CROSS-CULTURAL HUMAN RIGHTS REVIEW

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BOOK REVIEW

Julie Fraser and Brianne McGonigle Leyh, Intersections of Law and Culture at the International Criminal Court (Elgar, 2020) 456 pp. ISBN 9781839107290 (Hardback)

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Intersections of Law and Culture at the International Criminal Court begins with a quote from the preamble to the *Rome Statute*:

> Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time…

The book does not explicitly say it but throughout the analyses contained therein, it is clear that the mosaic may have been shattered not only by the atrocities falling within the jurisdiction of the International Criminal Court ('ICC'), but by the institutional response to these atrocities. Much of this book explores those methods of shattering, and the path ahead to reconstruct the mosaic. As is explored throughout *Intersections*, law and culture are traditionally placed in a dichotomy (which the editors note in the introductory Chapter 1) and this book analyses this concept through the intersection between the law applied at the ICC and minority cultures (particularly, Black African and Arab African cultures).[1] In this review, I propose to first give an

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** The opinions expressed in this review are those of the author, and do not represent the views of the author's employer, the International Criminal Court, or any constituent part thereof. The author makes no comment concerning the discussion in this book in relation to the case in which the author is involved.

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[1] See Kamari Maxine Clarke, 'Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality' (*Just Security*, 24 July 2020)

overview of the themes and findings of the book, and then delve deeper into the book's findings on judicial deliberation and the organisational culture of the ICC.

The book has explored three levels of 'culture' which manifest in the work of the ICC: the micro level, where individuals come into contact with the ICC; the meso level, the organisational culture of the ICC; and the macro level, the ICC's interactions with the broader international community (p. 8). These three levels are elaborated in relation to four key themes: (1) the court's substantive crimes; (2) its proceedings; (3) defences, sentencing, and victim participation and reparation; and (4) the wider geo-political context (pp. 8-9). The text is insightful and effective in exploring all these aspects, but is at its most original when providing insights on procedural and organisational matters at the ICC, and the interactions between the ICC and the global community, particularly given the extensive literature on the *Al Mahdi* case. Given its canvassing of many different topics and its exploration of topical developments through a modern, intersectional lens, this book will be of use to all people interested in issues of culture, the functioning of international institutions, and the development of international law. However, it will be of particular value to practitioners working on these sorts of complex cases.

Judicial deliberation on culture

The text is able to craft a detailed and insightful view of the way in which judges consider cultural issues in relation to gender (Chapter 6), religion (Chapters 7, 8 and 19) and other cultural factors (throughout the text, but most incisively in Chapters 9 and 10). One theme which recurs across this text is the impact that individuals can have on the way in which the law intersects with culture.

In Chapter 6, Alison Dundes Renteln's exploration of gender justice, it is noted that Judge Navi Pillay, the only judge in the ICTR Trial Chamber considering the *Akayesu* case, was responsible for that case's ground-breaking

<https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/> accessed 22 April 2021, noting 'To date, the ICC has issued indictments against forty-two individuals, all of whom are Black and/or Arab-Africans.'

charging of Mr. Akayesu for rape as a war crime (pp. 109-111). Similarly, as Suzanne Schot notes in Chapter 9, Judge Fatoumata Dembélé Diarra's intervention in the *Katanga* case to explain the role of fetishism in Africa had a major impact on how Trial Chamber II understood the role of the *féticheurs* in the context of the armed conflict (p. 180). This seems to suggest that one of the main solutions to any mishandling of culture will be the recruitment of more diverse judges from the cultures it considers. However, the ICC is highly diverse and has been so since its inception (as mandated by the UN system) and these structural issues remain, in part because of broader issues relating to the form and structure of international criminal adjudication. Kamari Maxine Clarke noted last year that '[r]ace is coded as being external to an international criminal law paradigm in which all lives are supposed to matter; the cultures and systems of white supremacy are rarely acknowledged as shaping the conditions of (in)justice both within and outside this framework.'[2] These are larger, structural problems with the structure of international criminal law, which go beyond the ability and willingness of individual judges; indeed, these individual success stories concerning Judges Pillay and Diarra could be used to stifle calls for reform.

