“Thinking Through Others”: The Development of a Culturally Resonant International Criminal Jurisprudence

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November, 2009

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Master of Laws (LL.M.)

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Abstract

In this thesis, the author asserts that through the process of cultural contextualization, the universal norms of international criminal law are interpreted and defined in a manner which resonates across cultures. Critics of the international criminal legal system assert that it fails to adequately accommodate the cultural diversity of its subjects. Through a detailed examination of international criminal jurisprudence, the author displays that the consideration of cultural context has become commonplace for international criminal tribunals. Furthermore, the Rome Statute of the International Criminal Court contains provisions which allow for the consideration of cultural context in assessing international crimes. Cultural contextualization of international crime serves to make the universal norms of international criminal law more relevant in diverse cultures and also enhances our understanding of the universal norms of international criminal law. Finally, the author provides a critical assessment of cultural contextualization, and asserts that it is a process which must be undertaken in a way which preserves the fairness of international criminal proceedings.

Résumé

Dans cette thèse, l’auteur affirme que par le processus de la contextualisation culturelle, les normes universelles du système pénal international sont interprétées et définies de façon telle qu’elles résonnent à travers des cultures. Les critiques du système pénal international affirment que le système ne répond pas adéquatement à la diversité culturelle des individus. Par un examen détaillé de la jurisprudence pénale internationale, l’auteur montre que la prise en considération du contexte culturel est devenue habituelle pour les tribunaux criminels internationaux. De plus, le Statut de Rome de la Cour Pénale Internationale contient des dispositions qui tiennent compte du contexte culturel dans l’évaluation des crimes internationaux. La prise en considération du contexte culturel sert à établir des normes de droit pénal universelles dans le respect des différentes cultures et permet de mieux comprendre les normes universelles du droit pénal international. Finalement, l’auteur fournit une évaluation critique de la contextualisation culturelle et conclut que c’est un processus qui doit être fait de manière à préserver l'impartialité des procédures criminelles internationales.
Acknowledgements

I would like to extend my sincere gratitude to my thesis supervisor, Professor Colleen Sheppard, for her ideas, insight and encouragement, and for her emphasis upon the importance of intellectual nuance. I would also like to express thanks to my professors and fellow graduate students at McGill University.
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Introduction

International criminal law is based upon universally accepted norms of behavior. It also functions within a global and culturally pluralist context. In the course of international criminal prosecutions, tribunals have been entrusted with applying the universal norms of international criminal law in diverse cultural contexts. Prosecutions have arisen out of conflicts occurring in such varying locations as Yugoslavia, Rwanda, Sierra Leone, Cambodia and the Congo. Future prosecutions under international criminal law are certain to arise out of varied environments as well. At present, the prosecutor for the International Criminal Court is prosecuting cases arising out of conflicts in Uganda, the Congo, the Central African Republic and the Sudan. The ICC prosecutor is currently analyzing cases emanating from four continents, including cases arising out of Colombia, Georgia, Kenya, the Ivory Coast and Afghanistan.

1 It is not within the purview of this paper to challenge or debate conceptions of what constitutes “culture.” Richard Schweder provides a working definition of culture which displays the multivariate character of the concept. He defines culture as “the constituted scheme of things for intending persons, or at least that part of the scheme that is inherited or received from the past. Culture refers to persons, society, and nature as lit up and made possible by some already there intentional world, an intentional world composed of conceptions, evaluations, judgments, goals, and other mental representations already embodied in socially inherited institutions, practices, artifacts, technologies, art forms, texts, and modes of discourse.” See Richard A. Shweder, Thinking Through Cultures: Expeditions in Cultural Psychology (Cambridge: Harvard University Press 1991) at 101. Furthermore, according to the anthropologist Sally Merry, culture is “unbounded, contested and connected to relations of power.” Merry puts forth that culture consists of “beliefs and values but also practices, habits and commonsensical ways of doing things.” Contemporary anthropology views culture as more than traditional practices. Instead it is something “fluid, contested, and changing” over time. See Sally Engle Merry, “Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)” (2003) 26 Polar: Political and Legal Anthropology Review 55 at 67.


The extent to which international criminal law is able to make its norms relevant to populations across diverse cultural contexts is viewed as a fundamental challenge for the legitimacy of the international criminal legal system. Critics assert that the system fails to adequately accommodate the cultural diversity of its subjects. Noting that international criminal law has been strongly influenced by Western theories of justice and Western procedural structures, critics claim that the system cannot simply be transposed onto subjects of differing cultural traditions. Observers critique the legal system for its emphasis upon penal sanction as the proper response to the commission of international crimes. The shortcomings of international criminal law are said to lie in its institutional structure. By focusing on internationalized and individualized criminal prosecutions, the structure of international criminal law enforcement does not adequately take into account localized, more culturally resonant norms and procedures. The failure of international criminal law to accommodate cultural diversity comes at a price, threatening the legitimacy of the structures set in place to implement and enforce the law.

Yet cultural diversity does not necessarily work at cross-purposes with the international prosecution of international crimes. The legitimacy of international criminal law does not only derive from the institutions entrusted with implementation and with the method (or lack thereof) of punishment for the breach of international criminal law. Legitimacy also derives from the extent to which the international criminal legal system is able to make the substantive norms of international criminal law apply and resonate across cultures. Writing
with regard to human rights norms, Abdullahi Ahmed An-Na’im suggests that “since people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards.” Legitimacy therefore attaches to a legal regime if diverse peoples are able to view the substantive norms of the regime as being reflective of their own cultural norms and views. In this thesis, I argue that through the process of cultural contextualization, the international criminal legal system has interpreted and defined the system’s universal norms in a manner which resonates across cultures. I also provide a critical assessment of cultural contextualization, and argue that it is a process which must be undertaken in a way which preserves the fairness and procedural integrity of international criminal proceedings.

Considering cultural context has become commonplace for international criminal tribunals. It is often a necessary process to engage in, in order for courts to come to a truthful assessment of mass atrocities and crimes of war. Faced with applying international criminal law in varying cultural contexts, international criminal tribunals have noted that culture may influence the way a witness recounts his or her story in court, it may influence the degree of harm a victim suffers as the result of an international crime, and it may provide the necessary context for determining whether an international crime has been committed.

Substantive international criminal law is thus interpreted and applied in a manner which accommodates cultural diversity. The substantive norms of international criminal law, such as prohibitions against genocide and crimes against humanity, are universal in scope. Yet the question of whether genocide, a crime against humanity or a war crime has occurred may depend upon the precise context in which the alleged crime occurs. The tribunals established in post-conflict Rwanda and Sierra Leone hold that a proper evaluation of evidence and application of law requires that evidence be read in its cultural context. Similarly, provisions of the Rome Statute recognize the role of cultural context in establishing international criminal liability. Proving whether a particular crime has occurred, within a particular cultural context, often requires courts to evaluate evidence from the culture-specific perspective of the parties involved in international prosecutions. Expert testimony of cultural context is therefore common in international prosecutions. The testimony of anthropologists, psychologists and linguists is frequently presented in order to supply courts with insight into particularized cultural norms and practices. This contextualization of international crime serves to make the universal norms of international criminal law more relevant in diverse cultures. In turn, cultural diversity enhances our understanding of the universal norms which constitute international criminal law.

Cultural contextualization may assist courts in arriving at a truer representation of the horrors of mass atrocities, but courts must also be cautious in how cultural evidence is used during the course of proceedings. Cultural evidence may be introduced and utilized in ways which promote negative cultural
stereotypes and generalizations. In addition, courts must ensure that any conclusions regarding cultural norms or practices are arrived at based upon reliable evidence. Lastly, if courts accept the relevance which cultural context has in elucidating the universal norms of international criminal law, courts must also accept that defendants may seek to consult cultural context in attempting to escape or mitigate their criminal liability. Cultural context may enlighten international criminal proceedings, yet it must be used in a manner which preserves the fundamental fairness and procedural integrity of these proceedings.

Accordingly, this thesis proceeds in three sections. Section I sets out the universal norms which undergird international criminal law and reviews the critiques which suggest that the institutional structure of international criminal law fails to adequately accommodate cultural diversity. Section II analyzes how actors within the international criminal legal system interpret the universal norms of international criminal law in cultural context, giving local, cultural resonance to these norms. Section III sets out the risks and implications of considering cultural context in the course of international criminal proceedings, and establishes that cultural contextualization must be carried out in a fair, reliable and equitable manner.
I. **Universalism, the Institutional Structure of International Criminal Law and the Challenge of Cultural Diversity.**

   **A. The universalist nature of international criminal law.**

   At their core, the substantive elements of international criminal law are based upon universally accepted norms of human behavior.\(^5\) Mark Drumbl refers to universalism as the “dominant metanarrative of international criminal law.”\(^6\) The universalist view of international criminal law emphasizes that the norms governing international criminal law are collectively recognized and accepted by all of humanity. The former President of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) Antonio Cassese voices this viewpoint, stating that substantive international criminal law is based upon “a set of universal values transcending the immediate interests of each state.”\(^7\) Moreover, punitive sanction of individual defendants is hailed as the proper means to enforce these norms. Holding individuals criminally accountable under international law suggests that criminal norms exist which are universally binding and have application across national borders.\(^8\) In this respect, international criminal law represents a departure from the traditional view that the formulation and enforcement of criminal law is the sole domain of individual states and localities.

   The universalist nature of international criminal law emerges in part from the sources of international criminal law. Many of the crimes constituting the

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\(^8\) May, *supra* note 5 at 24.
substance of international criminal law are derived from treaties which have been either universally or widely accepted internationally, such as the Geneva Conventions and their Protocols and the Genocide Convention. Regarding the norms of international humanitarian law which form the basis for many international crimes, Rene Provost notes that, “[u]niversal participation in the 1949 Geneva Conventions and widespread ratification of the 1977 Additional Protocol testify to a broad consensus among states as to the desirability and acceptable character of these humanitarian norms.”

Customary international law, “which derives from the practices of States accompanied by opinio juris (the belief that what is done is required by or in accordance with law)” constitutes another source of international criminal law. Customary international law is also considered to be “of a universally obligatory nature,” and thus reinforces the notion that international criminal law is based upon universally accepted norms.

The Rome Statute of the International Criminal Court (“ICC”) represents the codification of the universalist approach. The Statute contains universalist language, espousing global norms which have been established to apply across borders and cultures. Steven Roach posits that the Rome Statute “contains

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13 Benjamin N. Schiff, Building the International Criminal Court (Cambridge: Cambridge University Press 2008) at 155.
universal elements of crimes, or crimes that have been universally condemned by a vast majority of states.”\textsuperscript{14} In enumerating crimes such as genocide and crimes against humanity the Rome Statute may be said to not create criminal offenses \textit{per se} as much as it represents the codification of an already existing universal condemnation against such acts.\textsuperscript{15} The Preamble to the Rome Statute recounts the historical precedent which led to the construction of the ICC, remembering that the twentieth century witnessed “unimaginable atrocities that deeply shock the conscience of humanity,” and that the Statute was enacted to combat such grave crimes.\textsuperscript{16} The Preamble propounds that “all peoples are united by common bonds, their cultures pieced together in a shared heritage,” and voices concern that “this delicate mosaic may be shattered at any time.”\textsuperscript{17} Furthermore, the Statute applies universally across this mosaic, to all “natural persons” without distinction.\textsuperscript{18}

Beyond positivist explanations, more ethereal sources are cited as explaining the universal nature of international criminal law norms. Scholars suggest natural law as a source of international criminal law. Larry May offers that crimes such as genocide, crimes against humanity and war crimes may be prosecuted under international law because these actions violate \textit{jus cogens} norms, which in turn have their root in natural law.\textsuperscript{19} In international law \textit{jus cogens} norms, which May succinctly defines as “the laws or norms that are known and

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\textsuperscript{16} \textit{Rome Statute}, supra note 12 at Preamble.  
\textsuperscript{17} Ibid.  
\textsuperscript{18} Fletcher, \textit{supra} note 15 at 106; \textit{Rome Statute}, supra note 12 at Article 25(1).  
\textsuperscript{19} May, \textit{supra} note 5 at 25.
binding throughout humanity,” bind the actions of states even where states have not explicitly consented to their application. May asserts that *jus cogens* norms represent a moral minimum of requisite behavior on the international level, applying to individuals as well as states. The International Court of Justice’s Advisory Opinion on the Genocide Convention, displays the relation between *jus cogens* norms and natural law. Ruling upon the *jus cogens* nature of the crime of genocide, the ICJ stated “it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.” (emphasis added). The ICJ concluded that the Convention has a “universal character,” setting out principles which were already binding upon States, even prior to the Convention’s enactment. George Fletcher echoes these words in providing his assessment of the Rome Statute, stating that the great majority of crimes set out in the Rome Statute appeal to “shared norms of moral wrongdoing.”

In accord with the universality of the system’s norms, violations of international criminal law are viewed as crimes committed not just against individual victims, but also against humankind as a whole. This opinion has surfaced in the jurisprudence of the ICTY. Regarding the crime of genocide, the

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20 *Ibid* at 32.
22 *Ibid* at 12.
23 Fletcher, *supra* note 15 at 31.
ICTY has stated that “[t]he Crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.”

Similarly, of crimes against humanity the ICTY has remarked that such crimes “are serious acts of violence which harm human beings by striking what is most essential to them: their life liberty, physical welfare, health, and or dignity. . . . But crimes against humanity also transcend the individual because when the individual is assaulted humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity.” Prosecutions of international crimes are thus not assumed on behalf of a particular state or a particular set of victims. Rather, prosecutions for breaches of international criminal law are considered to be undertaken on behalf of the entire international community.

**B. Critiques of the international criminal legal system based upon its failure to accommodate cultural diversity.**

In their volume *Accountability for Human Rights Atrocities in International Law*, Steven Ratner, *et al* acknowledge that the application of international criminal law may at times involve the imposition of Western legal

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26 May, *supra* note 5 at 35.
norms and structures upon non-Western countries and subjects. They assert that the essential universality of human rights norms ethically justifies the endeavor of international criminal law. Yet communities outside of the Western legal tradition may have different conceptions of criminal law. They may possess particular views regarding the actions which constitute criminality, the proper procedure to be applied in a criminal proceeding, the nature of individual criminal responsibility or the appropriate sanctions for criminal activity. Owing to a potential disconnect in values, the global application of international criminal law may face cultural resistance. Thus, the implementation of international criminal law must “be sensitive to concerns that foreigners are imposing their values” upon other states and cultures.

Most observers agree as to the universality of the general substantive norms of international criminal law. It is difficult to find commentators who assert, for example, that genocide is somehow justifiable through any culture-specific lens. That said, there is by no means unanimous acceptance of the proposition that substantive international criminal law applies equally in all contexts and to all peoples. Writing with respect to the laws of war, David Chuter asserts that such laws represent a form of neocolonialism. He argues that claims of universality rest entirely upon conjecture. Establishing the true universal nature of such values is impossible to ascertain, and it is “simply

28 Ibid.
29 Ibid.
assumed to be common in the absence of any evidence either way.”\textsuperscript{31} Chuter contends that international criminal law “has a heavily Western, white, Anglo-Saxon character, and for the foreseeable future this will continue to be the case.”\textsuperscript{32}

Yet even Chuter himself grudgingly acknowledges the limits of cultural relativism as applied to international criminal law, stating that “[i]t is true, at the most mundane level, that the kind of crimes punished in the ICC Statute are against the laws of most, if not all, states, at least in present times.”\textsuperscript{33}

To the extent that international criminal law discourse does not contain a prominent debate regarding the cultural application of substantive norms, it differs from human rights discourse.\textsuperscript{34} The international human rights regime is often critiqued for being built upon Western individualist and classical liberal norms which are not necessarily translatable or applicable in non-Western cultural contexts. Different cultures are said to possess distinct practices and intellectual traditions which are inconsistent with liberal human rights theory. Countries such as Singapore are said to possess “Asian values,” and thus place greater emphasis upon the good of society as a whole rather than the interests of the individual.\textsuperscript{35} Islamic states assert that certain provisions of international human rights instruments are inconsistent with Islamic law.\textsuperscript{36} The various legal instruments codifying human rights also take note of cultural distinctions. Rene Provost notes

\begin{itemize}
\item \textsuperscript{31} Ibid at 96.
\item \textsuperscript{32} Ibid at 94.
\item \textsuperscript{33} Ibid at 96.
\item \textsuperscript{34} See generally Provost, supra note 9 (nothing the difference in discourse regarding the influence of “culture” in the fields of international humanitarian law and international human rights law).
\item \textsuperscript{35} Eva Brems, Human Rights: Universality and Diversity (The Hague: Martinus Nijhoff 2001) at 89-90.
\item \textsuperscript{36} Ibid at 271.
\end{itemize}
that the multiplicity of human rights instruments, particularly regionalized human rights instruments, has encouraged and codified differing cultural approaches to human rights.\textsuperscript{37} Thus whereas the European Convention of Human Rights puts forth a more traditional, liberal and individualist approach to rights, the African Charter on Human and People’s Rights diverges from this view, containing a provision which states that “the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.”\textsuperscript{38} Similarly, the Cairo Declaration on Human Rights in Islam sets out a vision of human rights specific to Islamic subjects. The Declaration seeks to “contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari’ah.”\textsuperscript{39} According to the Declaration, all men possess certain rights such as a right to privacy, a right to own property and a “right to a dignified life.”\textsuperscript{40} Yet the Declaration also emphasizes the “basic obligations and responsibilities” of everyone and states that “[t]rue faith is the guarantee” for enhancing human dignity.”\textsuperscript{41} Furthermore, the rights and freedoms set out in the Declaration “are subject to the Islamic Shari'ah.”\textsuperscript{42} This approach contrasts with that of international criminal law. The statutes enacted to enforce international criminal

\textsuperscript{37} Provost, supra note 9 at 636.
\textsuperscript{40} Ibid.
\textsuperscript{41} Ibid at Article 1(a).
\textsuperscript{42} Ibid at Article 24.
law, even those which have been established to have region and conflict-specific application, do not contain the same nature of substantive discrepancies as one finds in regionalized and subject-specific human rights instruments. For example, the international crimes set out in the Rome Statute and the enacting statutes of the Rwanda and Yugoslavia tribunals, although not identical, remain generally constant from one document to the other.

Rather than concentrating upon substantive norms, the culture-centered critique in international criminal law focuses upon the institutions established to enforce these norms as well as the theories of justice underlying these institutions. Critics assert that in order to be effective and understood by non-Western populations, international criminal justice mechanisms must integrate elements of local culture and justice.\(^\text{43}\) Sensitivity to local cultural norms on the institutional level is necessary because “it is foolish to presume that Western norms will be intuitively understood and accepted by everyone, everywhere.”\(^\text{44}\) The institutions and procedures of international criminal law are portrayed as being distant and unfamiliar, therefore alienating non-Western participants in the system. Critical observers challenge the prudence of relying upon international criminal institutions to enforce international criminal law.

Critics take aim at international criminal law’s liberal nature, with its focus upon holding perpetrators individually and criminally responsible for their breaches of the law. The punitive and individualistic model of criminal justice is


\(^{44}\) Ibid at 360.
said to be based upon Western individualist norms which do not necessarily resonate across cultures. Different cultures possess differing opinions regarding the concept of justice and the nature of criminal law, which are not necessarily reflected in the punitive model.

The notion of holding individual defendants criminally responsible for their actions is central to international criminal law. The primary purpose of international criminal proceedings is to adjudicate beyond a reasonable doubt the guilt or innocence of the individual accused of transgressing international criminal law. As set out in the course of the trials at Nuremberg:

[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. International criminal justice may serve other purposes as well. Trials provide a means to create a historical record and also may promote post-conflict peace and reconciliation. Yet as evidenced by their various enacting statutes, the fundamental work of international criminal tribunals is to provide individualized criminal justice. Article 25(2) of the Rome Statute sets out that “[a] person who commits a crime within the jurisdiction of the Court shall be individually

48 May and Wierda, supra note 46 at 12.
responsible and liable for punishment in accordance with this Statute.” The enacting statutes for the ICTY, the International Criminal Tribunal for Rwanda (“ICTR”), the Special Court for Sierra Leone (“SCSL”) and the Cambodian tribunal all contain similar provisions setting out the focus upon individual prosecution and criminal responsibility. In its Kupreskic decision the Trial Chamber of the ICTY expressed this approach, stating that: “The primary task of this Trial Chamber was not to construct a historical record of modern human horrors in Bosnia and Herzegovina. The principal duty of the Trial Chamber was simply to decide whether the six defendants standing trial were guilty of partaking in this persecutory violence or whether they were. . . not guilty.”

