DISTANT JUSTICE: THE IMPACT OF THE INTERNATIONAL CRIMINAL COURT ON AFRICAN POLITICS by PHIL CLARK
(Cambridge: Cambridge University Press, 2018, 379 pp., £26.99 (pbk))

> Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. 'It is possible,' says the gatekeeper, 'but not now.' At the moment the gate to the law stands open, as always, and the gatekeeper walks to the side, so the man bends over in order to see through the gate into the inside. When the gatekeeper notices that, he laughs and says: 'If it tempts you so much, try it in spite of my prohibition. But take note: I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other.'[1]

The conclusion of Kafka's celebrated parable 'Before the Law' is all too well known: the country man dies without ever gaining access to the law. It also provides an apt background to Phil Clark's *Distant Justice*. The book's intent is to assess critically the politics of the International Criminal Court (ICC), focusing specifically on the cases of Uganda and the Democratic Republic of Congo (DRC) and providing broader insights on the African continent. Read in the context of the deep – and apparently intractable – crisis of a Court that stands accused of bias against the African continent, this book is particularly timely. The ICC was established in 1998 as the first permanent global court tasked with prosecuting the most egregious crimes worldwide – genocide, crimes against humanity, crimes of war, and (since 2010) aggression. As such, it was celebrated as the revival of a 'Nuremberg legacy' left dormant throughout the Cold War. Yet the Court's decision to acquit former Ivory Coast President Laurent Gbagbo in January 2019 came at the tail-end of a series of failed cases – a failure rate that stands unprecedented in the global justice landscape.[2] In a context of wider contests against the Court – from the US but also from states originally favorable to it, starting with African states themselves – without the support of African states, indeed, it seems the very existence of the ICC stands in the dock.

Clark's conclusions are bleak. He traces the ICC's failures in Africa to one core dynamic: *distance*. The physical, institutional, and demographic distance of the Court 'from the African societies in which it intervenes has been damaging, both to the Court and to local politics' (p. 17). In keeping with his long-established and prolific research on peace, truth, justice, and reconciliation across various parts of the African continent as a Professor of

1 F. Kafka, 'Before the Law' (1915) trans. I. Johnston <https://www.kafka-online.info/before-the-law.html>.

2 Since 2002, the ICC has pronounced only three convictions, including one overturned on appeal. Eleven proceedings have failed out of a total of 22 completed cases since 2002. Four accused have been acquitted. Four cases were dismissed. Proceedings were abandoned in two other cases.

International Politics at the SOAS in London, Clark marshals an impressive body of evidence to support his thesis. Through multi-sited and multi-level methodology fieldwork – carried out over the course of 11 years, through 653 interviews with ICC personnel, senior Ugandan officials and DRC political and judicial officials, civil society and religious leaders, and former rebel combatants, as well as 426 interviews with everyday people in Uganda and the DRC – Clark essentially chronicles the history of the ICC since inception. In the meantime, he manages the rare feat of looking both inside the Court and outside of it – that is, in some of the country contexts in which it has been involved, from the state apparatus down to the local level of communities' perceptions of international criminal justice.

One of the book's main arguments is 'that the ICC represents a unique form of foreign intervention in African affairs insofar as it views distance and detachment from the domestic realm as a virtue because, it believes, this maintains the Court's neutrality and impartiality' (p. 13). This, Clark argues, stems from the paradox of a Court that is both *independent* and *interdependent*. The politics that undergirded the principle of complementarity – a core feature of the Court, according to which states have the first responsibility and right to prosecute international crimes – aimed at avoiding sovereignty clashes. Yet the practice of the Court so far, Clark claims, has tended to be dominated by a legal conception of complementarity, which establishes an extremely high threshold for states to claim jurisdiction over cases within their territory. On the other hand, 'distance', he claims, 'is encoded in the DNA of the ICC' (p. 25): unlike other practices of external interventions, indeed, the law 'views distance as an inherent virtue' (p. 308).