The book also demonstrates the risks of having judges without these individual experiences. In Chapter 2, Leigh Swigart notes that the ICC, as a permanent court of general jurisdiction, must constantly adjust and shift focus to new situations, new cultures, and new language groups (p. 19). This is in stark contradiction to its predecessor and contemporary institutions, which are in the form of temporally, geographically and culturally fixed *ad hoc* tribunals. These shifts generally come with major cultural differences in the way in which individuals process key concepts like time, distance, age and kinship which strongly differ from Western conceptions thereof (p. 20). The issue of how to process a lack of knowledge or background about a culture is a thorny one with no clear solution: if the judge chooses to learn nothing about the situation country, they may miss an important nuance in the evidence; if the judge chooses to research it themselves, they may compromise the fairness of the trial by using evidence untested by the rigors of in-court examination to make

[2] *Ibid*.

conclusions adverse to the accused. Even more likely, the experts relied upon by the parties may have their own biases. Phoebe Oyugi recently wrote about this phenomenon, noting generally that Western expert witnesses called at the ICC may have only visited Africa a few times and sometimes do not speak the language of the situation.[3]

If the evidence of such experts is adopted uncritically by the Chamber, this may prejudice the legitimacy of the ICC's judgments (particularly, as Chapter 16 notes, in Africa, where the ICC's legitimacy has been tested, but also, as Chapter 18 discusses in detail, in Asia). In Chapter 11, Gregor Maučec suggests that the ICC Chamber could appoint its own culture experts *proprio motu* (pp. 204-206) to solve legitimacy issues. The International Court of Justice ('ICJ') has a power under Article 50 of the ICJ Statute to call its own experts (but has not regularly done this[4] and has never done so to appoint a cultural expert). Caution, again, should be observed in embracing this solution: a Chamber-appointed expert is far more legitimate in a party-party proceeding, rather than the asymmetrical criminal law paradigm. If a particular fact is unclear or not established in a case before the ICC, this may mean that the Office of the Prosecutor has not sufficiently discharged their burden of proof, and the Chamber should not operate to 'fill the gap'.

This also applies in relation to judicial determination of issues relating to religion, particularly in Chapter 7's exploration of the solemn undertaking and Chapter 19's discussion of Islamic law. It is important to note here that the ICC geographically lies in the secularising Europe,[5] whereas worldwide people

[3] Phoebe Oyugi, 'My Hague Diaries Entry 3: Westerners Who Are "Experts" on the African Continent' (*Ideas Worth Sharing*, 11 April 2021) <https://phoebeoyugi.com/2021/04/11/my-hague-diaries-entry-3-westerners-who-are-experts-on-the-african-continent/> accessed 22 April 2021.

[4] Daniel Peat, 'The Use of Court-Appointed Experts by the International Court of Justice' (2013) 84 *British Yearbook of International Law* 271; Bruno Simma, 'The International Court of Justice and Scientific Expertise' (2012) 106 *Proceedings of the Annual Meeting of the American Society of International Law* 230.

[5] For example, France has long been one of the ICC's largest donors and had many of its judges represented in Chambers: see e.g. *Report of the Committee on Budget and Finance on the work of its thirty-fourth session*, ICC-ASP/19/5, 24 August 2020

are becoming on average more religious (pp. 379-380) and certainly, the people whose lives the ICC affects often are. The case remains that the ICC is seeing a translated view of these conflicts and these defendants. The victims and witnesses whose testimony it hears have oftentimes been sourced or recruited by Western-influenced human rights non-governmental organisations and they have been required to frame behaviours in a way understood in the West. The ICC receives context and guidance from Western 'experts' on these minority culture, and questions are put to these witnesses largely by Western legal practitioners. The defendant is almost silent in these interlocutions, either translated through counsel or only able to speak at the time of sentencing.[6]

Chapters 8 and 12 discuss Defence-facing concepts such as cultural norms around mental illness and culture-based defences, particular in the context of the *Ongwen* case and Acholi spiritual concepts such as *cen*. However, these chapters could have benefited from deeper analysis of the ways in which culture would prevent these issues from being raised or further change the way in which they manifest. For example, different cultural paradigms between ICC staff and potential defendants, especially concerning issues of mental health, could impact on the safety and integrity of ICC investigations and convictions. This is because defendants' ability to report to the ICC abuses in national detention, or assert culture-based defences, may be impaired.