Furthermore, international criminal law is punitive in nature. George Fletcher remarks that the imposition of criminal punishment for the violation of legal norms is in and of itself a universal concept, which “defines the criminal law around the world.” Following a defendant’s conviction, tribunals possess the authority--and in fact are mandated--to impose a sentence of imprisonment. The ICTY and ICTR Statutes state unequivocally that “[t]he penalty imposed by the

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49 Rome Statute, supra note 12 at Article 25(2).
50 For Rwanda, see Statute of the International Tribunal for Rwanda, Annex to SC Res. 955, UN SCOR, 49th Sess., UN Doc. S/RES/955 (1994) at Art. 6 [ICTR Statute]; For Yugoslavia, see Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res. 827, 3217th Mtg., UN Doc. S/RES/827 (1993) at Art. 7 [ICTY Statute]; For Sierra Leone, see Statute of the Special Court for Sierra Leone, Enclosure to UN SC, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (October 2000), art. 6 [SCSL Statute]; For Cambodia, see Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) at Art. 29 [ECCC Law].
52 Fletcher supra note 15 at 263.
Trial Chamber shall be limited to imprisonment.” The Rome Statute sets out that convicted individuals must be sentenced to a term of imprisonment. As in domestic criminal law, imprisonment of offenders is justified in various ways. In the *Erdemovic* case, the ICTY stated that imprisonment is intended to deter future crimes from being committed and also serves as retribution against the convicted on the part of the international community. The Chamber also cited reprobation as an appropriate purpose of the punitive nature of international criminal justice noting that “[o]ne of the purposes of punishment for a crime against humanity lies precisely in stigmatizing criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole.”

Critics challenge the cultural competence of international criminal law on the basis that it demands the criminal prosecution of individual transgressors. “Justice” does not necessarily have a singular meaning. Different cultures may define justice in terms other than holding individual perpetrators criminally responsible for their actions. Mark Drumbl asserts that the legitimacy of international criminal law is undermined by its single-minded emphasis upon punitive sanctions. He acknowledges that the fundamental values underlying international criminal law resonate across cultures. “There is no culture,” he

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53 *ICTY Statute*, supra note 50 at Article 24(1); *ICTR Statute*, supra note 50 at Article 23(1).
54 *Rome Statute*, supra note 12 at Article 77.
56 *Ibid* at para. 64.
states, “that views the infliction of such acts as tolerable.” Yet he insists that the institutions and procedures set in place to enforce international criminal law fail to integrate local conceptions of justice. Because of the imposition of western norms and procedures upon non-western populations, international criminal law suffers from a “democratic deficit.” Drumbl argues that international criminal law generally operates in a top-down fashion, without accounting for indigenous laws, customs and practices. International criminal law “remains a reflection of the hegemonic values of Western punitive criminal justice,” focusing upon the retributive and deterrent aspects of criminal law, at the expense of other goals such as atonement and post-conflict reintegration. As an alternative approach, Drumbl favors what he terms a democratization of international criminal justice—a system which “takes into account cultural needs instead of imposing cultural values.” Acknowledging that local customs may in and of themselves be undemocratic and unrepresentative of local populations, he advocates a diversified and inclusive international justice system which also incorporates the norms of locally marginalized populations.

Rama Mani argues that international criminal law fails to recognize alternative, culturally-based theories of justice and post-conflict adjudication. She asserts that it may not always be appropriate to apply individualist and punitive

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59 Ibid at 596.
60 Ibid.
61 Ibid at 599.
62 Ibid at 610.
63 Ibid 607-610.
theories of justice in response to violations of international criminal norms.\textsuperscript{64} “If ideas and institutions about as fundamental and personal a value as justice are imposed from the outside without an internal resonance,” Mani writes, “they may flounder, notwithstanding their assertions of universality.”\textsuperscript{65} Western notions of justice, with their concentration upon the role of the individual, may fail to resonate with local populations.\textsuperscript{66}

Depending upon the cultural milieu involved, an individualized criminal trial may constitute an insufficient response in the aftermath of mass atrocities.\textsuperscript{67} Non-punitive reconciliation procedures may be preferable to criminal trials.\textsuperscript{68} Other cultures may view justice as something collective and social, therefore requiring a communal response to the commission of international crimes. Rather than imposing foreign legal structures based upon foreign legal principles, Mani advocates an international criminal justice which incorporates indigenous and national law.\textsuperscript{69} Mani cites as an example the role that animist purification rituals have played in the aftermath of the civil war in Mozambique.\textsuperscript{70} The rituals, which are performed upon entire communities--not simply perpetrators and victims--are intended to remove past traumas and injustices from the collective memory.\textsuperscript{71} Mani does not completely discount the role which criminal trials may play, but

\textsuperscript{65} Ibid at 49.
\textsuperscript{66} Ibid at 48-49.
\textsuperscript{67} Ibid at 123.
\textsuperscript{68} See Adam Branch, “International Justice, Local Injustice” \textit{Dissent} Summer 2004, online: http://www.dissentmagazine.org/article/?article=336
\textsuperscript{69} Mani, \textit{supra} note 64 at 81.
\textsuperscript{70} Ibid at 117.
\textsuperscript{71} Ibid at 117-118.
states that the system must be open to mechanisms which “are shaped by [a] society’s particular context, history, culture and needs.”

Truth and reconciliation commissions, such as that established in Sierra Leone and which operates in tandem with the Special Court of Sierra Leone, represent another potential non-punitive and culturally resonant device. Martha Minow suggests that truth and reconciliation commissions “can afford benefits to a society” and that such bodies may be “a better option than prosecutions.” For example, the Sierra Leone Truth and Reconciliation Commission is entrusted with the task of creating an unbiased historical record of human rights abuses and violations of international humanitarian law. Its purpose is, in the words of the Attorney General of Sierra Leone, “to serve as the most legitimate and credible forum for victims to reclaim their human worth and a channel for the perpetrators of atrocities to expiate their guilt, and chasten their consciences.”

Even assuming the punitive model of enforcement, critics claim that the institutional structures of international criminal law fail to adequately accommodate cultural diversity. Critics assert that international prosecutions of accused criminals are too distant from the participants in the international criminal justice system, both philosophically and logistically. On the international level, judicial bodies such as the ICC, the ICTY and the ICTR have been entrusted with the task of implementation. These institutions draw their personnel, including

72 Ibid at 116.
75 Ibid at 160.
their judges, primarily from the international community.\textsuperscript{76} Generally speaking, the procedural rules governing the operation of international criminal proceedings embody a mixture of the Anglo-American and continental legal systems.\textsuperscript{77} As noted by the ICTY in the \textit{Tadic} case, the Tribunal “with its unique amalgam of civil and common law features, does not strictly follow the procedure of civil law or common law jurisdictions.”\textsuperscript{78} The international adjudicative bodies established to enforce international criminal law borrow rules and procedures from both legal traditions. Consistent with the common law tradition, for example, international criminal proceedings are generally adversarial in nature, affording defendants with the opportunity to examine the witnesses presented against them.\textsuperscript{79}

Prosecutions at the ICC, the ICTY and the ICTR, are critiqued for imposing foreign and unfamiliar legal procedures upon non-Western populations. This distance alienates participants from the international criminal justice process and prevents meaningful participation. Rama Mani takes issue with the institutional structure of international criminal law, and argues that in countries such as Rwanda, international lawyers “have largely referred to and replicated their own legal systems, rather than catered to and built on local realities and

\textsuperscript{76} \textit{Rome Statute}, supra note 12 at Art. 36.
\textsuperscript{79} \textit{Rome Statute}, supra note 12 at Article 67(1)(e).
needs.” Mark Drumbl asserts that the adversarial nature of most international criminal proceedings further exemplifies their western hegemonic character. Conducting international criminal justice in this fashion serves to disenfranchise the communities who suffered atrocities, and prevents the actual victims from being able to redress crimes on their own specific cultural terms. Local populations are disconnected from international criminal procedures, and this in turn undermines the legitimacy of the entire system.

Jessica Almqvist echoes these concerns regarding the challenge posed by cultural diversity to the legitimacy of international criminal law. She notes the potential for a cultural disconnect between the culture of western adjudicatory proceedings and that of the defendants, victims, and witnesses who participate therein. Cultural differences may prohibit individuals from meaningfully participating in international criminal proceedings. Linguistic barriers may exist which prevent effective participation. Participants in the system may also possess different outlooks upon the rules which govern international criminal proceedings. For example, cross-examination, while considered a fundamental right in western law and under international criminal procedure, may be perceived of as humiliating or offensive to a witness of a different culture. Almqvist asserts that the ability to accurately assess witness testimony requires judges to be familiar

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80 Mani, supra note 64 at 81.
81 Drumbl, supra note 58 at 599.
82 Ibid at 597.
83 Almqvist, supra note 57 at 746.
84 Ibid at 747.
85 Ibid at 750.
with the particular cultural norms of each witness.\textsuperscript{86} In Almqvist’s view, the lack of cultural equivalence between the institutions and participants in international criminal law “undermines the conditions for effective and meaningful participation in international criminal proceedings.”\textsuperscript{87}

In a similar vein, Ida Bostian critiques the institutional character of the ICTR. Bostian asserts that there exists a tension between the cultural diversity of the subjects of international criminal law and the universalism of the regime’s principles.\textsuperscript{88} She argues that the legitimacy of international criminal tribunals depends in great part upon their acceptance by local communities.\textsuperscript{89} This acceptance depends upon the ability of the tribunals to take into account cultural differences which may affect their ability to find the truth and to hold people accountable for international crimes.\textsuperscript{90} While lauding the universalist principles undergirding international criminal law, Bostian claims that in establishing the ICTR, the U.N. “probably went too far in embracing universal values at the expense of the true needs of the Rwandan people.”\textsuperscript{91} She asserts that the ICTR contains elements of “moral imperialism,”\textsuperscript{92} noting that the Tribunal does not allow for the imposition of the death penalty despite Rwandan norms to the contrary.\textsuperscript{93}

\textsuperscript{86} \textit{Ibid.} \\
\textsuperscript{87} \textit{Ibid} at 747. \\
\textsuperscript{89} \textit{Ibid} at 2. \\
\textsuperscript{90} \textit{Ibid}. \\
\textsuperscript{91} \textit{Ibid} at 33. \\
\textsuperscript{92} \textit{Ibid} at 22. \\
\textsuperscript{93} \textit{Ibid} 19-20.
Within the punitive enforcement model, observers concerned with the cross-cultural legitimacy of international criminal law prescribe differing solutions. They advocate an enforcement structure which reflects the diversity of the subjects of international criminal law. International criminal law must be more inclusive lest non-Western populations be alienated from the criminal justice process. Many advocate a decentralized system of international criminal justice—one which incorporates local values and procedures, which they assert will be more likely to garner support and legitimacy across cultures.\(^\text{94}\)

Almqvist asserts that because of the importance of “cultural proximity” between judicial institutions and their participants, international criminal law should ideally be enforced by national jurisdictions.\(^\text{95}\) She notes that international criminal adjudicative bodies have attempted to accommodate cultural diversity. For example, both the ICTR and ICTY have provided that witnesses must be allowed to testify in their own language. Almqvist also cites several ICTR cases where the Tribunal considered cultural factors in assessing witness testimony. Furthermore, the Rome Statute contains a provision for a victims and witnesses unit, the staff of which must be trained in cultural sensitivity. Ultimately however, Almqvist asserts that national jurisdictions, while not entirely immune to the problems of cultural difference, are more likely to share the same culture as their

\(^{94}\) The advocacy of localized enforcement of international criminal law does not necessarily assume a culturally based argument. For example, Jose Alvarez argues the example of the ICTR “provides a cautionary tale against a 'one size fits all' approach to international criminal justice.” He cautions that international criminal justice institutions such as the ICTY and ICTR wrongly ignore ethnic tensions and biases which often form the basis for breaches of international criminal law. Alvarez emphasizes that his critique “is not based on cultural relativism.” Jose E. Alvarez, “Crimes of States/Crimes of Hate: Lessons from Rwanda” (1999) 24 Yale J. Int’l L. 365 at 369-370, 436-452.

\(^{95}\) Almqvist, supra note 57 at 759.
participants and thus will possess greater legitimacy in adjudicating international crimes.  

Indeed, domestic courts play a significant role in the implementation of international criminal law. The Rome Statute incorporates domestic enforcement mechanisms within the international criminal legal system. The Preamble to the Rome Statute states that the prosecution of international crimes “must be ensured by taking measures at the national level,” and recognizes “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Furthermore, through the complementarity principle contained in Article 17, the Rome Statute encourages domestic prosecutions under international criminal law.

The complementarity principle institutionalizes the idea that the ICC should complement and not supplant national jurisdictions. Under this principle, the ICC should deem a case inadmissible if the case is being investigated or prosecuted by a state, or if the case has been investigated by a state which has jurisdiction over it and the state decided not to prosecute. Article 17 also contains a double jeopardy provision, prohibiting the assertion of ICC jurisdiction where a person has already been tried for an alleged criminal act. Conversely, a case may be admissible before the ICC if a domestic jurisdiction is unwilling or

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96 Ibid at 760.
98 Rome Statute, supra note 12 at Preamble.
99 Ibid at Article 17(1)(a-b).
100 Ibid at Article 17(1)(c).
unable to genuinely investigate or prosecute the case. A case is admissible if judicial proceedings at the national level were undertaken “for the purpose of shielding the person concerned from criminal responsibility,” if there is “an unjustified delay in the proceedings” or if the proceedings were not independent or impartial and thus “inconsistent with an intent to bring the person to justice.”

Observers note that Article 17 provides a mechanism for accommodating cultural diversity. Jo Stigen asserts that by giving primacy to national jurisdictions, Article 17 acknowledges the existence of diverse legal cultures. Stigen notes that the ICC’s Office of the Prosecutor (“OTP”) has stated that a major purpose of the prosecutor’s office is to encourage individual States to investigate and prosecute international crimes. The OTP has stated that in assessing the prosecutorial efforts of individual states, “the [OTP] will take into consideration the need to respect the diversity of legal systems, traditions, and cultures.” By giving primacy to national criminal jurisdictions, “the ICC will only interfere when there are clear signs that the state is trying to shield the perpetrator or the state is incapable of carrying out essential investigative steps and not simply because a proceeding stands out as conceptually different from more ‘sophisticated’ proceedings.” This allows for different traditions and

101 Ibid at Article 17(1)(a)(b).
102 Ibid at Article 17 (2)(a)(b)(c).
104 Ibid.
106 Stigen, supra note 103 at 217.
cultures to be encompassed within the enforcement structure of international criminal law.\textsuperscript{107}

Courts operating in Rwanda in the aftermath of that country’s genocide provide an example of how domestic enforcement mechanisms may come in diverse forms. Accused participants in the genocide may be tried by the ICTR or in domestic Rwandan criminal courts, under Rwandan criminal law.\textsuperscript{108} In addition, the Rwandan government established gacaca tribunals, a system rooted in “indigenous models of local justice” to try low-level \textit{genocidaires}.\textsuperscript{109} The tribunals are based upon a customary Rwandan dispute resolution method, and were established in part to show that the Rwanda people could bring offenders to justice through their own traditional legal system.\textsuperscript{110} In their historic manifestation, gacaca tribunals were based upon “the traditional Rwandan worldview that considered the family and the wider community as the most valuable societal units.”\textsuperscript{111} The traditional objective of gacaca tribunals was to provide reconciliation within this communitarian worldview.\textsuperscript{112} Traditional gacaca tribunals viewed punitive sanctions as inadequate toward the pursuit of reconciliation, and thus did not impose prison sentences upon convicted offenders.\textsuperscript{113}

\textsuperscript{109} \textit{Ibid} at 881.
\textsuperscript{110} \textit{Ibid} at 891, 892 at footnote 52.
\textsuperscript{112} \textit{Ibid}.
\textsuperscript{113} \textit{Ibid}.
The gacaca tribunals are non-adversarial, and do not function through formalized rules of evidence.\textsuperscript{114} Lawyers may not assist victims or witnesses during the course of proceedings.\textsuperscript{115} Furthermore, by law, the judges in the gacaca system are chosen by the community, and cannot be lawyers by training.\textsuperscript{116} The current gacaca tribunals differ somewhat from their traditional predecessors. They may impose sentences of imprisonment as punishment.\textsuperscript{117} However, convicts may reduce their sentences by performing community service.\textsuperscript{118} Mark Drumbl looks favorably upon the gacaca process, stating that “gacaca may constitute the only realistic method to allocate some responsibility, promote reintegration [and] embed local conceptions of justice.”\textsuperscript{119}

Hybrid criminal tribunals are also lauded as a potentially more culturally resonant institutional alternative within the punitive model.\textsuperscript{120} Hybrid tribunals have been established following the conflicts in Sierra Leone, Cambodia, East Timor and Kosovo. Although each differs somewhat in character, these bodies consist of a hybrid of international and domestic elements, including substantive law, procedural regulations and personnel.\textsuperscript{121} Both international and domestic judges serve on these tribunals.\textsuperscript{122} Certain logistical advantages attach to localized proceedings of this nature. Local prosecutors and judges are more

\textsuperscript{114} Ibid at 793.  
\textsuperscript{115} Ibid.  
\textsuperscript{116} Ibid at 791-792.  
\textsuperscript{117} Ibid at 794.  
\textsuperscript{118} Ibid.  
\textsuperscript{119} Drumbl, supra note 58 at 601.  
\textsuperscript{120} See e.g. Drumbl supra note 58; Bostian, supra note 88.  
\textsuperscript{122} Ibid.
familiar with the history and territory of a country, as well as the language of both
the victims and the accused.\footnote{Cassese, supra note 7 at 6.} Bostian asserts that domestic judges participating
in these tribunals “may be able to explain relevant cultural norms to their
international colleagues, thus lessening the need for costly and time consuming
expert witness testimony and decreasing the chance of error in interpreting
cultural norms.”\footnote{Bostian, supra note 88 at 34.}

The integration of local elements is said to foster legitimacy among local
counties.\footnote{Higonnet, supra note 43 at 360.} In the words of one scholar, hybrid tribunals are appropriate
enforcement institutions because “responses to such crimes must, in a meaningful
way, reflect the peculiar social and historical culture of the country in which they
occurred if the process of accountability is to achieve its central aims. There
ILSA Journal of Int’l & Comparative Law 705 at 705.}

In Cambodia, Cambodian and international authorities established the Extraordinary
Chambers in the Courts of Cambodia (“ECCC”), a hybrid tribunal instituted to try
former leaders of the Khmer Rouge.\footnote{ECCC Law, supra note 50.} Helen Horsington favors the hybrid nature
of the ECCC in part because “it is important that the Cambodian people have the
opportunity to see that their legal system, judiciary and government have the
capacity to deliver real justice.”\footnote{Helen Horsington, “The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid

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\footnote{Cassese, supra note 7 at 6.}
\footnote{Bostian, supra note 88 at 34.}
\footnote{Higonnet, supra note 43 at 360.}
\footnote{Diane F. Orentlicher, “International Criminal Law and the Cambodian Killing Fields” (1997) 3
ILSA Journal of Int’l & Comparative Law 705 at 705.}
\footnote{ECCC Law, supra note 50.}
\footnote{Helen Horsington, “The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid
law, but is influenced by international norms.\textsuperscript{129} The ECCC includes both international and domestic judicial personnel. Furthermore, both international and domestic personnel serve as prosecutors and investigatory judges. In Horsington’s view, the localized institutional structure will “provide a meaningful process of accountability,” because “responses to atrocities such as those committed by the Khmer Rouge must reflect the peculiar social, cultural and historical culture of the country in which they occurred.”\textsuperscript{130}

