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978-0-521-76778-1 - Culture Under Cross-Examination: International Justice and the
Special Court for Sierra Leone

Tim Kelsall

Excerpt

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CHAPTER 1

WHITE MAN'S JUSTICE? SIERRA
LEONE AND THE EXPANDING PROJECT
OF INTERNATIONAL LAW

The Special Court for Sierra Leone stands on a sprawling site in central Freetown, shielded from the rest of the country by imposing grey walls. An outer wall, ranging between five and eight feet in height, displays signs warning people that to park or even stand in the court's vicinity is forbidden; an inner one, about fifteen feet tall, is crowned by coils of razor wire. A policeman brandishing an AK-47, accompanied by other security personnel, guards the entrance from a sentry post; above it, a sand-bagged gun turret takes aim at the main road. Visitors who pass through the court's steel gate are obliged to acquire a security pass from a razor-wired concrete reception area in the shape of a pill box, then walk through a car park area and into the court's inner compound through two sliding, steel doors; vehicles, meanwhile, are subjected to bomb checks. Inside, to the left, stand the prefabricated huts of the Office of the Prosecutor, reminiscent of a military barracks or prisoner of war camp, ringed by razor wire and a six-foot high fence carrying signs that read 'ID Cards Must be Shown at All Times', 'Restricted Access', 'Authorised Personnel Only', 'Visitors Must Be Escorted'. At various junctures gun-toting Nigerian soldiers stand guard, wearing dark sunglasses, blue helmets and military fatigues; sometimes they conduct drills and simulate combat situations. Past the Office of the Prosecutor and up a path stands the gleaming structure of the courthouse itself, architecturally designed, apparently, to evoke an impression of the scales of justice. It is protected not only by the Nigerian troops, but by blue-uniformed security personnel, the public gaining entrance through a metal detector. Down the hill to the left are the Defence offices and opposite them another set of steel

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doors, walls, and razor wire, which guard the entrance to the detention centre where defendants indicted for war crimes are held. Between the prison and the courthouse resides a tank, a UN logo emblazoned on its side.¹

Inside this enclave the Special Court is implementing a global project to bring accountability under the rule of law to a region formerly destabilised by conflict and war. In this book I discuss some of the challenges posed to that project by the fact that the Court is surrounded by an unfamiliar social and legal culture, in which the way people think about human rights, human agency and appropriate social conduct often differs radically from the way international lawyers think about these things. I do so by focusing on the trial of the alleged leaders of the Kamajors, a popular militia that fought on the side of the democratic government in the country's eleven-year civil war. The Kamajors, several thousand strong, were widely believed to be able to make themselves immune to bullets through magic, a technique which allowed them to defend their communities from rebel attack, won them widespread applause, and even helped them to restore civilian rule.² The Kamajor Society, however, was far from being universally benign. Some of its members reputedly looted and burned Sierra Leonean towns, indulged in acts of cannibalism, and committed violent acts of a grotesque and terrifying nature, such as decapitating victims and dancing around with their heads on poles.

The Civil Defence Forces (CDF) trial, as it was called, is a case with tremendous significance for the expanding global project of international criminal law, as well as for other post-conflict justice modalities. For reasons explained below, we are unlikely in the near future to witness international prosecutions in developed Western nations: international trials will focus mainly on countries that are part of the 'Third World', a trend already indicated by the first arrest warrants of the International

¹ Adapted from fieldnote, September 2004. By 2006 Mongolians had replaced the Nigerians. Vivek Maru, an astute observer of justice in Sierra Leone, once remarked to me that looking down on the Court from the Freetown hills, its saucer shaped roof glowing in the darkness, one could be forgiven for thinking that an alien spacecraft had landed in Sierra Leone. Prosecutor David Crane appears to have picked up on this imagery in a speech he gave in 2007 entitled, 'The spaceship has landed' (Crane 2007).

