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Cultural Experts at the International Criminal Court (ICC): The Local and the International

*Joshua Isaac Bishay*¹

Abstract

This paper extends existing research on cultural expertise in domestic settings to international courtrooms where several cultures, religions and worldviews are represented. This exercise reduces the widespread knowledge gap on the cultural particularities of post-conflict communities. In the interim, such research also can bridge the gap between the Western lawyers who currently are the most prevalent in international courts, and the members of post-conflict communities who usually appear on its docket. This article suggests that by including cultural expertise, the ICC can take one more step toward becoming a truly international court.

Introduction

The International Criminal Court (ICC or ‘the Court’) has the difficult and unique task of transcending borders. It is the first of its kind, a permanent court aimed at ending the individual impunity that has followed so many violations of international criminal law (ICL). Unfortunately, like previous international tribunals, it is often in the midst of diplomatic squabbles. The ICC has been the object of intense and growing criticism from academics and practitioners, and even from the communities it claims to protect; it is accused of being neo-colonial, ignorant to the situation on the ground and, decades after its founding, still suffering from growing pains (Clark, 2018; de Vos, 2013; Owiny, 2019; Ochs, 2020; Swart, nd).

There is a common thread among these criticisms: the ICC, and more specifically the Office of the Prosecutor (OTP), have a deficit when it comes to cultural (and

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political) knowledge of the affected communities and situation countries with which they interact. This may be because legal practitioners are more likely to misunderstand individuals who are from different backgrounds. Further, institutional processes in courtrooms structured in the Western common and civil law traditions offer few opportunities for cultural experts to share their expertise with the courts (Cooke, 2019, p. 14).

This contribution explores the role cultural experts could play in improving the ICC's relationship with the affected community by identifying some of the types of cultural experts that have appeared before the ICC, analysing their roles and, on the basis of this analysis, offering some tentative recommendations about how they can be better integrated into the court structures to better transmit relevant cultural knowledge to judicial decision-makers.

For the purposes of this contribution, and in context of international criminal tribunals, cultural expertise will be defined as “the special knowledge that enables ... cultural mediators – the so-called cultural brokers, to locate and describe relevant facts in light of the particular background of the [affected communities and the tribunals]” (Holden, 2019a, p. 1). Cultural experts can be integrated throughout the Court's institutional functions, with the prosecution and defence teams, as victims' representatives, and more. Every stage of an ICC case – from preliminary examination up through the appeals – is steeped in cultural context and layered in meaning. The benefits of using cultural experts, as clearly demonstrated by previous researchers, is a growing necessity in our globalising world (Black, 2019; Lopes *et al.*, 2019; Cooke, 2019; Holden, 2019a; Ciccozzi & Decarli, 2019).

Several forms of cultural experts could be valuably incorporated into the ICC, with some more directly connected to the legal process than others. They may include intermediaries, investigators, translators, resource people, locals who work at the Court and expert witnesses. The focus in this article will be on resource people, investigators, interpreters, expert witnesses and legal professionals. The numerous cultural experts who already fill those roles are in the best position to provide guidance to courtroom actors and communicate with and for the affected community throughout the trial process.

The hypothesis of this thesis is that the highly bureaucratic structure of the prosecutorial teams places those who are from the affected community, and are willing to share

their cultural knowledge, at a distance from the legal staff who must make courtroom decisions.

This contribution does not suggest that ICC staff are in any way incompetent or that the ICC lacks cultural experts or cultural expertise. Rather, there is a lack of communication and effective delivery of cultural knowledge. This is because some courtroom actors may misunderstand, misinterpret or misattribute the value and potential of these cultural experts in favour of expert witnesses such as anthropologists or sociologists.

Furthermore, although other courtroom actors will be discussed, this thesis will take the perspective of the defence practitioner. Not only have I worked on and with defence teams that have appeared several tribunals come from working on and with defence teams, but also, as will be discussed below, defence teams have taken the lead in harnessing the resources of cultural experts. This also presents an important opportunity to approach such research from an often-ignored perspective. Within international tribunals, the defence tends to be viewed as outsiders to the institution; the entire defence apparatus is weakly institutionalised in the Court and team members are not staff of the Court. Indeed, many court actors view defence teams with trepidation. Those who defend people who have been charged with heinous crimes are often believed to be diametrically opposed to the advancement of human rights, and to be willing to accept any device, subterfuge or legerdemain that might lead to the acquittal of their client.

To explore this, the contribution will look at various types of cultural experts, the way they are integrated with and utilised by the various legal teams, and how the OTP's trial team, specifically, may have experienced a break in the lines of communication between those who have cultural knowledge, and those who (may not know they) need it. This contribution relies on academic sources, ICC court documents and the personal experiences of myself and three other ICL practitioners with experience before the ICC. As noted by other scholars on cultural expertise, much of the cultural knowledge presented to the international courts is brought forward by the defence (Cooke, 2019, p. 23). Collectively, the interviewees, referred to as ICL Practitioners one through three, and I have decades of experience on defence teams before the ICC and several other tribunals, and one has also helped to represent victims.