Similarly, in the aftermath of the Sierra Leone conflict in the 1990’s, international and domestic authorities established a hybrid tribunal. The United Nations and the government of Sierra Leone set up the Special Court of Sierra Leone to prosecute individuals “who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”\textsuperscript{131} Judges on the SCSL come from both the international community and Sierra Leone and are appointed by both the government of Sierra Leone and by the Secretary-General of the United Nations.\textsuperscript{132} The agreement establishing the SCSL also calls for Sierra Leonean staff to be hired to the court and for a Sierra Leonean to be appointed as deputy prosecutor.\textsuperscript{133}

The jurisprudence of the SCSL provides some support for the contention that local judges bring a different and potentially valuable perspective to international criminal proceedings. The \textit{Civil Defence Forces} case (“the CDF

\textsuperscript{129} Ibid at 478.
\textsuperscript{130} Ibid.
\textsuperscript{131} SCSL Statute, \textit{supra} note 50 at Article I.
\textsuperscript{132} Ibid at Article 12(1).
\textsuperscript{133} Ibid at Article 3(3).
case”) serves as an example.\textsuperscript{134} The case arose out of the conflict in Sierra Leone which began in 1991 between the government of Sierra Leone and the rebel organization the Revolutionary United Front.\textsuperscript{135} In the CDF case, SCSL prosecutors tried three leaders of the CDF, a security force comprised mainly of “Kamajors,” a group of traditional hunters. Prior to the Sierra Leonean civil war, the Kamajors were employed by local chiefs to defend villages in the rural parts of the country. During the conflict, the Kamajors fought on the side of the government.\textsuperscript{136} The indictment issued against the defendants in the CDF case alleged, \textit{inter alia}, that the defendants committed war crimes and crimes against humanity, including that they “did. . . . initiate or enlist children under the age of 15 years into armed forces or groups.”\textsuperscript{137} The prosecutor also charged the defendants with having superior responsibility for the actions of their subordinates in the CDF.\textsuperscript{138}

The approach taken by the Sierra Leonean judges in the CDF case differed significantly from that of their international counterparts. In both the Trial Chamber and the Appeals Chamber, the Sierra Leonean judges wrote dissents which displayed skepticism towards findings of guilt which were based upon distinct cultural practices. The three judge Trial Chamber panel included two

\textsuperscript{134} \textit{Prosecutor v. Fofana and Kondewa (CDF Case)}, SCSL-04-14-T, Judgement (2 August 2007) at para. 2 (Special Court for Sierra Leone, Trial Chamber I).
\textsuperscript{135} \textit{Ibid} at paras. 2, 62.
\textsuperscript{136} \textit{Ibid} at para. 2.
\textsuperscript{137} \textit{Prosecutor v. Fofana and Kondewa (CDF Case)}, SCSL-04-14-T, Indictment at para. 29 (Special Court for Sierra Leone).
\textsuperscript{138} CDF Case Judgement, \textit{supra} note 134 at para 232.
international judges and one Sierra Leonean judge, Mr. Bankole Thompson.\textsuperscript{139} The Sierra Leonean judge George Kelaga King sat on the Appeals Chamber panel. One of the defendants, Allieu Kondewa, was said to be the “High Priest” of the CDF.\textsuperscript{140} In his role as “High Priest,” Kondewa was involved in initiating soldiers, including individuals under the age of 15, into the CDF. The aim of the initiation was to teach recruits not to be afraid, and not to flee from the battlefield.\textsuperscript{141} Kondewa himself did not go to the front to fight.\textsuperscript{142} The initiation procedure preceded the civil war, and provided soldiers with a perceived immunization from injury by bullets. The SCSL summarized the Kamajor initiation process as follows, stating that it was a process through which a fighter joined the Kamajor society. Young male fighters of good character were recommended and selected by the local chiefdom authorities for initiation. . . . During the initiation, Kamajors were given certain rules and prohibitions that they were bound to follow. Some of these prohibitions precluded, inter alia, the killing of civilians who were not participating in the conflict; the killing of women; looting; and the killing of a surrendered enemy. The consequence for violating one of these rules was that a Kamajor would lose his immunisation to bullets and would be killed.\textsuperscript{143}

\textsuperscript{139} Eastern Kentucky University, EKU Dean Named to Special United Nations Court, online Eastern Kentucky University <http://www.publicrelations.eku.edu/news/thompson_UN_court.htm>.  
\textsuperscript{140} CDF Case Judgement, supra note 134 at para 1.  
\textsuperscript{141} Ibid at footnote 56.  
\textsuperscript{142} Ibid at para. 345.  
\textsuperscript{143} Ibid at para. 314.
The Trial Chamber held that evidence of the initiation process was relevant in establishing whether Kondewa was liable for enlisting child soldiers.\textsuperscript{144} Based in part upon the evidence that he participated in the initiations, the Trial Chamber found Kondewa guilty.\textsuperscript{145}

The Sierra Leonean judge Bankole Thompson dissented from the Trial Chamber’s decision, disagreeing with the majority’s reliance upon evidence of the initiation process, a cultural practice without inherent illegal tendencies, to prove Kondewa’s criminality. Specifically, Judge Thompson stated that he dissented from the Trial Chamber’s decision regarding,

any findings of fact in relation to the initiation process to the extent to which they might have appeared to serve as a basis for the tribunal to pronounce on the permissibility or legality of initiation either as a cultural imperative for membership of the Kamajor society or as a prerequisite for military training for combat purposes in the context of said society.\textsuperscript{146}

On appeal as well, the Sierra Leonean judge on the panel distinguished himself from his international colleagues in his evaluation of Sierra Leonean cultural practices. The Trial Chamber ruled that Kondewa could be held responsible as a superior for the war crimes committed by Kamajor soldiers, \textit{by virtue of his de jure status as High Priest . . . . and his de facto status as a superior to these Kamajors.}\textsuperscript{147} The Appeals Chamber upheld the Trial Chamber’s

\begin{flushleft}
\textsuperscript{144} \textit{Ibid} at para. 198.  \\
\textsuperscript{145} \textit{Ibid} at para. 300.  \\
\textsuperscript{146} \textit{Ibid} at para. 3, Thompson J., dissenting.  \\
\textsuperscript{147} \textit{Prosecutor v. Fofana and Kondewa (CDF Case)}, SCSL-04-14-A, Judgement on Appeal (28 May 2008) at para. 66 (Special Court for Sierra Leone, Appeals Chamber) King J., dissenting.
\end{flushleft}
finding, yet Judge George Kelaga King dissented from his counterparts on the issue of Kondewa’s criminality. King accused his colleagues of fundamentally misunderstanding the role which Kondewa played in Kamajor society. King stressed that referring to Kondewa as a “high Priest” was a misnomer. Kondewa was “a ‘juju man’ or ‘medicine man.’” Judge King cited to the expert testimony of a cultural anthropologist who testified for the defense, and noted that “Kondewa would have knowledge of the forest, supernatural or superhuman knowledge which anthropologists prefer to call ‘occult’ and could protect the village from witches and bush devils.”

Given Kondewa’s role in Kamajor society, Judge King found it ludicrous that the Trial Chamber and the Appeals Chamber could attribute any military standing to Kondewa. Dissenting from the majority’s finding that Kondewa possessed superior responsibility for the actions of the CDF troops, King remarked that the majority for the first time in the history of international criminal law has concluded that a civilian Sierra Leonean juju man or witch doctor, who practiced fetish, had never been a soldier, had never before been engaged in combat . . . . who had never before smelt military service . . . . can be held to be a commander of subordinates in a bush and guerilla conflict in Sierra Leone, ‘by virtue’ of his reputed superstitious, mystical, supernatural and suchlike fictional and fantasy powers!

The dissenting opinions of Judges Thompson and King display how domestic judges may lend a distinct and perhaps more culturally resonant voice to

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148 Ibid at para 68.
149 Ibid.
150 Ibid at para 69.
international criminal proceedings. Certainly the *CDF* case represents only an anecdotal example of the differing role which indigenous, local judges may play in hybrid tribunals. Yet the case shows how local judges’ familiarity with local history and culture may provide valuable insight into the context of international crimes and the liability of individual actors for international crimes.\(^{151}\)

The above critiques and recommendations for the international criminal legal system focus upon cultural diversity as presenting a challenge to the present institutional structure and ideological grounding of international criminal law. They share a general viewpoint that the international criminal legal system must incorporate local, culture-specific procedures in order to maintain legitimacy. Localized institutions may, in certain instances, be capable of providing culturally resonant justice in the aftermath of mass atrocities. Yet the localization of international criminal enforcement comes with problems as well. While local procedures may be more culturally resonant, they may also lack neutrality and be infected with local prejudices which prevent the impartial implementation of justice. It is correct to suggest that diverse cultures must perceive that the norms of international criminal law reflect their own norms of behavior. Yet the above critiques fail to acknowledge the extent to which the international criminal legal system has already accommodated cultural diversity through the interpretation and application of the universal norms of international criminal law.

\(^{151}\) See also Alvarez, *supra* note 94 at 452 (“While a more ethnically representative . . . bench does not ensure greater ethnic sensitivity, we ought not to dismiss the value of insiders’ insights nor underestimate the difficulty outsiders have in discovering the truth under ethnically charged circumstances.”)
II. **Defining the Universal Norms of International Criminal Law through Cultural Interpretation.**

Within its existing institutional structure, the universal norms of international criminal law have been interpreted and applied in a manner which recognizes and accommodates cultural diversity. The norms of international criminal law have been given culture-specific content and meaning. In order to apply the universal norms of international criminal law in diverse cultural contexts, judges and other actors in the international criminal justice system undertake a process of what the anthropologist Richard Shweder calls “thinking through others.” Shweder posits that “the processes of consciousness (self-maintenance processes, learning processes, reasoning processes, emotional feeling processes) may not be uniform across the cultural regions of the world.”¹⁵² The mental lives of individuals are not universal and fixed by nature, but rather are impacted and influenced by cultural context.¹⁵³ Understanding how an individual thinks, communicates, reacts to external stimuli, and understands the world requires a contextual understanding of these processes. The goal of thinking through others “is a rational reconstruction of indigenous belief, desire, and practice.”¹⁵⁴ Cultural contextualization provides a means of improving understanding, “of getting the other straight, of providing a systematic account of the internal logic of the intentional world constructed by the other.”¹⁵⁵

¹⁵³ *Ibid* at 97.
¹⁵⁴ *Ibid*.
Judges and other actors in the international criminal justice system analyze facts and law within cultural context in order to determine whether the universal norms of international criminal law have been breached. Often, a true understanding of the nature of international crimes and the harms they cause may only be arrived at by looking at the crimes through the lens of the culture in which the crime occurred. This requires a culture-specific interpretation of the facts and a culture-specific application of the law to the facts. The substance of international criminal law thus allows for interpretation which is consistent with, and accommodates, cultural diversity. The universal norms of international criminal law become more richly defined and relevant as they are applied in diverse contexts.

A. “Decoding” Rwandan culture at the International Criminal Tribunal for Rwanda.

Cultural contextualization has played a significant role in the jurisprudence of the International Criminal Tribunal for Rwanda. The United Nations established the ICTR in order to prosecute the persons responsible for serious violations of international humanitarian law committed during the 1994 Rwandan genocide, during which up to 1 million members of the Tutsi ethnic group were killed.\textsuperscript{156} Several previous commentators have noted that the ICTR considers the cultural background of witnesses when determining witness credibility.\textsuperscript{157} A less noted phenomenon is how the ICTR has examined cultural

\textsuperscript{156} ICTR Statute, supra note 50 at Art. 1; Prosecutor v. Akayesu, ICTR-96-4-T, Judgement (2 September 1998) at para. 111 (International Criminal Tribunal for Rwanda, Trial Chamber I).

\textsuperscript{157} See generally Almqvist, supra note 57; Bostian, supra note 88; Robert Cryer, “A Message From Elsewhere: Witnesses Before International Criminal Tribunals” in Paul Roberts and Mike
context in defining international crimes themselves.\textsuperscript{158} ICTR case law displays how international criminal tribunals give culture-specific meaning to the universal norms of international criminal law. The ICTR has embraced a view that the culture in which a person lives affects how he or she communicates, acts, and how he or she responds to the words and actions of others. The Tribunal considers cultural context in interpreting witness testimony and in interpreting whether the evidence presented at trial establishes criminal liability. The international crimes of rape as a crime against humanity, genocide, and incitement to genocide have all been defined by the ICTR in culture-specific terms.

1. **Culturally contextualized determinations of witness credibility at the ICTR.**

In order to explain how the ICTR has interpreted the universal norms of international criminal law to fit the specific cultural milieu of Rwanda, it is first necessary to examine how the ICTR has assessed witness testimony in light of cultural context. In addition to more standard methods of witness assessment, such as considering contradictions between trial testimony and prior statements, the ICTR considers “cultural factors which may explain apparent discrepancies,”\textsuperscript{159} when assessing the testimony of Rwandan witnesses. At the

\textsuperscript{158} Bostian notes how the ICTR has defined “ethnicity” in cultural context when analyzing the crime of genocide. See Bostian, \textit{supra} note 88 at 28.

ICTR, the consideration of cultural factors in making credibility determinations has achieved the status of a “general principle.”

The ICTR’s consideration of cultural factors in determining witness credibility is not necessarily novel. In contexts other than international criminal law, commentators and judges assert that fact-finders must contextualize evidence in order to adequately assess its impact at trial. Part of this contextualization involves considering the cultural background of witnesses. Cultural background may impact the way in which a witness recounts an event to the court, which in turn will influence how the finder of fact evaluates the witness’ testimony. The cultural background of a witness may affect the demeanor he or she exhibits while testifying or may affect the accuracy with which a witness is able to testify to dates, times or distances. Satvinder Juss posits that judges should practice what he terms a “cultural jurisprudence,” which requires “courts to consider sociological facts before they can determine the impact of a legal rule on the cultural expectation of all peoples.” Judge Richard Posner also emphasizes the importance of considering cultural context in assessing witness credibility. Posner has admonished that in the context of asylum proceedings, immigration judges face difficulty in making cross-cultural assessments of witness credibility and that a familiarity with foreign cultures is necessary to properly assess asylum claims. He notes that misunderstandings may occur as a result of the process of

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160 The generality of this practice is somewhat tempered, however, by the fact that the ICTR has only contextually evaluated the testimony of Rwandan witnesses.
translating witness testimony and acknowledges “the difficulty of basing a
determination of credibility on the demeanor of a person from a culture remote
from the American, such as the Chinese. . . . Behaviors that in our culture are
considered evidence of unreliability, such as refusing to look a person in the eyes
when he is talking to you, are in Asian cultures a sign of respect.” 163 Robert
Currie notes a similar phenomenon among certain aboriginal cultures, in which
individuals avert their gaze in the face of an authority figure. 164

The proper assessment of an individual’s in court testimony may therefore
require a trier of fact to familiarize him or herself with culture-specific modes of
communication. Frequently a court becomes familiarized with cultural factors
through the presentation of expert testimony from an anthropologist or other
person familiar with the witness’ cultural background. Acquainting oneself with
contextualized communication methods and ascertaining the content of a witness’
testimony is not necessarily a simple task. Posner notes that U.S. immigration
judges often lack training and do not possess the “cultural competence” necessary
to make accurate credibility determinations when confronted with the testimony
of individuals from other cultures. 165 Yet despite such challenges, a
contextualized reading of witness testimony is often necessary in order to arrive at
a genuine and accurate assessment of the facts presented.

163 Iao v. Gonzales, 400 F.3d 530, 534 (7th Cir. 2005).
164 Currie, supra note 161 at 91.
165 Djouma v. Gonzalez 429 F.3d 685, 688 (7th Cir. 2005); see also Ni v. Attorney General 210 Fed.
Appx. 161, 165 (3d Cir. 2006) (“It is asking a great deal of an [immigration judge], much less a
reviewing appellate court, to make informed and reliable credibility determinations, particularly in
light of cultural differences and language barriers which may compound the problem.”)
Accordingly, across jurisdictions, triers of fact consider the cultural background of witnesses in making credibility assessments. American courts evaluate witness credibility through the witness’ own cultural lens, noting for example that “[i]n many cultures the specifics of dates, time, and ages are not valued as significantly as they are in western, industrialized cultures.” Canadian courts note that “problems may arise in interpreting the demeanour of refugee claimants from different cultural backgrounds.” The European Court of Human Rights has made similar findings, particularly in cases involving Turkish and Cypriot witnesses, stating its awareness that “the cultural context in which some of the applicants and witnesses live has rendered inevitable a certain imprecision with regard to dates and other details (in particular, numerical matters), and it does not consider that this by itself affects the credibility of the testimonies.”

Broader cultural norms may also influence the content of a witness’ testimony and thus influence courts’ credibility determinations. Victims of sexual trauma, for example, may be more or less forthcoming at trial regarding the

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166 Fiadjo v. Attorney General, 411 F.3d 135, 150 (3d Cir. 2005).
169 But see United States v. Khang, 36 F.3d 77, 79 (9th Cir. 1994) (refusing to consider cultural context, stating that “Lee Khang argues that we should remand for a determination of whether he should get a downward departure because of cultural differences in the medicinal use of opium. We do not reach the question whether a departure on that ground would be appropriate. Mr. Khang had the burden of proving the factual basis for the departure he sought, and failed. The district judge must decide the facts for himself, not uncritically defer to "experts" or accept representations about a culture with which he is unfamiliar. Credibility, the defendant's individual knowledge and responsibility, and applicability of American legal principles must be considered by the judge, not just assertions that in things are done in a different way in another culture.”)
details of their experiences, depending upon culture-specific taboos. The case

*Mousa v. Mukasey,* displays this dynamic. In *Mousa,* the petitioner sought

asylum in part because she had been raped while imprisoned in her home country

of Iraq. At the asylum hearing, the immigration judge concluded that the

petitioner was not credible because she did not mention that she had been raped at

an earlier stage of the proceedings. On review, the appellate court emphasized

the necessity of evaluating the witness’ inconsistency in cultural context. The

court stated that:

A woman who has suffered sexual abuse by
government officials in her home country may be
especially reluctant to reveal that abuse to
government officials in this country, even when
such a revelation could help her asylum application
[citation omitted]. This is especially true when the
woman is fleeing a country where reported rapes
often go uninvestigated, and where rape victims are
sometimes murdered by members of their own
families because they have ‘dishonored’ their
families by being raped.

The court concluded that the witness’ “cultural reluctance to admit the fact that

[the rape] had occurred” explained the prior omission.

Similarly, in *Vang v. Xiong,* the court held that the consideration of
culture-based gender norms was necessary for the court to engage in an accurate
credibility determination. The plaintiffs, who were Hmong refugees, asserted in a
civil suit that they had been raped by the defendant, a state employment office

170 Fiadjoe, supra note 166 at 151.
171 *Mousa v. Mukasey,* 530 F.3d 1025, 1026 (9th Cir. 2008).
172 *Ibid* at 1027.
173 *Ibid* at 1028.

42
employee. One plaintiff claimed that the defendant raped her multiple times and that on each occasion, the defendant relied on the pretext of a potential employment opportunity. At trial, the plaintiffs called an expert witness who testified that “Hmong women are generally submissive, and are raised to respect and obey men.” The expert also testified that Hmong refugees in the United States relied on government officials to survive and that they therefore had “developed an awe of persons in government positions.” On appeal, the defendant asserted that the expert’s testimony “painted unsupported ethnic stereotypes which engendered compassion for the plaintiffs and bolstered their credibility.” The appeals court concluded that the expert properly testified at trial, stating that:

The testimony was relevant to assist the trier of fact to understand certain behavior of the parties here that might otherwise be confusing, and to explain the cause, effect and nature of long term Hmong reliance on governmental agencies for support. The testimony was prejudicial to Xiong because it supported plaintiffs’ assertions that he raped them.