² Precise figures for Kamajor and CDF membership are hard to come by. After the war some 37,216 CDF were officially demobilised, the majority among whom would have been Kamajors (Humphreys and Weinstein 2004, 13). However, the real figures are likely to be much larger, since in some areas fewer than one in five CDF fighters possessed a modern weapon that would qualify them for demobilisation.

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Criminal Court, all of which target African individuals.³ As in the CDF case, witnesses and defendants in these trials will come from societies with very different cultures or cultural mixes to those that predominate in the West, with varying ideas about morality, responsibility, evidence and truth. International justice, because of this, needs to learn the lessons of working with unfamiliar cultures fast.

Although the Special Court is regarded in some circles as ‘a promising hybrid’ (Dougherty 2004; Stromseth, Wippman and Brooks 2006), suggesting that it successfully blends elements of international and indigenous law and expertise,⁴ I will argue in this book that it failed in crucial ways to adjust to the local culture in which it worked. In its prosecution of the crime of enlisting child soldiers, for example, it levelled an inappropriate and ethnocentric charge at the CDF defendants. In its handling of the phenomenon of bullet-proofing, it proved deaf to an enormously important system of local magical belief. In its ruling on superior responsibility, it drew on an unrealistic Western norm. And in its assessment of evidence, it failed to find convincing means for assessing the credibility of witnesses, some of whom deployed, I argue, culturally grounded strategies of concealment in court. These failures had profound implications: they contributed to a laborious trial-process that dragged on for more than two years – one of the defendants dying before a verdict could be returned – and they raised serious questions about the quality of the convictions of the two surviving accused. Meanwhile, at a societal level, these failures threatened the Court’s legacy in Sierra Leone.

In light of these depressing results, critics of the international justice project will doubtless find in my study more evidence that the aspiration to globalise law’s rule is not only malign but misconceived. Supporters of the project will hopefully find stimuli to rethinking and reform.

AN EXPANDING PROJECT

Today, international criminal justice (ICJ) casts a wider net and has a longer reach than at any time in previous history. Inaugurated at Nuremberg and Tokyo with the International Military Tribunals to try the top leaders of the defeated Axis powers, ICJ was re-animated in the 1990s with the creation of the International Criminal Tribunal for the

³ The countries concerned are Uganda, Democratic Republic of Congo, Central African Republic and Sudan.

⁴ For a less sanguine view, see Sriram (2006).

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Figure 1. The Court compound and environs.

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former Yugoslavia (ICTY) (to try alleged perpetrators of war crimes and violations of international humanitarian law that occurred during the internecine conflict that convulsed the Balkans in the early 1990s) and the International Criminal Tribunal for Rwanda (ICTR) (to prosecute the masterminds of genocide that decimated the population of that tiny central African republic in April and May of 1994), following a forty-five year, Cold War freeze (Maguire 2000; Minear 1972; Minow 1998; Sands 2003).

These two landmark courts, known as the *ad hoc* tribunals, shaped the emergence of a new breed of *hybrid* tribunal in the next decade. Novel experiments in international and national law, situated in the countries where conflict occurred, hybrid tribunals have been opened in Bosnia (mopping up some of the lower level leaders not tried at the ICTY); Kosovo (targeting alleged perpetrators of violations that occurred during the conflict in Serbia-governed Kosovo in 1999); Timor Leste (where pro-Indonesia militias terrorised the population in the wake of the UN-sponsored referendum on independence in 1999); Sierra Leone (where a ghastly civil war raged from 1991 to 2002); and now Cambodia (targeting surviving leaders of Pol Pot's murderous Khmer Rouge regime (1975–1979)). The most recent addition is a hybrid tribunal in The Hague to try those suspected of the car bomb killing of Lebanese Prime Minister Rafik Hariri in February 2005.