This contribution suggests that the difference between the victims, defence and prosecution teams' approaches to the various cultural experts available to them may be a direct result of the way the OTP is structured, the way it conducts investigations and the way it views what it may see as extraneous facts in the face of a clear-cut legal case. In other words, those whom the OTP deem cultural experts – often relying on intermediaries, human right activists and NGO's as local experts as opposed to members of the affected community – and their over-reliance on building a universal system of prosecution that can be copied and pasted from one situation to another efficiently.

As many have argued in the past, international law needs to take a more contextual approach, whether it be in courtroom procedure or during the investigation (Bostian, 2005; Bishay, 2020; Fraser, 2020). One way to achieve this is for all courtroom actors to allow for better flow of cultural knowledge from cultural experts – not only in the courtroom, but in their investigations and trial teams preparations for litigation. Doing so will improve the quality of ICC prosecutions, meet the ICC's goal of becoming a translocal solution in the eyes of affected communities (*Ruto & Sang* Transcript of Hearing on 16 September 2014, p. 64, lns. 6–12; *Ruto & Sang* Transcript of Hearing on 29 September 2014, p. 12, lns. 13–21; *Ruto & Sang* Transcript of Hearing on 12 January 2015, p. 26, lns. 13–18).

Key Terms and Concepts

Some key terms and concepts used throughout this thesis carry different meanings for anthropologists than for lawyers. Other terms, such as culture, are vague in their vernacular usage, have no uniform definition within the anthropological community, and hence are shunned in contexts where legal precision is highly valued. The definition of 'culture' used in this contribution and by cultural scholars is 'a taught, inherited and patterned system of meaning, built on ideas which "communicate, perpetuate and develop a group's knowledge and attitudes towards life"' (Geertz, 1973, p. 89).

The term 'affected community' – the group of people which the international criminal law trials directly touch and concern – will appear throughout this contribution. Affected communities generally include the victims, witnesses and perpetrators of crimes. Another term often referred to in this article is 'situation country', the term used by the ICC to refer to the country or region where the investigation or prosecution is concerned. For example, Omar al-Bashir's trial is part of the "Darfur Situation", and

William Samoei Ruto's indictment was under the "Kenya Situation". Some countries are under investigation for more than one situation stemming from more than one conflict. For example, the Central African Republic currently has CAR I and CAR II.

Another community often grouped together is that of the 'Westerner'. This term is admittedly problematic, especially when discussing law. The Western world's diverse law practices can be classed into two major categories: the common law tradition and the civil law tradition. Within each tradition, however, approaches to law vary from one country to another. Nonetheless, it is both fair and common to say that international tribunals are mostly a hybrid of these traditions and that most practitioners in these tribunals have been trained in North America, Europe or Australia.

Finally, a distinction must be made between cultural knowledge and cultural defences. The cultural defence, sometimes known as cultural arguments or cultural evidence, asks the Chambers to assess the degree to which the Court should consider religious, social or cultural context when weighing the facts and evidence before them (Holden, 2019b). Simply put, the cultural defence can be defined as:

an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act, nevertheless, is within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation. (van Broeck, 2001, p. 5)

Such arguments are not without strong criticism, especially in international criminal justice. For example, if a person is allowed to act with impunity as long as the actions are consistent with cultural norms and expectations, then a pillar of the judicial process – equality before the law – is called into question (Lopes *et al.*, 2019, p. 62). In other ways as well, within the context of the ICC (and international criminal law in general), the cultural defence brings into question the universality of the international legal framework.

In comparison, cultural knowledge is what I will call the information that might be relevant to the courtroom proceedings or the investigatory process. This may include culturally informs interpretations of the language and body language, and the way witnesses may react to direct questions. Cultural experts also can provide information

about the geographical and historical context of the situation country and even nuances of religious expression. Cultural experts do not hold a monopoly on this knowledge, certainly many in the Court are aware of many aspects of the affected community's culture; however, cultural experts are unique in their holistic and intuitive understanding of it.

The Structure of the OTP versus defence and victims' teams

Before discussing the various types of cultural experts that have appeared before the ICC, it is necessary to discuss the internal structures of the Court's legal teams.

The interests of the defence and legal representatives of victims (LRV) are represented internally via the Office of the Public Council for the Defence and the Office of the Public Counsel for Victims. However, defence and LRV practitioners are not staff of the Court (although many are paid by the Court) and are referred to as 'External Parties', thus leading them to be structured very differently from the internal OTP, Chambers² and the Registry³. The typical defence team has four to eight members; the OTP, during trials, typically utilises the combined resources of the entire office for all cases simultaneously (Fedorova, 2012, p. 303). Arguments related to equality of arms and fair trial rights aside, this means that an individual on a defence or LRV team must work multiple roles simultaneously (Fedorova, 2012, pp. 315–6). On the other hand, many on defence and LRV teams are dedicated to one case and one client, while OTP staff may be working simultaneously on multiple cases involving multiple situation countries.