The court noted that the expert’s testimony explained why the plaintiffs continued to have contact with the defendant, even after he initially raped them. His

175 Vang v. Xiong, 944 F.2d 476, 478 (9th Cir. 1991).
176 Ibid.
177 Ibid at 481.
178 Ibid.
179 Ibid.
180 Ibid at 481-482.
testimony on the role of women in Hmong culture “was helpful in understanding plaintiffs’ actions after [the defendant’s] attacks.”\textsuperscript{181}

Lastly, in \textit{Barapind v. Rogers}, the court consulted cultural factors in assessing witness credibility. Barapind filed a petition for habeas corpus to challenge an order of deportation.\textsuperscript{182} The case arose out of the conflict in Punjab, where the Sikhs were fighting for independence.\textsuperscript{183} Barapind came to the United States and sought political asylum, claiming that he had been tortured by the Indian government. At his asylum hearing, the immigration judge denied Barapind’s claim on the grounds that he lacked credibility.\textsuperscript{184} The immigration judge rejected the credibility of Barapind’s testimony, in part upon his observation that Barapind was “stoic” while testifying that he had been tortured. Barapind’s “‘stoic’ demeanor as he testified about torture by the Indian police was a sign that he was lying.”\textsuperscript{185} The appellate court overturned the ruling of the immigration judge, noting that Barapind’s demeanor could only be understood in cultural context. The court stated that the “stoic acceptance of misfortune is expected from persons of constancy and courage,” and Sikhs had “long enjoyed the reputation of being ‘unsurpassed’ as soldiers.”\textsuperscript{186} The court therefore concluded that “[t]here is no reason to equate a brave or even cheerful demeanor

\begin{footnotesize}
\begin{enumerate}
\item Ibid at footnote 3.
\item \textit{Barapind v. Rogers}, U.S. App. LEXIS 11532 at *1 (9th Cir 1997).
\item Ibid.
\item Ibid at *4.
\item Ibid at *5.
\item Ibid.
\end{enumerate}
\end{footnotesize}
with absence of suffering. A lie is not proved or even suggested by the proverbial stiff upper lip. “187

In a manner similar to the above jurisdictions, the ICTR has concluded that cultural context influences witness testimony. The Tribunal adopted a contextual approach to the assessment of witness testimony in the trial of Jean-Paul Akayesu. The ICTR prosecutor charged Akayesu, a Hutu leader in the village of Taba, with genocide, incitement to genocide and war crimes. 188 The indictment also alleged that Akayesu had committed crimes against humanity, based upon rapes committed by people under his authority. 189 At least 2000 Tutsis were killed in Taba while Akayesu was in authority and “[m]any women were forced to endure multiple acts of sexual violence.” 190 The prosecutor alleged that the women affected “lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.” 191 Much of the evidence presented against Akayesu consisted of eyewitness accounts of the role he played in the killings and sexual violence and his failure to stop these acts from occurring.

The Trial Chamber admitted that at times, it was necessary for the Chamber to “decode” the testimony of Rwandan witnesses. 192 The Chamber therefore concluded that the literal testimony of Rwandan witnesses was not necessarily dispositive of its meaning. At trial, a Rwandan linguist testified as an

187 Ibid.
188 Akayesu, supra note 156 at paras. 3-9.
189 Ibid at para. 23.
190 Ibid at para 12, 12A.
191 Ibid at para 12A.
192 Ibid at para 156.
expert witness regarding Rwandan modes of discourse. The linguist testified that “it is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate.”

In its decision, the Trial Chamber did not specify what sorts of questions qualify as “delicate,” but held that “[i]n such cases, the answers given will very often have to be ‘decoded’ in order to be understood correctly.” Interpreting the credibility of a Rwandan witness depends upon “the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question.”

Similarly, in *Prosecutor v. Musema* the ICTR noted that it considered the indirect nature of Rwandan witness testimony in evaluating the evidence submitted. Like Akayesu, Musema was a local Hutu political figure, indicted on charges of genocide, crimes against humanity and war crimes. The Trial Chamber concluded that “[t]he testimonies of many of the witnesses in this case were affected by cultural factors.” The Chamber thus stated that it had “not drawn any adverse conclusions regarding the credibility of witnesses when cultural constraints appeared to induce them to answer indirectly certain questions regarded as delicate.”

The ICTR has also concluded that cultural factors influence the ability of Rwandans to accurately testify regarding “dates, times, distances and

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193 Ibid.
194 Ibid.
195 Ibid.
197 Ibid at para 103.
198 Ibid.
In the Akayesu and Musema decisions, the ICTR noted that during trial proceedings, Rwandan witnesses displayed an “unfamiliarity with spatio-temporal identification mechanisms and techniques,” and showed a lack of experience with maps and other graphic representations of geographic locations. In the light of this understanding,” the Chamber concluded that it “did not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions.” The Chamber further indicated that “it has taken the accuracy and other relevant elements of such responses into account when assessing such evidence.”

The Trial Chamber made similar observations in the Rutaganda decision.

The prosecutor charged Georges Rutaganda, a Hutu political leader, with genocide, crimes against humanity and war crimes. In a manner similar to Akayesu and Musema, the Rutaganda court asserted the importance of culture upon its assessment of the credibility of witnesses and also noted the problems faced by the court in relying upon translated testimony. The Trial Chamber stated as follows:

The Chamber has also taken into consideration various social and cultural factors in assessing the testimony of some of the witnesses. Some of these witnesses were farmers and people who did not have a high standard of education, and they had difficulty

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199 Ibid at para 104; Akayesu supra note 156 at 156.
200 Ibid.
201 Ibid.
202 Ibid.
203 Prosecutor v. Rutaganda, ICTR-96-3-T, Judgement (6 December 1999) at paras. 10-19 (International Criminal Tribunal for Rwanda, Trial Chamber I).
in identifying and testifying to some of the exhibits, such as photographs of various locations, maps etc. These witnesses also experienced difficulty in testifying as to dates, times, distances, colours and motor vehicles. In this regard, the Chamber also notes that many of the witnesses testified in Kinyarwanda and as such their testimonies were simultaneously translated into French and English. As a result, the essence of the witnesses’ testimonies was at times lost. Counsel questioned witnesses in either English or French, and these questions were simultaneously translated to the witnesses in Kinyarwanda. In some instances it was evident, after translation, that the witnesses had not understood the questions. 204

The ICTR has also concluded that determining the credibility of Rwandan witnesses requires the tribunal to consider traditional Rwandan methods of storytelling. The relevance of the Rwandan story-telling methods arose in the aforementioned Akayesu case, where the tribunal noted that Rwandans live in an oral tradition. One of the characteristics of this oral tradition is that Rwandans relate second-hand information as if it was something actually perceived by the witness. The prosecution’s linguistic expert witness informed the court of this phenomenon. 205 The Chamber summarized the pertinent part of his testimony as follows:

Dr. Mathias Ruzindana noted that most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else. Since not many people are literate or own a radio, much of the

204 Ibid at para. 23.
205 Akayesu, supra note 156 at para. 146.
information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazard of distortion of the information each time it is passed on to a new listener. Similarly, with regard to events in Taba, the Chamber noted that on examination it was at times clarified that evidence which had been reported as an eyewitness account was in fact a second-hand account of what was witnessed. Dr. Ruzindana explained this as a common phenomenon within the culture, but also confirmed that the Rwandan community was like any other and that a clear distinction could be articulated by the witnesses between what they had heard and what they had seen.206

The Chamber noted that throughout the trial proceedings, it made an effort to distinguish between what the witnesses had actually seen and what they were reporting as second hand knowledge.207

By considering the admissibility and relevance of culturally specific story telling techniques, the ICTR’s jurisprudence resembles that of the Supreme Court of Canada. In Delgamuukw v. British Columbia, the SCC ruled that aboriginal oral histories constituted potentially relevant and admissible evidence in aboriginal land cases.208 The admission of evidence related through traditional story telling methods such as these contradicts the traditional rule against hearsay.209 Yet both the ICTR and the SCC have acknowledged that relevant and

206 Ibid at para 155.
207 Ibid.
208 Currie, supra note 161 at 95.
209 As a general rule international criminal tribunals allow parties to admit hearsay evidence at trial.
reliable testimony may be presented through alternate, culture-specific modes of communication.

In concluding that witness credibility must be assessed in cultural context, the ICTR has acknowledged the complicated nature of the fact-finding process and the varied ways in which facts are constructed in courts of law. Like other international and domestic jurisdictions, the ICTR views cultural context as one factor to consider in evaluating evidence presented at trial. In a criminal trial, determinations regarding witness credibility carry obvious importance. Criminal trials often revolve around the prosecution being able to establish that the defendant committed specific acts, often at a precise location and on a certain time and date. The credibility or lack thereof of a witness may therefore be outcome determinative. Reading evidence in cultural context does not merely impact how courts such as the ICTR establish facts. It also influences the development of substantive law.

2. The ICTR’s definition of substantive international criminal law norms within the context of Rwandan culture.

The ICTR’s culturally contextualized approach to determining witness credibility is intimately linked to its analysis of substantive international criminal law. When interpreting cases involving the crimes of rape as a crime against humanity, genocide, and incitement to genocide the ICTR has found it necessary to evaluate the facts and apply the law in cultural context. The ICTR’s consideration of cultural factors therefore plays an important role in how the tribunal has interpreted and applied substantive international criminal law.
Culture-specific modes of behavior, beliefs and mental processes are consulted and analyzed in order to assess whether an international crime has been committed. In this way, the ICTR interprets and applies the universal norms of international criminal law in a way to accommodate cultural diversity.

a. Rape as a Crime against Humanity

In the Akayesu decision, the Trial Chamber’s cultural contextualization of Rwandan witness testimony bore directly upon its conclusion that Akayesu was guilty of crimes against humanity, based upon the rapes which had occurred during Akayesu’s tenure as the leader in the village of Taba. The Chamber noted that in order to rule upon whether Akayesu was guilty of rape as a crime against humanity, it was required to define which specific acts of sexual violence constituted “rape,” and to determine whether these acts were committed in the case at hand.\(^{210}\) The Chamber further noted that at the time of its judgment, there was no commonly accepted definition of the term “rape” in international law.\(^{211}\)

During trial proceedings both the prosecution and the defense attempted to elicit explicit descriptions from the victim-witnesses regarding what specific acts had been perpetrated upon them. This proved problematic. As an expert witness for the defense testified, “there is a cultural factor which prevented people from talking about rape.”\(^{212}\) Witnesses were reluctant to testify to the details of the sexual violence they endured, thus complicating the Trial Chamber’s task.

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\(^{210}\) *Ibid* at para. 686.
\(^{211}\) *Ibid*.
\(^{212}\) *Ibid* at para. 442.
In arriving at a legal definition of rape, the Chamber accounted for the cultural reluctance of witnesses to provide detailed testimony. The Chamber noted “the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured.”\textsuperscript{213} Defining rape as a crime required an accommodation to such cultural sensitivities. The Chamber therefore concluded that “rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.”\textsuperscript{214} It defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”\textsuperscript{215} Furthermore, the Chamber held that rape constitutes a crime similar to torture, in that it consists of a violation of personal dignity. The Chamber cited to the United Nations Convention Against Torture, and noted that it does not list specific acts in its definition of torture. Rape as a crime against humanity was an analogous crime whose definition also did not require a cataloging of specific acts.\textsuperscript{216} In this fashion, the Chamber ensured that culture-specific sensitivities regarding the discussion of rape would not impede prosecutions. General witness testimony regarding the commission of rapes would be sufficient to prove the elements of the crime.

\textsuperscript{213} Ibid at para. 687.
\textsuperscript{214} Ibid.
\textsuperscript{215} Ibid at para. 688.
\textsuperscript{216} Ibid at para. 687.
b. **The crime of genocide – determining whether the Tutsis constituted an “ethnic group” within cultural context.**

Similarly, the ICTR has determined that cultural context must be consulted in determining whether the crime of genocide has been committed. Article 2 of the ICTR Statute sets out the elements of the crime of genocide, stipulating that acts constituting genocide must be “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”\(^\text{217}\) A genocide exists only if it directed at a group of this nature. In the Rutaganda case, the ICTR assessed whether the Tutsis constituted one such group. The Trial Chamber noted that under the Genocide Convention, genocide could not be committed against “mobile groups” such as political or economic groups "which one joins through individual, political commitment."\(^\text{218}\)

The Rutaganda Court concluded that membership in a national, ethnic, racial or religious group “is, in essence, a subjective rather than an objective concept.”\(^\text{219}\) The victim is perceived by the perpetrator as a member of the group.\(^\text{220}\) The court stated that as a result “[e]ach of these concepts must be assessed in the light of a particular political, social and cultural context.”\(^\text{221}\) The Chamber concluded that “in assessing whether a particular group may be considered as protected from the crime of genocide, it will proceed on a case-by-

\[^{217}\text{ICTR Statute, supra note 50 at Art. 2.}\]
\[^{218}\text{Rutaganda, supra note 203 at 57.}\]
\[^{219}\text{Ibid at 56.}\]
\[^{220}\text{Ibid.}\]
\[^{221}\text{Ibid.}\]
case basis, taking into account both the relevant evidence proffered and the political and cultural context.”

Determining if the Tutsis constituted an “ethnic group” therefore required an evaluation of whether they were perceived as such within the context of Rwandan culture. The status of the Tutsis as an “ethnic group” was not a foregone conclusion. To the general observer, the Tutsis were not necessarily set apart from the Hutu population. The Trial Chamber noted that “the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population.” Yet when looked at in cultural context, the Tutsis constituted an ethnic group. The Chamber noted how Rwandan customs and institutions established the ethnic identity of the Tutsis:

Every Rwandan citizen was, before 1994, required to carry an identity card which included an entry for ethnic group, the ethnic group being either Hutu, Tutsi or Twa. The Rwandan Constitution and laws in force in 1994 also identified Rwandans by reference to their ethnic group. Moreover, customary rules existed in Rwanda governing the determination of ethnic group, which followed patrilineal lines. The identification of persons as belonging to the group of Hutu or Tutsi or Twa had thus become embedded in Rwandan culture.

Thus the Chamber concluded that the Tutsis constituted a “stable and permanent group,” for purposes of determining whether genocide occurred.

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222 Ibid at 58.
223 Ibid at 374.
224 Ibid.
225 Ibid.
c. Defining the crime of incitement to genocide in culture-specific terms.

ICTR jurisprudence regarding the crime of incitement to genocide further displays how the ICTR has interpreted the substantive norms of international criminal law in the specific cultural context of the Rwandan genocide. In cases where Rwandan defendants are charged with incitement to genocide, oftentimes the individual accused never made direct appeals for Tutsis to be killed. The ICTR has therefore concluded that determining whether incitement occurred requires the court to “decode” the speech at issue in order to determine its meaning. In essence, the ICTR has held that the words uttered by Rwandans must be analyzed in their cultural context in order to determine if a defendant is guilty of incitement. Cultural context must be consulted in order to determine whether the speaker possessed the requisite intent to incite genocide and whether the audience understood the speaker’s words as propounding genocide.

The ICTR Statute establishes incitement to genocide as a crime.\textsuperscript{226} The Statute sets out that defendants may be held criminally liable for the “direct and public incitement to genocide.”\textsuperscript{227} The Rome Statute contains a similar provision, holding individuals criminally responsible for directly and publicly inciting others to commit genocide.\textsuperscript{228} Establishing that someone incited others to commit genocide requires proof that the individual possessed the requisite intent to commit the predicate offense of genocide. This requires the prosecutor to prove beyond a reasonable doubt that the defendant had “the specific intent to commit

\textsuperscript{226} ICTR Statute, supra note 50 at Art. 2(3)(c).
\textsuperscript{227} Ibid.
\textsuperscript{228} Rome Statute, supra note 12 at Art. 25(3)(e)
genocide namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

In interpreting what nature of speech may be considered the “direct” incitement to genocide, the ICTR has concluded that the words spoken by defendants must be considered in their cultural and linguistic context. Ascertaining whether speech directly incites genocide requires the court to interpret how the words were intended by the speaker and how they were understood by the audience. The ICTR has rejected the notion that only discourse which is “entirely unambiguous for all types of audiences” may serve as the basis for direct incitement to genocide. In the words of the Chamber, “It does not matter that the message may appear ambiguous to another audience or in another context.” The speech at issue “has to be more than a mere vague or indirect suggestion,” yet at the same time “incitement may be direct, and nonetheless implicit.”

The Chamber has admitted that interpreting the contextual meaning of speech may be a difficult task, particularly where the Chamber relies upon translations to ascertain the content of the speech. In the Akayesu decision, the Chamber considered prima facie whether a speech delivered by the defendant constituted incitement. The speech at issue had been delivered in the

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229 Akayesu, supra note 156 at 560.
232 Ibid at para 701.
233 Ibid at para 692.
234 Akayesu, supra note 156 at para 557.
Kiryarwandan language and translated into English and French for the Court.\textsuperscript{235} Ascertaining the meaning of the speech was a “great challenge” because “everyday modes of expression in the Kinyarwanda language are complex and difficult to translate.”\textsuperscript{236} The Trial Chamber acknowledged that the translation process “entailed obvious risks of misunderstandings.”\textsuperscript{237}

The ICTR relied upon expert witness testimony to aid it in the difficult task of interpreting the culture-specific meaning of speech. In \textit{Akayesu}, the Chamber relied upon the aforementioned testimony of Mathias Ruzindana, an expert in linguistics, to ascertain the meaning of Akayesu’s speech.\textsuperscript{238} The prosecutor charged the defendant with delivering a speech where he “urged the population to eliminate accomplices of the [Rwandan Patriotic Front], which was understood be those present to mean Tutsis.”\textsuperscript{239} During the speech however, Akayesu did not make explicit reference to Tutsis. Instead, he used the Kinyarwanda words \textit{Inkotanyi} and \textit{Inyenzi}. Witnesses testified that Akayesu told the audience that “the \textit{Inkotanyi} and their accomplices wanted to seize power,”\textsuperscript{240} and that he told the crowd “to fight against the \textit{Inkotanyi} and their accomplices.”\textsuperscript{241} Witnesses testified that while Akayesu and his followers captured and beat individuals they made such statements as “catch these \textit{Inyenzi},

\begin{footnotes}
\textsuperscript{235} \textit{Ibid} at para 6.
\textsuperscript{236} \textit{Ibid} at 145.
\textsuperscript{237} \textit{Ibid}.
\textsuperscript{238} \textit{Ibid} at 146.
\textsuperscript{239} \textit{Prosecutor v. Akayesu}, ICTR-96-4-I, Amended Indictment at para. 14 (International Criminal Tribunal for Rwanda).
\textsuperscript{240} \textit{Akayesu}, supra note 156 at para. 333.
\textsuperscript{241} \textit{Ibid}.
\end{footnotes}
don't let them get away.” 242 The Chamber was entrusted with determining whether such statements rose to the level of incitement to genocide.

The expert witness told the Trial Chamber that “in ascertaining the specific meaning of certain words and expressions in Kinyarwanda, it is necessary to place them contextually, both in time and in space.” 243 He testified that the term Inkotanyi had roots in the 19th century as a name for a group of warriors. 244 In a contemporary context, the term referred to the RPF army, a Tutsi organization. 245 Ruzindana also testified that the term had “a number of extended meanings” including supporters of the RPF and “in some instances, it even seemed to make reference to Tutsi as an ethnic group.” 246 Ruzindana further testified that the basic translation of Inyenzi is “cockroach,” and that the term carried a negative connotation. 247 It was a term applied to a group of Tutsi refugees and revolutionaries during the 1959 Rwandan revolution. 248 Because they would enter and leave the country during the night, their activity was likened to cockroaches, and thus the name. 249 Ruzindana testified that the term also applied to Tutsi refugees in 1990, a time when the RPF army attacked Rwanda. 250 The term was often used on anti-Tutsi radio broadcasts. 251 Based upon Ruzindana’s testimony, the Trial Chamber concluded that the term “was widely

242 Ibid at para 250.
243 Ibid at para 146.
244 Ibid at 147.
245 Ibid.
246 Ibid.
247 Ibid at 148.
248 Ibid.
249 Ibid.
250 Ibid.
251 Ibid at 149.
used by extremist media by . . . those who wanted to exterminate the Tutsi, in whole or in part.”252 Lay witnesses also testified that at the time of the events, when Akayesu used the terms Inkotanyi and Inyenzi, he meant “Tutsi.”253 One witness testified that “while all Inkotanyi were not Tutsi, everyone understood at the time that all Tutsi were Inkotanyi.”254 Not all witnesses concurred with this analysis of Akayesu’s speech. A defense witness rebutted this testimony, stating that the speech must be read in the context that the RPF was making incursions into Rwandan territory and that people who knew Akayesu could not have construed his speech as a general call to kill the Tutsi.255

Based upon the witness testimony and the expert testimony of Dr. Ruzidana, the Trial Chamber concluded that Akayesu had called on the population to eliminate the accomplices of the Inkotanyi, and that the audience construed this as a call to kill the Tutsi in general.256 Reading the speech in its cultural context, the Chamber concluded that Akayesu had engaged in the direct incitement to genocide.

