

## INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS SYMPOSIUM: EXPERTISE, UNCERTAINTY, AND INTERNATIONAL LAW

# Integrating a Socio-Legal Approach to Evidence in the International Criminal Tribunals

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Although there has been a massive literature on the political and jurisprudential development of international criminal tribunals over the last 20 years, there has been a lack of empirical research on the operation of the tribunals, especially in the field of socio-legal studies. Socio-legal studies examine legal phenomena and institutions through the lens of different disciplines, encompassing a range of methodological approaches and situating law in a broad social and political context.<sup>†</sup> These studies have permeated many fields of law, yet although the demand for empirical research in the fast-developing area of international criminal law is growing, there has to date been a shortage of socio-legal research to inform and evaluate the international criminal tribunals.

The guest editors of this symposium considered that there would be value in bringing together a group of scholars with expertise in socio-legal studies and international criminal procedure and evidence to discuss particular aspects of their work and how the use of socio-legal studies can enrich the development of international criminal law and procedure. With this aim in mind a conference was held in University College Dublin (UCD) in November 2011 and this symposium has its roots in that conference. The editors would like to thank the School of Law (UCD) for its support for the conference and the *Leiden Journal of International Law* for agreeing to publish the symposium. A number of articles are published in this issue. Other articles under way will follow in the next issue.

The field of evidence was chosen as a particular focus for the conference as it has posed particular challenges for the prosecution of international crimes. Although there is some literature on the core principles and rules of evidence that have been

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† For a good summary of what socio-legal studies mean, see P. Cane and J. Conaghan (eds.), *The New Oxford Companion to Law* (2008).

developed by the ad hoc tribunals of the Former Yugoslavia (ICTY), Rwanda (ICTR) and Sierra Leone (SCSL), and at the International Criminal Court (ICC),<sup>2</sup> there has been a lack of empirical analysis of how evidential issues have been handled by the various actors involved and what impact this has had on victims, witnesses, and defendants and on international criminal justice as a whole.

The symposium begins with a general introduction by the Hon. Justice Teresa Doherty, who is ideally placed to give a unique perspective on the evidentiary issues faced by the tribunals and to provide a context for the kinds of question that can be addressed by socio-legal research. Quite apart from her recent experience as a judge in the SCSL, she has a long experience of working in different legal cultures, having practised law in Northern Ireland and Papua New Guinea before being appointed in 1987 as a principal magistrate in Papua New Guinea. From 1988 to 1997 she served as a Judge of the Supreme and National Courts and was the first woman to hold high judicial office in Papua New Guinea. From 2003 to 2005 she served as a Judge of the High Court and the Court of Appeal of Sierra Leone. She joined the Special Court of Sierra Leone in January 2005 and has served there as presiding judge of Trial Chamber II and was a member of the bench that gave judgment in the trial of former Liberian President Charles Taylor in The Hague.

Each of the articles that follow illustrates ways in which socio-legal studies can enlarge our knowledge and understanding of evidentiary practice beyond the 'black-letter' rules of procedure and evidence. They draw attention to particular socio-legal research projects carried out within the international criminal context and to the lessons that can be learned for international law and practice from socio-legal research.

Yvonne McDermott's article considers the practice that has been developed of receiving witness statements in lieu of oral evidence. Unlike much of the legal literature to date, which has focused on the issue of the admissibility of such statements, her focus is on the impact that such evidence has had on the final judgment and what weight it has been given in comparison with oral testimony. In considering what effect admissibility decisions can have on the ultimate weight that is attached to evidence, she illustrates the value of engaging in detailed textual analysis of the trial judgments of the tribunals.

In his article Christian De Vos examines the under-researched area of international criminal investigations. Drawing on the comments and reflections of former ICC staff, as well as on an emerging jurisprudence critical of the Office of the Prosecutor's investigative techniques, he provides a broad outline of how ICC investigations have been structured and approached within the overall architecture of the OTP, suggesting that, at an institutional level, investigative practices have not been sufficiently prioritized in the past decade of the Court's operations. This lack of prioritization appears to be premised, in part, on a presumption that keeping the Court at a distance best preserves its impartiality and efficiency. De Vos argues that the OTP should develop a more field-based orientation to its investigations, while

<sup>2</sup> See, e.g., K. Khan, C. Buisman, and C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (2011). See also G. Sluiter et al. (eds.), *International Criminal Procedure: Rules and Principles* (2013).

also developing better partnerships with the variety of local actors – individuals as well as non-governmental organizations (NGOs) – that it engages.

Drawing upon her experience of engaging in one of the most expansive empirical studies of international trial practice ever undertaken, during the second mandate (1999–2003) of the ICTR, Rosemary Byrne offers insights into how empirical socio-legal research can inform our understanding of aspects of trial practice. She argues in particular that in an era where the struggle for the legitimacy of the institutions of international criminal justice continues, with much critical scrutiny being focused on performance, socio-legal research may offer legal scholars important insights into what transpires in the international criminal trial chamber, beyond what we can learn from the self-assessment of judges and lawyers operating within the system.

Finally, in their article, John Jackson and Yassin M'Boge use a recent smaller-scale comparative pilot study into the evidentiary challenges that face practitioners across a range of international criminal tribunals to reflect upon how socio-legal research can enlighten international legal practice. They illustrate how self-assessments which are carefully triangulated across the full spectrum of professional practice—including prosecutors, defence counsel, judges, and officials from Chambers and the Registry—can extract useful data on how practitioners from different legal cultures make international criminal justice work and on the contribution they are making towards the development of professional norms at the international level.