More than physical and geographical remoteness, the 'distancing' tendencies of the Court, specifically espoused by its prosecutorial practices that stand at the heart of Clark's critique, have deliberately aimed at using the law as a means of operating above politics. This, he claims, has embedded within the operations of the Court the double vicious effect of isolating the ICC from national social contexts and marshalling hegemonic tendencies under the cover of universality. Clark argues that the Office of the Prosecutor (OTP)'s politics of distance have thereby rendered the Court vulnerable to domestic politics – especially in countries like Uganda and the DRC where 'self-referrals' have been part and parcel of domestic politics. Further, the Court represents 'a view from somewhere (Western liberalism) and a highly contradictory and counter-productive one at that' (p. 305). Distancing, Clark argues, has not only side-stepped domestic judicial processes; it also quenches what he sees as national choices to facilitate peace, and foremost community-based visions of justice and responses to atrocity.

Based on this bleak chronicle, which he extends to a survey of other African situations, Clark's response aims at being practical. The Court, he claims, needs to be politically savvier by achieving 'politically grounded legalism' or 'prudent politics' (p. 309). That is, it needs to morph from an essentially itinerant and short-term institution – one whose interactions with national

spheres (what he traces as the 'intersections' between international criminal justice processes and national outcomes) are defined by the judicial politics of individual cases – to an institution invested at the local level, demographically proximate through a representative African staff, and effectively present on site, including by holding trials *in situ*.

Clark's book enters the fold of a now abundant scholarship on the ICC. One of its main (and undisputable) virtues is the extensive and long-term nature of the research – that is, the sheer mass of data collected over the course of 11 years, both at the Court itself and across national and local sites. Yet as a scholarly intervention, Clark also espouses what seems to characterize debates on the ICC: an intellectual trench warfare between *friends* and *foes* of the Court. This is epitomized by the debates sparked by what commentators have widely characterized as a 'divorce' between the ICC and African states[3] – following the African Union (AU) Extraordinary session of October 2013 organized around the threat of a collective pull-out of African states from the Rome Statute – and specifically discussions around Clark's book.[4] While Burundi is the only state yet to have effectively pulled out of the Rome Statute, some commentators have been quick to assert that the demurely termed 'fraught' relationship between the AU and the ICC was nurtured by misperceptions and misunderstandings: they therefore see this not so much as a 'withdrawal' strategy as a call for 'reforming' the ICC, starting with the role played by permanent members of the Security Council.[5] Others have pinpointed that there is no working alternative for an 'African' version of global justice, as the 2014 Malabo Protocol instituting a criminal chamber within the African Court of Justice and Human Rights is still unlikely to enter into force.[6]

While downplaying the rift between Africa and the ICC, these responses still tend to reproduce the lines of an ideological war of position between a neo-colonial form of global justice and the wheels (albeit rusty) of universalism. Here, Clark stands at one end of the spectrum, through his denunciation of the Court's 'hegemonic tendencies' (p. 310) while others, such as Carlson, explicitly espouse the Western liberalism enshrined in the project for international criminal justice with the aim of 'perfecting' it.[7] This

3 See S. Allison, 'African Revolt Threatens International Criminal Court's Legitimacy' *Guardian*, 27 October 2016 <https://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia>.

4 See P. Labuda and T. B. Bouwknegt (eds), 'Symposium on Phil Clark's *Distant Justice*' *Opinio Juris*, 30 September 2019 <https://opiniojuris.org/2019/09/30/symposium-on-phil-clarks-distant-justice/>.

5 See M. Kersten, 'How Three Words Could Change the ICC–Africa Relationship' *Justice in Conflict*, 9 May 2017 <https://justiceinconflict.org/2017/05/09/how-three-words-could-change-the-icc-africa-relationship/#more-7344>.

6 Fifteen member states need to ratify the protocol. As of 1 July 2019, 15 states had signed it but none had ratified it.

7 K. Carlson, *Model(ing) Justice: Perfecting the Promise of International Criminal Law* (2018).

opposition between the denunciation of the ICC as the epitome of 'tropical justice … at the service of the powerful'[8] and calls for the ICC to 'exclusively use the language of the law'[9] signals the acute difficulty of situating the *critique* of the ICC. First and foremost, such debates illustrate what could be described as the 'bunkerization' of the Court among the very restricted market of scholars and practitioners clustered around the Hague[10] – whereby what Clark aptly construes as law's 'inherent virtue' of distance (p. 37) is seen to have become the only available weapon against the perceived 'politicization' of the Court.