The Appeals Chamber of the ICTR endorsed this interpretation of the crime of incitement to genocide. In Prosecutor v. Nahimana et al, the prosecutor indicted the defendants on charges of direct and public incitement to commit genocide.257 Two of the defendants had been involved in the establishment of

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252 Ibid.
253 Ibid at 339.
254 Ibid.
255 Ibid at 342.
256 Ibid at 361.
257 Nahimina, supra note 231 at paras. 673-675.
RTLM, a radio and television company.\(^{258}\) The third defendant had been the editor-in-chief of a Rwandan newspaper.\(^{259}\) As in Akayesu, at issue was the defendants’ use of the terms *Inkotanyi* and *Inyenzi* and whether these terms referred to the Tutsi population in general.\(^{260}\) The trial chamber convicted all three defendants of incitement to commit genocide.

On appeal, the defendants asserted that the Trial Chamber erred in concluding that “equivocal and ambiguous” language, which was open to different interpretations, could constitute the crime of direct and public incitement to genocide.\(^{261}\) They claimed that the requirement that incitement be “direct” precluded findings of guilt based upon words which held a subjective interpretation.\(^{262}\) The prosecutor argued that the defendants’ speech must be assessed in context.\(^{263}\) The directness of the incitement “is confirmed by the fact that its meaning is immediately appreciated by its intended audience and must be gauged by reference to the way speech is used in its society and country of origin.”\(^{264}\) The Appeals Chamber upheld the Trial Chamber’s ruling and concluded that “the culture, including the nuances of the Kinyarwanda language, should be considered in determining what constitutes direct and public incitement

\(^{258}\) *Ibid* at paras. 2-3.  
\(^{259}\) *Ibid* at para. 4.  
\(^{260}\) *Ibid* at para. 732.  
\(^{261}\) *Ibid* at para. 682.  
\(^{262}\) *Ibid*.  
\(^{263}\) *Ibid*.  
\(^{264}\) *Ibid*.  

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to commit genocide in Rwanda."  

Ascertaining the true message of a speech requires the court to analyze how it is understood by its intended audience.  

In subsequent cases, the ICTR has applied the same reasoning, asserting the necessity of considering cultural context in order to determine whether speech could be considered as directly inciting genocide.  

In *Prosecutor v. Niyitegeka*, for example the defendant gave a speech to an audience during which he stated that “the troubles. . . were due to the Inyenzi, and the young people would be mobilized to fight against, and neutralize, the Inyenzi.” A lay witness testified that he heard the accused tell others “to go to work,” and that they should eat “so that they would be strong to return the next day to continue to work.”  

The witness also testified that following attacks upon Tutsis, he heard the accused commend the attackers for “a good work.” The witness testified that “work” meant “killing.”  

The Trial Chamber concluded that the defendant had incited people to kill Tutsis, stating that “the Accused’s words, including the call to “work,” were understood by his audience as a call to kill the Tutsi, and that the Accused knew his words would be interpreted as such.”  

Yet determining the precise meaning of speech within a given cultural context is not an exact science, as evidenced by the case of Leon Mugesera. Mugesera had been a member of a Hutu political party in Rwanda, and in 1992 he

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265 *Ibid* at para 700.
266 *Ibid*.
268 *Ibid* at para. 142.
269 *Ibid* at paras. 142, 235.
270 *Ibid* at para. 142.
gave a speech which resulted in the Rwandan government issuing a warrant for his arrest.\textsuperscript{272} He and his wife and children fled Rwanda. Mugesera and his family subsequently came to Canada and were granted permanent residency status in 1993.\textsuperscript{273} Canadian immigration authorities sought to deport Mugesera on the grounds that during the 1992 speech, which was delivered in Kinyarwanda, he incited members of his political party to commit genocide and murder.\textsuperscript{274}

As in the ICTR cases cited above, in the course of his speech Mugesera did not make any explicit appeals for the audience to kill Tutsis. He made references to the threat posed by the “\textit{Inyenzis}.” He stated that “These people called \textit{Inyenzis} are now on their way to attack us,” and urged that “we must defend ourselves.”\textsuperscript{275} Particularly at issue was a portion of the speech where Mugesera recounted a conversation he had with a Tutsi political leader. Mugesera told the audience that he said the following to the Tutsi leader:

\begin{quote}
The mistake we made in 1959, when I was still a child, is to let you leave.’ I asked him if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! I told him ‘So don't you know how to listen or read? I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly.’\textsuperscript{276}
\end{quote}

This phrase is laden with references historically and socially relevant to a Rwandan audience. The reference to 1959 refers to a time when numerous Tutsis

\begin{footnotes}
\textsuperscript{272} \textit{Mugesera v. Canada} [2005] 2 S.C.R. 100 at paras. 2, 3, 23.
\textsuperscript{273} \textit{Ibid} at para. 3.
\textsuperscript{274} \textit{Ibid} at para. 4.
\textsuperscript{275} \textit{Ibid} at para. 69, Appendix III.
\textsuperscript{276} \textit{Ibid}, Appendix III.
\end{footnotes}
went into exile.\textsuperscript{277} Rwandan lore indicates that the Tutsis originated in Ethiopia.\textsuperscript{278} The Nyabarongo River runs through Rwanda and in the direction of Ethiopia.\textsuperscript{279} In earlier massacres, Tutsi had been killed and their bodies thrown into the Nyabarongo River.\textsuperscript{280}

The Immigration Appeals Division (“IAD”) concluded that the speech constituted incitement to genocide. Based upon expert witness testimony, the IAD judge held that “when Mr. Mugesera says ‘we will send you down the Nyabarongo’, ‘you’ means the Tutsi and ‘we’, means the Hutu. It is also obvious that the speaker is impressing on the audience that it was a mistake to drive the Tutsi out of Rwanda in 1959, since they are now attacking the country. Finally, it is clear that he is suggesting that the Tutsi corpses be sent back via the Nyabarongo River.”\textsuperscript{281} Furthermore, the IAD judge concluded that “When a person says that Tutsis should be thrown into the river as [sic] and is making references to 1959, he is sending out a clear signal.”\textsuperscript{282}

The Federal Appeals Court reversed the ruling of the IAD, concluding that the speech did not constitute incitement to genocide.\textsuperscript{283} In so holding, the Appeals Court relied upon the report of an expert witness who testified at the immigration hearing. Professor Marc Angenot of McGill University, an expert on genocidal speeches, submitted a report in which he averred the difficulties inherent in

\textsuperscript{277} \textit{Ibid} at para. 91.  
\textsuperscript{278} \textit{Ibid}.  
\textsuperscript{279} \textit{Ibid} at para. 92.  
\textsuperscript{280} \textit{Ibid}.  
\textsuperscript{281} \textit{Ibid} at para. 94.  
\textsuperscript{282} \textit{Ibid} at para. 95.  
attempting to ascertain the particular meaning of a speech in its cultural context.

Angenot stated that:

the speech to be analysed, like any reported statement
made in a situation which is completely unfamiliar to us,
contains difficulties of comprehension which are due
not to its being translated but to the fact that it is full of
references to empirical realities, persons and institutions
unknown to the ordinary Canadian reader, and
underlying it are inferences, intra-cultural value
judgments and assumptions which, though undoubtedy
familiar to the public addressed by [Mugesera] in
Rwanda in 1992, must be reconstituted in their entirety
to make the matter clear to the legal system.284

Angenot emphasized that in a political speech, an orator does not use
language which is “covert and very, very difficult to extrapolate, known only to
the 'happy few'. . . . if you want to get a message across, it cannot be done in a
completely hermetic way.”285 Based upon his research of anti-Semitic
propaganda, Angenot concluded that in genocidal speech, “the object of hatred is
not only identified, but is generally identified by a very rich vocabulary.”286 In
the course of his speech, Mugesera only used the word “Tutsi” one time. Based
upon his reading of Mugesera’s speech as a whole, Angenot concluded that the
speech was political in nature: “The entities attacked are for the most part not
characterized in racial or ethnic terms: they are the other parties who are members
of the government, and are accused of corruption, partisan appointments, illegality,
demoralizing the national armed forces and conspiring with armed invaders.”287

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286 *Ibid* at para. 188.
The Appeals Court concluded that the speech could neither objectively nor subjectively be interpreted as an incitement to genocide.

Upon review, the Supreme Court of Canada adopted the approach set out in the ICTR’s *Akayesu* decision, holding that the “direct” element of the crime of incitement to genocide must be read within its cultural and linguistic context.\footnote{Mugesera v. Canada [2005] 2 S.C.R. 100 at para. 87.} The Supreme Court stated that “*Depending on the audience*, a particular speech may be perceived as direct in one country, and not so in another. The determination of whether acts of incitement can be viewed as direct necessarily focuses mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.” (emphasis in original).\footnote{Ibid.} Applying this standard, the Court overturned the Appeals Court, concluding that the speech did in fact incite genocide. The Court accepted the finding of the IAD that Mugesera’s speech advocated that “Tutsi corpses be sent back to Ethiopia.”\footnote{Ibid at para. 92.} Furthermore, the Supreme Court held that the Appeals Court improperly considered the interpretation of the speech offered by Professor Angenot. In doing so, the Appeals Court “reviewed the evidence as if it were the trier of fact,” and thus applied an improper standard of review.\footnote{Ibid at para. 40.}

The Supreme Court of Canada therefore agreed with the ICTR’s analysis regarding the importance of cultural context in assessing the crime of incitement to genocide. Yet the *Mugesera* case displays a potential difficulty involved in the process of culturally contextualizing facts. As shown by the testimony of

\footnote{Mugesera v. Canada [2005] 2 S.C.R. 100 at para. 87.}
\footnote{Ibid.}
\footnote{Ibid at para. 92.}
\footnote{Ibid at para. 40.}
Professor Angenot, experts may disagree as to the ability of courts to accurately assess the cultural meaning of political speech. In some instances, the ability of courts to understand and assess facts in a culturally contextualized manner may be limited. Courts may lack the ability to enter the minds of others and thus contextualize international crimes. The process of “thinking through others” may be necessary for courts to attempt to understand the true nature of international crimes. But the process may have its limitations as well.

**B. The Special Court of Sierra Leone--Defining the war crime of “acts of terrorism” in culture-specific terms.**

The Special Court for Sierra Leone has also engaged in a culture-specific interpretation of substantive international criminal law. The SCSL has analyzed whether defendants committed war crimes by considering the culture-specific impact of the defendants’ acts upon their victims. In focusing upon the cultural impact of mass atrocities, the SCSL’s jurisprudence differs slightly from that of the ICTR. Rather than attempting to decode culture-specific language or understandings, the cultural jurisprudence of the SCSL involves an analysis of the collective and culture-specific effect of crimes of war.

The SCSL’s cultural jurisprudence emerges from its consideration of the war crime of “acts of terrorism” and sexual violence. Based upon Additional Protocol II to the Geneva Conventions, Article 3 of the Statute of the SCSL includes “acts of terrorism” among the crimes to be prosecuted before the
SCSL.\textsuperscript{292} The Statute also provides for jurisdiction over acts of sexual violence as crimes against humanity, and outrages upon personal dignity, including rape as one such offense.\textsuperscript{293}

Designed to apply during the course of internal armed conflicts, Additional Protocol II to the Geneva Conventions guarantees humane treatment towards noncombatants.\textsuperscript{294} “Acts of terrorism” are among the actions which the Protocol lists as being contrary to humane treatment.\textsuperscript{295} Protocol II contains little guidance as to what specific actions constitute acts of terrorism. The commentaries to Protocol II admit to the generality of the provision stating that: “The ICRC draft prohibited ‘acts of terrorism in the form of acts of violence committed against those persons’ (i.e. against protected persons). The formula which was finally adopted is simpler and more general and therefore extends the scope of the prohibition. In fact, the prohibition of acts of terrorism, with no further detail, covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect.”\textsuperscript{296}

Contextually interpreting the elements of these crimes, the SCSL has concluded that sexual violence constitutes an act of terrorism. In the \textit{Revolutionary United Front} case (the RUF case) SCSL prosecutors indicted three members of the RUF, a guerrilla army which sought to overthrow the government

\textsuperscript{292} SCSL Statute, supra note 50 at Article 3(d); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977 at Article 4(2)(d).
\textsuperscript{293} SCSL Statute, supra note 50 at Article 3(e).
\textsuperscript{294} See Protocol II, supra note 292.
\textsuperscript{295} Ibid at Art 4(2)(d).
of Sierra Leone in the 1990’s. The prosecutor charged the defendants, *inter alia*, with committing sexual violence under Article 2 of the Special Court of Sierra Leone Statute and also with committing acts of terrorism under Article 3 of the Statute. The indictment states that the charges stemmed from incidents occurring in 1998 and 1999, where the defendants and their soldiers committed acts of “[w]idespread sexual violence committed against civilian women and girls” which “included rapes, often by multiple rapists, and forced ‘marriages.’”

Relying upon precedent from the ICTY, the SCSL concluded that the crime of “acts of terrorism” consists of three elements. First, the accused had to have committed acts or threats of violence. Second, the accused had to have willfully made the civilian population or individual civilians the objects of those acts or threats of violence. Finally, the acts or threats of violence had to have been carried out with the specific intent of spreading terror among the civilian population. The Trial Chamber specified that the prohibition against acts of terrorism “is meant to criminalise acts or threats that are specifically undertaken for the purpose of spreading terror in the protected population.”

Assessing the prosecution’s case against the defendants, the Trial Chamber summarized the sexually violent acts committed by the defendants and their soldiers. The Chamber noted that “sexual violence was rampantly committed against the civilian population in an atmosphere in which violence,

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297 *Prosecutor v. Sesay, Kallon and Gbao (RUF Case)*, SCSL-04-15-T, Judgement (2 March 2009) at paras. 4, 9 (Special Court of Sierra Leone, Trial Chamber I).
298 *Ibid* at paras. 6, 75, 91.
300 *Ibid* at para. 113.
301 *Ibid* at para. 120
oppression and lawlessness prevailed.”\textsuperscript{302} The defendants and their subordinates “employed perverse methods of sexual violence against women and men of all ages ranging from brutal gang rapes, the insertion of various objects into victims’ genitalia, the raping of pregnant women and forced sexual intercourse between male and female civilian abductees.”\textsuperscript{303}

The Chamber concluded that “the nature and manner in which the female population was a target of sexual violence portrays a calculated and concerted pattern on the part of the perpetrators to use sexual violence as a weapon of terror.”\textsuperscript{304} The tactics were implemented with the specific intent to instill fear into entire communities, “in order to break the will of the population and ensure their submission.”\textsuperscript{305} The Trial Chamber thus concluded that the acts of sexual violence committed by the defendants themselves constituted acts of terrorism.\textsuperscript{306}

The Trial Chamber arrived at its conclusion based upon a report by Human Rights Watch ("HRW"), which analyzed how the sexual crimes committed by the rebel forces during the course of the Sierra Leone Civil War violated and disrupted Sierra Leonean cultural norms.\textsuperscript{307} The HRW report asserted that the sexual attacks assailed the cultural norms of the population.\textsuperscript{308}

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\textsuperscript{302} Ibid at para. 1347.
\textsuperscript{303} Ibid.
\textsuperscript{304} Ibid.
\textsuperscript{305} Ibid at para 1348.
\textsuperscript{306} Ibid at para 1352 (the Appeals Chamber of the Special Court of Sierra Leone subsequently upheld the holding of the Trial Chamber, see Prosecutor v. Sesay, Kallon and Gbao (RUF Case), SCSL-04-15-A, Judgement on Appeal (26 October 2009) (Special Court of Sierra Leone, Appeals Chamber).
\textsuperscript{307} Ibid at para 1349 at footnote 2513.
\textsuperscript{308} Human Rights Watch, We Will Kill You if You Cry: Sexual Violence in the Sierra Leone Conflict Human Rights Watch (January 2003) online: <http://www.hrw.org/reports/2003/sierraleone/index.htm#TopOfPage>.
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According to the report, pregnant, postmenopausal and breastfeeding women in Sierra Leone are presumed not to be sexually active. 309 Breastfeeding women are not supposed to engage in sexual intercourse, because Sierra Leoneans believe that to do so will weaken the child’s ability to fend off infection. 310 The rebels, however, systematically raped older, pregnant and breastfeeding women.311 The report indicated that “the rebels sought complete domination over girls and women by doing whatever they wanted to, including breaking numerous cultural taboos, such as raping lactating mothers or elderly women.”312 Another expert report cited by the Trial Chamber concluded that the acts of sexual violence had a lasting effect, and that “fear of discrimination and stigmatization remains an enormous barrier to the effective reintegration of victims and their families.”313

The Trial Chamber concluded that because the sexual violence was deliberately designed to exploit Sierra Leonean cultural norms, the acts were “intentionally employed by the perpetrators to alienate victims and render apart communities, thus inflicting physical and psychological injury on the civilian population as a whole.”314 The systematic nature of the sexual violence created an “atmosphere of terror” and through these means, the rebel forces “extended their power and dominance over the civilian population by perpetuating a constant threat of insecurity that pervaded daily life.”315 The particular effect of sexual

309 Ibid.
310 Ibid.
311 Ibid.
312 Ibid.
313 RUF Case Judgement, supra note 297 at footnote 2514.
314 Ibid at para. 1349.
315 Ibid at para. 1350.
violence upon Sierra Leonean cultural norms led the Trial Chamber to conclude that acts of terror had been committed.

At sentencing, the SCSL further expounded upon the cultural impact of the defendants’ actions, stating that:

...the crimes of sexual violence were committed in a society where cultural values greatly dictate the sacred manner in which any form of sexual acts take place. Such violations in a society where the sexual lives of women and girls are strictly scrutinised would have an adverse impact on the family as a whole and the society at large.

We therefore recall our finding that the brutal manner in which women and girls were debased and molested, in the naked view of their protectors, the fathers, husbands and brothers deliberately destroyed the existing family nucleus, and flagrantly undermined the cultural values and relationships which held the societies together. The Chamber observes that the shame and fear experienced by victims of sexual violence, alienated and tore apart communities, creating vacuums where bonds and relations were initially established.  

The SCSL therefore determined that the culture-specific impact that the defendants’ actions had increased the gravity of the offense for sentencing purposes.

The Trial Chamber concluded that the defendants committed a crime of war based upon its consideration of cultural norms specific to the affected victims.

In determining whether the defendants’ acts of sexual violence were committed

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316 Prosecutor v. Sesay, Kallon and Gbao (RUF Case), SCSL-04-15-T, Sentencing Judgement (8 April 2009) at paras. 133-134 (Special Court for Sierra Leone, Trial Chamber I).

317 Ibid at para 136.
with the intent of “spreading terror among the civilian population,” the Trial Chamber considered the impact of the sexual crimes within the specific context of Sierra Leonean society. The Chamber concluded that the sexual violence committed was intended to not only violate the individual victims, but also “deliberately destroyed the existing family nucleus, thus undermining the cultural values and relationships which held the societies together.”

Cultural context thus determined the nature of the international crime which had been committed.

C. Defining humiliating and degrading treatment and violations of human dignity in cultural context.

The Rome Statute of the International Criminal Court also includes provisions which require considerations of cultural context in order to determine whether an international crime has been committed. Specifically, ascertaining whether a defendant has treated a victim in a humiliating or degrading manner or whether a defendant has violated the human dignity of a victim requires an examination of the victim’s cultural background. Courts must assess the defendant’s actions through the cultural lens of the victim. Actions which may constitute a war crime in one context, may not constitute a crime in another context, depending upon the culture of the victim.

The Rome Statute provides that violations of human dignity must be defined in culture-specific terms. Article 8(b)(xxi) of the Statute establishes that the ICC has jurisdiction over the war crime of “committing outrages upon personal dignity, in particular humiliating and degrading treatment.”

