The International Criminal Court and Africa: An Interview with Phil Clark

Phil Clark discusses the International Criminal Court's approach to Africa and how it has affected politics in the region.

Q. What is the International Criminal Court (ICC) and why was it created?

The ICC is the first permanent global court mandated to prosecute cases of genocide, war crimes and crimes against humanity. When the ICC was created in 1998, the founders envisaged the Court only stepping in to address atrocity crimes when states proved unwilling or unable to do so. The idea was that the ICC and its backers would encourage states to deal with these cases themselves, as a way to avoid ICC intervention and thus maintain their sovereignty.

Before 1998, international justice took the form of two ad hoc United Nations tribunals for the former Yugoslavia and for Rwanda - temporary courts set up to deal only with atrocities committed in those states. The creators of the ICC wanted a permanent, roving court that could prosecute cases wherever they occurred and help construct a more coherent international system of criminal law.

Q. How does the ICC decide which criminal situations to investigate and which cases to prosecute?

On paper, the ICC has a high threshold for intervening in societies affected by mass violence. As I show in my book *Distant Justice: The Impact of the International Criminal Court on African Politics*, however, the ICC has too readily claimed jurisdiction over cases that domestic institutions in various African

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states were already investigating. The Rome Statute puts the onus on states to prosecute international crimes and frames the ICC as an exceptional measure. Conflict situations can be referred to the ICC in one of three ways: through a referral to the ICC Prosecutor from the state where atrocities occurred or whose nationals are accused of committing crimes; from the UN Security Council; or when the ICC Prosecutor herself initiates independent investigations.

Once the ICC has established jurisdiction over a particular conflict situation, the Statute prescribes which specific cases the ICC should not prosecute. These comprise cases where states with jurisdiction are already investigating or prosecuting, while displaying a genuine willingness and ability to do so; where the crimes in question are considered of insufficient gravity to concern the ICC; or where an investigation would not serve the nebulous concept of 'the interests of justice' – which the ICC Pre-Trial Chamber judges recently invoked in halting investigations in Afghanistan because of the United States' refusal to cooperate with the Court.

Q. Your new book examines the impact of the ICC on African politics. As mentioned, you use the conceptual framing of "distant justice" to characterise the ICC's approach to the continent. What is "distant justice"?

The concept of "distant justice" captures the fundamental detachment of the ICC from the African societies where it has intervened over the last 15 years. That detachment is deliberate - the ICC as an institution tries to separate itself from the domestic terrain because it believes this delivers impartial and even-handed justice. This distancing happens in various ways. The most obvious aspect is geographical, with the Court based in The Hague but investigating and prosecuting crimes committed tens of thousands of miles away.

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The ICC also tries to distance itself from the local arena by deploying mainly foreign generalist staff rather than country experts with deep knowledge of the local context. For example, neither the ICC Prosecution nor Defence to date has hired a single national investigator from any of the African states where it has operated. The Court believes – erroneously, as I show in my book – that foreign investigators are more impartial and technically adept than their domestic counterparts and can be used effectively across multiple states, rather than being limited to one specialist country.

My book argues that these components of "distant justice" are the cause of most of the ICC's major missteps since it came into force in 2002. Rather than making the Court more impartial and more effective, its lack of expertise on domestic politics, society and culture in Africa has left it vulnerable to political manipulation and less capable of building robust criminal cases. The ICC has been politically naive in its dealings with states such as those in Uganda, the Democratic Republic of Congo, Côte d'Ivoire and Mali, which have used the Court as a weapon against their political and military opponents while insulating themselves from investigation. To achieve independence in volatile political and conflict environments in Africa, the ICC needs to become politically savvier - more engaged, less detached - and to hire investigators and political advisors from the African states concerned who can provide the local knowledge required to navigate complex domestic environments.

Q. You've spent several years researching the ICC's role in Uganda and the Democratic Republic of Congo. What impact did the ICC's operations have on peace and reconciliation in these countries?

"Distant justice" also means the ICC generally ignores the local impact of its work because, according to this view, too much consideration of the local context threatens the Court's neutrality. Underpinning the philosophy of distance is a belief that suspects must be prosecuted and perpetrators must be punished regardless of the domestic consequences. This means the Court typically forges ahead with investigations and prosecutions even when these disrupt local attempts at accountability, peace and reconciliation.