However, it is not enough, simply, to 'do justice to the political'[11] by opposing the ICC as a hegemonic endeavour against the perceived virtues of national and foremost community responses to atrocities. The risk is to fall into the trap of 'reinventing' tradition[12] – albeit under the claimed benevolent guise of a critique of imperialism. A cynical observer, indeed, could see in Clark's defense – and objectification – of such local processes as the *mato oput* in Uganda nothing different to the colonizers' reinvention of 'custom' across colonial Africa. The pitfall lies in the theorization itself of what Clark describes as 'distance'. While Clark's analysis does open the black box of the ICC as an institution – something that few studies have succeeded in doing so far,[13] by tracing the OTP's strategies and practices – it still illustrates what could be construed as a reciprocal blindness between lawyers and politics scholars on international courts and their operations. 'International law is so primitive, that for us it is law, but for others it is just one option among others.'[14] This lapidary comment by Luis Moreno Ocampo, the first Prosecutor of the ICC, reflects the overwhelming tendency in ongoing debates on the ICC to adopt a narrow, functionalist focus on international criminal courts *qua* judicial institutions. Thus, 'justice often remains a kind of background, an institution taken as a given, static in its (legal) forms and

8 P. Kipré, 'Procès Laurent Gbagbo à la CPI: Pour le Droit et la Justice' *Jeune Afrique*, 30 January 2019 <https://www.jeuneafrique.com/723354/societe/tribune-proces-laurent-gbagbo-a-la-cpi-pour-le-droit-et-la-justice/>. Author's translation from French.

9 M. Bergsmo, 'La CPI, l'Affaire Gbagbo et le Rôle de la France' *Le Monde*, 18 January 2019 <https://www.lemonde.fr/afrique/article/2019/01/18/la-cpi-l-affaire-gbagbo-et-le-role-de-la-france_5410996_3212.html>. Author's translation from French.

10 See S. Dezalay, 'L'Afrique contre la Cour Pénale Internationale? Éléments de Sociogenèse sur les Possibles de la Justice Internationale' (2017) 146 *Politique Africaine* 165.

11 S. M. H. Nouwen and W. G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 *The European J. of International Law* 941.

12 E. Hobsbawm and T. Ranger (eds), *The Invention of Tradition* (1983).

13 See J. Meierenrich, 'The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory' in *The First Global Prosecutor: Promises and Constraints*, eds M. Minow et al. (2015) 97.

14 Author's interview (with Ron Levi) with Luis Moreno Ocampo, Toronto, 8 November 2012.

equal in its effects (of legitimation)'.[15] To boot: Clark sees domestic courts as 'institutions that are arguably most like' the ICC (p. 150). Yet this points to a misunderstanding about the Court – it is *not* a giant version of domestic courts – as much as about what the concept of distance should entail.

It is, indeed, the articulation between law and politics itself that needs to be fed back into the debate: as a core driver in the constitution and legitimation of national state power – as traced by Pierre Bourdieu in his posthumous *Sur l'État*[16] – as much as in the structure of the international as an arena of projection of national interests and of the institutionalization of the legalization of politics. Distance, thus, is in law's DNA, but it reflects a constant tension – or double bind – between law and politics. The research path opened by Kantorowicz[17] and others in his wake has shown that lawyers are structurally positioned to play 'double games'.[18] While at the service of power holders – and thus playing a central role in the legitimation of state power – lawyers also need to distance themselves from politics, as a condition to protect the autonomy of the law, and with it their professional practices.

On the other hand, certainly, the very mandate of the ICC – which enables it to perform 'real-time' justice, not only *ex post* but also *ex ante*, by launching prosecutions in the context of ongoing conflicts – has exacerbated the perceived cleavage between justice and politics as two antithetical goals. Yet these oppositions also highlight the structural embeddedness in politics of international criminal justice as a 'weak field' – that is, a space that is weak as regards its internal autonomy but not weak in its wider social effects.[19] In this sense, the structure itself of the OTP – with its Jurisdiction, Complementarity and Cooperation Division designed specifically to act as an interface with diplomatic *milieux* and the international non-governmental organizations (INGOs) that gravitate around the Court – reflects the double strategy of survival adopted by international criminal tribunals since the 1990s, through accretion[20] and institutional conversion,[21] designed to respond

15 A. Vauchez, 'La Justice comme "Institution Politique": Retour sur un Objet (Longtemps) Perdu de la Science Politique' (2006) 63–64 *Droit et Société* 491, at 493. Author's translation from French.

