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# Evidence in International Criminal Tribunals: Contrast between Domestic and International Trials

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**Abstract**
This keynote address delivered to a Conference on Evidence in International Criminal Tribunals at University College Dublin in November 2011 considers how differently evidentiary issues are dealt with by international criminal tribunals from domestic tribunals. It is argued that, although there are jurisdictional differences affecting what international prosecutors have to prove before international criminal tribunals, many of the problems and difficulties that beset international tribunals are also to be found in domestic tribunals and both types of tribunal have similar duties and issues to grapple with.

**Key words**
evidence; contrasts between domestic and international tribunals

## 1. Introduction

When asked to speak on the contrast in evidence and presentation of evidence between domestic and international trials my initial reaction was that there are not many differences. The duty of an international tribunal, just as in a domestic court, is to give an accused person a fair and just trial within a reasonable time, and to do so involves listening to evidence and making a finding of truth beyond reasonable doubt. The same standard as is applied in any domestic national jurisdiction: upholding a just and fair system.

However, whilst I maintain that fundamental philosophy, I inevitably found differences as I researched. The first and most obvious difference between the domestic and the international tribunals is their different jurisdictions. A domestic court will have to determine if the elements of a crime, such as murder or rape, have been proven beyond reasonable doubt. The international tribunals dealing with crimes against humanity, crimes against international customary law, and breaches of the Geneva Conventions (commonly referred to as war crimes) must determine both the elements of the crime and the extra elements, showing that an accused thereby committed serious violations of Article 3 common to the Geneva Conventions, or,

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with crimes against humanity, that there was a widespread or systematic attack upon any civilian population, or that there were serious violations of international humanitarian law.

As further hybrid international criminal tribunals were appointed, I observed that there appears to have been a conscious decision by the United Nations or the treaty body agreeing to their institution to limit their jurisdiction. Hence whilst the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was to try 'those responsible' for crimes enumerated in its Statute, the jurisdiction of such tribunals as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) is limited to those who bear the 'greatest responsibility' or the 'most responsibility'. This has led to considerable argument and evidence that an accused's role or/and his relationship with the perpetrators of the crimes did not constitute 'the greatest responsibility' and on what, in law and in fact, constitutes superior responsibility.[1]

Hence, already I have identified two extra elements an international tribunal must find and adjudicate upon when deciding the guilt or innocence of an accused.

## 2. The clash between local culture and codified law

Decisions, such as the SCSL Appeals Chambers decision on the recruitment and use of children in hostilities, commonly referred to as child soldiers,[2] have also given rise to arguments that the international tribunals do not take into account local social and cultural norms and differences. An example is Tim Kelsall's criticism in his book, *Culture under Cross-Examination*, that the SCSL has failed to take account of tribal attitudes to children, in particular as to when a child is considered mature, when assessing the evidence of the crime of recruiting into or using children in armed forces. Kelsall, in his research on the SCSL case of *Prosecutor* v. *Norman et al.* (the Civil Defence Forces or CDF case),[3] stressed the cultural attitudes as to when children reached maturity among the Mende people of southern Sierra Leone and stated 'that the judges were ignorant of these facts'.[4] I do not know how he determined this judicial ignorance because he did not ask me if I, as a judge of the SCSL, knew of this cultural attitude. If he had, I would have pointed out to him the different attitude to children and child-rearing in such other ethnic groups in Sierra Leone as the Temne. A related argument was made by defence counsel in the case of the *Prosecutor* v. *Brima et al.*[5] He submitted that cultural differences and attitudes as to when a child could be considered adult enough to partake in work or a fight were unique to African societies and that the Trial Chamber should consider and apply this standard rather than the age of 15 years provided in Article 4 of the SCSL Statute which prohibits conscripting or enlisting children under the age of 15 years into armed forces or

1 E.g. *Prosecutor v. Brima et al.*, Trial Judgment, SCSL-04–16-T, 20 June 2007.
2 *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL-2004–14-AR72(E), 31 May 2004.
3 *Prosecutor v. Norman et al.*, SCSL-04–14-T.
4 T. Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (2009), 155.
5 *Prosecutor v. Brima et al.*, SCSL-04–16-T, Transcript, 7–8 December 2006.

using them to participate actively in hostilities. The Court pointed out that Sierra Leone, in common with most African countries, had signed the Convention on the Rights of a Child and there should not be one standard of no or limited protection for the children of Africa and another for other children.