The OTP is broken up into three divisions: (1) the Jurisdiction, Complementarity and Cooperation Division, which handles issues related to "jurisdiction, admissibility and cooperation, and coordinates judicial cooperation and external relations for the OTP"; (2) the Investigations Division, "providing investigative expertise and support, coordinating field deployment of staff and security plans and protection policies, and providing crime analysis and analysis of information and evidence"; and finally (3) the Prosecution Division, which "prepares the litigation strategies and

2 Chambers is the term the ICC gives to the judicial organ of the Court.

3 The closest domestic analog to The ICC's Registry would be a combination of a court clerk, an administrator, liaison with external parties and, borrowing from the French civil system a *huissier*.

conducts prosecutions, including through written and oral submissions to the judges” (International Criminal Court, 2020).

Finally, as counsel for the defence and LRV are not hired directly by the Court, but are often selected by the accused in the case of the defence, or through local NGOs in the case of victims. Note that individuals from the country and/or the affected communities are sometimes represented by counsel (this was the case for *Ongwen* and in *Ruto & Sang*). The OTP’s trial lawyers, on the other hand, work on a variety of cases and therefore might have limited or no knowledge of a specific cultural context. As will be discussed later, this knowledge can provide an advantage to the defence or LRV team, as they can source cultural knowledge themselves.

Cultural Experts before the ICC

Intermediaries and Resource Persons

Intermediaries before the ICC (usually referred to as ‘resource persons’ on defence and victims teams) are individuals or organisations, usually based in the situation country, who act as ‘contact points’ for the legal teams by assisting in locating witnesses and working with investigators in the field. They either come from the affected community or region, or have worked there in the past with a Non-Governmental Organisation (NGO) or an International Governmental Organisation (IGO), and thus are viewed as being on-the-ground experts. In my experience, OTP intermediaries are usually recruited because of their network of social contacts, and are often treated as local experts (some are even called as witnesses). A resource person differs from an intermediary as they are usually individuals who speak the language, have contacts in the area and have background knowledge of the situation. They are sometimes the investigator of the team as well, conducting the investigations on the ground. (ICL Practitioner 3, 2020)

The ICC, historically, has relied on investigations teams composed mainly of individuals of European, North American or Australian origin (Clark, 2018, p. 67), although some more recent recruits come from Africa (ICL Practitioner 1, 2020). Given their limited cultural knowledge, compared to someone from the affected community or situation country, intermediaries end up playing a “critical role” in the ICC’s ability to investigate, locate witnesses and gather information for trial (Women’s Initiative for Gender Justice, 2012; ICL Practitioner 1, 2020). They are “often essential to Court functions” and can

be the objects of uncomfortable questions regarding their impartiality. Many had been “insiders who may have been involved in criminal activities themselves” and “facilitate locating and/or contacting other insider witnesses for the prosecution or defence” (Open Society Justice Initiative, 2011, p. 2). The overdependence on an intermediary, as opposed to more intimate contact with the affected community by investigators and trial staff in the Democratic Republic of the Congo (DRC), left many in the local community feeling that the ICC had not attempted “to foster relationships with local actors”, something that hurt their standing in such communities (Clark, 2018, p. 131). Additionally, this heavy reliance on intermediaries leaves OTP staff “rarely be able to see the full picture” and often limited to “the relevant and often preselected information” (Hieramente *et al.*, 2014, p. 1134).

To mitigate many of the aforementioned issues, it is OTP policy to try and control the information being sent to intermediaries – i.e. avoid prosecutorial strategy from reaching them – however, it was established as judicial fact in Lubanga that the intermediaries, who in fact were activists, were keeping themselves apprised of the developments in International Criminal Justice and the objectives of the OTP’s Investigations teams (*Lubanga* Judgment pursuant to Article 74 of the Statute, 2012, paras. 183–4).

It is, however, necessary to explain why the OTP feels it so necessary to hold such distance between itself and the local community. In the past, the OTP has explained that their witnesses risk (and some have experienced) reprisals when they were discovered to be cooperating with the ICC or the OTP (*Bemba* Public Redacted Version of “Decision on in-court protective measures for Witness 45”, 2016). This problem has plagued several international tribunals, including as the Special Tribunal for Lebanon (STL), which has done a much better job of integrating Lebanese staff into their court structure, and which maintains a permanent and open presence in Lebanon (*Al Jadeed S.A.L. & Al Khayat* Redacted version of Decision in proceedings for contempt with orders in lieu of an indictment, 2014; RSF, 2015).

