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AFFECTIVE JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE PAN-AFRICANIST PUSHBACK (AFFECTIVE JUSTICE), by Kamari Maxine Clarke. Duke University Press Durham and London 2019. pp. 375. ISBN: 9781478007388 Hardcover $114.95. ISBN: 9781478005759. Paperback $30.95. ISBN: 9781478006701).

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Kamari Maxine Clarke's AFFECTIVE JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE PAN-AFRICANIST PUSHBACK unravels the miseries and mysteries around the relationship and functioning of the International Criminal Court (ICC) and African states. Over the past few decades, the ICC has been the subject of criticisms and accusations of targeting African leaders, with postulations about its practice, procedure, and effectiveness. Established by the Statute adopted in Rome (Rome Statute), Italy in 1998, the ICC has been operational for over 20 years, having entered into force on July 1, 2002. Contrary to the several criticisms leveled against the Court, the fact remains that the ICC functions on two main pillars: complementarity and cooperation. However, the first decade of the operational phase of the ICC saw only Africans and African leaders from Uganda, the Democratic Republic of Congo (DRC), the Central African Republic (CAR), Kenya, Sudan, Mali, and Cote d'Ivoire being prosecuted at the Court.

This asymmetrical posture prompted questions: Is Africa a laboratory or a scapegoat? Why has Africa become the most "frequent user and 'repeat customer'" of the ICC? Why is Africa portrayed as being exclusively responsible for all of humanity's inhumanities and criminalities? Certain African leaders also postulated that Africa is not against international criminal justice; however, it appears that a "fraudulent institution" in the guise of the ICC, was established to put Africa in a somewhat laboratory test for international criminal law. The activities of the United States of America and the United Kingdom in Afghanistan and Iraq in 2003 are examples of situations that befit investigations and prosecutions by the ICC. Arguably, however, there is an unspoken truth about international criminal justice, in that certain individuals and countries will never be indicted before the ICC. This is what is referred to as selectivity *ratione-personae,* which is both legal and legitimacy-based.

Highlighting the issues of selectivity amongst others, this piece by Clarke is inclusive, pervasive, and highly intellectual. She produced a clear thesis that explores the practice of the ICC from a Pan-Africanist perspective and evaluates the decisions of the Court in line with its complementarity and cooperation pillars. Critically, the ICC functions by its enabling Statute – The Rome Statute. In accordance with its trigger mechanisms – referrals by states, the United Nations Security Council (UNSC), and *proprio-motu* powers of the ICC Chief Prosecutor, as outlined in the Statute, the ICC's practice and procedure in investigations and prosecutions of situations and cases have

been rightly guided. Therefore, Clarke's assumptions and perspectives as articulated in the book AFFECTIVE JUSTICE are clear, concise, and appropriate.

Within the space of over four years, AFFECTIVE JUSTICE is the outcome of rigorous research and several physical visits to some African countries. Specifically, the author visited post-violence sites in Kenya and Nigeria, collected data in relation to international criminal trials at the ICC in The Hague, engaged with civil society organizations, and attended African Union (AU) Summits and meetings in Addis Ababa, Ethiopia. The robustness of the book is demonstrated by the conscientious travels to different regional courts, such as the African Court in Tanzania, the Extraordinary African Chambers in Senegal, and engagements in the Assembly of State Parties of the AU, in which Clarke attended meetings, conferences, and workshops.

Thus, in order to unravel the mysteries behind the challenges and criticisms of the ICC as an international criminal justice institution, Clarke saw the need to grapple with the paradoxes of contemporary justice; justice that is affective, justice that is tainted by individual sensibilities, memories, aspirations, fears, and hopes.

The book is divided into two parts: Part 1 is entitled "Component Parts of the International Criminal Law Assemblage**"** and it includes Chapters 1 to 4, whilst Part II encompasses discussions around "Affects, Emotional Regimes and the Reattribution of International Law**"**, covered in Chapters 5 and 6. With detailed sources, resources, and data collection, Clarke provides a summary of each chapter set out in Parts I and II, giving the reader an exposé into the sturdiness of the discourse within the book (pp. 41-45). AFFECTIVE JUSTICE is well organised and clearly written as it provides insights into the author's thoughts and the concerns of three interlocutors regarding the "justice narrative", which she identifies through the opinions of said interlocutors that "…law has the potential to provide a way out of the poisoned politics of the post-colonial state" (p. xxi). This introduction sets the tone for the ensuing parts of the book.