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318 RUF Case Judgement, supra note 297 at para 1349.
319 Rome Statute, supra note 12 at Arts. 8(b)(xxi), 8(c)(ii).
face, the crime is defined in a vague manner, containing little guidance as to what nature of behavior may constitute a violation. The *travaux preparatoires* of the Statute provide some clarification in this regard, stating that the elements of the crime include that:

1. The perpetrator humiliated or otherwise violated the dignity of one or more persons.  
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.  
3. The conduct took place in the context of and was associated with an international armed conflict.  
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.\(^{320}\)

In a footnote, the *travaux preparatoires* further explain that in order to determine whether an act “humiliated or otherwise violated the dignity” of an individual, a fact finder must “take[ ] into account relevant aspects of the cultural background of the victim.”\(^{321}\) “Dignity” and “humiliation” and “degradation” are therefore terms which must be defined in cultural context. They have a collective component.

Professor Rhoda E. Howard provides a useful lens through which to understand how the Rome Statute defines human dignity. Howard contrasts dignity with the concept of human rights. She posits that individuals possess human rights by the sole virtue of being human, regardless of social, cultural or other status. Human rights are by definition private and autonomous. The

\(^{321}\) *Ibid* at footnote 49.
individual may assert their human rights not only against states but also against his or her community or family.\footnote{Rhoda E. Howard, “Dignity, Community, and Human Rights” in Abdullahi Ahmed An-Na’im, ed., Human Rights in Cross-Cultural Perspectives: A Quest for Consensus (Philadelphia: University of Pennsylvania Press 1992) 81 at 83.}

In contrast, Howard asserts that dignity is a concept which has meaning only through an investigation of the social and cultural context within which an individual lives. Howard posits that dignity is “the particular cultural understandings of the inner moral worth of the human person and his or her proper political relations with society.”\footnote{Ibid.} An individual does not possess dignity on the sole basis of being human. It is something defined communally. It is “something that is granted at birth or on incorporation into the community as a concomitant of one’s particular ascribed status, or that accumulates and is earned during the life of an adult who adheres to his or her society’s values, customs, and norms.”\footnote{Ibid.}

The Rome Statute embraces this concept of dignity as a collective concept which must be defined within cultural context. Violations of human dignity are crimes which are committed against an individual victim, yet an individual as defined within his or her social and cultural context. The harm done to a victim is done to the victim as the member of a specific group.

The negotiations of the Preparatory Committee to the Rome Statute provide further guidance as to what types of culture-specific violations of dignity

\footnote{Ibid.}
\footnote{Ibid.}
may constitute a war crime. Examples provided during negotiations on the provision included a situation where a perpetrator forces a victim to eat food prohibited by the victim’s religion. In addition, the negotiations included the example of the Tanaka Chuichi and Others case, which arose out of World War II. The case, which was heard before an Australian military court, involved three accused Japanese defendants charged with the ill-treatment of prisoners of war. The accused were prison guards and had tied prisoners to a post and beat them with a stick. The ill-treatment of the prisoners “was aggravated by the fact that the accused, after beating the prisoners, cut off their hair and beards and in one instance forced a prisoner to smoke a cigarette.” The fact that the defendants cut the prisoners’ hair and beards and forced a prisoner to smoke a cigarette was significant because “[t]he prisoners were Indians, of the Sikh religion, which forbids them to have their hair or beards removed or to handle tobacco.” The Australian court concluded that the defendants violated the laws of war as set down in the Articles of the Geneva Convention. The Tanaka Chuichi case was considered “a novelty in so far as the court seems to have extended the protection usually given to prisoners of war in respect of attacks against life and limb to attacks on their religious feelings.”

326 Ibid.
327 Ibid at 315.
329 Ibid.
330 Ibid.
331 Ibid.
violated the personal dignity of a victim may involve viewing the crime through
the specific cultural norms of the victim.

D. The Rome Statute’s allowance for the consideration of culture-
specific norms in guiding the ICC Office of the Prosecutor’s decision
to investigate and prosecute a case.

The Rome Statute also allows for the ICC’s Office of the Prosecutor
(“OTP”) to consider culture-specific norms in determining whether to investigate
and prosecute a case. Under Article 53 of the Rome Statute, the OTP may
consider the culture-specific “interests of the victims” in deciding whether to
pursue a case and seek to invoke the jurisdiction of the ICC. The manner in
which this provision will be employed by the OTP remains somewhat speculative
and theoretical. Yet the wording of Article 53 allows the OTP to assess the harm
suffered by victims, and whether this harm warrants investigation and prosecution,
through the victims’ own cultural lens.

Article 53 sets out the standards the OTP must follow in evaluating
whether to initiate an investigation. Subsection (1) states that in determining
whether to investigate a case, the OTP shall consider whether there exists a
reasonable basis to believe that a violation of the Rome Statute occurred.332 In
addition, the case must be admissible under Article 17’s complementarity
principle (see Section I supra). The OTP must also consider whether “[t]aking
into account the gravity of the crime and the interests of victims, there are
nonetheless substantial reasons to believe that an investigation would not serve

332 Rome Statute, supra note 12 at Art. 53(1).
the interests of justice.”\textsuperscript{333} Furthermore, following an investigation, the OTP may initiate a prosecution only if a “sufficient basis” for prosecution exists. Factors mitigating against prosecution of a case include whether there is an insufficient legal or factual basis to proceed and whether the cause is inadmissible under the principle of complementarity.\textsuperscript{334} Article 53(2)(c) also states that the prosecutor may decline to proceed with a prosecution if “[a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”\textsuperscript{335}

The concept of the “interests of justice” contained in Article 53 is not defined in the Statute and is thus open to interpretation.\textsuperscript{336} Furthermore, the provisions which require the prosecutor to consider “the interests of the victims” are subjective in nature, and may therefore be interpreted in culture-specific terms.\textsuperscript{337} As Jo Stigen notes, “[t]he extent to which the victims view a mechanism as ‘just’ might partly depend upon cultural differences.”\textsuperscript{338} Mireille Delmas-Marty asserts that Article 53 highlights the tension between the universal values of international criminal justice and “the relativism of national concepts, which encourages taking into account certain criteria (such as the interests of the victims, the impact of proceedings on the situation in the country or the issue of

\textsuperscript{333} Ibid at Art. 53(1)(c).
\textsuperscript{334} Ibid at Art. 53(2).
\textsuperscript{335} Ibid at Art. 53(2)(c).
\textsuperscript{337} Stigen, \textit{supra} note 103 at 461.
\textsuperscript{338} Ibid.
alternatives to criminal justice), in a differentiated fashion.” Article 53 may thus provide a means for the prosecutor to forgo prosecutions in favor of national proceedings, based upon culture-specific notions of justice.

Conversely, a consideration of culture-specific norms may also be invoked to support an investigation and prosecution. An investigation and prosecution at the international level may be “in the interests of justice” and in “the interests of the victims” only when viewed through the cultural lens of victims. To the author’s knowledge, no examples yet exist of the OTP pursuing a case based upon the culture-specific interests of the victims. However, the Inter-American Court of Human Rights (“IACHR”) case *Moiwana Village v. Suriname* provides an example of how the interests of justice and the interests of the victims may be interpreted in a culture-specific manner. Of course, the IACHR is not a criminal law jurisdiction and operates under a completely different enacting statute from the ICC, and thus the case is not directly analogous to proceedings under the Rome Statute. Yet the case provides a theoretical model, showing how culture-specific norms may be consulted in evaluating the harm suffered by a

340 This may result in the promotion of both punitive and non-punitive domestic enforcement mechanisms, depending on particular cultural norms. Stigen notes for example that Desmond Tutu asserts that restorative justice reflects a fundamental African value of healing and nurturing social relationships at the expense of exacting vengeance. Stigen also notes that local populations have already requested the ICC prosecutor to consider local notions of justice. In Northern Uganda, local leaders asked the OTP to acknowledge the importance of local and traditional justice and reconciliation process. The prosecutor responded by stating that “[u]nder the Rome Statute, the Prosecutor has the responsibility to investigate and prosecute serious international crimes, taking into account the interests of victims and justice. I am mindful of traditional justice and reconciliation processes and sensitive to leaders’ efforts to promote dialogue between different actors in order to achieve peace.” *Statements by the ICC Chief Prosecutor and the Visiting Delegation of Acholi leaders from Northern Uganda*, 18 March 2005, quoted in Stigen, supra note 103 at 463.
population, and in determining whether judicial recourse is a necessary and warranted response.

In Moiwana Village, the IACHR asserted its jurisdiction based upon the particular cultural norms of justice held by the victims of a government sponsored massacre.\(^{342}\) The case arose from a massacre committed by the Suriname military against inhabitants of the village of Moiwa on November 29, 1986.\(^{343}\) The inhabitants of Moiwa, including the over 40 individuals who perished in the massacre, were members of the N’djuka Maroon clan—a distinct ethnic community in Suriname, descended from escaped slaves.\(^{344}\) The massacre occurred almost a year prior to the date which Suriname became a party to the American Convention on Human Rights and thus acceded to the jurisdiction of the IACHR.\(^{345}\)

As a result of the massacre, the surviving villagers abandoned Moiwa, which had been an N’djuka settlement since the 19\(^{1}\)th century.\(^{346}\) The N’djuka repeatedly requested that the Surinamese government investigate the massacre as a crime.\(^{347}\) The government prevented an investigation into the massacre, despite the uncovering of a mass grave near Moiwa.\(^{348}\) The mass grave included between 7 to 10 individuals, but the government did not release any information


\(^{343}\) Moiwa Community Case, supra note 341 at para. 3.

\(^{344}\) Ibid at paras. 3, 86(1).

\(^{345}\) Ibid at para. 37.

\(^{346}\) Ibid at para 86(18).

\(^{347}\) Ibid at paras. 80, 86(34-36).

\(^{348}\) Ibid at paras. 80, 86(31), 86(35).
on the identity of the corpses, and the N’djuka population was not able to recover the bodies of the dead.\textsuperscript{349} As of the date of the IACHR’s judgment in 2005, no one had been convicted of the massacre in Suriname, the N’djuka had not returned to Moiwana, and the village remained abandoned.\textsuperscript{350}

The IACHR heard testimony from members of the N’djuka community regarding N’djuka notions of justice and spiritual beliefs. The testimony revealed that the Suriname government’s failure to investigate the massacre had a particularly adverse effect upon the N’djuka. Former residents of Moiwana testified that N’djuka culture mandated them to pursue justice for the massacre, both for the sake of the living and the deceased. One resident testified that “[i]n the N’djuka culture it is an obligation to pursue justice; if it is not obtained, ‘then your life is disturbed; it’s disrupted, and you can’t live your life in a proper way.’”\textsuperscript{351} Another resident testified that: “[i]n the N’djuka culture it is ‘essential’ to search for justice when someone dies in an unjust way. This obligation ‘to set things straight,’ if not fulfilled, will cause the living as well as the dead to suffer.”\textsuperscript{352} Members of the N’djuka community also testified that they had not returned to their former village because the dead had never been vindicated.\textsuperscript{353}

Providing a proper burial was a crucial aspect of N’djuka culture, and the failure to do so brought “negative consequences upon the living,” as well as upon their

\textsuperscript{349} Ibid at paras. 80, 86(31).
\textsuperscript{350} Ibid.
\textsuperscript{351} Ibid at para. 80.
\textsuperscript{352} Ibid.
\textsuperscript{353} Ibid.
next of kin. As long as justice was not served, the N’djuka were unable to return to Moiwana.”

In addition, an anthropologist testified regarding the importance of land to N’djuka collective identity. Facilitating a return of the N’djuka to Moiwana required an investigation of the massacre. The failure to perform proper burial rituals led to “spiritually-caused illnesses,” among the N’djuka, and would continue to affect future generations.

As the massacre occurred prior to Suriname’s acceptance of the IACHR’s jurisdiction, Suriname claimed that the court lacked jurisdiction *ratione temporis* to hear the case. The IACHR rejected Suriname’s claim and asserted its jurisdiction. The IACHR concluded that it did not have jurisdiction over the massacre itself, but it did have jurisdiction over the government’s failure to investigate the massacre. Because the N’djuka remained disconnected from their village, the forcible displacement constituted a continuing violation of the N’djuka’s rights.

The IACHR made its jurisdictional decision based upon its consideration of the specific norms of N’djuka culture. No evidence existed that the Suriname government affirmatively prevented the N’djuka population from returning to

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359 *Ibid* at para. 34(c).
360 *Ibid* at paras. 37-44.
361 *Ibid* at para. 70.
362 *Ibid* at para. 43.
Moiwana in the aftermath of the massacre. Presumably, the former residents remained at liberty to physically return to Moiwana. Yet the evidence presented to the IACHR established that, when viewed through N’djuka conceptions of justice and rights, the government’s failure to investigate the massacre prevented the former residents from returning.

The IACHR concluded that “the ongoing impunity has a particularly severe impact upon the Moiwana villagers, as an N’djuka people . . . . justice and collective responsibility are central precepts within traditional N’djuka society.” Suriname’s failure to prosecute the case was “one of the greatest sources of suffering” for the N’djuka because they could not bury their dead in accordance with cultural norms. An investigation was necessitated because “only when justice is accomplished in the case will [the former Moiwana residents] be able to appease the angry spirits of their deceased family members, purify their land, and return to permanent residence without apprehension of further hostilities.” The villagers would remain severed from their land until a proper investigation took place because “until the Moiwana community members obtain justice for the events of 1986, they are convinced they cannot return to their ancestral territory.”

Seen through the lens of N’djuka cultural norms, the government’s failure to investigate and prosecute the massacre resulted in a continuing violation of the rights of the Moiwana residents.

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363 Ibid at para. 95.
364 Ibid at para. 100.
365 Ibid at para. 118.
366 Ibid at para. 113.
The Moiwana Village case provides an example of how the harm suffered by a population following a mass atrocity may at times only be understood when looked at through the specific cultural lens of the victims. Article 53 of the Rome Statute sets out that in determining whether an investigation and prosecution is warranted, the OTP must consult the “interests of the victims.” The Moiwana Village case shows how the interests of the victims may be particularized and defined in a culture-specific manner. As the IACHR consulted culture-specific norms in asserting its jurisdiction in the Moiwana Village case, the OTP may consult culture-specific norms in determining whether an investigation and prosecution is in the interests of justice and in the interests of the victims. An investigation and prosecution under the Rome Statute may be necessitated when viewed through the victims’ cultural lens.

Pursuing an investigation and prosecution of international criminals at the international level may thus serve as a means to promote and enforce culture-specific norms. Cultural diversity is not only promoted through deference to domestic enforcement mechanisms. Domestic entities may in and of themselves fail to recognize culture-specific norms of justice. These norms may come into conflict with institutions at the domestic level. The Rome Statute provides a mechanism for pursuing an investigation and prosecution where culture-specific notions of justice have not been accommodated by domestic institutions.
III. **Ensuring that the Process of Cultural Contextualization is Undertaken in a Manner which Preserves the Fairness of International Criminal Proceedings.**

Through cultural contextualization, actors in the international criminal law system accept the notion that the thoughts and actions of individuals are influenced by their cultural background. Cultural contextualization of facts and law in this manner is not without its potential hazards. Courts must ensure that cultural contextualization is performed in a manner which preserves the fairness and procedural integrity of international criminal proceedings. First, courts must be cognizant that the use of cultural evidence may result in negative cultural generalizations and stereotypes, which may in turn lead international tribunals to decide cases based upon erroneous and prejudicial evidence. Second, courts must ensure that findings rooted in cultural context are based upon reliable evidence of cultural norms or practices. Lastly, a contextualized interpretation of law and evidence should apply to all individuals involved in the international criminal justice process, including witnesses, victims, and also defendants. It would be disingenuous to apply cultural contextualization arbitrarily and selectively. Defendants may therefore seek to present defenses based upon their own cultural background. They may seek to have their criminal liability mitigated or erased by arguing that cultural context impacted their behavior.

A. **The risk of cultural stereotyping and the introduction of evidence which promotes a prejudicial implication that individuals possess a propensity to commit crimes based upon their cultural background.**

The introduction of cultural evidence during the course of international criminal proceedings may promote unfounded cultural stereotypes. In turn, this
may result in the introduction of highly prejudicial and damaging evidence in international criminal trials. Anthropologists note the potential hazards of introducing evidence of culture in courtroom proceedings. The risks stem from the very nature of culture itself as an anthropological concept. Anthony Good indicates that most contemporary anthropologists would agree with the proposition that “culture ‘does not cause behaviour, but summarizes and abstracts from it, and is thus neither normative nor predictive.’” 367 “Culture” is not viewed as a monolithic, explanatory concept, but rather as something fluid and dynamic. Multiple variables, including but not limited to local political and social structures, gender, and class, all influence the context within which individuals operate. Furthermore, while culture may constrain or limit the options of an individual operating within its ambit, individuals still maintain agency within their cultural context, and therefore may act in ways which are unpredictable.

Given this, the categorization of human beings as members of this or that cultural entity, and thus prone to this or that type of behavior, is bound to lead to oversimplification and distortion. Often however, when introduced as evidence in courts of law, culture is used in just this manner. The parties introducing cultural evidence during courtroom proceedings often do so in an essentializing manner, downplaying the “contested nature of cultural practices.” 368 Utilizing culture as evidence in courts of law runs the risk of shifting culture “from something to be

368 Ibid at s56.
described, interpreted even perhaps explained, . . . [to being] treated as a source or explanation in and of itself.”369

Anthropologist Stephanie Schwandner-Sievers expresses concern with how culture is used in courts of law. She acknowledges the value of introducing cultural evidence in court, noting that such evidence is often necessary to explain the risks and consequences attached to individual actions.370 Yet she also notes the risk of engaging in cultural essentialization. Regarding her specific area of specialization—Albanian culture--she asks “[h]ow can the dangers of ‘Albanian traditions of violence’ be represented to a court without reproducing generalised, stereotypical outside assumptions of Albanians?”371 Introducing evidence of such traditions often serves only to consolidate and reproduce these negative images.372 Schwandner-Sievers asserts that in order to avoid essentialization, expert witnesses testifying in court must attempt to ensure that any cultural evidence which is presented is itself contextualized, taking into account local power relationships and other background variables such as gender, age and individual agency.373

The ICTY’s decisions in *Prosecutor v. Limaj* and *Prosecutor v. Boskoski* represent examples of the questionable use of cultural evidence, promoting negative stereotypes of the violent nature of Albanian culture. In *Limaj* and *Boskoski* the ICTY Trial Chamber evaluated the credibility of witness testimony

370 Ibid at 213.
371 Ibid at 211.
372 Ibid at 223.
373 Ibid at 224
in light of cultural context and evidence. In both cases the Trial Chamber ruled that the importance of honor among people of Albanian background caused Albanian witnesses to provide false testimony before the tribunal.

In *Limaj*, the ICTY prosecutor charged the Kosovar defendants with war crimes committed against Serbian and Kosovo Albanian civilians during the course of the Yugoslavian civil war.\(^{374}\) The defendants were all members of the Kosovo Liberation Army (“KLA”).\(^{375}\) The indictment alleged that KLA forces abducted 35 civilians, detained them in a prison camp under inhuman conditions, and submitted them to beatings and torture.\(^ {376}\) The indictment further alleged that the defendants murdered 24 of the prisoners.\(^{377}\)

In its judgment on the merits, the Trial Chamber noted that some prosecution witnesses who testified at trial had given prior inconsistent statements.\(^{378}\) The witnesses, themselves all former members of the KLA, gave testimony at trial which differed from prior statements given by the witnesses, and which undermined the Prosecution’s case.\(^{379}\) The Chamber concluded that in some instances, the different methods of questioning used during trial and the previous investigations sufficiently explained the discrepancies.\(^ {380}\) Yet other inconsistent statements “remain[ed] unaccounted for.”\(^{381}\) At times, “the oral

\(^{375}\) *Ibid.*
\(^{376}\) *Ibid.*
\(^{378}\) *Ibid* at paras. 12, 13 (the Chamber focused primarily upon prior inconsistent statements of prosecution witnesses, but referred to defense witnesses as well in this assessment).
\(^{379}\) *Ibid* at para. 13.
\(^{381}\) *Ibid.*
evidence was deliberately contrived to render it much less favourable to the
Prosecution than the prior statement.”