Investigators

As previously described, the Investigations Division of the OTP is an organ within an ICC organ. This administrative organisation has some unusual effects on investigations. First is the relatively stringent control the Prosecutorial Division exerts over its investigation teams, in comparison to control levels traditionally associated with

criminal investigations (Fedorova, 2012, p. 143–4; Whiting, 2013). Secondly, the OTP continues its investigations well after the trial has begun (Fedorova, 2012, p. 15; Whiting, 2013), which means the investigations conducted by the defence and the LRV also continue well into the Trial Phase. Thirdly, as the Prosecutor is the arbiter of what should and should not be investigated, there is often a conflict of interest between her role as prosecutor and her mandate to investigate all facets of a case, including potentially exonerating information (Fedorova, 2012, p. 145–6)

In my experience, as well as that of those interviewed, it appears that the OTP's institutionalised structure, which features strict divisions between prosecutorial tasks, creates tension within the OTP and may have caused a break in effective communication. In effect, the trial attorney is often left unaware of the “factual minutiae of the specific case” (Fedorova, 2012, p. 160), and oftentimes the left-out details are culturally relevant, but may appear as less important than facts that a cursory glance suggests prove the elements of the crime. As investigators may understand the value of certain cultural knowledge, sometimes there appear to be “disagreements between the senior trial attorneys and the investigators”, regarding what is important to the trial and what is extraneous, with suggestions that these disagreements may have an effect on the quality of litigation (ICL Practitioner 2, 2020; *Katanga* Judgment pursuant to article 74 of the Statute, 2014).

Finally, as previously described, the investigators hired by the OTP are predominately from North America, Europe or Australia. This increases the reliance the investigators have on the intermediaries and increases the risk of politically charged or partisan evidence and allegations making their way to the courtroom. Additionally, there is a preference for investigators who have a history of working with potentially activist human rights organisations, NGOs and IGOs, which further influences the orientation of those who build the evidence for the trial team. When considering that the average Senior Trial Attorney is less likely to be in direct contact with individuals based in the field than their defence counterparts (ICL Practitioner 2, 2020; Clark, 2018, p. 148), and the reliance on intermediaries who have a vested interest in the result of the trials (*Ruto & Sang* Transcript of Hearing on 1 November 2013, p. 12, lns. 15–22), it may be possible that the distance put between a trial team and the cultural experts on its investigation team may contribute to the investigatory shortcomings of the Prosecution's case.

Translators and Interpreters

Translators and interpreters before the ICC are members of the Registry’s Language Services Section (LSS) – previously known as the Court Translation and Interpretation Section (STIC, derived from the French acronym *Section de traduction et d’interprétation de la Cour*). They are under immense pressure to deliver important and exact legalese into their target language. Translators, especially those whose target language is a local language, often come from the affected communities and hold an immense wealth of cultural knowledge.

To accurately interpret tribunal proceedings, both a solid foundation in the grammar and vocabulary of a language and an in-depth knowledge of its cultural aspects are essential. While many in the courtroom expect the delivery of a ‘true’ interpretation of the testimony, question or statement, “every act of translation involves interpretation and judgement” and is never a “purely technical matter” (Edwards, 2010, p. 96). Language is ordinarily layered in meaning, subtext, nuance and allusion; to a native speaker, full comprehension requires one to “read between the lines” (*Ibid.*, p. 96–7). In order to produce the most accurate interpretation, including the associated nuance, subtext and full range of intended meaning, the interpreter must invariably access their knowledge of two cultures, that is, of both the source language and the target language (*Ibid.*).

I have had informal conversations with interpreters and translators who were able to share cultural knowledge with me. In one example, it was explained to me that in the affected community with which I was interacting, meetings and appointments could be more accurately planned in reference to the Islamic prayer schedule – which shifts daily based on the position of the sun – as opposed to the precise time of day on the 12- or 24-hour clock. In another example, during one trial, several interpreters were hired on week-by-week contracts to assist the Defence in translating evidence. However, interpreters for languages such as Zaghawa or Swahili were from the affected community, and were able not only to provide interpretation to whichever team needed it, but also were to explain the subtext to the legal teams. One phrase that came up from trial preparations was to ‘never cross the *wadi* in the winter.’ This phrase meant that crossing a *wadi* or a dried river / valley during the winter (which is in the rainy season) is dangerous as water may suddenly arrive and deluge the traveller. Without the interpreter, the legal team would have had to conduct extensive research of the

geography, climatology and colloquial history of the situation country to gain this knowledge, and even then, its importance may not have been as easily grasped.

In the future, the ICC presumably will bring these temporary contract interpreters and translators under more permanent engagements as the trials move into later stages. However, as demonstrated, these individuals were able to contextualise the meaning behind wording which is shrouded in cultural nuance. Such knowledge is just as important before the trial as it is during.

Legal and Registry Staff

In addition to the language staff, many individuals in the Registry, defence teams, victim's teams, Chambers, and even Prosecution come from the affected communities or countries. This is because after a conflict, individuals from the affected communities often come forward to offer their first-hand knowledge of their communities and the conflict (Elias-Bursać, 2015, p. 27).

