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BOOK REVIEW

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Oumar Ba, *States of Justice: The Politics of the International Criminal Court* (Cambridge University Press, 2020) 190 pp. ISBN 978 110848 877 8 (Hardback)

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The historical evolution of international criminal justice is littered with evidence of politically and economically dominant states leveraging their power to influence the course of international justice. Scholarship on this is considerable.¹ In *States of Justice: The Politics of the International Criminal Court*, Oumar Ba gets off this beaten path, instead delving into a meticulous examination of an aspect of states' behaviour that has so far received little attention in the literature. He examines how states presumed to be weaker or who appear weaker in the international system² engage and interact with

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¹ See for example Jackson Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (Transnational Publishers 2003); Zhang Wanhong, 'From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (On the Sixtieth Anniversary of the Nuremberg Trials)' (2006) 27 *Cardozo Law Review* 1673; Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *Journal of International Criminal Justice* 830; William A. Schabas, *The Trial of the Kaiser* (Oxford University Press 2018).

² Ba understands 'weaker states' as those 'that do not wield global power or influence'. See Oumar Ba, *States of Justice: The Politics of the International Criminal Court* (Cambridge University Press, 2020) 9.

international criminal justice, specifically how some of these states have strategically instrumentalised the International Criminal Court ('ICC' or 'the Court') to serve their domestic political and security interests, or at least those of their public elite. Using empirical evidence painstakingly gathered from ICC situation countries, the Court and other stakeholders, Ba exposes inconsistencies in practice, strategic interpretations and application by both the Court and states, and the politicisation of the Court by 'weaker' states. He does this by focusing on the use of the ICC's trigger mechanisms – self-referrals, the Prosecutor's *proprio motu* powers and UN Security Council referrals – as well as attendant issues of complementarity, state co-operation and compliance.

To argue that the Court is a political agent and actor as Ba does is not necessarily to say that its judicial functions are driven by political considerations. Rather, it is to say that being an inter-governmental organisation established by states through a political process, the Court is set against the backdrop of a political arena in which intra-state and inter-state politics will inevitably have an impact on its work. This is further exacerbated by the fact that even though the Court is exclusively concerned with individual criminal responsibility, there is almost always an element of state responsibility lurking in the background of international crimes, either in the form of state failure or state complicity. As Ba has convincingly demonstrated, the Court's positioning within a political environment has been exploited by state actors in 'weaker' states to instrumentalise some of the Court's judicial functions. While acknowledging the Court's role in 'push[ing] the boundaries of international law'³ through its jurisprudence and, to a limited extent, in spurring states to action in strengthening international criminal justice at national and regional levels, the book ultimately challenges the post-Nuremberg narrative of international criminal justice's unmitigated progress and seamless norm diffusion. It also challenges the common belief of 'weaker' states as passive recipients of international (criminal) justice and debunks the myth of the ICC

³ Oumar Ba, *States of Justice: The Politics of the International Criminal Court* (Cambridge University Press, 2020) 160.

as an omnipotent and apolitical institution. With this bold book, 'Ba is coming for our [international criminal justice] fairy tales',⁴ as Kelly-Jo Bluen observed.

It is not all doom and gloom, however. Ba leaves the reader with some hope, even if it be just a glimmer, as well as some tough questions. Ba argues that the Court's continued relevance will depend on an honest acknowledgment of its positionality in the global political arena and on a modest and realistic assessment of its ambitions and abilities. Ba then invites the reader to have in mind the Court's uninspiring track record of almost two decades when pondering the future of the Court specifically and of international criminal justice generally. Taking Ba's advice, perhaps one may take comfort in the fact that the Assembly of State Parties (ASP) commissioned a review of the Court in 2019 'with a view to making concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole'.⁵ This review was occasioned by what the ASP referred to as 'multifaceted challenges facing the [Court]'.⁶ This culminated in the Independent Expert Review (IER) report published on 30 September 2020,⁷ barely two months after the publication of Ba's book. While it is evident from the report that some of the challenges that the Court faces are partly as a result of its failure to appreciate its political ecosystem, as Ba's research reveals, the report nonetheless skirts around the issue of politicisation revealed in Ba's research. Considering the failure of the IER report – the first major attempt at a comprehensive independent review of the Rome Statute system – to confront

⁴ Kelly-Jo Bluen, 'States of Justice Symposium: States of Justice, Cascade Scientism, and Snow White in The Hague' 19 August 2020 <http://opiniojuris.org/2020/08/19/states-of-justice-symposium-states-of-justice-cascade-scientism-and-snow-white-in-the-hague/> accessed 19 August 2020.

⁵ Resolution ICC-ASP/18/Res.7 (6 December 2019), para 6.

⁶ Resolution ICC-ASP/18/Res.7 (6 December 2019), preamble.

⁷ Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report (30 September 2020) https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf accessed 30 September 2020.

instrumentalisation of the Court by (weaker) states,⁸ one wonders whether a major opportunity for course-correction has been missed; and whether the international criminal justice project as currently conceived is so fundamentally flawed as to be irredeemable even by the kind of reform recommended in the IER report.

I have argued elsewhere that, 'an assessment of the ICC's performance should have in mind the extent and limits of its legal powers ... [and should be] based on the legal possibilities under the [Rome Statute] and general standards of international criminal justice'.⁹ It is therefore refreshing to observe that while pointedly analysing the behaviour of 'weaker' states in their interaction with the ICC, Ba has taken particular care not to veer off the realm of legal possibility under the Rome Statute system. In summary, Ba's pointed research is a clarion call to the Court, particularly the Office of the Prosecutor, to take a long and hard look in the mirror and engage in honest introspection. It is also an indication to stakeholders that perhaps the all-too-common rose-tinted view of the Court is a counter-productive narrative that only serves to entrench an international criminal justice echo-chamber in which genuine, effective and non-partisan justice is impossible to deliver. The kind of introspection and humble acknowledgment of the Court's political environment that the book calls for¹⁰ may not necessarily guarantee that states will no longer strategically instrumentalise the Court. However, it may equip the Court with the requisite skills to navigate its complex political ecosystem

⁸ A review of the Rome Statute was undertaken by states at the Review Conference held in Kampala, Uganda in 2010. However, this was a review led by the ASP and was less comprehensive compared to the IER which is an independent expert-led review.

⁹ Owiso Owiso, 'Distant Justice Symposium: Phil Clark's "Distant Justice" – A Wake-Up Call for the International Criminal Court or a Case for Managing Expectations?' 01 October 2019 <http://opiniojuris.org/2019/10/01/distant-justice-symposium-phil-clarks-distant-justice-a-wake-up-call-for-the-international-criminal-court-or-a-case-for-managing-expectations/> accessed 17 August 2020.

¹⁰ See also Julie Fraser and Brianne McGonigle Leyh (eds), *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar 2020) where the various authors also call for introspection.

and enhance its prospects of ‘put[ting] an end to impunity for the perpetrators of [international] crimes’¹¹ as its constituent instrument so ambitiously declares. While it is not entirely possible to divorce the Court from its political environment, neither is it desirable, the Court would likely be in a better position to navigate this environment without falling prey to debilitating state instrumentalisation. The unfortunate reality of the Court’s practice documented in Ba’s book does not need to be so. While ardent proponents of the Rome Statute system unaccustomed to unflattering commentaries on the Court may be tempted to brush aside this book because of its bold departure from the all-too common unmitigated progress narrative of international criminal justice, this book is timely and necessary reading for all who profess an interest in the Rome Statute system, and especially for those invested in seeing an efficient and effective ICC.

¹¹ Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, preamble.