The Chamber proceeded to provide its explanation for the inconsistent
witness statements, attributing them to the “notions of honour and other group
values have a particular relevance to the cultural background of witnesses with
Albanian roots in Kosovo.” In support of this conclusion, the Chamber cited
the report of an expert witness which had been submitted at trial by the
Prosecution. The expert reported to the ICTY that:

[The] Albanian concept of honour governs all
relations that extend beyond blood kinship . . . .
Solidarity with those individuals that share the same
‘blood’ is taken for granted, but faithfulness to a
group or cause that reaches beyond the family needs
to be ritually invoked. Honour can also be explained
in terms of an ideal-type of model of conduct, and a
man’s perceived potential of protecting the integrity
of the family or any wider reference group (such as
the clan or a political party) against outside
attacks … [The pledge of allegiance or besa]
requests absolute loyalty, and it requires the
individual’s compliance with family and group
values in general. At the same time it justifies the
killing of those within the group who break this
code… However… the members of a group can
chose [sic] to avoid violence. The reaction to
conflict, insult, treason, or other transgressions to
group norms, depends on the members’
interpretations of the facts and these may vary
greatly.”

382 Ibid.
383 Ibid.
384 Ibid.
The Chamber stated that these characteristics of Albanian culture are “not disputed.” On the basis of these observations, the Chamber concluded that “overriding loyalties,” to both the KLA and the accused, “had a bearing upon the willingness of some witnesses to speak the truth in court about some issues.” Furthermore, these considerations impacted the Chamber’s assessment of the credibility of the witnesses. The Chamber noted as well that the same cultural factors of loyalty and honour may have affected the testimony of the victim-witnesses who testified in the case, and concluded that it considered this in determining the credibility of these witnesses.

The ICTY Trial Chamber made similar observations in Prosecutor v. Boskoski. The Boskoski case arose from the killings and cruel treatment of residents of the Albanian village of Ljuboten at the hands of Macedonian police. The Prosecutor charged Boskoski, a former Minister of the Interior, with murder, cruel treatment and wanton destruction. As in Limaj, the Trial Chamber remarked that a consideration of Albanian cultural norms influenced its determination on the credibility of Albanian witnesses. Relying upon the same expert witness report as the Limaj Trial Chamber, the Chamber concluded that the Albanian cultural values of group honour and loyalty influenced the believability of their testimony. The Chamber stated this point as follows:

385 Ibid.
386 Ibid.
387 Ibid.
388 Ibid at para. 15.
390 Ibid at paras 1-2.
391 Ibid at para. 2.
In the present case the Chamber received evidence from a number of witnesses then residents of the village of Ljuboten where the events charged in the Indictment are alleged to have taken place. The Chamber observed an obvious tendency of these witnesses to speak as if with one voice, especially with respect to matters such as whether there were NLA members in the village, the circumstances in which certain deaths occurred, and the identity of the Macedonian forces who entered the village on 12 August 2001. This left the Chamber with a clear impression that, before coming to the Tribunal, these witnesses had been prepared so that they gave pre-determined evidence with respect to some issues. The Chamber is also mindful of the relevance of group values, honour and family loyalty to the cultural background of witnesses with ethnic Albanian roots. The Chamber, therefore, has not been able to accept their evidence as fully convincing in some respect.\(^{392}\)

The ICTY’s use of culture in this manner is questionable, furthering generalizations and stereotypes of the violence of Albanian culture. In essence the Trial Chamber concluded that Albanian cultural norms caused Albanian witnesses to perjure themselves before the ICTY, based in part upon a fear of violent reprisal. Notably, the expert report relied upon by the Trial Chamber provides a more nuanced view of Albanian culture and traditions.\(^{393}\) The report indicates the existence of many factors which influenced Albanian social interactions, including “socio-cultural divides” such as “rural-urban, traditionalist-

\(^{392}\) Ibid at para. 11.
\(^{393}\) Schwandner-Sievers, Stephanie and Duijzings, Ger, War Within a War, Historical and Cultural-Anthropological Background Report (31 May 2004).
modernist, working versus middle class.” Alb.

Albanian cultural tradition is only one factor which may determine whether violence is the reaction to breaches of honour. The report states that “recourse to the rigid traditions of violence contains an element of choice and voluntarism . . . motivations, reasons and interests residing outside the ‘tradition’ and customary law may determine recourse to its rules and regulations, offering justifications to violent acts in terms of ‘our tradition.’”

Albanian culture and tradition may indeed have had an influence upon the testimony of witnesses in Limaj and Boskoski. But the ICTY Trial Chamber provides an oversimplified explanation, ignoring the numerous factors at work in determining why a witness may change his or her story in the course of proceedings. The ICTY does a disservice by attributing inconsistent witness testimony solely to Albanian traditions of honour and violence, and reinforces simplified generalizations about Albanian culture.

Cultural essentialization presents a particular problem when such evidence is presented against a defendant during the course of an international criminal proceeding. Prosecutors may present evidence which suggests that a defendant’s cultural background establishes a propensity on the part of the defendant to commit criminal behavior. Domestic case law supports the proposition that such evidence is irrelevant and prejudicial and should not be considered by finders of fact. American and Canadian courts routinely reject arguments and evidence which attempt to show establish a cultural propensity to commit crimes. In Jinro

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394 Ibid at 125.
395 Ibid at 40.
America Inc. v. Secure Investments, Inc., for example, the court ruled as inadmissible the testimony of an expert witness who stated that most Korean businesses are corrupt and evade Korean currency laws. The court ruled that “such testimony is tantamount to ethnic or cultural stereotyping, inviting the jury to assume the Korean litigant fits the stereotype.”396 Similarly, in United States v. Bahena-Cardenas, the court assessed the admissibility of expert testimony offered to establish the propensity to give false information on official documents in Mexican transborder culture. The court ruled that such testimony would encourage the fact-finder to rely on cultural stereotypes.397 Moreover, in the Canadian case DaCruz v. Vancouver, the prosecutor asserted in closing that the plaintiff, as a Portugese, had a propensity to exaggerate. The appellate court ruled this statement was inappropriate.398

Evidence introduced during the ICC trial of Thomas Lubanga Dyilo displays how generalized, stereotypical and prejudicial notions of culture are introduced and utilized during international criminal proceedings. Lubanga is the first defendant to be tried by the ICC. The prosecutor charged Lubanga under Article 8(2)(b)(xxvi) of the Rome Statute, alleging that he enlisted and conscripted children under the age of 15 into the Patriotic Forces for the Liberation of Congo and that he used them to actively participate in hostilities.399

396 Jinro America, Inc. v. Secure Investments, Inc., 266 F.3d 993, 1007 (9th Cir. 2001).
397 U.S. v. Rubio Villareal, 927 F.2d 1495, 1502 n. 6 (9th Cir. 1991); see also U.S. v. Verduzo, 373 F.3d 1022, 1034 (9th Cir. 2004) (holding that it was not an abuse of discretion to exclude expert witness testimony regarding drug cultures).
399 ICC, Thomas Lubanga Dyilo, online: ICC <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/democratic%20republic%20of%20the%20congo?lan=en-GB>. 92
Lubanga had been a leader of the rebel organization. At trial, the prosecution presented evidence asserting that Lubanga’s African heritage made him more likely to have committed the crime of recruitment of child soldiers.

The prosecutor had presented cultural evidence to support its claims that Lubanga engaged in the recruitment of child soldiers. Through the expert testimony of a psychologist, the prosecutor presented evidence that “African” cultural norms facilitated Lubanga’s recruitment of child soldiers. During the trial, the prosecutor submitted as evidence a report submitted by Elisabeth Schauer, a psychologist and Director of Vivo International, a non-governmental organization which “works to overcome and prevent traumatic stress and its consequences, . . . . safeguarding the rights and dignity of people affected by violence and conflict.”

Schauer also testified in person at Lubanga’s trial.

Schauer submitted a report to the Court entitled “The Psychological Impact of Child Soldiering”. The report contains a general overview of the use of child soldiers in war, as well as an assessment of the psychological and social effects of child soldiering upon its victims. In addition to citing demographic and economic considerations as explanations for the phenomenon of child soldiering, Schauer’s report indicates that “especially African commanders emphasize stamina, survival and stealth of child soldiers as well as their fearlessness and will to fight.”

She attributes that this “may be due to children’s limited ability to

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402 Ibid at 6.
assess risks, feelings of invulnerability, and short-sightedness.\textsuperscript{403} Children are viewed as easier to indoctrinate and less able to assess the danger of a situation.\textsuperscript{404}

During her testimony in court, Schauer further expounded upon her opinion as to why the phenomenon of child soldiering was prominent in Africa. Responding to a question by the prosecutor as to why children are considered fearless and therefore effective in war, Schauer testified that the children’s fearlessness was rooted in the hierarchical nature of African family structures.

Schauer testified on this point as follows:

\begin{quote}
You have to understand the cultural context. In Africa children are – or families are built in a very hierarchical structure. So children are not actually taught as much as maybe in Germany, where I come from, to think for themselves or to estimate life consequences and learning for themselves. It’s really more to you to follow the order or an older and more adult person that you are living with. So also a commander would be a person of respect, a person of great trust, and if that person says, ‘This is what we’re going to do, and I decide that this is a good thing,’ a child is very unlikely to even re-think such a decision or challenge such a decision in this context. . . . Usually children are not informed about the details about how this ambush or this at tack is going to take place, at least not the children I have met. They were surprised by many things that they encountered during such a day. So they are not made a part of decision-making, and fear usually comes from knowing what to expect.\textsuperscript{405}
\end{quote}

\textsuperscript{403} Ibid.
\textsuperscript{404} Ibid at 7.
\textsuperscript{405} Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, “Testimony of Elisabeth Schauer” (4 July 2009) at 42-43.
The attorney for the victims followed the prosecutor and asked Schauer about the influence of other relevant cultural factors on the trauma experienced by child soldiers in Africa. The attorney asked Schauer whether the fact “that children can feel that their commanders has [sic] supernatural powers,” has an influence on the amount of trauma experienced by victims, and whether “amulets and witchcraft” could minimize the trauma.\textsuperscript{406} Schauer agreed that the perception of one’s commander as supernatural “instills more fear and more hierarchy. If you think that your chief commander is a supernatural man, probably you obey better.”\textsuperscript{407}

Schauer’s testimony amounts to an assertion that “African” culture facilitates child soldiering. The general phenomenon of child soldiering in Africa (and by implication, Lubanga’s recruitment of child soldiers in particular) is caused in part by the difference in “African” culture. Schauer’s testimony contains an astounding level of generalization regarding “African” culture. She fails to make any distinction among the multitude of localized cultures contained on the African continent. Her testimony puts forth dubious claims that African children are unable to think and learn in the same way as Europeans. Her testimony represents the genre of evidence which essentializes culture, portraying the “African” as an “other” who lacks the same judgment and reasoning shared by others.

The use of cultural evidence of this nature is particularly problematic in a criminal trial where the purpose of proceedings is to determine the guilt beyond a reasonable doubt of an individual defendant. Introducing evidence that

\textsuperscript{406} Ibid at 66.  
\textsuperscript{407} Ibid at 68.
“especially African commanders” acknowledge the benefits of using child soldiers is a highly prejudicial statement in the context of Lubanga’s trial. It amounts to an assertion that as a commander of African origin, he has a greater propensity to commit the crime of recruiting child soldiers. Criminal defendants, even those charged with the most heinous international crimes, must be tried based upon evidence of their own individual criminal liability—not based upon stereotypical and erroneous cultural generalizations.

B. The necessity of basing cultural findings upon reliable evidence.

When examining cultural context, international criminal tribunals must also ensure that evidence of culture-specific facts or practices is reliable and established with a proper foundation. During the course of proceedings, tribunals frequently become apprised of cultural context through expert testimony. However in some instances, international criminal tribunals have asserted the relevance of cultural factors in the absence of any evidence establishing the basis for such an assertion.

Robert Cryer asserts that the ICTR’s consideration of cultural evidence “underline[s] the importance of anthropological evidence and pertinent research findings in the fields of psychology and anthropology.” Yet the ICTR has come to conclusions regarding the influence of cultural factors upon witness testimony without the aid of expert testimony. In the Musema case cited above in section II, the Trial Chamber makes no reference to having heard expert witness testimony, or that any expert evidence served as the basis for its consideration of

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408 Cryer, supra note 157 at 393.
cultural factors. Instead the Trial Chamber simply relied on the previous ruling in *Akayesu* as establishing the precedent that cultural factors could be used to assess Rwandan witness testimony. The Chamber also held that evidence recited in the traditional Rwandan manner was admissible under the Chamber’s rules of evidence. The Chamber noted that such evidence is admissible before the ICTR in the same manner as all other evidence proffered by the parties.\(^\text{409}\) Rule 89 of the ICTR Rules of Procedure and Evidence allows the Chamber to “admit any relevant evidence which it deems to have probative value.”\(^\text{410}\) This Rule, the Chamber noted, allows for the admission of hearsay evidence, as long as it is relevant and has probative value.\(^\text{411}\) The Chamber acknowledged that “there appears . . . . to be in Rwandan culture a ‘tradition that the perceived knowledge of one becomes the knowledge of all.’” Yet the Chamber ruled that this evidence was to be assessed like all other evidence submitted at trial. Accordingly, the Chamber ruled that “evidence which appears to be ‘second-hand’ is not, in and of itself, inadmissible; rather it is assessed, like all other evidence, on the basis of its credibility and relevance.\(^\text{412}\)

The ICTR’s *Rutaganda* case also shows that the Tribunal does not necessarily consult expert testimony to identify what cultural factors impact evidence. As in *Musema*, the Chamber did not cite expert testimony as establishing a basis for its consideration cultural factors. On appeal, the defendant challenged the Trial Chamber’s ruling, asserting that the Chamber improperly

\(^{409}\) *Musema*, supra note 196 at 103.
\(^{410}\) *ICTR Rules*, supra note 80 at Rule 89(C).
\(^{411}\) *Musema*, supra note 196 at para 51.
\(^{412}\) *Ibid* at 103.
took judicial notice of cultural factors.\textsuperscript{413} Rule 94(A) of the ICTR Rules of Procedure and Evidence provides that the Trial Chamber “shall not require proof of facts of common knowledge but shall take judicial notice thereof.”\textsuperscript{414} Rutaganda asserted that the social and cultural factors cited by the Trial Chamber were not matters of common knowledge. He asserted that the Chamber engaged in stereotyping and made generalizations about Rwandan culture which were unsupported by any evidence or expert opinion.\textsuperscript{415} Furthermore, Rutaganda asserted that the Chamber’s assessment of the credibility of prosecution witnesses in light of these cultural factors led the Trial Chamber to disregard discrepancies in their testimony.\textsuperscript{416} In response, the Prosecution asserted that the Trial Chamber simply mentioned general observations about the witnesses who testified, and that no expert testimony was needed to validate these observations.\textsuperscript{417} The judges “had already heard many witnesses having the same socio-cultural background,” and they were therefore “perfectly entitled to draw certain general conclusions from their experience, without such amounting to common knowledge within the meaning of Rule 94(A).”\textsuperscript{418}

The Appeals Chamber rejected the defendant’s claims and ruled that expert witness testimony was not needed for the Trial Chamber to come to conclusions regarding the cultural factors which influenced witness testimony.\textsuperscript{419}

\begin{footnotes}
\footnotetext[413]{Prosecutor v. Rutaganda, ICTR-96-3-A, Judgement on Appeal (26 May 2003) at para. 12 (International Criminal Tribunal for Rwanda, Appeals Chamber).}
\footnotetext[414]{ICTR Rules, supra note 80 at Rule 94(A).}
\footnotetext[415]{Rutaganda Judgement on Appeal, supra note 413 at para 223.}
\footnotetext[416]{Ibid.}
\footnotetext[417]{Ibid at para. 224.}
\footnotetext[418]{Ibid.}
\footnotetext[419]{Ibid at para. 226.}
\end{footnotes}
Specifically, the Appeals Chamber concluded that the Trial Chamber’s ruling on the importance of cultural factors concerned only the “proceedings proper and not facts of common knowledge.”\textsuperscript{420} The Trial Chamber’s judgment “only states an observation that obviously dawned on the Trial Chamber as it heard the evidence given before it, namely, the fact that some of the persons heard were farmers and people who were not sufficiently literate, and that this situation had repercussions on the quality of their evidence, insofar as these witnesses experienced difficulties in answering certain questions under the conditions described by the Trial Chamber.”\textsuperscript{421} The Appeals Chamber thus concluded that it was proper for the Trial Chamber to arrive at broad conclusions regarding Rwandan culture in its attempt to assess witness credibility and reliability.\textsuperscript{422}

Given the importance which cultural evidence may have on international criminal proceedings, if tribunals are to consider cultural context it is paramount that such considerations be based upon a proper foundation. The ICTR’s willingness to express generalizations regarding Rwandan culture without any foundation is disconcerting. Tribunals must ensure that such determinations are made only when based upon reliable evidence.

\textbf{C. The cultural contextualization of defenses in international criminal law.}

In the course of trial proceedings, the norms of international criminal law are interpreted and applied during adversarial proceedings. Defendants are uniformly granted the right to present a defense. When presenting a defense, a

\textsuperscript{420} Ibid.
\textsuperscript{421} Ibid.
\textsuperscript{422} Ibid at para. 228.
defendant may ask a tribunal to assess cultural context in order to mitigate or erase his or her criminal liability. Catharine Mackinnon has voiced concern at the possibility of invoking cultural norms to negate criminal responsibility. She asks the question:

Can post-modernism hold the perpetrators of genocide accountable? If the subject is dead, and we are dealing with deeds without doers, how do we hold perpetrators accountable for what they perpetrate? Can the Serbian cultural defense for the extermination of Croats, Bosnian Muslims, and Kosovar Albanians be far behind? If we can have a multicultural defense for the current genocide, because that’s how the Serbs see it, why not a German cultural defense for the earlier one? Anti-Semitism was part of German culture.\(^{423}\)

Despite Mackinnon’s concerns, defendants may indeed assert culturally contextualized defenses in the course of international criminal proceedings. The anthropologist Alison Dundes Rentlen advocates that defenses based upon cultural background should be admissible and assessed seriously by courts of law. She asserts that “[c]ultural differences deserve to be considered in litigation because enculturation shapes individuals’ perceptions and influences their actions.”\(^{424}\) Understanding the cultural background of a defendant is often necessary and crucial to understand the context of a defendant’s actions.\(^{425}\)

Viewing a defendant’s actions in cultural context may obviate or mitigate criminal


\(^{425}\) *Ibid* at 64-65.
liability, particularly with regard to whether a defendant possesses the requisite mental state to establish criminal liability. Renteln cites the defense of provocation as an example of a circumstance in which cultural context may be relevant in establishing liability. Determining whether a defendant was provoked by another’s words requires the court to assess the meaning of the words from the defendant’s perspective, in the defendant’s particular cultural context.

As a matter of intellectual consistency, defenses of this nature should be allowed and evaluated seriously in international criminal tribunals. As set out above, international criminal tribunals have held that international crimes may be assessed and interpreted through the particular cultural lens of the participants. (See Section II supra). International criminal law thus recognizes the influence which culture has upon human communication, thought and behavior. Proposing that tribunals should evaluate the actions of accused international criminals in a similar manner simply involves an extension of this principle, ensuring that all evidence presented at trial is evaluated in a similar manner. Just as culture influences the thoughts and actions of victims and witnesses, defendants are also so impacted. Culture may be used to establish criminal liability, and defendants may also invoke cultural context in their attempt to evade criminal responsibility.