An early example of cultural expertise being used by the prosecution is the Nuremberg trials. The US chief counsel hired an individual named Robert Kemper, a German, who assisted the prosecution not only with his legal skills, but also with his knowledge of Germans and Germany. Of note, he was the head of the Defense Rebuttal Section, which was tasked with “anticipating the defence strategies of the accused and for preparing cross-examination” (Holocaust Encyclopedia, 2020). Similar steps were taken in the Tokyo trials as American lawyers “worked closely” with Japanese lawyers to become “acquainted with the various Japanese mentalities, nuances in languages, and customs” (Glazer, 2017, p. 82).

Defence teams are more likely to have a counsel who comes from the country or the affected community. This means that some court actors themselves may have the advantage of holding cultural expertise that opposing counsel or judges may not have. As noted by Cooke, much of the cultural knowledge is brought forward by defence teams (Cooke, 2019, p. 23). In this case of international courts, it is no different. This is because the defence, and to an extent the LRV, have clients who can offer clarifications, provide cultural context and/or guidance for the field when navigating the evidence which the prosecution have laid out in their allegations – becoming an immediate “in-house advisor” who can offer “contextual, cultural and historical” expertise, which the

defence teams then go out and confirm in the field independently (ICL Practitioner 2, 2020).

At the ICC, the convention that nationals from the affected community will represent their clients is also practised. As an example, Mr Dominic Ongwen, a Ugandan who was Joseph Kony's number two in command of the Lord's Resistance Army (LRA), accused of being responsible for the decades of war in Northern Uganda, had a lawyer from Uganda. Another example is Mr Joshua Sang, a Kenyan radio host accused by the ICC of stoking Kenya's 2007 post-election violence, who was represented by a Kenyan lawyer. The latter lawyer at times stopped their own questioning on the record, as they noticed the interpretation was different from the meaning trying to be conveyed by the witness and wanted to clarify this for the ICC judges (*Ruto & Sang* Transcript of Hearing on 3 October 2013, p. 5, lns. 3–7).

Some of these lawyers have cited their cultural expertise as giving them an advantage, especially when questioning witnesses in court. Before the ICTR, a Rwandan defence lawyer explained that because he was Rwandan, he could properly “read somebody's demeanour”, their body language and their tone (Sindayigaya, 2008, part 5, 01:58). Additionally, and as described in the previous section on language assistants, some defence counsels have pointed to their ability to more effectively interview or question their clients and witnesses (as opposed to an individual who relies on an interpreter). Before the ICTR, Counsel Sindayigaya explained that sometimes interpretation can only transmit 80% of the full intended meaning (Sindayigaya, 2008, part 5, 01:33) suggesting that tone, body language and the intentions behind word choice account for the remaining 20%. Having members of the affected community serve as counsel is especially prevalent in ICTY and ICC, where they are not hired directly by the Court, but are often selected by the accused or the victims they will represent. Before the ICTY, social scientists have pointed out that the international lawyers and consultants who worked with the prosecution's legal team had a limited knowledge of the legal traditions and culture, which “undermined the courts' legitimacy and effectiveness” (Lowry and McMahan, 2010, p. 110).

Expert Witnesses

This class of cultural experts falls most in line with the traditional view of the courtroom expert. They can be “anthropologists, academics, or leaders or elders from a particular traditional community”, pretty much anyone who meets the Chamber's qualifications

of an expert on a particular matter (International Criminal Court Regulations of the Court, 2018, reg. 44; Holden, 2019b, p. 182; Rautenbach, 2019, p. 161). Additionally, expert witnesses, including those on cultural matters, can be called by any party, including the Chambers (International Criminal Court Regulations of the Court, 2018, reg. 44; *Lubanga* Decision on the procedures to be adopted for instructing expert witnesses, 2007; *Bemba* Decision on the procedures to be adopted for instructing expert witnesses, 2010; *Ongwen* Decision on Prosecution Request in Relation to its Mental Health Experts Examining the Accused, 2017).

Sociologists and anthropologists have a history of being involved as cultural experts who provide guidance to ICC judges. For example, in the Ngudjolo and Katanga cases, which relate to the allegations of war crimes and crimes against humanity committed in the Democratic Republic of the Congo (DRC) since 2002, sociologist Julien Seroussi was instrumental in assisting the judges to appreciate the cultural context in Bogoro, DRC and had aided them in deliberations. In another example from the ICC, once it became apparent that Acholi cosmology would play a major role in the trial of the Northern Ugandan conflict, the Ongwen trial saw the Prosecution, LRV and the Defence calling for expert witnesses to provide cultural and historical knowledge in regard to the historical, cultural and spiritual aspects of the LRA (Nistor *et al.*, 2020). In that case, it was brought to the Court's attention that Joseph Kony had exploited a feature of Ugandan spiritualism during his military campaign: "the general population of Uganda, particularly the Acholi, believes in practices such as witchcraft or *cen*". *Cen* is a spirit that can possess people. The Ongwen Defence put forward the argument that spiritual indoctrination was part of a 'brainwashing' process suffered by Ongwen and many other child soldiers (Nistor *et al.*, 2020). Unfortunately, both parties called on these experts to "further elaborate on cultural concepts that had been extensively explained by the local population" and instead found them trying to place the cultural concepts with equivalents from Western society, with one even referring to 'we in the west' or trying to equate *cen* possession with PTSD (Nistor *et al.*, 2020).

