

International Criminal Justice and Non-Western Cultures

Tim Kelsall

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When signatories to the Rome Statute meet in Uganda later this year, one of the tasks confronting them will be to take stock of progress in international criminal justice (ICJ). ICJ has advanced in leaps and bounds over the past ten years, and yet a significant number of voices – activists, academics, statesmen – continue to debate its relevance to African conflict contexts. To date much of the discussion, emanating in particular from Uganda and the Sudan, has centred on the trade-offs between peace and justice, and on the distinction between restorative and retributive justice (see for example Allen 2006, 2008; Branch 2004; Huyse and Salter 2007; Baines 2007; Otim and Wierde 2008; Edozie 2009; Johnson 2009; Mamdani 2008). In this, my own brief contribution, I want to pick up this debate, but provide a different angle, drawing on research conducted at the Special Court for Sierra Leone. That Court, now entering its final stages, raised a number of questions about criminal justice and cultural dissonance, questions of a jurisprudential, procedural, and normative kind.

I turn first to jurisprudential matters. Although international criminal law strives to borrow from and legitimate itself via a plurality of legal systems, the fact remains that its basic doctrines are Western in origin. This can cause problems when the jurisprudence has a poor sociological fit with the non-Western societies to which it is applied. Take for instance the doctrine of ‘superior responsibility’, one of the modes of liability under which international criminal suspects are commonly tried. Although the case law on superior responsibility is increasingly sophisticated, and the doctrine has been applied with sensitivity and intelligence by some judges, it remains the case that it evolved in the context of well-drilled Western-style bureaucratic and military organisations, in which it made sense to think that a superior could be held responsible for the actions of his subordinates, no matter how far physically removed (Knoops 2007).

In Africa, however, well-drilled hierarchies of this nature are a rarity. Over the past forty years many African governments, armies and guerilla movements have found it tremendously difficult to create stable organisations, and authority relations tend to be informal and fluid instead (for introductions to a vast literature see Chabal and Daloz 1999; Clapham 1985; Jackson and Rosberg 1982; Médard 1982; Migdal 1988; Murphy 2007). This was certainly the case in Sierra Leone, where authority in at least one of the fighting factions – the Civil Defence Forces - was based on patron-client or neo-patrimonial ties, and was more akin to a ‘militarised social movement’ than a conventional army (Hoffman 2007; Kelsall 2009).

While it is not impossible that superiors in such networks should have the ‘material ability to prevent or punish’ the crimes of their subordinates, as the superior responsibility doctrine demands, it is much less likely than in a Western context. Nevertheless, some international prosecutors have sought, rather unthinkingly, to gain convictions under this doctrine even when the evidence for it was flimsy. This, in my opinion, has led to a waste of time and resources and, in the worst cases, some highly questionable judicial decisions (Kelsall 2009, 71-104).

A related problem, although I lack space to address it here, is that the superior responsibility doctrine as currently conceived is ill-equipped to deal with the exercise of charismatic authority, which is rather more common in Africa than it is in the West (see for example Ellis 1995, 2001; Ellis and ter Haar 2004, 90-113). In Sierra Leone it played a part in the trial of Allieu Kondewa, alleged by the Prosecution to have authority over his subordinates by virtue of the ‘mystical powers’ he possessed, and it is arguable that it would also be significant were Joseph Kony ever brought to trial (Kelsall 2009, 105-145).

The next issue I would like to raise is procedural. Just as most of the jurisprudence used in international criminal trials is Western in origin, so is the procedure. Legal anthropologists have long pointed to the more informal and inquisitorial style of African customary courts as compared with Western ones, especially in adversarial, common law contexts (Gibbs 1963; Gluckman 1964). It is difficult for most of us to imagine how unnerving international trials must be for many African witnesses, who find themselves miles from home, in a courtroom of extraordinary grandeur, confronted with robed judges and lawyers who speak a foreign language, and who subject them to highly unusual communicative practices including frequently hostile cross-examination. It is no wonder that getting clear testimony in such circumstances has often proved difficult (Cryer 2007), a problem compounded in contexts, not uncommon in Africa, where secrecy is prized as a high social ideal, and in which there have developed a repertoire of dissembling rhetorical techniques (Ellis and ter Haar 2004, 70-89; Ferme 2001; Murphy 1980; Shaw 2000).

Things are made worse where local conceptions of space and time are at variance with Western coordinates, as they are in many rural African contexts, such as in Sierra Leone. Existing attempts to put witnesses at ease by concealing their identities, paying them allowances, and proofing them before testifying, create their own problems. In my analysis these communicative troubles, in addition to making trials, slow, laborious, and expensive, can seriously call into question the quality of the evidence on which judicial decisions are based (Kelsall 2009, 171-224).

Finally, I turn to normative issues. While some of the crimes adumbrated under the Rome Statute are doubtless regarded abhorrent by all but the most deviant sub-cultural groups or individuals, the same cannot be said for all of them. The issue here turns on the relation between the international ‘community’ that makes international law – comprised of activists, academics, statesmen and lawyers, at the pinnacle of which are the States Parties themselves – and the less cosmopolitan communities existing on their periphery. Take for instance the crime of enlisting children under a certain age (the age has varied over time) into an armed force. Anthropologists and historians have shown that the very conception of what it is to be a child varies cross-culturally, as do the expectations of what a ‘child’ can legitimately be expected or forced to do (Archard 1993; Boli-Bennett and Meyer 1978; Hoffman 2003; James and James 2005; Rosen 2007). Such appeared to be the case in rural Sierra Leone where, in the case of the Civil Defence Forces, commanders enlisted and communities volunteered young fighters, apparently not knowing that this was a morally or legally wrong act. By prosecuting individuals for this crime, the Special Court arguably held those concerned to an alien standard of justice of which they

knew nothing, *imposing* international norms and law on people, raised in a different culture, with contrasting moral ideas. Rather similar points could be made in respect of the crime of ‘forced marriage’ (Kelsall 2009, 146-170, 243-254).

To conclude, at the same time as the States Parties reflect on some of ICJ’s recent achievements, they might also consider some of its difficulties, including those problems that are not prominent on the agenda but become apparent when we dig deep into international trials. These difficulties concern the appropriateness of international criminal jurisprudence, procedure, and norms to African and other non-Western contexts. Is it within the power of the States Parties to recommend a more sociologically attuned use of the existing jurisprudence? Can they, by addressing the entire ecology of the courtroom, make international criminal procedure as friendly and productive as possible for witnesses unfamiliar with a Western courtroom setting? And can they advise a more sensitive enforcement of those laws which, although regarded as universally abhorrent by the ‘international community’, have yet to penetrate the consciousness of communities on its fringe? In short, is a more genuinely international, multicultural type of justice attainable than the kind we have now?

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* Tim Kelsall has taught politics at the Universities of Oxford and Newcastle, is a former editor of the journal *African Affairs*, and is the author of *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press, 2009) (<http://www.cambridge.org/9780521767781>). He is currently living in Phnom Penh, Cambodia, working freelance as an Associate of the Africa, Power and Politics Programme (<http://www.institutions-africa.org/>) and as a Visiting Fellow of the War Crimes Studies Center, University of California at Berkeley (<http://socrates.berkeley.edu/~warcrime/>).