<https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-5-ENG-CBF34%20Report-Final.pdf> accessed 22 April 2021; Ministère de l'Europe et des affaires étrangères, 'France and the International Criminal Court (ICC)', *Ministère de l'Europe et des affaires étrangères* (15 June 2018) < https://www.diplomatie.gouv.fr/en/french-foreign-policy/international-justice/france-and-the-international-criminal-court-icc/> accessed 22 April 2021. In recent years, France has enacted laws which increasingly prevent the public manifestation of religious practice: Al Jazeera, '"Law against Islam": French vote in favour of hijab ban condemned' (*Al Jazeera*, 9 April 2021) <https://www.aljazeera.com/news/2021/4/9/a-law-against-islam> accessed 22 April 2021.

[6] Kjell Anderson, 'Ongwen blog symposium: Ongwen Unsworn' (*Armed Groups and International Law*, 16 April 2021) https://armedgroups-internationallaw.org/2021/04/16/ongwen-blog-symposium-ongwen-unsworn/> accessed 22 April 2021.

The organisational culture of the ICC

In Chapter 2, Leigh Swigart explores multilingualism at the ICC through an interview-based method, having completed some 60 interviews with ICC staff members and members of defence teams (pp. 14-15). As Swigart notes, English dominates at the ICC (pp. 30-31), both in terms of the language used by practitioners at the ICC and the tendency of major texts to be available only in English (pp. 32-33). Indeed, engaging staff who have the linguistic skills to communicate in the languages of the situations within the Court's jurisdiction has not been sufficiently prioritised (pp. 30-32). This trend was also found by the recent work of the Independent Expert Review on the Court, which noted that English appears to be the default working language[7] and recommended strengthening staff's French language capabilities.[8] However, these suggested reforms are not necessarily appropriate: as recently recognised by Justina Uriburu,[9] the dominance of English creates significant barriers to a truly multilingual international law system and is not resolved by bilingualism with French. Rather, this problem (and even its proposed solutions) is paradigmatic of the focus of the ICC: English (and to a lesser extent French) legal and linguistic culture dominates; the languages and cultures of the nations which the ICC directly affects are an afterthought.

Chapter 10 details, quite stridently, a mismatch between the aims and realities of the culture of 'justice' which the Office of the Prosecutor emphasises with the international community. Most notably, its public statements show an almost complete lack of respect for the presumption of innocence for ICC defendants (pp. 217-218). This, coupled with the emphasis on office-centric

[7] *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, 30 September 2020, <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf> accessed 22 April 2021 ('IER Final Report'), para 234.

[8] IER Final Report, paras 235-236; Recommendation R100.

[9] Justina Uriburu, 'Between Elitist Conversations and Local Clusters: How Should We Address English-centrism in International Law?' (*Opinio Juris*, 2 November 2020) <https://opiniojuris.org/2020/11/02/between-elitist-conversations-and-local-clusters-how-should-we-address-english-centrism-in-international-law/> accessed 22 April 2021.

goals for justice for victims (p. 216), and the ICC's lack of convictions,[10] may be one of the key drivers of the organisational culture *and* the Office of the Prosecutor's engagement with culture.[11]

The editors have sourced interesting, topical pieces with detailed analysis and clear perspectives on important issues. The only major weakness of the book is an occasional lack of awareness at times of practical, procedural issues. No point is made, for example, of the fact that trials continue to sit through Ramadan, a period during which Muslim defendants (and indeed, witnesses, victims and members of staff, as relevant) will be fasting.[12] The book notes that witness testimony will be affected by witnesses' different conceptions of kinship ties (pp. 20-21), but no consideration is given to the practical consequences of that for defendants detained in The Hague. What do these concepts of kinship mean for the ICC's identification of individuals permitted to pay family visits to detainees, or engage in non-privileged communications?[13] Overall, however, this text is an important and incisive exploration into cultural issues relating to the practice and procedure of the ICC, and will likely continue to prompt discussions into these important subjects.

[10] See e.g. Douglas Guilfoyle, 'Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis' (2019) 20 *Melbourne Journal of International Law* 401.

[11] See further *ibid*; Hemi Mistry, 'The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals' (2017) 17(4) *International Criminal Law Review* 703, 711; IER Final Report, paras 62 and 72.

[12] Equal treatment bench books generally advise in favour of making adjustments, including additional breaks, during Ramadan due to the impacts which fasting has on a defendant's ability to properly engage with proceedings: see e.g. UK Judicial College, *Equal Treatment Bench Book*, February 2018 <https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf> accessed 22 April 2021, para 159.

[13] *Regulations of the Registry*, Regulation 173 (as amended 1 August 2018) <https://www.icc-cpi.int/Publications/Regulations-of-the-Registry.pdf> accessed 22 April 2021.