PART I – COMPONENT PARTS OF THE INTERNATIONAL CRIMINAL LAW ASSEMBLAGE

In the Introduction, "Formations, Dislocations, and Unravelings", Clarke alludes to the referral of the situation in Darfur, Sudan to the ICC in 2005 and the subsequent indictments and arrest warrants issued against former President Hassan Omar Al-Bashir, the underlying rationale for Clarke's adoption of the term "affective justice" was clearly articulated. She posits that "affective justice" is a term advanced to facilitate "…understanding of people's embodied engagements with and production of justice through particular structures of power, history and contingencies" (p. 5). Affective justice reflects embodiments of feelings that are manifested in expressions and embodied in practices, including the spoken word, legal actions, and innovations, or electronically mediated campaigns. Accordingly, Clarke notes that in an attempt to shape justice institutions and conceptions of justice, the ICC and AU agents, nongovernmental advocates, and civil society activists compete for control of social norms or challenge those norms to produce new ones. Thus, affective justice reflects the way that people come to understand,

challenge, and influence legal orders through the biopolitical instrumentalization of technocratic knowledge, as well as through their affective embodiments, interjections, and social actions. On the contrary, international justice is often presumed to be outside the realm of these practices of construction. Rather, it is seen by many of its advocates as objective and non-prejudicial (p. 5).

These engagements are the main highlights in Chapter 1, where details of "Genealogies of Anti-Impunity: Encapsulating Victims and Perpetrators" are conceptualized. With specific reference to Kenya and Kenyan Criminal Law, Clarke highlights the inextricable perceptions of justice from the perspectives of the ICC and African leaders, identifying the "…inability of international law to adequately protect or compensate those victimized by violence" (p. 53). The Chapter emphasizes "...how law's biopolitical techniques contribute to the technocratic management of violence through its emotive and aspirational force"(p. 54).

Within the Chapter, Clarke's penchant for excellence and meticulous research is demonstrated in the analysis of the historical origins of transitional justice, governance mechanisms through different continents including Africa, the idea of neo-liberal reforms, and the resulting influences on political control and economic inequalities. The Chapter further expounds on the notion of "transitional justice", a term that has been effectively implemented by South Africa and Rwanda in the aftermath of apartheid and genocide that occurred in both countries. Transitional justice exemplified in these countries were encapsulated in the idea of amnesty thereby eroding the concept of retributive justice. At the core of the Truth and Reconciliation Commission (TRC) of post-Apartheid South Africa, for example, was the idea of forgiveness. With three committees, namely, the Amnesty Committee, the Reparation and Rehabilitation (R&R) Committee, and the Human Rights Violations (HRV) Committee, "justice" was served in accordance with the Promotion of National Unity and Reconciliation Act No 34 of 1995.

Similarly, post-genocide Rwanda had three mechanisms by which those who were most responsible for the genocide and other human rights and humanitarian law violations were criminalized. These included the Rwanda National Courts, the International Criminal Tribunal for Rwanda (ICTR), and the Gacaca Courts. Consequently, Clarke aptly identifies that "...what became clear was that forgiveness also required the acknowledgement that a 'perpetrator' had committed an offence" (p. 66). Critically, there is a "paradigm shift from forgiveness to accountability… of perpetrators for international crimes and …international tribunals that hosted multiple trials of named 'perpetrators.' This became the testing grounds for determining whether the deployment of criminal justice in post-war contexts could be used to advance political transitions" (p. 67). This part of the Chapter skillfully provides some food-for-thought for international criminal law experts and readers generally, which allows them to evaluate the nuances of international criminal justice in war-torn or post-war contexts with increased curiosity regarding the approaches of international criminal tribunals; ICTY, ICTR, and the ICC.

Chapter 2, entitled "Founding Moments? Shaping Publics through Sentimental Narratives", identifies the "…way that feelings of alliance and compassion are generated through political speeches and legal narratives that…make various anti-impunity ICC and Pan-Africanist justice discourses real…" (p. 91). Chapter 3 highlights the "Bioremediation and the #BringBackOurGirls Campaign", which provided the historical background to this slogan that brought to light the kidnapping of over three hundred girls, who were abducted from a school in Chibok, Nigeria. In addition, the chapter highlights the related violence inflicted by Boko Haram in the context of the differences between the southern and northern parts of Nigeria. The Chapter reflects a social phenomenon and the influence of "various forms of electronic and digital media, such as hashtag activism, [which]...provides renewed platforms to confront injustice…" (p. 118).