But the clash between local culture and codified law is in no way unique to the international tribunals. Custom as an excuse is raised in argument in defence in national courts. For example, in some communities in Papua New Guinea the belief that a person was a sorcerer or had malicious magical powers led to his/her murder. In several criminal trials arising from the murder of alleged sorcerers that I dealt with as a judge in the Papua New Guinean courts the perpetrators considered that they had done the community a service in ridding it of a malevolent person and that their actions warranted commendation and not official retribution and punishment. The accused raised such arguments in their own defence. The government had legislated otherwise and codified killing of alleged 'sorcerers' as murder, so such attempted defences were of no avail. So called 'honour killings' of young women who refuse to agree to an arranged marriage or who, in some other way, offend cultural norms are a further example of the clash between custom and the written law. As the clash between culture, legislation, and international human rights treaties and conventions is as much a live issue in domestic courts as it is in the international tribunals, it is misleading to present such clashes of culture as unique to international criminal trials.

Kelsall also refers to and emphasizes the local belief in sorcery. However, evidence of local beliefs and tradition surrounding sorcery and how evidence about it can be adduced is most definitely not unique to the international tribunals. Just because the issues are unlikely to arise in a European domestic court, it must not be assumed that they are unique to international tribunals. These issues occur regularly in domestic situations and are raised in evidence in the domestic courts in parts of Africa and the South Pacific region. When interviewed in 2004 for a student publication in Sierra Leone, Justice George Gelaga King[6] was asked about cases he remembered and gave the example of:

> a ritual murder case in which the accused person killed his brother in law to use his body parts for ritual ceremony. It was the custom in that area for members of the group to sacrifice someone at every ceremony and it was his turn.[7]

## 3. The equality of arms

Defence lawyers raise and voice particular concerns on equality of arms between the prosecutor and the defence in the international tribunals. In the SCSL, it has been argued that the staff, finance, and investigatory provision allotted to the Prosecutor are greater than those allocated to the defence. Certainly, this was stated and led

6 Presently a judge of the Special Court for Sierra Leone.
7 *Student Advocate Magazine-Sierra Leone* (2004), at 11.

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to a delay in the *Prosecutor* v. *Charles Ghankay Taylor* trial.[8] The ad hoc and hybrid tribunals are aware of this issue. The Appeals Chamber of the ICTY held:

> The Appeals Chamber has long recognised that 'the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee'. At a minimum, 'equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case,' certainly in terms of procedural equity. This is not to say, however, that an Accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution.[9]

Likewise, the ICTY Trial Chamber, whilst noting 'the Accused should have the same time as the Prosecution to present his (the Accused's) case in Chief', then held that the time might be adjusted depending on specified issues.[10]

As well as that issue of equality of arms it is often alleged during sometimes strenuous cross-examination and in subsequent submissions that prosecution witnesses can be and must have been influenced by the payments made for their travel and other expenses. The defence argue that payments are excessive and do not reflect what is necessary to bring the witness to court. In particular, it is argued that the payments influence witnesses to 'slant' evidence in favour of the prosecution. Such arguments are made notwithstanding the rules providing for the limits on expenses allowed to both prosecution and defence witnesses.[11] The thrust of the arguments in the SCSL have been targeted at the fund allowed to the Office of the Prosecutor for its investigations and locating of witnesses.[12]

However, such concerns about equality of arms arise also in domestic courts, particularly in those jurisdictions which do not provide government-funded legal aid or a public defender for indigent accused. Legal aid is not a universally accepted right or statutory entitlement available to an indigent accused person. As a judge in the national system in Sierra Leone I observed that the majority of accused persons in criminal trials did not have legal representation – and that included trials for capital offences. Such lack of legal representation not only impacted on an accused's trial itself, it also meant that administrative or bureaucratic errors and administrative negligence could lead to lengthy delays whilst people waited in custody. As a judge on an inspection of Pademba Road Prisons in Freetown, Sierra Leone, I found, inter alia, two convicted detainees who had been held for over 10 years awaiting decisions on their appeals and another 14 men held without warrant or charge for four years. They

8 SCSL-2003-01-T. See in particular defence submissions on 4 June 2008 when defence counsel, Mr Karim Khan, read a letter from Taylor complaining of lack of facilities etc. for his defence. Taylor had been declared indigent by the principal defender but his complaint concerning the defence facilities allocated to him led to withdrawal of defence counsel and a delay in his trial until another defence team was appointed.