The mere fact that a defendant raises a defense with a cultural component does not necessarily mean that the claim has merit. To date, international criminal tribunals have been reluctant to accept culture-specific defenses. In some circumstances, defendants have asserted defenses based upon phantom cultural norms which are unsupported by sufficient evidence. Tribunals have correctly
dismissed such claims without much consideration. Before the ICTR for example, defendants charged with rape have asserted that rape does not constitute a crime in Rwanda, and therefore should not be a crime cognizable by the ICTR. In *Prosecutor v. Muhimana*, the defendant was charged, *inter alia*, with rape as a crime against humanity.\(^{426}\) The prosecution charged that the defendant brought two Tutsi women to his home, raped them, and subsequently killed them.\(^{427}\) As a part of his defense, Muhimana presented witnesses who asserted that under Rwandan cultural standards, a rape could not have occurred. The witnesses averred that “under Rwandan culture it is not ‘possible’ for a married man to rape someone in the matrimonial home.”\(^{428}\) The ICTR Trial Chamber rejected this claim, stating that it “does not accept the contention that under Rwandan culture it is impossible for a man to rape a woman in the matrimonial home. The Chamber accepts that in any society such behaviour would be considered unacceptable.”\(^{429}\)

Similarly in *Prosecutor v. Semanza*, the prosecutor asserted that the defendant was responsible as a superior for rapes and other acts of sexual violence which occurred in the village of Bicumbi, during the course of the Rwandan genocide.\(^{430}\) The defendant “denied any knowledge of rapes in Bicumbi commune explaining that ‘[i]n Rwandan tradition or culture, rape has never existed.’”\(^{431}\) Other witnesses presented by the defense testified similarly, “stating

\(^{426}\) *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgement (28 April 2005) at para. 6 (International Criminal Tribunal for Rwanda, Trial Chamber III).

\(^{427}\) *Ibid* at paragraph 16.

\(^{428}\) *Ibid* at paragraph 20.

\(^{429}\) *Ibid* at paragraph 25.

\(^{430}\) *Prosecutor v. Semanza*, ICTR-97-20-T, Judgement and Sentence (15 May 2003) at paras. 9, 51 (International Criminal Tribunal for Rwanda, Trial Chamber III).

\(^{431}\) *Ibid* at para. 255.
either that rape is unknown in Rwanda, or that they did not see or hear of any rapes in 1994.\textsuperscript{432} The Trial Chamber dismissed these assertions. Although the Trial Chamber did not specifically address the defendant’s claim that rape was unknown in Rwandan culture, the Chamber concluded that “the unsubstantiated claims of Defence witnesses that no rapes occurred in their localities or in Rwanda are not credible or reliable.”\textsuperscript{433}

Before the Special Court of Sierra Leone as well, defendants have been unsuccessful in their attempts to assert defenses rooted upon cultural norms. Defendants invoked cultural context in asserting that they could not be found guilty of recruiting child soldiers. In the AFRC case, the indictment alleged that the defendants had committed crimes of war in that they “routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities” during the course of the Sierra Leone civil war.\textsuperscript{434} The defendants were leaders of the AFRC, a splinter group of the Sierra Leone military which sided with rebel forces.

One of the defendants challenged whether the crime of child recruitment was applicable in the Sierra Leonean context. They asserted that the age of 15 as a demarcation for childhood was “arbitrary,” and presented expert witness testimony positing that in a “traditional African setting the concept of childhood is related to the ability to perform tasks not to age.”\textsuperscript{435} Furthermore, the defendants

\textsuperscript{432} \textit{Ibid.}

\textsuperscript{433} \textit{Ibid} at para. 259.

\textsuperscript{434} \textit{Prosecutor v. Brima et al (AFRC Case), SCSL-04-16-T, Judgement (20 June 2007) at para. 727 (Special Court for Sierra Leone, Trial Chamber II).}

\textsuperscript{435} \textit{Ibid} at para. 1250.
asserted that Sierra Leonean governments had recruited persons under the age of 15 as soldiers prior to the civil war.\textsuperscript{436} The defendant asserted that he had made a mistake of law, in that he was unaware of the unlawfulness of recruiting child soldiers under the age of 15.\textsuperscript{437}

The Trial Chamber rejected “any defence based on cultural distinctions regarding the definition of ‘childhood.’”\textsuperscript{438} The Chamber cited an earlier SCSL Appeals Chamber decision which concluded that customary international law established that the recruitment of persons under the age of 15 constituted a crime.\textsuperscript{439} The Trial Chamber thus rejected the defendant’s “mistake of law” claim, concluding that “[t]he rules of customary international law are not contingent on domestic practice in one given country. Hence, it cannot be argued that a national practice creating an appearance of lawfulness can be raised as a defence of conduct violating international norms.”\textsuperscript{440}

Defendants have also unsuccessfully invoked cultural context in attempting to challenge the admissibility of statements made to investigators during the course of pre-trial interrogation. In the ICTY case \textit{Prosecutor v. Delalic et al.},\textsuperscript{441} the defendant Zdravko Mucic sought to have his statements to Austrian police excluded from trial.\textsuperscript{442} Mucic and his co-defendants were indicted on charges of crimes of war stemming from events which occurred at a prison

\begin{flushleft}
\textsuperscript{436} \textit{Ibid} at para. 730.  \\
\textsuperscript{437} \textit{Ibid}.  \\
\textsuperscript{438} \textit{Ibid} at para. 1251.  \\
\textsuperscript{439} \textit{Ibid} at para. 731.  \\
\textsuperscript{440} \textit{Ibid} at para. 732.  \\
\textsuperscript{441} \textit{Prosecutor v. Delalic et al.}, IT-96-21-T, Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence (2 September 1997) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).  \\
\textsuperscript{442} \textit{Delalic} Decision at para. 2.
\end{flushleft}
camp in the village of Celebici in Bosnia and Herzegovina.\textsuperscript{443} Mucic had been the commander of the prison camp.\textsuperscript{444}

While living in Austria after the events at issue, Mucic had been arrested and questioned by Austrian police, and subsequently made statements which the prosecution introduced at trial. Consistent with Austrian law, the police questioning Mucic advised him only that he had a right to counsel only after he had been questioned.\textsuperscript{445} Mucic asserted that his right to have counsel present during his questioning, a right protected by the ICTY Statute, had been violated.\textsuperscript{446} The prosecution asserted that Mucic voluntarily waived his right to counsel.\textsuperscript{447}

Mucic asserted that his questioning without an attorney violated his human rights, and that his statement was therefore inadmissible under the ICTY statute.\textsuperscript{448} He asserted that because of his cultural background “he was unable to appreciate the scope and meaning of his right to counsel when the right was read to him.”\textsuperscript{449} As a Yugoslavian living in Austria he “was subjected to two different systems opposed to each other in terms of the kinds of rights they provide.”\textsuperscript{450} Mucic asserted that he was unfamiliar with the Rule 42 of the ICTY Rules of Evidence and Procedure, which sets out the rights of suspects during the course of investigations, and establishes that suspects have the right to counsel and the right

\textsuperscript{443} Prosecutor v. Delalic et al, IT-96-21-T, Judgement (20 February 2001) at para. 3 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).
\textsuperscript{444} Ibid at para. 4.
\textsuperscript{445} Delalic Decision, supra note 441 at para. 9.
\textsuperscript{446} ICTY Rules, supra note 80 at Art. 42.
\textsuperscript{447} Ibid at para. 5.
\textsuperscript{448} Ibid at para. 6.
\textsuperscript{449} Ibid at para. 58.
\textsuperscript{450} Ibid.
to remain silent. Mucic pled that the Austrian police had a duty to explain the provisions of this Rule to him.

The Trial Chamber rejected Mucic’s argument that his cultural background prevented him from fully understanding his rights during the interrogation process. The Chamber stated that it “finds the cultural argument difficult to accept as a basis for considering the interpretation of the application of the human rights provisions. The suspect had the facility of interpretation of the rights involved in a language which he understands. Hence, whether he was familiar with some other systems will not concern the new rights interpreted to him. If we were to accept the cultural argument, it would be tantamount to every person interpreting the rights read to him subject to his personal or contemporary cultural environment. The provision should be objectively construed.” The Chamber ruled that “there is no doubt the Accused understood that he had a right to counsel during the interview,” and rejected his claim.

On appeal, Mucic claimed that the Trial Chamber “should have applied a subjective test in considering the admissibility” of the statements. He asserted that “[t]he fact that somebody is being interviewed in a language other than his, probably in a jurisdiction or a place [of] which he has no cultural or personal knowledge, and the fact that he is being interviewed about matters which have

451 ICTY Statute, supra note 50 at Art. 42.
452 Delalic Decision, supra note 441 at para. 58.
453 Ibid at para. 59.
454 Ibid at para. 63.
arisen from an extraordinary and extra-national set of circumstances […] is very germane.\(^{456}\)

The Appeals Chamber rejected Mucic’s culture-based claim.\(^{457}\) The Chamber upheld the Trial Chamber’s ruling that the requirements of ICTY Rule 42 must be objectively construed and that investigators are not obliged to inform a suspect of his rights in a different manner because of the suspects’ particular cultural background.\(^{458}\) Investigators are only obliged to inform suspects of their rights in a language they understand.\(^{459}\) The Chamber concluded that the rights set out in Rule 42 are “neither ambiguous nor difficult to understand.”\(^{460}\) The investigators informed Mucic of his rights and Mucic knowingly waived them.\(^{461}\)

Before the Special Court of Sierra Leone, defendants have made similar culture-based arguments regarding the admissibility of statements garnered during the course of custodial interrogation. In the RUF case, the prosecution sought to admit statements which one of the accused, Issa Hassan Sesay, made to investigators during custodial interviews. Sesay had been one of the leaders of the RUF.\(^{462}\) In the course of his interrogation, interrogators informed him of his rights. Sesay subsequently signed a waiver of his rights to counsel and to remain silent. Sesay asserted that the statements he made to investigators were made

\(^{456}\) Ibid at para. 549.
\(^{457}\) Ibid at para. 551.
\(^{458}\) Ibid at para. 553.
\(^{459}\) Ibid at paras. 551-552.
\(^{460}\) Ibid at para 551.
\(^{461}\) Ibid at para 554.
\(^{462}\) RUF Case Judgement, supra note 297 at para. 916.
involuntarily and that he did not knowingly waive his rights. He claimed that investigators used trickery, threats and coercive methods to induce the statements. He therefore claimed that the statements were inadmissible under Rule 95 of the SCSL Rules of Procedure and Evidence, which provides that “[n]o evidence shall be admitted if its admission would bring the administration of justice into serious disrepute.”

Sesay proffered that his cultural background was relevant in determining whether his statement had been made voluntarily to investigators. During oral argument on the motion, Sesay’s lawyers proffered that when Sesay was arrested, he was a man with education up [sic] the age of 13 who had effectively spent ten years in the bush fighting a guerrilla war, who, it is clear from the evidence. . . .had no experience of a Western or Anglo notion of criminal justice, had no experience of a United Nations court and who relied upon the information to be passed to him by the Prosecution investigators.

The defense submitted that it was impossible for Sesay to knowingly waive rights which he did not understand.

Although the Court ultimately refused to allow the prosecution to admit the statements, the Court strongly rejected Sesay’s argument that the waiver of his

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463 Prosecutor v. Sesay, Kallon and Gbao (RUF Case), SCSL-04-15-T, Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution (30 June 2008) at paras. 21-27 (Special Court of Sierra Leone, Trial Chamber I).
464 Rules of Procedure and Evidence, Special Court of Sierra Leone, as amended 27 May 2008 at Rule 95.
466 Ibid at 72.
rights was unknowing based upon his particular cultural background.\textsuperscript{467} The Court held that

\begin{quote}
we find no merit in the submission that the fact that the Accused had spent the previous ten years fighting in a war in the bush and did not have direct experience of a judicial system or of a system or a state authority based on the rule of law the protection of human rights relevant to its analysis of the circumstances in which the questioning occurred.\textsuperscript{468}
\end{quote}

The Court relied upon the ruling by the ICTY’s \textit{Delilac} decision and concluded that “the cultural background of the Accused is not relevant in determining whether the manner of questioning and the way in which the rights advisements were given to the Accused constituted oppressive circumstances.”\textsuperscript{469} The Court held that investigators are obliged only to read an accused his rights in a language he understands.\textsuperscript{470} As in \textit{Delilac}, the Court ruled that it would assess the voluntariness of a defendant’s statements on an “objective” basis, and rejected Sesay’s argument.\textsuperscript{471}

International criminal tribunals have thus been reluctant to accept defenses which ask the court to culturally contextualize a defendant’s actions in order to assess criminal liability. Yet this reluctance should not lead to the conclusion that defenses containing a cultural component are necessarily meritless.\textsuperscript{472} The merit

\begin{footnotes}
\textsuperscript{467} \textit{RUF Case} Decision, \textit{supra} note 463 at para. 56.
\textsuperscript{468} \textit{Ibid}.
\textsuperscript{469} \textit{Ibid} at para. 57.
\textsuperscript{470} \textit{Ibid} at para. 64.
\textsuperscript{471} \textit{Ibid} at para. 57.
\textsuperscript{472} See e.g. Jennifer L. Larkin, “The Insanity Defense Founded on Ethnic Oppression: Defending the Accused in the International Criminal Tribunal for the Former Yugoslavia” (2001) 21 N.Y.L.
\end{footnotes}
of such a claim will depend upon the facts of a given case. As a theoretical example, a defendant could ask the court to consider cultural context in putting forth a defense of duress. The defense of duress involves a claim by the defendant that his or her criminal act was not performed voluntarily because of threats of death or serious injury from a third party. The Rome Statute codifies duress as a defense, stating that “a person shall not be criminally responsible if, at the time of that person's conduct. . .(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.” The Statute goes on to specify that the threat “may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person’s control.”

One may envision a case involving the defense of duress in which a defendant comes from a culture in which belief in magic or sorcery plays a role. A defendant could claim that he committed a crime of war because he had been threatened with death or bodily harm to be inflicted by means of such magic or sorcery. Although the judges hearing the case may not necessarily share the

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Sch. J. Int’l & Comp. L. 91 (arguing for the legitimacy of a culturally based insanity defense based upon ethnic oppression as a legal defense to crimes of war committed in the former Yugoslavia).

Rome Statute, supra note 12 at Art. 31.

As seen in the CDF Case before the Special Court of Sierra Leone, cultural beliefs in magic or sorcery have already played a role in international criminal proceedings.

defendant’s belief in threats by magic, such evidence may be of paramount importance in determining whether the defendant acted “necessarily and reasonably to avoid this threat,” under the terms of the Rome Statute.

Moreover, defendants appearing before the International Criminal Court may argue that the text of the Rome Statute supports the proposition that the tribunal must seriously evaluate defenses based upon cultural difference. Article 21 of the Rome Statute addresses the sources of law to be applied by the ICC. Among the relevant sources of law, Article 21 lists the Rome Statute and the ICC’s Rules of Procedure and Evidence. Article 21(3) specifies that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.”

Defendants may assert that Article 21(3) should be read to include a right to present defenses rooted in cultural context, citing to Article 27 of the International Covenant on Civil and Political Rights. This Article sets out a general right to culture, stating that

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

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476 Rome Statute, supra note 12 at Article 21(1-2).
477 Ibid at Art. 21(3).
Defenses based upon cultural background may therefore be presented before the ICC, and argued for on the basis of international human rights.\textsuperscript{479}

As cultural contextualization has influenced how international criminal tribunals define substantive crimes, it may also influence how tribunals give content to the defenses available under international criminal law. Of course, cultural evidence submitted on behalf of defendants may also be prone to essentialization and reductionism. Culture does not, in and of itself, determine the actions of an individual. Yet cultural context, when taken in combination with other evidence, may provide a tribunal with valuable insight into the actions of an individual defendant.

**Conclusion**

Former ICTY prosecutor Richard Goldstone warns of potential harmful consequences in considering cultural diversity during the course of international criminal proceedings. He acknowledges the pluralist context within which international criminal law operates, and asserts that the regime must account for cultural and linguistic differences within the “details” of international criminal law.\textsuperscript{480} He stresses however that the basic liberal principles underlying international criminal law (\textit{e.g.}, its punitive nature and its guarantees of due process for accused individuals) apply across cultures and must not be compromised.\textsuperscript{481} “Justice is justice and murder is murder” according to Goldstone, and across the global sphere victims desire the same punitive result for

\textsuperscript{479} Renteln, \textit{supra} note 424 at 48.
\textsuperscript{481} \textit{Ibid.}
the individuals who perpetrate international crimes.\textsuperscript{482} Goldstone suggests that culturally relativistic approaches to international criminal justice represent a “dangerous trend” which threatens the human rights of both the victims and the accused involved in international proceedings.\textsuperscript{483} He discounts the notion that international criminal law must accommodate different cultural conceptions of justice or criminal procedure, stating that “[t]hose who say human rights is a Western or European concept . . . . and those who talk about the accused being given too many rights are almost invariably people who either excuse past violations or who want to excuse, in advance, violations they intend to carry out in the future.”\textsuperscript{484}

Justice Goldstone provides a useful critique of the potential deleterious effects of cultural relativism in international criminal law. Yet his critique fails to acknowledge the positive influence which cultural diversity may have on international criminal law. It does not recognize the extent to which cultural diversity may actually enhance and enrich the universal norms of international criminal law. The universal norms of international law and cultural diversity complement each other. Likewise, the culture-based critiques of international criminal law set out in Section I of this thesis illuminate the extent to which cultural resonance is necessary for the legal system to maintain its legitimacy. But these critiques do not acknowledge the extent to which the international

\textsuperscript{482} Ibid.
\textsuperscript{483} Ibid.
\textsuperscript{484} Ibid at 12.
criminal legal system has already accommodated cultural diversity through the
interpretation and application of the universal norms of international criminal law.

The universal norms of international criminal law have been, and should
continue to be, given content in culture-specific terms. This process is imperfect.
Experts may present differing interpretations of cultural norms or practices, which
may complicate a court’s ability to arrive at an accurate assessment of the facts.
Criminal tribunals may possess limited ability to enter the mindset of an
individual from a different culture. They may rely upon erroneous or
essentializing cultural evidence. In such instances, an evaluation of criminal
liability for the commission of crimes of war or other atrocities may remain
elusive, even when placed within cultural context. Owing to the difficulties
inherent in the consideration of cultural evidence, some observers doubt the
ability of courts to engage in the practice of interpreting culture. Anthony Good
asserts that as “legal proceedings must produce definite outcomes . . . within
quite short time spans” they are particularly bad forums to engage in the
interpretation of culture. As cultural practices are contested, fluid and must
themselves be contextualized, Good asserts that efforts at using cultural evidence
in courts of law “is almost bound to produce distorted understandings and, in
many cases, miscarriages of justice.”

Yet the imperfection of cultural contextualization does not necessitate
jettisoning it as an interpretive method. The process of cultural contextualization
involves courts looking outside themselves and assessing both the facts and law

485 Good, supra note 367 at s52.
486 Ibid.
from the perspective of the participants in the incidents at issue. Culture may help
to explain why a victim of rape refuses to testify at trial regarding his or her
ordeal. It may provide a court with the necessary context to assess a defendant’s
actions in the course of battle. And cultural contextualization may provide the
only true method of evaluating the harm, both individual and collective, which
results from the commission of mass atrocities. By interpreting facts and law in a
culturally contextual manner, tribunals attempt to come to a truer assessment of
what actually occurred in the course of the fact patterns at issue. They attempt to
understand the true culpability of individual defendants and understand the true
impact of international crimes upon their victims.

Defining the universal norms of international criminal law in cultural
context also serves to increase the legitimacy of the international criminal justice
system among diverse populations. Diverse cultures see their own particular
norms reflected in the universal norms of international criminal law. Through
cultural contextualization, the international criminal justice system establishes that
the universal norms of international criminal law apply across diverse contexts. It
is a process which acknowledges the importance of incorporating diverse cultural
norms within the universal norms of international criminal law.

Cultural contextualization also has an influence upon the international
criminal legal system itself. It leads the participants in the system to constantly
re-evaluate and adapt the system’s own norms, ensuring that they have resonance
and relevance across cultures. Richard Schweder remarks that “the process of
representing the other goes hand in hand with a process of portraying one’s own
self as part of the process of representing the other, thereby encouraging an open-ended self-reflexive dialogic turn of mind.\textsuperscript{487} By considering cultural context in the evaluation of international crimes, actors in the international criminal justice system reflect upon the true meaning of the system’s norms and the nature of behavior which deserves universal condemnation. The universal norms of international criminal law are allowed to evolve and take shape through the process of cultural interpretation.

\textsuperscript{487} Schweder, supra note 1 at 110.
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