Contemporaneously, in 1998, over a hundred states signed the Rome Statute of the International Criminal Court, a new, permanent tribunal located in The Hague, with the power to try suspected war criminals and human rights violators in cases where national states are unable or unwilling to pursue prosecutions themselves. It has subsequently issued arrest warrants for individuals in Northern Uganda (where for years the Lord's Resistance Army has been forcing women and girls into sexual slavery, abducting children, and mutilating and murdering the civilian population), the Central African Republic (where sexual violence was widely used as a weapon when the country slid into civil war in the wake of its failed democratic transition), the Sudan (where as many as 400,000 people may have died in conflict driven by government-backed *janjaweed* militias) and the Democratic Republic of Congo (where domestic and foreign armies and ethnic militia devastated the civilian population in the course of Africa's 'first world war'). Its first indictee, Congolese militia leader Thomas Lubanga, was transferred to The Hague in March 2006.

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This ICJ expansion is nested in broader processes of 'transitional justice' and projects to build the rule of law. Transitional justice is a term used to describe the diverse mechanisms by which a society recently emerged from repressive rule or violent conflict attempts to hold wrongdoers accountable for their actions (Elster 2004; Roht-Arriaza 2006; Teitel 2000, 2003; ICTJ 2007). These mechanisms may include prosecutions, purges, publicly shaming offenders, opening police files, truth commissions, memorials and reparations, to name but a few (Minow 1998, 23; ICTJ 2007). In recent years transitional justice initiatives have multiplied with transitions to democracy in former dictatorships in Latin America, East and Central Europe and Africa, and by a spate of so-called 'new wars' in the more fragile of these transitional states (Kaldor 2006). Meanwhile, rule of law projects attempt to institutionalise accountability under the law for present and future events. According to Jessica Matthews, 'the rule of law is often held out these days as the solution to almost every international policy problem, from consolidating shaky democratic transitions, establishing sustainable economic development, and stabilizing post-conflict societies, to fostering new global norms' (foreword to Carothers 2006, vii).

These developments are supported by a billion-dollar international industry (Oomen 2005, 890) of lawyers, scholars, journalists, transitional justice experts and consultants, departments or sections in First World governments, and the lobbying, intervention and participation of a host of influential legal and human rights NGOs, including Human Rights Watch, Amnesty International, the Open Society Justice Initiative, Lawyers without Borders, No Peace Without Justice, The International Center for Transitional Justice, and the Coalition for an International Criminal Court (which is itself a network of over 2,000 NGOs); they are the legal arm of what Alex de Waal has called the 'humanitarian international' (De Waal 1997), a global social movement that drives UN peace-keeping interventions and post-conflict accountability projects in crisis states around the world. Today, the conventional UN response to political transitions and post-conflict situations is to dispatch teams of legal technocrats who, with the support of the UN Office of the High Commissioner for Human Rights and the Office for Legal Affairs, support and assist local actors to implement transitional justice mechanisms, believing that accountability for past atrocities is required for rehabilitation to begin (Lutz 2006, 332).

The expansion of international justice has often been written about in triumphalist tones. In the field of criminal prosecutions, much of the

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early commentary has been by avid supporters, ‘the generation of the founders’, who are often practitioners themselves (Drumbl 2005, 546–7). Human rights lawyer Geoffrey Robertson, for example, has gone so far as to claim a ‘millennial shift, from appeasement to justice, as the dominant factor in world affairs’ (Robertson 2002, xiii), stating confidently that ‘International criminal justice is here to stay’ (Robertson 2007, 1). Early apparent successes have led some to make exuberant claims, presenting ICJ as a panacea for post-conflict societies. Take for instance Antonio Cassese, first President of the ICTY, who has written that:

Trials establish individual responsibility over collective assignation of guilt ... justice dissipates the call for revenge, because when the Court metes out to the perpetrator his just deserts, then the victims’ calls for retribution are met ... victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes; a fully reliable record is established of the atrocities so that future generations can remember and be made fully cognizant of what happened.

(Cited in Stover and Weinstein 2004b, 3–4.)

Others argue that prosecutions provide an end to impunity: ‘drawing a clear line for all to see’ (Stromseth, Wippman and Brooks 2006, 251), a foundation for peace, and a deterrent to future violations (Rudolph 2001).

