’ forging alliances and group unification (106-7).

Mobilization of affect can also occur through new forms of electronic and digital media, such as hashtag activism as exemplified by the #kenyadecides campaign. Activists used this campaign to divert attention away from ICC’s indictment of Kenyatta and Ruto toward the emotional regime of nationalism and against Western interference in Kenya’s elections. While biomediated activism enables new forms of meaning making, it rarely delivers any tangible results for victims or survivors it claims to be supporting. Instead, as Clarke points out, it decouples “human suffering from their sites of suffering and relocate them to the ‘international community’ with the responsibility to protect” (119). Using the two examples of the #BringBackOurGirls campaign in 2014 and the now infamous #Kony2012 campaign to arrest Joseph Kony, the leader of the Lord Resistance Arm, Clarke shows how these depersonalized and celebritized campaigns in the West reasserted the urgency of ending impunity through their temporality of the now while relegating the larger structures of victimhood caused by economic and political marginalization to the shadows. In fact, by displacing the bodies of those suffering, these campaigns in effect became sites for formulation of “ideological alignments and social positioning and not just the manifestation of humanitarian empathy” (120). These movements elicit affective responses in ways that generate social action while constituting new publics through the articulation of certain moral principles. By displacing the bodies of those suffering, they highlight Western agency over the cause of those victimized by violence while decentering victims and recentering those supporting the cause. The result is an aesthetic repackaging of suffering and “humanitarianism through the agency of an activist-consumer making choices about principles they can rally around” (131). In short, the international community becomes proxy victims giving a *raison d’être* to those engaged in such campaigns rather than addressing the root causes of violence.

The second part of the book focuses on the workings of refusals and reattributions in response to technocratic knowledge practices. I particularly found the discussion of reattribution processes very illuminating. Clarke defines reattribution as “a process of reassigning guilt through rhetorical strategies that appeal to subjective and supposedly universal emotions but shift the ontological domain on which competing conceptions lie” (20). This process is closely tied with notions of culpability and justice. For instance, the UhuRuto 2013 campaign built on historical and contemporary emotional sensibilities to challenge the legal temporality at the heart of international criminal law. The campaign rebranded Kenyatta and Ruto not as ‘perpetrators’ but as African freedom fighter heroes by drawing on post-colonial emotional regimes that celebrate the freedom fighter discourse and generate emotional sympathies among the target constituent publics. Their campaign, which was ironically run by two UK-based companies, reclassified the temporal basis of culpability by emphasizing a new agenda for change that addressed the historical roots of inequality. For many Kenyans, the violence did not start and end within the period under the jurisdiction of ICC but had a much longer *durée*. The UhuRuto 2013 campaign challenged the inability of legal time to encompass historical forms of violence which fall outside liberalist temporal constructions of culpability. Through reattribution, it propelled particular narratives, though equally manipulative, undermining post-2002 linear determinants of legality. As Clarke’s interview participants pointed out, the contemporary violence cannot be separated from the question of land and the displacement inherent in British colonial policies. Clarke also finds a disconnection between the ICC’s focus on individual command responsibility and some Kenyans’ identification of proximate perpetrators or foot soldiers as being directly responsible.

The processes of retribution and refusal have also resulted in the formation of new cartographies of TJ. The Pan-African renaissance articulated mainly by AU has produced new African geographies of justice. These geographies are mainly concerned with the particularities of justice on the African continent. This not only shows how legal hegemonies travel and adapt to different circumstances, but also indicates the critical role of affective justice in the making and unmaking of sociolegal and political institutions. When efforts to convince the UN Security Council (UNSC) to defer the ICC process against al-Bashir failed, AU considered other actions. In 2014, it launched a new campaign, 'I am African, I am the African Union,' to broaden public awareness of its role and activities. This campaign was meant to evoke particular emotional responses and to articulate a narrative of African leaders taking control and advancing a prosperous Africa. It drew on Pan-Africanist sentiments of a reconceived Africa with a mobilizing narrative that "flowed from Africa's anticolonial struggles, to its political freedom, to its contemporary road to economic and political integration" (186). To develop new Pan-Africanist justice regimes, the AU-commissioned Panel of the Wise devised a Transitional Justice Policy Framework which emphasizes the importance of an interrelated justice architecture and the necessity of peace and justice sequencing. This sequencing approach was visible in AU's approach to the conflicts in South Sudan and Libya.

Furthermore, in response to the power inequalities at the ICC and UNSC, AU launched an initiative to propose amendments to the Rome Statute, including article 27 on the irrelevance of official capacity. Once this initiative failed to be fruitful, AU considered other actions including non-cooperation as well as an attempt to launch a collective withdrawal as affective alignment of protests to challenge international legal rules. In 2014, the AU also adopted the Malabo Protocol to expand the jurisdiction of the proposed African Court of Justice and Human Rights (ACJR) to include international and transnational crimes. Once ratified, the ACJHR's jurisdiction will not only include all of the Rome Statute crimes, but also a range of political and economic crimes such as unconstitutional change of government, piracy, terrorism, corruption, and illicit exploitation of natural resources. The Malabo Protocol "represents a counterjudicial narrative that encompasses political concerns at the heart of African inequalities" (214). The affective expressions supporting the erection of an African court with criminal jurisdiction reinforce the mantra of 'African solutions to African problems,' and forms the terrain for the retributive politics to manage Africa's violence on its own terms within African geographies of justice. Article 46A *bis* of the Malabo protocol explicitly ensures immunity for heads of state and is a further manifestation of the emotional regimes discussed by Clarke. Through articulating a differentiated practice, African countries are seeking to develop a new regional norm as a form of refusal. The Malabo protocol, however, has not yet entered into force and other efforts, such as collective withdrawal, have faced resistance from several African countries. *Affective Justice* shows how struggles over inequality and selectivity shape the emotional embodiments of affective justice that propel the formation of new institutions as well as the critical role of affective justice processes in making and unmaking international law. For those interested in international criminal law and particularly in the complexities of legality in the mix of postcolonial politics, this book is a must-read.

## References

Bowsher, Josh. "The South African TRC as Neoliberal Reconciliation: Victim Subjectivities and the Synchronization of Affects." *Social & Legal Studies* 29.1 (2020): 41-64.

Mamdani, Mahmood. "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)." *Diacritics* 32.3/4 (2002): 33-59.

Sikkink, Kathryn and Hun Joon Kim. "The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations." *Annual Review of Law and Social Science* 9.1 (2013): 269-285.

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