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BOOK REVIEW

Patryk I. Labuda, *International Criminal Tribunals and Domestic Accountability: In the Court's Shadow*, Oxford University Press, 2023
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Patryk Labuda's book presents a novel take on a topic that has captured the imagination of international criminal law scholars since the adoption of the Rome Statute – namely, the notion of 'complementarity'. For Labuda, while originally developed as an element of the institutional design of the International Criminal Court (ICC), over time the term 'complementarity' has transformed into a set of 'diverse assumptions, expectations, and beliefs' about how international courts and tribunals (ICTs) more generally should *interact* with domestic actors in the fight against impunity.[1] The author begins with the observation that international criminal justice has undergone a 'paradigm shift'.[2] Specifically, the ICC has ushered a new era – that of (positive) complementarity, where domestic trials have become 'the new promise of international criminal law'[3] and the most important role of ICTs is seen as their ability to cast a 'shadow' over states and incentivize the latter to combat impunity.[4] This review unpacks Labuda's intriguing argument and offers critical insights on how it could be developed further.

In its core, the book explores what happens when the lofty expectations about the ability of ICTs to catalyse domestic proceedings meet the reality of international politics and self-interest. Labuda examines these dynamics in the context of three case studies: the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the ICC investigation in the Democratic Republic of the Congo (DRC). What is most impressive about Labuda's book is the level of empirical detail, which quickly makes it clear to the reader that this manuscript is the product of long years of research on the topic. The book builds on a variety of sources including legislation, court transcripts, civil society reports, prosecutorial policies, and government statements, as well as over 220 interviews.[5] The impact of ICTs on domestic accountability processes is meticulously assessed in each case study with respect to three types of influence: incentivising domestic proceedings (Chapter 4), promoting capacity building (Chapter 5), and internalizing international criminal justice norms (Chapter 6). This makes Labuda's book a must-read for researchers working on the intersection between international and domestic criminal proceedings.

Notably, the book not only draws conclusions based on the empirical analysis but also takes a normative stance on what the relationship between ICTs and governments *should* be like. Specifically, the author distinguishes between three ideal-type relationships: 'isolation', which

[1]P. I. Labuda, *International Criminal Tribunals and Domestic Accountability: In the Court's Shadow* (2023), 259.
[2]Ibid., at 8.
[3]Ibid., at 7.
[4]Ibid., at 27–8.
[5]Ibid., at 12–13.

precludes meaningful exchanges between ICTs and governments; 'accommodation', where international and domestic officials agree to divide their work without challenging each other[6]; and 'iteration', defined as a 'push-pull relationships between international civil servants and government officials based on evaluative conditionalities for the exercise of jurisdiction'.[7] According to Labuda, iteration is the desired type of relationship between ICTs and states as it affords a degree of 'strategic conflict' and 'tactical bargaining' between international civil service officials and governments.[8] Thus, iteration fosters important sociolegal debates about the merits of relying on both international and domestic proceedings, including the capacity and willingness of states to carry out such proceedings. By contrast, according to the author, accommodation, which constitutes a form of uncontested division of labour between ICTs and governments, is dangerous not only because it precludes such inquiries[9] but also because it creates a superficial sense of achieving progress in terms of promoting domestic proceedings – an effect which the author calls 'unintended diversionary complementarity'.[10] For Labuda then, ICTs should become much more engaged at the domestic level, including by evaluating the quality of the state's justice system and monitoring domestic proceedings to ensure compliance with international human rights standards.[11]

The book nevertheless observes that, in general, iteration dynamics have failed to materialize in practice and ICTs have in most cases fostered a relationship of mutual accommodation with states. The author explains this outcome with the 'self-interest' of international civil servants to maintain the institutional relevance of ICTs.[12] Specifically in the case of the ICC's early days, Labuda observes that the prosecutorial strategy was driven by 'short-term opportunism' exemplified by the desire to secure suspects for trial at the expense of giving up on the opportunity to exercise closer scrutiny over domestic proceedings.[13] Notably, for the author, in the ICC context, the *judges* have also played a crucial role in fostering accommodation with states and 'refused to call out' the inability or unwillingness of states to prosecute suspects.[14] By examining merely whether a state had been 'inactive' (or, in case a state had taken action, whether the latter met the 'same case, same conduct' test) ICC judges have eschewed 'politically sensitive issues' of domestic capacity, political will, and fair trial standards.[15] In effect, complementarity, in the specific way in which it has been construed by ICT officials and furthered by civil society and donors, has ended up 'romanticizing domestic accountability'[16] and transforming international criminal justice into a 'managerial statebuilding enterprise geared towards the crimes of non-state actors and consolidating the authority of incumbent governments'.[17] Rather than casting a normative shadow, ICTs have had an 'authoritarian "shadow effect"' allowing domestic elites to 'to implement rule-of-law reforms and then launch less controversial proceedings while blocking high-stakes trials of government-affiliated perpetrators'.[18]