All these claims have been contested, of course. The impunity claim has been criticised on the grounds that international prosecutions tend only to target ordinary perpetrators or weak leaders in weak states (Minear 1972; Moghalu 2005, 125–52; Rudolph 2001; Allen 2006, 22; Maguire 2000; Sriram and Ross 2007). The deterrent effect of international trials has been thrown into doubt by the fact that some leaders have continued to order atrocities even after being indicted – for example in Bosnia – while in Congo, East Timor, Liberia and Sudan, the presence or threat of tribunals appears to have done little to abate war crimes (Rudolph 2001; Hazan 2006; Snyder and Vinjamuri 2003/4). The idea that retributive justice heals the wounds of victims and society has been dismissed on grounds that testifying may represent an ‘injudicious catharsis’ for victims (Stover and Weinstein 2004, 13), while for many survivors, tribunal justice fails to palliate their sense of injustice (Stover and Weinstein 2004a, 333). There is some evidence that criminal trials drive communities further apart ‘by causing further suspicion and fear’ (Stover and Weinstein 2004a, 323). When it comes to establishing a reliable record, it is clear that while some trials, for example Nuremburg, can produce a strong documentary record,

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courts more often tell implausible or impoverished histories (Minear 1972; Osiel 1997, 61; Minow 1998, 47). Meanwhile, the lessons of these histories are often lost on the populations at which they are aimed (Maguire 2000, 131; Stover 2004, 116; Fletcher and Weinstein 2004, 33; Stover and Weinstein 2004a, 324, 334; Osiel 1997, 160). The quality of justice dispensed by international trials has also come under fire, with problems of lawlessness, retroactivity, prosecutorial bias, over-protection of witnesses, undue delay, unqualified judges, corruption of court officials and frequent changes to procedures and rules being just some of the problems identified (Minow 1998, 30; Elster 2004, 84; Minear 1972, 169; Forges and Longman 2004; Weinstein *et al.* 2006; Robertson 2007; Laughland 2007). And all this has come at vast expense, 'a scandalous waste of money' in the view of some commentators (Allen 2006, 12), with the *ad hoc* tribunals alone consuming around 15 per cent of the UN's entire budget (UNSC 2004), and convictions at the ICTR costing around \$25 million a piece (Drumbl 2005).

INTERNATIONAL JUSTICE AND THE POLITICS OF CULTURE

There is also disquiet about the global role of international criminal justice, with some commentators using terms like 'new' or 'liberal' imperialism (Stromseth, Wippman, and Brooks 2006; Weinstein and van de Merwe 2007), 'liberal peace' (Duffield 2001), 'international judicial intervention' (Laughland 2007), 'international law fundamentalism' (Branch 2004) and 'lawfare' (Comaroff and Comaroff 2006). Behind this terminology is the idea that leaders in the West are seeking to pacify and civilise the Third World using peacekeeping missions, high-level prosecutions, and then programmes to strengthen the rule of law. Inevitably, this has led to concerns about culture. Is the new judicial intervention also a form of cultural imperialism? Can international criminal trials function satisfactorily in unfamiliar cultures? What are the prospects for the rule of law earning legitimacy if international interventions are imposed on local cultural beliefs and practices?⁵ Legal scholar Mark Drumbl, for one, has argued that the transplantation of domestic criminal law into the international context is based on the pernicious fiction

⁵ '[T]he law may be categorized as "imposed" in the sense that it does not reflect the values and norms of the majority of the population or of that segment which will be subject to it' (Burman and Harrell-Bond 1979, xiii).