Since I began conducting fieldwork into the ICC's impact in Uganda and Congo in 2006, the Court has undermined domestic war crimes prosecutions in both countries (including stealing cases that were already being investigated domestically – most prominently in the cases of three rebel leaders from Ituri province in the DRC, Thomas Lubanga, Mathieu Ngudjolo and Germain Katanga); circumvented the Ugandan amnesty act - passed by the Ugandan parliament in 2000 after lobbying from conflict-affected communities in northern Uganda - by insisting on the criminal prosecution of Joseph Kony, Dominic Ongwen and the other leaders of the Lord's Resistance Army (LRA); weakened the 2006-2008 peace talks between the Ugandan government and the LRA by removing amnesty as an incentive for the rebels to lay down their arms; sowing confusion about demobilisation and security sector reform processes in the DRC which also involve amnesties; and dismissing calls from local communities in northern Uganda and eastern Congo to use community-based mediation ceremonies and cleansing rituals to peacefully reintegrate combatants. The ICC's prosecution-at-all-costs approach when it comes to dealing with high-ranking atrocity suspects limits the scope for domestic actors to determine, within their own context, how best to resolve mass conflict.

Q. The Rwandan genocide was 25 years ago. Though there have been criticisms of the locally led gacaca community courts, they have been the centrepiece of Rwanda's post-genocide justice and reconciliation process. What have these courts achieved that the ICC hasn't?

I first became interested in the ICC's work in Uganda and Congo when I was writing a book on the gacaca jurisdictions in Rwanda in 2006. Here were two diametrically opposed processes addressing mass atrocities in neighbouring countries – Hague-based international justice alongside village-based accountability. My fieldwork for the gacaca book and for *Distant Justice* overlapped, so there's no surprise that my understanding of each process informed the other. While gacaca had many flaws, its great strength was its locality – the fact that justice for crimes committed during the 1994 genocide against the Tutsi was being delivered in the same communities where suspects were accused of committing crimes; that local people could watch and participate in the process, including giving emotional testimony that went far beyond providing evidence for the purposes of a trial; and that ultimately gacaca used plea-bargaining and creative forms of sentencing to bring convicted perpetrators back to the community to restart work on the farms. Gacaca mattered to people – perpetrators and survivors alike – because they felt part of the process and could mould it according to their own needs and values.

Rwandans were also aware that the UN International Criminal Tribunal for Rwanda (ICTR) based in Arusha, Tanzania, was simultaneously prosecuting high-level genocide suspects. One refrain among my local respondents – who were attending gacaca hearings once a week – was that suspects prosecuted

at the ICTR were experiencing lesser justice because they didn't have to confront local communities directly. Many local respondents expressed a strong desire for suspects' presence, which gacaca provided by prosecuting them in their home communities.

I first started to grapple with the pathologies of "distant justice" when in 2003 I asked a senior ICTR judge in Arusha whether he had travelled to Rwanda to gauge the Tribunal's impact in light of the ICTR's Statute's claim that it should contribute to reconciliation in Rwanda. The judge replied, "I have never been to Rwanda and I have no desire to visit. Going there and seeing the effect we are having would only make my work more difficult. How can I do my job – judging these cases fairly – with pictures in my mind of what is happening over there? This task is already complicated enough."

That spirit of absolute detachment from the local terrain was magnified tenfold by the ICC, based even further from affected communities than the ICTR in Tanzania. As I began researching the ICC, community respondents in northern Uganda and eastern Congo increasingly expressed disillusionment with the Court's brand of aloof justice, delivered by foreigners in farflung courtrooms, in languages they didn't speak and with local consequences of which Court personnel were often unaware. Judges and lawyers at the ICTR and the ICC are often dismissive of community-based practices of gacaca but they could learnt much by examining the factors – especially ideas and practices of presence as opposed to distance – that mean gacaca, which ended in 2012, still resonates deeply within Rwandan society today.