AFFECTIVE JUSTICE is dexterously written with ingenious interlinkages and postulations about the different perspectives on international criminal justice, thereby providing an emotional, yet historical and analytical evaluation of key figures and situations within Africa, and the socio-economic, political, and cultural influences, which affect distributive justice. For example, in Chapter 4 entitled "From Perpetrator to Hero – Renarrating Culpability through Reattribution", the histo-political narrative of Kenyan leaders is indicative of the author's thoughts on "historical emotional sensibilities and contemporary emotional climates…social domains that produce emotional cultural sensibilities, they engage in the socialization of practices and attitudes and create acceptable meanings out of particular political contexts" (p. 141).

With regards to the notion of "legal time," Clarke posits that "...attributing guilt through strict understandings and demarcations of time is critical to anti-impunity formations in international criminal law. Rather than reflecting on historical developments or broader root causes, ICC jurisprudence has adopted a relatively strict view of temporality with the recognition that non-retroactivity or the principle of *nullum crimen sine lege* – no crime except what is proscribed by law – is one of the central tenets of law"(p. 171). Consequently, Clarke's histo-political narrative is justified succinctly in the following:

> I am not suggesting that those who are responsible for mass violence should not be held accountable for their role in wrongdoing. What I am highlighting here, however, is that competing attributions of culpability reveal substantive differences between social and legal justice in shaping varying understandings of guilt as affective formulations of culpability. They highlight the afterlife of disappointment with the failure to balance power historically in postcolonial Kenya, set alongside the articulate failure of the law to rectify histories of human dispossession from their ancestral land…(p. 171).

PART II – AFFECTS, EMOTIONAL REGIMES AND THE REATTRIBUTION OF INTERNATIONAL LAW

Having articulated a historical basis which facilitates understanding of the differences between social and legal justice and affective formulations of justice in African states, Part II of the book highlights the role of the African Union (AU), including key international instruments geared towards social, economic, environmental and political development. This part of the book highlights the way affective justice techniques find expression alongside these instruments, including the possibility of an African Court with "international criminal jurisdictions offer[ing] … a lens through which to explore new cartographies of African justice…" (p. 183). Indeed, the Malabo Protocol and the creation of the criminal jurisdiction for an African Court have yet to see the light of day. On June 27, 2014, the Assembly of Heads of States and Government of the African Union at its Twenty-third Ordinary Session, adopted the Protocol establishing the African Criminal Court in Malabo, Equatorial Guinea. The Protocol merged the African Court of Human and Peoples' Right and the Court of Justice of the African Union into one Court, granting it international criminal jurisdiction. However, nine years down the line, with only 15 signatories out of 55 African states, the Malabo Protocol has yet to attract one ratification, and therefore, "affective justice" from the AU perspective seems far-fetched.

In Chapter 6, "Reattributions: The Refusal to Arrest and Surrender African Heads of State" reflects on the dissatisfactions and disaffections leading to threats of withdrawals of several African states from the ICC. Burundi, South Africa, Gambia, Kenya, etc. were some African states who have threatened withdrawals. The Gambian minister charged, noted that "[D]espite being called International Criminal Court, [it] is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans" (p. 218).

In 2010, at a Summit of African heads of state, Malawi raised concerns about the ICC's encroachment on state sovereignty. In the context of arrest warrants issued against former President Al-Bashir, the Malawian president Bingu wa Mutharika noted:

> To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years. . . . There is a general concern in Africa that the issuance of a warrant of arrest for . . . al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union Charter… (p. 222).

These arguments were further raised in the wake of the Kenyan post-election violence that led to the indictment of former president Uhuru Kenyatta, his then deputy William Ruto, and four others (popularly referred to as the "Ocampo Six"). However, these cases have long been withdrawn from the ICC due to frustration arising from the non-cooperation of the Kenyan authorities to provide evidence and witnesses to prosecute the cases. Succinctly, AFFECTIVE JUSTICE left no stones unturned. Clarke indeed exhibited an unusual wit and ability to analyse ICC cases involving African

heads of states. The question remains: "Why Africa?" With the establishment of the ICTY and ICTR, Richard Goldstone noted thus:

> The problem with the UNSC is that it says no in the case of Cambodia, Mozambique, Iraq and other places where terrible war crimes have been committed but yes in the case of Yugoslavia and Rwanda. It is noteworthy that no *ad hoc* tribunals would ever be established to investigate war crimes committed by any of the five permanent members of the United Nations Security Council or those nations these powerful states might wish to protect (Goldstone, 2013).