In a particular example, during the Ongwen trial, the Defence called Mr Jackson Acama, a "clerk to the spirits" (another term for witchdoctor), to testify on the cultural knowledge he picked up during his 17 years with the Lord's Resistance Army and its predecessor, the Holy Spirit Mobile Forces (Maliti, 2019). During his testimony, Mr Acama described the various spirits that LRA leader Joseph Kony would commune with, and the various powers associated with them – including their influence on

spiritual operational commanders (*Ongwen* Transcript of Hearing on 25 October 2018, p. 20, lns. 2–4). Mr Acama also explained that the failure of a subordinate in the LRA to comply with Mr Kony's orders would result in the spirits notifying Mr Kony of the insubordination (*Ongwen* Transcript of Hearing on 25 October 2018, p. 19, ln. 13). However, there appears an overwhelming tendency by the trial teams (on all sides of the courtroom) to try and force the testimony provided by these cultural experts into the 'neat little boxes' delineated by the international criminal law framework. In the example of the *Ongwen* trial, the Defence and Prosecution tried to fit the testimony about spirits into Western ideas of mental health, suggesting that some spirit possessions could be equated to post-traumatic stress disorder (Samson, 2019). This is especially problematic when considering the historical and cultural complexity which can be found in all cultures – complexity that can lend itself to virtually any legal argument (Wilson, 2011, p. 70; Eltringham, 2013, p. 339; Nistor *et al.*, 2020).

A Lack of Expertise, not of 'Experts'

In general, defence and LRV teams are structured and function quite differently from their OTP counterparts. While an OTP Case Manager is primarily responsible for organising and digitising evidence, and communicating with the defence and LRV, the defence and LRV counterparts must not only complete these tasks but also serve as legal researchers and drafters, in-court assistants, contact persons for witnesses and resource persons, and on-site investigators who travel frequently to the field. Defence and LRV's legal assistants, counsel and investigators are expected to perform a similar variety of tasks. Unlike the OTP, all members of the defence and LRV staffs share and assist each other in the same tasks. This usually means that all members of LRV and defence teams have constant contact with witnesses, cultural experts, and one another. This translates to a faster rate of transmission of cultural knowledge from one team member to all team members on the smaller and more intimate defence and LRV teams than the more bureaucratic OTP.

Defence and LRV teams may (but do not always) hire resource persons or investigators who are from the situation country or are locals from the crime base. The OTP has, so far, avoided the use of investigators who are nationals of the situation country (Clark, 2018, p. 67), although there is no specific Regulation of the OTP against it (Regulations of the Office of the Prosecutor, 2009). In my experience, investigators,

lawyers and support staff are based in The Hague and perform “Field Missions” to the situation country (or a neighbouring country) for investigatory activities.

The two examples below were selected because they demonstrate places where the ICC could benefit from cultural expertise. For example, adjusting the manner in which the passage of time is described or measured, although it may seem unimportant to some, can improve the relations between the Court and witnesses. The second example represents a larger shortfall of all parties before the ICC; it illustrates the tendency to take cultural knowledge and force it to fit into typical Western legal categories.

Telling time

As Clifford Geertz once wrote, “There are many ways in which men are made aware, or rather make themselves aware, of the passage of time” (Geertz, 1973, p. 389). In today’s ‘modern’ world, the Gregorian calendar has come to be a temporal *lingua franca* of sorts, even as many societies use their own calendar alongside the Gregorian. All trial teams – OTP, Defence and LRV – have had the difficult task of ‘factually’ establishing the timeline of alleged events in parts of the world where time may not be measured the same as in The Hague.

This is not to say that the ICC has engaged in trials where the witnesses are unaware of Gregorian months, or have not heard of them; they most certainly have. I refer to the internalised sense of time – how we ‘feel’ the time of a year pass – whether it be through seasons, months, or work schedules, and how that in turn affects how we remember the chronology of the events that fill our lives. For many around the world, the linearity of time is predominantly felt by the changing agricultural seasons, the alternation of dry/wet seasons (perhaps accompanied by flooding of bodies of water) and the passage of religious holidays or markers.

An interesting example of this before the ICC, which demonstrates how cultural knowledge – not just local knowledge – could have been applied, appeared during *The Prosecutor v. Dominic Ongwen* trial. At the beginning of the trial, the Prosecution trial lawyers asked their witness for specific dates or months of events, but were sometimes unsatisfied with the witnesses’ responses. The following excerpt is from the Prosecution’s questioning of one of their witnesses, number P-0205:

Q: All right. Now we'll discuss the bay in detail, but just before that, around when did Ngora happen? The event at Ngora, around when did it happen?