Q. Is the ICC dead and, if not, what can it do to survive and improve its effectiveness?

The ICC is teetering. Within the Court itself, there is deep a sense of crisis following the recent high profile acquittals of former Congolese vice-president Jean-Pierre Bemba and former Ivorian president Laurent Gbagbo, as well as the Pre-Trial Chamber's halting of the Afghanistan investigations. Some of the ICC's most ardent backers such as the UK have started to question whether the $1.7 billion spent on the Court since its inauguration – during which time it has completed only five cases and seen as many cases collapse before or during trial – represents value for money. Most of the prescriptions for reforming the ICC currently emanating from the Court itself or from the Assembly of States Parties, however, amount to technical tinkering. Almost none of these Hague-centric reforms responds to the damage the ICC has done to African societies since its first ever investigations began in Uganda and Congo in mid-2004.

The conclusion to *Distant Justice* lays out a more comprehensive agenda for reform of the ICC. A crucial first step is to remove from the Rome Statute the capacity for the UN Security Council – three of whose permanent members are not signatories to the Statute – to refer situations to the ICC. The hypocrisy of the major powers' willingness to use the ICC in conflict zones around the world except those involving their own forces is a major source of the Court's widespread illegitimacy.

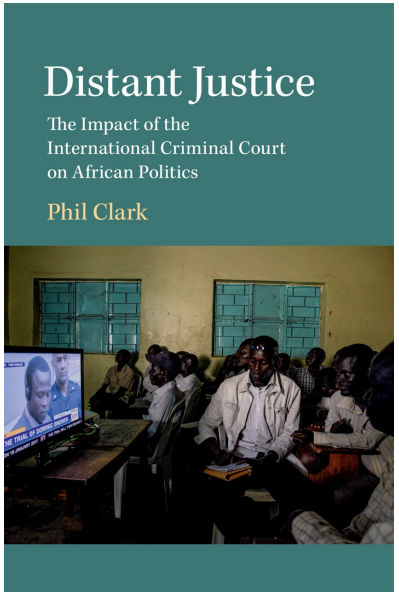
The ICC must transform the profile of its personnel. The intricacies of the settings where the ICC intervenes require deep contextual expertise. National investigators should be hired to investigate crimes in the societies they know intimately and country experts – rather than legal generalists – must advise on how to navigate difficult political and social terrain. This would improve the quality of investigations, while assisting the ICC to develop more even-handed and productive state cooperation than the overly cosy relations developed, for

example, with the governments of Uganda and the DRC.

The ICC must also increase its presence in the communities where it operates. This requires allowing investigators to spend more time on the ground and holding trials closer to atrocity sites, rather than in The Hague. This would make the Court's work more visible and approachable for local communities, help build trust and encourage more local witnesses to assist the Court's investigations – issues that have hamstrung the ICC since its inception.

More fundamentally, though, the ICC and international policymakers must afford domestic actors greater latitude to address atrocities by whichever means they deem appropriate. This entails giving greater scope for domestic courts to prove their capacity in tackling serious crimes and donors directing more resources to the kinds of domestic judicial reforms witnessed in Ituri and other parts of Africa. This also requires giving greater room for non-prosecutorial mechanisms, including conditional amnesties, truth commissions, reparations programmes and community-based accountability and reconciliation, even for high-ranking atrocity suspects. The flaws witnessed in the ICC's model of international justice over the last 17 years should encourage societies in Africa and elsewhere to tailor responses, legal or otherwise, to their specific conflict contexts. The ICC has dominated these discussions for the last 20 years, and it's time now to think more creatively, and more locally.

Distant Justice: The Impact of the International Criminal Court on African Politics was released last year via Cambridge University Press.



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About the interviewee

Dr Phil Clark *is a Reader in Comparative and International Politics at SOAS, University of London. An Australian by nationality but born in Sudan, Dr Clark is a political scientist specialising in conflict and post-conflict issues in Africa, particularly questions of peace, truth, justice and reconciliation. His research addresses the history and politics of the African Great Lakes, focusing on causes of and responses to genocide and other forms of mass violence. His work also explores the theory and practice of transitional justice, with particular emphasis on community-based approaches to accountability and reconciliation and the law and politics of the International Criminal Court. Previously, he was a Research Fellow in Courts and Public Policy at the Centre for Socio-Legal Studies, University of Oxford, and co-founder and convenor of Oxford*

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