16 P. Bourdieu, *Sur l'État: Cours au Collège de France (1989–1992)* (2012).

17 E. Kantorowicz, *Les Deux Corps du Roi* (1989).

18 See Y. Dezalay and B. G. Garth, 'State Politics and Legal Markets' (2011) 10 *Comparative Sociology* 38.

19 S. Dezalay, 'Weakness as Routine in the Operations of the International Criminal Court' (2016) 17 *International Criminal Law Rev.* 281.

20 For example, beyond a case law built in reference to the experience of previous international criminal tribunals, the prosecution strategies of the ICC relied in great part on these antecedents (with about a third of the personnel coming from the ad hoc tribunals). See S. Dezalay, op. cit., n. 19.

21 See H. Schoenfeld et al., 'Crises Extrêmes et Institutionnalisation du Droit Pénal International' (2007) 36 *Critique Internationale* 37.

to the specific features of the 'atypical political environment' in which they are embedded.[22]

First and foremost, this unpacking of distance as, indeed, an inherent feature of the law, but also as part and parcel of the structuration of the international as an arena of projection of national political struggles, highlights that international criminal justice is a 'symbolic' market – that is, to use Bourdieu's reflections,[23] a space in which the belief in global justice as a symbolic good is a condition for the authority of global justice institutions. Certainly, it is a market that remains exceptionally contested. The ICC constitutes the most prominent institutionalized dimension of a diffuse 'reforming common sense'[24] on the criminalization of state and armed violence worldwide, but it operates in a global space where the judicial response to such crimes remains questioned, fragmented, and uneven. Crucially, however, tracing international criminal justice as a symbolic market points to the dynamic relationship between restricted markets of producers and wider markets of users of global justice. Looking only at one end of this space – be it the discourse produced by and for the ICC, or the discourses of contenders of the Court – can at best shed a partial light on how this space functions. This underlines the necessity of understanding the structure of positions, over time, within the ICC, within competing international spaces for the criminalization of certain practices, and within national fields of state power in the Global North and the Global South, as much as tracing the dynamic relationship between these national and international spaces. This is by no means a simple task. Clark's book, in this regard, can be acclaimed for aiming specifically at bringing into the same fold a focus on the internal strategies of the ICC, as well as national and local levels. Yet his analysis falls short of what such a broad-sweeping research agenda should entail. To offer a comprehensive insight, indeed, it would be necessary to trace systematically the structure of positions within sites of reception of global justice across national legal and political fields on the African continent. African lawyers, specifically – be they operating at the Court itself, or within national jurisdictions – remain a blind spot in Clark's analysis. However, ongoing research is laying out the hypothesis, precisely, that looking at lawyers, their trajectories, their resources, and their professional strategies can be an invaluable starting point in tracing in the *longue durée* the unequal and uneven relationship between Africa and the world.[25] This could provide a key to moving beyond the ideologically-laden

22 R. Levi et al., 'International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority in International Criminal Law' (2016) 78 *Law and Contemporary Problems* 289.

23 P. Bourdieu, 'Le Marché des Biens Symboliques' (1971) 22 *L'Année Sociologique* 49.

24 C. Topalov (ed.), *Laboratoires du Nouveau Siècle : La Nébuleuse Réformatrice et Ses Réseaux en France (1880–1914)* (1999).

25 See S. Dezalay, 'Les Juristes en Afrique: Entre Trajectoires d'Etat, Sillons d'Empire et Mondialisation' (2015) 138 *Politique Africaine* 5.

critique of the ICC as a form of hegemonic intervention or the epitome of the failing promise of universality.

SARA DEZALAY
School of Law and Politics, Cardiff University, Law Building, Museum Avenue, Cardiff, CF10 3AX, Wales
dezalays@cardiff.ac.uk