The book, thus, speaks to the rich body of critical interdisciplinary studies in this field[19] and shows how 'a well-known pathology of ICTs – victors' justice' has been 'mainstream[ed]' through

[6]Ibid., at 36.
[7]Ibid., at 286.
[8]Ibid., at 38, emphasis omitted.
[9]Ibid., at 84.
[10]Ibid., at 266.
[11]Ibid., at 292.
[12]Ibid., at 250.
[13]Ibid., at 128.
[14]Ibid., at 129.
[15]Ibid., at 84.
[16]Ibid., at 148.
[17]Ibid., at 20.
[18]Ibid., at 266.
[19]D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (2014); A. Branch, 'Uganda's Civil War and the Politics of ICC Intervention', (2007) 21 *Ethics & International Affairs* 179; S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013); S. Nouwen and

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complementarity into the domestic sphere.[20] Notably, some critical scholars might hesitate to embrace the book's normative stance in terms of the desirability of ICTs engaging more actively in domestic affairs. But perhaps what the author seeks to convey, in a somewhat similar manner to Phil Clark's *Distant Justice*,[21] is that whether ICTs like it or not, their interventions inevitably affect the political dynamics on the ground. Consequently, Labuda is not necessarily calling for more international trials or for enhancing ICC centricity (in fact, he is quite critical of the latter) but rather for international civil servants to embrace the consequences of their decisions and have an honest conversation about the merits of forum allocation.[22]

Crucially, despite the sombre conclusions of the book on the 'authoritarian shadow' cast by ICTs, the reader detects an element of optimism. Throughout the book Labuda emphasizes that while the institutional design of ICTs (including their personal jurisdiction and the question of primacy v. complementarity) has implications for the type of relationship they foster with states, that relationship is ultimately constructed by the actors in the international criminal justice field. Thus, for instance, in Chapter 4 the author argues that the ICTR Prosecution could have relied on the Tribunal's primacy to 'act differently' and fostered a more iterative relationship with the Rwandan government.[23] Similarly, while the SCSL's mandate was confined to the 'most responsible' persons, the isolationist stance taken by the Court[24] coupled with the fact that 'the Sierra Leonean political establishment avoided entanglement with the SCSL'[25] has turned the limited impact of the Court on domestic proceedings into a 'self-fulfilling prophecy'.[26] The book, thus, maintains that accommodation is not a preordained outcome but the product of the interaction between different actors in a particular moment in time.[27]

Here, one could take the discussion about the normative underpinnings of such interactions – and specifically, the principled beliefs held by those actors – even further. A key source of concern for Labuda is the judges' interpretation of Article 17 of the Rome Statute which has rendered the 'unwilling'/'unable' test 'something of a dead letter'[28] and thus transformed the relationship between the Court and states from one of 'conditionality' to one of 'consensuality'.[29] The book attributes the fact that the ICC judges have 'shown no interest' in supporting the policy goal of facilitating genuine domestic proceedings[30] to their 'self-interest (in having triable cases)'.[31] Labuda, thus, insists that the judicial interpretation of the Rome Statute should not be perceived in legalistic terms, as divorced from politics, but rather as pursuing a policy aim of its own, namely, to secure 'the admissibility of cases when the OTP secures custody of suspects'.[32] I agree with both of these conclusions. The interpretation of legal texts (especially in international law) always leaves room for the influence of ideology and policy considerations.[33] Furthermore, international

W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', (2011) 21 *European Journal of International Law* 941.

[20]See Labuda, *supra* note 1, at 10.

[21]P. Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (2018).