9 *Prosecutor v. Oric*, Interlocutory Decision on Length of Defence Case, Case No. IT-03-68-AR73.2, 20 July 2005, para. 7 (footnotes omitted). Restated in *Prosecutor v. Krajisnik*, Appeals Judgement, Case No. 17-00-39-A, 17 March 2009, para. 106.

10 *Prosecutor v. Milošević*, Third Order on the Use of Time the by? Defence Case and Decision on Prosecution's Further Submissions on the Recording and Use of Time during the Defence Case, Case No. IT-02–54-T, 19 May 2005.

11 For example SCSL Rule 34(A)(ii) and Practice Direction on Allowances for Witness and Expert Witnesses Testifying in the Hague.

12 Art. 15(2) provides that 'the Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations'. The prosecutor has provisions to enable her to locate witnesses and prepare evidence for trial.

had been forgotten by the court administrative system and, without representation, their cases were ignored. A judge or tribunal can inform a defendant of relevant procedures, for example, to cross-examine witnesses, but the obligation of a judge not to 'enter the arena' curtails how far the adjudicating tribunal can go.

## 4. Judicial assessment of evidence

None of the international tribunals have juries; hence judges are both judges of fact and of law. Nancy Combs, in her book *Fact-Finding without Facts*, refers to research on juries that shows that some jury decisions reflect prejudice.[13] Although stories circulate suggesting that perverse decisions have been made in favour of an accused I have not read or done any research that would enable me to comment on this. But courts where a judge or judges sit as both the tribunal of fact and the tribunal of law are not unique to the international tribunals. Northern Ireland had many non-jury trials, the so-called Diplock courts, for specified scheduled offences in the 1970–1980s. Papua New Guinea does not have the jury system although it is a common-law country. I am not aware if there have been articles or research into the possible involvement of juries in international tribunals, but given the length of the trials, I doubt if any jury would be willing to sit for several years. The oft-repeated phrase in all the tribunals is that judges are 'professional judges' and therefore sufficiently experienced to objectively weigh up the evidence. At times, I felt this remark was made sardonically.

Combs wrote her criticism of fact-finding in the tribunals after 'a large scale review of transcripts'. I query how anyone can assess the credibility of a witness without observing his/her demeanour and make conclusions that the evidence in the transcripts did not support findings. This was brought forcefully home to me on one occasion when a legal officer, preparing a draft opinion, dismissed the evidence of one witness as not credible. The legal officer had not been in court and had relied on the transcripts, and when I queried these conclusions, she explained that the witness was, in her view, not credible because she repeated the same answer. I remembered the witness very well; she was young, nervous, hesitant, but she was very sure of her facts, and very credible. As John Jackson and Yassin M'Boge's review shows,[14] Combs's analysis of the tribunals is restricted to one case in the SCSL and to a limited number of cases in the ICTR and has a 'tendency to make rather sweeping conclusions on the basis of a lack of substantial evidence', leading to 'her suggestion that the judges in the Trial Chambers take a lackadaisical attitude toward testimonial deficiencies'.[15]

Among other matters of which Combs is critical is the evidence of time, dates, and distance used by the international criminal tribunals. I do agree that such evidence can be vague, but the type of difficulty she speaks of is not, in my working

13 N. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).

14 Y. M'Boge and J. Jackson, Review of *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, (2011) 38 *Journal of Law and Society* 456.

15 Ibid., 458.

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experience, unique to the international tribunals. Witnesses who have not had the benefit of education, or not been exposed to societies where the majority of people are conscious of the measurement of time, often struggle to convey a precise explanation of their evidence to persons geared to, even governed by, clocks, speedometers, and precise measurements. Attempts to clarify a time when events took place by asking about a particular agricultural season are of limited success, as seasons can vary in length and time depending on the location. Again, this is in no way unique to the international tribunals: it occurs in those jurisdictions where modern measurement practices are not common.

In contrast to Combs's critique is the view put forward by the monitor, Jennifer Easterday of Berkeley University Monitoring Group, who commented on the trials in the SCSL.[16] She suggested the court could have saved time by following an example in the ICTY of admitting written evidence. This reflects on the wider debate on whether the civil- or common-law procedural systems have been adopted in the international tribunals. However, I mention it because these two critiques are examples of the occasionally conflicting criticism that judges and practitioners encounter. A personal reaction to such critiques is that many of the criticized decisions, rulings, or submissions were made as part of the continuing running of a trial, made without the benefit and knowledge that hindsight brings and the benefit of time to cogitate on options.