This re-echoes the selectivity discourse. Accordingly, Gerry Simpson notes that "...each war crime trial is an exercise in partial justice to the extent that it reminds us that the majority of war crimes remain unpunished. If Yugoslavia why not Somalia, if Rwanda why not Guatemala" (p. 8). Similarly, Alfred Rubin postulated that unless the law can be seen to apply to George H.W. Bush, who ordered the invasion of Panama, it would seem hypocritical again. A similar quagmire holds in the 21st Century invasion of Ukraine by Russia ordered by President Vladimir Putin since February 24, 2022. Although Article 28 Rome Statute makes a commander or person in control who fails to take all necessary measures to prevent or suppress the commission of atrocious crimes criminally responsible, yet it appears that political consideration, power, and patronage continues to determine who is tried for international crimes and who is not.

Clarke's AFFECTIVE JUSTICE exposes the various socio-economic, historical, and political phenomenons, which entangle criminal justice. The book reflects a culmination of Clarke's perspectives during the "Africa Debate" in 2013 on the theme: "Is the ICC Targeting Africa Inappropriately or are there sound reasons and justifications for why all of the situations currently under investigation or prosecution happen to be in Africa?" (Africa Debate). Clarke posited:

> Africa's submission to the ICC jurisdiction exists within political and structural inequalities in the global arena, meaning that the ICC's involvement in Africa is not simply a question of the ICC's targeting of Africa. Nor is it a matter of whether African states themselves participated in referring particular cases. Rather, it is to do with which crimes can be pursued, which agents can be held responsible, whether Africa's violence can be managed by African countries and whether the crimes of the Rome Statute are sufficient to address the root causes of violence in Africa's political landscape (Africa Debate, 2013).

Conclusion: Is an African Court the Solution?

The proposed establishment of an African Court has suffered setbacks. While the Pan-African Pushback in the wake of threatened withdrawals from the ICC is real, justice delivered to Africans, who are the victims of international

crimes, outweighs the accusations of unfair targeting of Africa by the ICC. It is doubtful that the establishment of an African Court would provide the much-needed solution. As articulated by Clarke,

> The conundrum of contemporary AU Pan-Africanism is that alongside deep-seated conceptions of the Pan-African liberatory past is actually a deep desire to participate in contemporary neoliberal power, in global power. The resistance to extradition and the anti-ICC mobilizations are expressions of this… These affective geographies create ambivalences that cannot be simply understood genealogically and mapped out with precision. The recognition of the violence of marginalization operates like ghosts in the present, even as there is a duelling struggle to become part of that which it marginalizes (p. 215).

Consequently, Clarke's in-depth analysis of "transitional justice" and the AU Transitional Justice Framework, provides the mechanisms deployed by the AU in conflict management, restoration of justice, peace, and security. Whilst admitting that there are "complex political dynamics" in attempting to facilitate peace and justice arising from various incidents of violence across Africa and by African leaders, AFFECTIVE JUSTICE proposes possible hybrid interventions, such as a, "…hybrid court that fuses domestic and international criminal justice procedures… that works in collaboration with complementary domestic alternative justice mechanisms that may function in tandem with various prosecutions – including the ICC when necessary" (p. 200). The idea of hybridized courts seems plausible, as this might resolve the limitations of the Malabo Protocol. However, this might militate against the African Renaissance and the concept of African solutions for African problems.

Undoubtedly, AFFECTIVE JUSTICE by Clarke is a scholarly work that addresses the political mix and nuances within which the ICC functions. The future of international criminal law is necessarily domestic. Focusing on some African states, the book reiterates the point of whose justice is being served by the ICC: Africa or the West? Justice according to who? Clarke provides insights into responses to judicial inequalities that do not always find expression in legal frameworks alone, as well as the social imaginaries that are shaped by perpetual campaigns for legal justice.

Bottom line: AFFECTIVE JUSTICE is an outstanding book that involved creative research design and painstaking data collection. It is a must-read for anyone interested in the work of the ICC, and an indispensable tool for the ICC, AU, African Heads of Governments and States, African Criminal Justice Systems, Judges, Law Courts, Lawyers, Academics, Researchers, Students, Civil Societies, and Non-Governmental Organizations (NGOs).

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