[22]See Labuda, *supra* note 1, at 292.

[23]Ibid., at 109.

[24]Ibid., at 230.

[25]Ibid., at 177.

[26]Ibid., at 230.

[27]Ibid., at 271.

[28]Ibid., at 73.

[29]Ibid., at 74.

[30]Ibid., at 81.

[31]Ibid., at 250.

[32]Ibid., at 87.

[33]For a critical take on the indeterminacy of international law see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006).

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organization studies have shown that institutions, including ICTs, remain dependent on their external environment for material and symbolic resources and need to demonstrate fulfilment of their mandates to secure their future existence.[34]

However, both of these factors need not play out only in terms of rational calculations aiming to secure more trials. Normative considerations – the judges' principled beliefs that the Court should be insulated from domestic politics – could be equally influential. Labuda touches upon this towards the end of the book, noting that some stakeholders, including states such as the United Kingdom, have argued that the ICC is 'not a development agency' and that greater involvement with governments would 'invit[e] politics' into the Court's work.[35] This point could have been developed a bit further, to reflect the fact that the majority of ICC judges have adopted a very specific understanding of their mandates, according to which using the law 'as an excuse to satisfy political or even humanitarian goals' would turn the ICC in 'a court in name only'.[36] The Court has thus developed what Phil Clark calls 'philosophical distance' vis-à-vis the world – namely, the tendency of ICC officials to see 'the need to separate the Court's decision-making from messy political calculations about utility and impact' as a crucial part of its mandate.[37] In fact, some ICC judges have taken pride in adopting decisions, such as 'the acquittal of persons who may actually be guilty',[38] that they see as just, even though those decisions risk triggering significant disapproval among some of the Court's audiences, including human rights organizations. Such conclusions are compatible with those of Labuda – adopting an institutional posture that the judges see as 'separate' from politics *is* a form of policy in itself. Furthermore, the judges still seem to be driven by the desire to turn the ICC into a well-functioning organization – simply, their *understanding* of what that entails involves isolation from (domestic) politics. In other words, this inquiry into the normative beliefs of the judges does not negate the fact that they interpret the Rome Statute by view of their preferences but rather seeks to contextualize further where those preferences come from.[39]

These insights also support the book's conclusion that while accommodation dynamics are not preordained and things could be done differently, fostering an iterative relationship with states, especially at the ICC, would be extremely difficult. Labuda attributes this to the fact that international civil servants tend to '(inevitably) choose non-conflictual means of mandate interpretation that preserve plausible deniability in the face of state opposition'.[40] Yet, these attempts to separate legal decisions from the political reality of domestic prosecutions could also result from the specific normative beliefs that are held by court officials. In fact, this gives further credence to Labuda's remark that nothing short of an 'ideational shift' or a 'shift in mentality' is required to force ICTs to face the political implications of their interventions.[41]

Overall, Patryk Labuda's new book is an impressive scholarly work on the intersection between international and domestic accountability for mass atrocities, which does not shy away from the

[34]M. Barnett and L. Coleman, 'Designing Police: Interpol and the Study of Change in International Organizations', (2005) 49 *International Studies Quarterly* 593.

[35]See Labuda, *supra* note 1, at 282–3.

[36]*Prosecutor v. Gbagbo and Blé Goudé*, Reasons of Judge Geoffrey Henderson, ICC-02/11-01/15-1263-AnxB-Red, Trial Chamber I, 16 July 2019, available at www.icc-cpi.int/RelatedRecords/CR2019_07450.PDF, Para. 10.

[37]See Clark, *supra* note 21, at 42.

[38]*Prosecutor v. Bemba Gombo*, Separate Opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, Appeals Chamber, 8 June 2018, available at www.icc-cpi.int/RelatedRecords/CR2018_02989.PDF, Para. 5.

[39]See for instance constructivist scholarship of international law: J. Brunnée and S. Toope, 'Constructivism and International Law', in J. Dunoff and M. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013), 119.

[40]See Labuda, *supra* note 1, at 286.

[41]Ibid., at 288–9.

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complexities of the topic, presents a rich comparative analysis of different case studies, and raises important questions for the future of international criminal law. Engaging with those questions is of utmost importance now that the ICC has entered into its third decade of operation and significantly expanded the scope of its investigations.

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