In most domestic jurisdictions the judges, witnesses, and parties speak a common language and are familiar with its nuances. Likewise, they usually have some familiarity with the local geography. In the international tribunals, judges and lawyers come from diverse countries and the hearing is often held in a country away from where the alleged crime took place. This can lead to practical problems. In any jurisdiction, interpretation from a local language into the language of record can be problematic. The use of certain words in one language may not readily translate into another language; witnesses may not be prepared to use certain words, for example, those relating to body parts, because of cultural attitudes and restrictions. This leads to problems in trying to convey what actually happened. Interpreters, even the most professionally efficient, can use a word which sounds the same in English but has a different meaning when used in a Creole or Pidgin language and judges have to be vigilant to ensure proper interpretations.[17] Again, these problems are not at all unique to international tribunals; exactly the same happens in national courts where interpreters are used.

Adducing evidence on specific issues, such as the age of a child, in places where there is no compulsory registration of births or where proper birth records are not maintained is problematic. Again, this is not unique to the international courts: I regularly had this problem in courts in the Pacific, when deciding whether a person facing a criminal trial was a juvenile or an adult.

16 J. Easterday, *Berkeley University Monitoring Group Report on Special Court for Sierra Leone* (2008).

17 E.g. the word 'mate' in Australia is a friend, in English a friend or fellow worker, but in Sierra Leonean Krio it is a co-wife of the same husband.

In that jurisdiction we were advised that the most reliable and readily available method to ascertain the approximate age of a juvenile was to have the person's teeth examined; apparently, wisdom teeth do not erupt until a certain age and this was, then, an accepted practice. In cases involving child soldiers in the international tribunals this was not possible as the evidence that was being adduced was anything up to ten years after the events.[18] In the cases before the SCSL the evidence of an adult with reliable experience, for example a teacher or parent, was accepted as evidence when making a finding of the age of a child, provided the witness was credible and reliable. However, it was approached with caution.

In my opinion a court, be it a national or an international court, must be vigilant to maintain a balance between ensuring that justice is not evaded by the pedantic insistence on documentary evidence that does not exist in some jurisdictions, and ensuring that the standards of procedure and evidence are maintained so as not to prejudice an accused's rights.

## 5. The interaction of common- and civil-law procedures

In common with national jurisdictions, both the ad hoc and the hybrid tribunals are bound by rules of procedure and evidence. These rules differ from tribunal to tribunal but, in my personal view, the differences are not great. A large number of national jurisdictions have adopted common-law or civil-law procedures depending upon their historical, usually colonial, past, and over the years have amended or adapted them in line with local jurisprudence or experience.[19] However, the basic tenets of court procedures and admission of evidence that prevailed when the rules were adopted have been retained.

There has been some judicial and academic commentary on the interaction of common- and civil-law procedures in the tribunals and some argument as to which, if either, is more appropriate or should prevail.[20] The adversarial rather than the inquisitorial system of adducing evidence prevails in the ICTY, ICTR, and SCSL. The rules of procedure and evidence in the ICTY, the ICTR, and the SCSL are very similar and the SCSL rules are based on those of the ICTR.[21] The ICTR Appeals Chamber itself has noted that 'rules on examination and cross-examination of witnesses … appear to be patterned on the US Federal Rules of Evidence'.[22] There are variations

18 This was also encountered in the International Criminal Court in *Prosecutor v. Lubanga*, ICC-01/04-01/06.

19 However, the Gambia made little or no changes to the very rudimentary court rules of procedure introduced there in 1990 leading, according to my findings, to unconscionable delay in the disposal of cases: *Report to the Commonwealth Secretariat on Court Delay in The Gambia* (1999).

20 See, e.g., D. A. Mundis, 'From "Common Law" towards "Civil Law": The Evolution of the Rules of Procedure and Evidence', (2001) 14 LJIL 287', A. Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1439; K. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or "Mixed"?, (2003) 3 *International Criminal Law Review* 1; M. Fairlie, 'The Marriage of Common Law and Continental Law at the ICTY and Its Progeny, Due Process Deficit', (2004) 4 *International Criminal Law Review* 243; M. Caianiello, 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models' (2011) 36 N.C.J. Int'l & Com. Reg. 287; J. D. Jackson and S. J. Summers, *The Internationalisation of Criminal Evidence* (2012), ch. 5.