A: It was around I believe October, November.

Q: All right. And just as a reminder, of course if at some point you don't know or you don't remember, don't try to please me, just say you don't know. All right. But that's just as a warning for the future... (*Ongwen* Transcript of Hearing on 6 March 2017, p. 25, lns. 10–15).

The Defence, however, took a very different approach when asking witnesses for a temporal range: they tried to tie them into the local method of keeping track of time by referring to agriculture and the timing of the rainy season. A defence counsel explained to me that the witnesses many times found it easier to associate time with what fruit was in season, what agricultural products had been planted, how tall the grass was, if the tall grasses had been burned yet, etc. rather than a strict date (ICL Practitioner 1, 2020). Furthermore, although the Defence used the Gregorian calendar for the benefit of the court and judges, it offered the witness the option to answer in either Gregorian, in terms of the growing seasons, or in terms of the dry/wet seasons. For example, during the Defence cross-examination of witness P-0142, after establishing for the judicial record when certain 'seasons' Uganda would correlate to the Gregorian calendar, counsel proceeded as follows:

Q: Now, Mr Witness, the reason for this discussion is so that over these next few sessions if we ask you for dates or times, if you can't remember the year or the month, please feel free to describe it by dry season, rainy season, or whether any type of agricultural product are in – are being harvested. Is that okay, Mr Witness?

A: That's fine. (*Ongwen* Transcript of Hearing on 8 May 2017, p. 14, lns. 17–21).

This propensity for marking time by agriculture or rainy season does not seem to be limited to those who work directly in agriculture. This strategy was eventually picked up by the OTP trial lawyers as the case progressed, as it became clear it was easier to extract

relevant information in this way than than by using the Western approach of eliciting exact, Gregorian calendar dates from witnesses (ICL Practitioner 1, 2020).

In my own experience, when I had to contact individuals in an Islamic country, after advice from a resource person on our team, I learned to keep track of the daily Islamic prayers, as many fighters marked the passage of time in a day by which of the Islamic prayers had passed or were to come. As the time of each prayer changed with the changing position of the sun against its zenith or the horizon, I found that a person who gladly accepted a phone call at noon one day would ignore a call at the same time a week later. Understanding this made it easier to communicate with witnesses and enabled me to demonstrate a degree of respect for their culture and beliefs. I found more success in planning a call after *salat al-duhr* (after the sun's zenith) or *salat al-'asr* (mid-afternoon) as opposed to planning one at 12h00 or 15h30.

Rituals, religion and Worldviews during Investigation and in Trial Narratives

The Cambodia Chambers has also criticised the OTP for failing to further explore cultural and spiritual elements that “warranted special attention” and could have produced a “more nuanced interpretation of certain facts” (*Katanga* Judgment pursuant to article 74 of the Statute, paras. 66–7).

Recently, scholars have criticised the ICC's efforts to translate cultural knowledge into the Court's legal language, which “oftentimes turns into mutilation during the course of legal argumentation” (Nistor *et al.*, 2020). Earlier, when the OTP referred to cultural or spiritual elements of a crime, such as a ceremony, it appears they did so only when they felt the ceremony could be used as evidence to prove the commission of the crime (ICL Practitioner 3, 2020). It has been observed “that local cultural concepts related to spirituality are often amputated from their context or stretched beyond their original meaning to fit the legal framework” (Nistor *et al.*, 2020). In other words, the pieces of local culture, when they must fit into the international laws presented in the ICC Rome Statute, are “selectively broken down by prosecution, defence, and victim's representatives into pieces that can fit within the puzzle of the international criminal law framework” (*Ibid.*). In other examples, the OTP has entirely ignored cultural realities because in the Western traditions at the base of the ICC trial process, the law is hermetically calculated and a stigma is placed on introducing into the courtroom

anything that might undermine the image of the court as a “laboratory where the science of law is performed” (Levenson, 2008, p. 574).

A prominent example of the importance of understanding Ugandan spirituality comes from the Ongwen trial. From the beginning of the trial, it became apparent that Acholi spiritualism would play a larger role than the OTP had foreseen. According to the Defence, the events in Northern Uganda could not be separated from the Acholi cosmology – which mixes elements of Christianity with animism and human interactions with ghosts, witches and spirits (*Ongwen* Transcript of Hearing on 18 September 2018; *Ongwen* Transcript of Hearing on 25 October 2018; *Ongwen* Transcript of Hearing on 19 November 2018; Nistor *et al.*, 2020). However, as a former member of Mr Ongwen’s legal team pointed out “[the OTP] knew [the belief in witchcraft] was present [in Uganda], they just didn’t understand how it played into the context of the LRA” (ICL Practitioner 1, 2020). They also pointed out that many of the witnesses were afraid because they believed Mr. Kony’s powers of witchcraft enabled him to know what they did, where they were and what they were thinking. One interviewee is confident that these beliefs “could have played a role in their willingness to testify” (ICL Practitioner 1, 2020). Not only was the OTP’s trial team unprepared (and uninformed) as to the importance of the Acholi spiritual beliefs in the trial, some OTP staff were later heard on a Ugandan radio broadcast, laughing about how some believed that witchcraft would have a bearing on the trial (ICL Practitioner 1, 2020).