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that Western justice modalities are value-neutral and universal, when '[t]hey are in fact deeply culturally contingent' (Drumbl 2005, 551). Even the UN Secretary General noted recently that 'the international community has, at times, imposed external transitional justice solutions' (UNSC 2004, 7) and official documents increasingly include nods to respecting indigenous justice beliefs, though the practical implications are sketchy at best.⁶

Cultural anxieties such as these stem from the fact that international criminal law is Western in origin: its ethical tenets flow from a Judaeo-Christian tradition (Kahn 1999, 46), while its standards of evidence are rooted in a scientific worldview and enlightenment philosophy. The 'rationalist' tradition of evidence in Anglo-American courts, for example, rests on a foundationalist epistemology, a correspondence theory of truth, and a scientific rationality. That is to say, courts function according to the principle that there exists an objective reality independent of what anyone thinks about the world, that knowledge corresponding to this value-free reality has the status of truth, and that the truth can be discovered by drawing inferences inductively from relevant evidence. In this tradition, judicial decision-making consists essentially in applying substantive law to the objective 'facts', as scientifically ascertained (Nicolson 1994, 727).

To be precise, Michael S. Moore has argued that the Western conception of criminal law requires a particular structure of moral and metaphysical belief. Morally, criminal answerability applies to an individual when (1) it can be shown that s/he acted, (2) that s/he did so intentionally, recklessly, or negligently (in other words that they had the requisite guilty mind, or *mens rea*) and (3) that in so acting, s/he caused some morally bad result (Moore 1985, 13). At a metaphysical level, this theory of moral culpability depends on the idea that persons are rational and autonomous. By rational, Moore means simply that individuals act for reasons, or on the basis of what he calls 'valid practical syllogisms', no matter how bizarre the premises. By autonomous is meant that individuals are in control of the actions of their own bodies; that is, that they have a will, even if it is not completely free (Moore 1985, 20, 23). Moore appears to think that these criteria are widely applicable cross-culturally; but this contention is the subject of some debate. The very stripped

⁶ A policy paper for the International Criminal Court also states that the prosecutor 'will take into consideration the need to respect the diversity of legal systems, traditions and cultures' cited in Allen (2006, 129).

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down nature of the criteria for criminal responsibility, rather than guaranteeing the idea's universality, just as easily reveals its cultural particularity.⁷ Lawrence Rosen, for example, has argued that while, on a trivial level, Moroccan individuals share the inner states, frames of mind and intentional structures identified by Moore, in practice Moroccan courts always inquire into the total social context of an individual's acts, since intentionality is regarded as a *socially embedded* phenomenon (Rosen 1985). In addition, the category term 'morally-bad result' would appear to be contingent on culture.⁸

A growing number of voices echo these and similar concerns. The critical legal studies movement, legal anthropology, feminist legal scholarship and post-modern legal scholars, among others, have in recent years criticised the patriarchy and ethnocentricity of Anglo-American law. For example, legal discourse theorists Joseph Conley and John O'Barr have pointed to the way in which male biases are built into the micro-linguistics of the disputing process itself (Conley and O'Barr 1998, 60–77). Donald Nicolson has criticised the politics of 'fact-positivism', arguing that, contrary to the law's ideology, fact and law are mutually constituted with potentially discriminatory effects; what counts as a punishable crime or a valid defence (a question of law) is inextricably bound up with perception-shaping assumptions one holds about the world (matters of fact) (Nicolson 1994; see also Geertz 1983, 173). People of colour, women and the poor, for example, often bring background assumptions at variance with those of the legal establishment to their interpretation of legal cases: 'Those whose stories are believed have the power to create fact; those whose stories are not believed live in a legally sanctioned "reality" that does not match their perceptions' (Scheppelle 1989, 2079). In cases involving different social groups in which different versions of the facts are offered, 'Whole worldviews may have come into collision' (Scheppelle 1989, 2098).

Certainly, the perceptual faultlines that separate the Western legal tradition from non-Western cultures have already been remarked upon in international trials. According to Harvard lawyer Judith Shklar:

When ... the American prosecutor at the Tokyo trials appealed to the law of nature as a basis for condemning the accused, he was only applying a foreign ideology, serving his nation's interests, to a group of people who

⁷ There is a similarity here to criticisms of John Rawls' *Theory of Justice*. See, for example, Sandel (1992).

⁸ For a critique, see Shapiro (1985).