21 Art. 14 of the Statute of the Special Court for Sierra Leone.

22 *Prosecutor v. Rutaganda*, Appeals Chamber judgment, ICTR Case No. 96-3-A, 26 May 2003, para. 128.

between the rules. For example, the SCSL Rule 89(C) provides for the admission of 'any relevant evidence' whereas the ICTR equivalent rule provides for admission of 'relevant and probative evidence'. The Appeals Chamber of the SCSL noted this distinction and stated it was intended to reflect the shorter time that the SCSL was expected to exist. There is a distinction also in the rules relating to cross-examination. ICTY Rule 90(H)(i) and ICTR Rule 90(G)(i) both provide that cross-examination

> shall be limited to the subject matter of the evidence in chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of that case.

There is no such rule in the SCSL but, given the latitude allowed by the Rule 90 cited, I suggest that there is little practical difference between them.

One aspect of civil-law procedure, the adducing of evidence in writing, is accepted in the rules of both the ad hoc and hybrid tribunals. Justice Patricia Wald contrasts the fairness as opposed to the efficiency of the trend of admission of written evidence in relation to principles of fairness but she also reminds that defence counsel can and do challenge the admission of such evidence.[23] The admission of written evidence has been the subject of conflicting academic comment. As noted above, whilst Combs is critical of the calibre of evidence adduced in the case she reviewed, Easterday suggested that the SCSL could expedite the hearing process by increased use of the rules allowing the admission of written evidence.[24] When considering written evidence my personal approach is to assess it as I would any hearsay evidence – viz. with caution.

In the course of hearing two trials in the Special Court I particularly noted the number of objections to evidence (oral and written) as being hearsay and the replies thereto that the provisions of Rule 89(C) permit the admission of evidence that is relevant. This is not the forum to review in detail the legislative erosion of the strict application of the hearsay rule in common-law jurisdictions, but instead I stress that the fact that evidence is admitted does not automatically mean that the adjudicator of fact will believe it. The issues of credibility of a witness and the weight to be accorded to his/her evidence exercise a tribunal, and the weight, if any, to be accorded to hearsay is only one aspect of that exercise.

There is no obligation on one tribunal to be bound by the jurisprudence of another. A personal view is that there should be consistency of interpretation, just as there should be consistency in a national jurisdiction in interpreting and applying the law. However, despite the fact that the doctrine of *stare decisis* does not apply, the tribunals do look to and consider each other's decisions when interpreting rules they have in common and/or principles of law. Meron records that '[t]he jurisprudence of international tribunals increasingly encompasses reasoning based on cross-institutional judicial dialogue and fertilization, demonstrated by the ICTY's and other tribunals' citations to the ICJ. The ICJ too has relied on the ICTY with regard

23 P. Wald, 'To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Evidence in Yugoslavia War Crimes Tribunal Proceedings', (2001) 42 Harv. Int'l L J 535.

24 See Easterday, *supra* note 16.

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to factual and legal findings on the law of genocide', and 'in these developments, one can discern the outlines of an informal stare decisis principle'.[25] One civil law procedure is not in the ad hoc or other hybrid tribunals is trial *in absentia*. Justice Gabrielle Kirk McDonald, former president of the ICTY, noted this as one of the notable differences between the civil- and common-law systems. She recalled discussions between the judges of the ICTY, particularly the viewpoint of the late Judge Antonio Cassese, as to whether such a rule should be adopted into the ICTY Rules.[26]

With regard to the debate whether the civil-law or common-law process should prevail in the ad hoc and hybrid tribunals my personal reaction is 'does it matter?' I share with Judge Orie of the ICTY the view that as the international tribunals develop their jurisprudence, does it make a difference?[27] Neither can be said to be a 'dominant model'. In my practical experience it does not impact upon the fact-finding obligations of the tribunal.

## 6. Conclusion

Although I stated early in this talk that I identified two differences between the matters that must be considered and ruled upon by the international tribunals that do not usually arise in criminal proceedings in domestic courts, those two matters are matters of evidence that must be proven by the prosecutor. But, as I have striven to show the social and cultural problems that arise in the hearing of evidence, the application of rules of evidence and procedure and the subsequent assessment of the evidence and the application of the law to it experienced by international tribunals correspond to the experiences in the domestic national courts. All litigants are entitled to a fair hearing regardless of whether they are parties in an international tribunal or a village or magistrate's court. True, the ad hoc and hybrid tribunals are dealing with cases that span many years, large geographical areas, and several counts but the duties and issues each court must grapple with are similar and common.

25 T. Meron, 'Judge Thomas Buergenthal and the Development of International Law by International Courts', in T. Meron, *The Making of International Criminal Justice–A View from the Bench: Selected Speeches* (2011), 240–1.
26 Discussion at ICTY Global Legacy Conference, 15–16 November 2011.
27 Ibid.

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