Another example, this time from Kenya, was from the Ruto & Sang case, where the Defence referred to the OTP’s allegations that post-election violence was “organised around pre-existing traditional Kalenjin rituals and structures” (*Ruto & Sang* Transcript of Hearing on 11 November 2013, p. 15, lns. 8–9). As defence counsel Katwa explained: “The Prosecution has put a sinister spin on all aspects of Kalenjin culture, [and] pre-existing [Kalenjin] structures including circumcision, getting engaged to get married ... [and] the ag[ing] process of getting to become an elder” (*Ruto & Sang* Transcript of Hearing on 11 November 2013, p. 18, lns. 15–17). For example, during the trial, the Prosecution alleged that there was a cleansing ceremony where a bull was sacrificed to “chase away curses”, resulting from alleged Kalenjin ejections of the Kikuyu from the Rift Valley in May 2008. The Chambers, in its decision to withdraw the charges, admonished the OTP’s assumptions that such ceremonies were not part of a criminal conspiracy:

Cleansing or reconciliation initiatives are common practice in numerous cultures and religions. It cannot be assumed that participation in such ceremonies, especially by persons of significance within an affected community, is evidence of acquiescence or approval of the atrocities for which absolution is sought. (*Ruto & Sang* Public Redacted Version of “Decision on Defence Applications for Judgements of Acquittal”, paras. 114–17)

In another example from the Ruto & Sang case, the Chambers questioned what the OTP alleged were Kalenjin “war cries”, as witness identified these “war cries” as alarm cries, calls for help, or songs traditionally used during Kalenjin circumcision ceremonies (*Ruto & Sang* Public Redacted Version of “Decision on Defence Applications for Judgements of Acquittal”, para. 66).

Enhancing the Dialogue between Cultural Experts and Courtroom Actors

The OTP’s main problem seems to be an overreliance on intermediaries and a bureaucratic structure that isolates cultural experts from more integrated participation in the analysis of evidence and vital trial preparations for the trial teams. As demonstrated, this means intermediaries end up having a larger influence on the direction of investigations, the contacting individuals and the information which is transmitted from the field to the legal teams in The Hague. The use of intermediaries per se is not the problem and many can be cultural experts. The problem comes when the legal team fails to appreciate the importance of certain cultural knowledge provided by the wide variety of cultural experts already embedded in the Court structure, or fails to verify/corroborate the information it receives from the field. More attention and in-depth appraisal of cultural expertise could give the OTP a more nuanced approach to prosecution, something the defence and victims are more apt to accept.

Both the defence and the OTP have the same problem when they over-rely on their resource persons and intermediaries, or failing to verify or corroborate the evidence or narratives received with personal knowledge or experience of the local culture from the legal team: successfully transmitted cultural knowledge is often ‘amputated’, ‘manipulated’, ‘mutilated’ or possibly subjected to racial stereotypes of those on the legal team who may be unfamiliar with the reality of the affected communities (Sagan, 2010; Nistor *et al.*, 2020). This problem is exacerbated for the OTP, as opposed to the

defence and LRV, because the OTP has much less access to embedded cultural experts can offer clarifications, explanations and/or guidance when navigating the evidence. In addition to other formal duties, many defence and LRV staff serve as immediate in-house advisors who can offer “contextual, cultural and historical” expertise, which the defence teams then go out and confirm in the field (ICL Practitioner 2, 2020). Hence, the OTP may be failing to properly challenge evidence that is inconsistent with their preconceived narratives (ICL Practitioner 1, 2020; ICL Practitioner 3, 2020).

Future research into the subject of cultural expertise before the ICC, and international tribunals in general, would greatly benefit from a more detailed exploration of how ad hoc courts such as the STL, ICTY and ICTR’s sole focus on one country assisted legal practitioners in becoming more familiar with the nuances of the affected communities. For example, how integrated members of the affected community were in their respective tribunals. Such research could clarify the importance of cultural experts, and the benefits of their assistance to the success of trials.

I argue for a change in how the ICC approaches cultural knowledge, and a change in how they handle the wealth of information provided by the variety of cultural experts that interact with the Court. Just because a certain belief may, from the Western perspective, be “contrary to the laws of biology, chemistry and physics” (*Ongwen* Transcript of Hearing on 19 November 2018, p. 71), does not mean they cannot add clarity to the totality of evidence being presented by a witness. In my opinion, the ICC will not be able to take another step toward becoming a truly international court until the institution as a whole, and in the OTP particular, come to appreciate the full range of cultural expertise available to them.

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