The Impact of Cultural Diversity on International Criminal Proceedings

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Abstract
This article analyses the impact of cultural diversity on international criminal proceedings, and what may be done to counter the unfortunate conditions — limited (or lack of) understanding, alienation and disagreement — resulting from this diversity. Each of these conditions, if ignored, seriously undermines not merely the efficacy of international criminal tribunals, but also their worth from the standpoint of those who are supposed to benefit from them, i.e. actual participants (accused, witnesses and victims) and affected populations. At present, international criminal tribunals primarily understand the problem of cultural diversity as one of how to cope with linguistic variations. However, a persistent focus on culture as language hides differences in terms of other culture-specific components of equal relevance to their work, notably socio-cultural norms and convictions about justice. These variations are especially difficult to tackle. In this context, the article examines whether national courts, which are assumed to conduct their proceedings in more culturally homogenous settings, offer more appropriate fora of adjudication of grave crimes under international law.

1. Introduction
The impact of cultural diversity on the prospects of successful international dispute resolution is not a novel issue in the field of international law.¹

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Until now, however, not much has been done to advance our understanding of the significance of cultural diversity in the context of international adjudication. The reality of cultural differences between disputing parties and judicial authorities is more often understood as indicating the need for alternative methods of dispute resolution (ADR) besides adjudication. Nevertheless, this approach fails to appreciate the many recent initiatives of the international community to confer rights of access to international justice on individual human beings in fields as diverse as human rights, criminal justice and regional cooperation. International adjudication is no longer mainly viewed as one option among others to resolve international disputes, but as flowing from a human right of individuals to access justice regardless of location or citizenship. It is also the result of a growing belief that the international community has some responsibility in ensuring such access, especially in response to genocide, war crimes and crimes against humanity.

The emerging recognition of access to international criminal justice as a right of individuals makes it all the more important to consider how to secure an effective and meaningful protection of this right. The prevalence of a broad range of cultural differences between international criminal tribunals (on the one hand) and the main categories of beneficiaries, i.e. actual participants (the accused, witnesses and victims) and affected populations (on the other), poses a particular challenge in this respect. The unfortunate conditions associated with a culturally diverse environment — limited (or lack of) understanding, alienation and disagreement — if ignored, seriously undermine the efforts of international criminal tribunals to deliver justice.

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2 For the purpose of this article, the term 'ADR' includes mediation, conciliation, and arbitration (although, in a European context, arbitration is normally not included).


4 For the purposes of the present analysis, the notion of 'access to international justice' is interpreted in broad terms to include the rights and opportunities of the accused, witnesses and victims to take part in the international judicial process.

5 For an account of the claim that the implementation of 'access to justice' requires not merely a formal recognition in law, but also a consideration of extra-legal conditions that inhibit the actual use of this right or opportunity, see, e.g. C. Harlow, 'Access to Justice as a Human Right: The European Convention and the European Union', in P. Alston (ed.), The EU and Human Rights (Oxford: OUP, 1999) 187–214, at 189; and M. Cappelletti and B. Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', 27 Buffalo Law Review (1978) 181–292. However, unlike conventional accounts of 'access to justice', which tend to focus on the lack of sufficient economic resources and the subsequent need for 'legal aid', this article directs attention to culture-specific obstacles and discusses how such obstacles might be
At present, however, international criminal tribunals mainly understand the problem of culture in terms of how to cope with linguistic diversity. A more comprehensive account of culture reveals the existence of other components of culture, such as socio-cultural norms and convictions about justice, of equal importance to the prospects of successful international adjudication of grave crimes. The objective of this article is to offer such an account, and to explore existing and possible responses to each of the cultural differences at stake. In this context, it focuses on the extent to which national courts, which are assumed to conduct their work in more culturally homogeneous settings, could offer more appropriate sites of adjudication.

2. Cultural Diversity: A Conceptual Framework

The notion of culture may best be understood as referring to: (1) language, skills, and tools (cultural equipment); (2) socio-cultural norms; and (3) culture-specific convictions about justice.

In general terms, both judicial institutions (international or national) and their beneficiaries can be characterized in terms of a certain culture. Though the particular contents of their cultures are not constant, but can and do change over time, it is nevertheless possible, at any given moment, to identify the main cultural traits of beneficiaries and judicial institutions, i.e. their particular cultural equipment, culture-specific norms and justice convictions. The institution and its intended beneficiaries may approximate one another, culturally speaking; however, their cultures might also differ, sometimes in a radical way. The absence of cultural proximity between beneficiaries and judicial institutions undermines the conditions for effective and meaningful participation in international criminal proceedings. More particularly, it implies the existence of opposing views on acceptable rules of conduct, disagreement over the meaning and requirement of justice in the context of grave crimes, and disruptions of fragile channels of communication.

A. Cultural Equipment

To begin with, whether an individual is capable of making effective use of international judicial institutions depends on his actual 'cultural equipment'.6 This notion, originally introduced into sociological research to explain the influence of culture on human action, and here applied to the field of international criminal justice, directs attention to the importance of possessing language, skills, tools and know-how in order to make effective use of one's rights and opportunities, whether to defend oneself, provide relevant redressed.

6 The notion of 'cultural equipment' is borrowed from A. Swidler, 'Culture in Action: Symbols and
information, express one’s concerns or contribute to deliberations about international criminal law and justice.

All of us possess some cultural equipment, but each of them differs in content, depending on our particular place of upbringing, education, possibility of travelling and attachment to particular communities (nations, religious associations, etc.). While it is reasonable to assume that everyone has the basic cultural equipment to access the judicial authorities in his place of birth and upbringing, it is doubtful that everyone is bestowed with basic equipment suitable for an international criminal justice setting. The widespread lack of such equipment among the intended beneficiaries of international criminal tribunals becomes all the more evident if we consider that the main languages of international criminal tribunals are English and French. The extensive engagement of the tribunals in translation and interpretation reveals that few of the intended beneficiaries are capable of using English or French.

Although language is an essential aspect of cultural equipment, the notion also aims at capturing other culture-specific components (skills, tools and know-how) of significance for individuals to make effective use of rights and opportunities. The term ‘skills’ refers to more basic skills (such as reading and writing skills) as well as more refined ones (e.g. computer skills or legal skills, including how to write a complaint, a motion or an amicus curiae brief). The development of practices of legal assistance, and radio broadcasting of hearings and judgments are straightforward manifestations of the widespread lack of these kinds of skills among the intended beneficiaries of international criminal justice. Furthermore, the term ‘tools’ refers to man-made cultural materials and products meant to facilitate the collection and dissemination of, and access to, relevant information (such as computers, fax machines, typewriters and copy machines). ‘Know-how’, finally, is meant to capture certain knowledge about how to make use of these cultural products and materials (e.g. computer literacy).

While the officials of international criminal tribunals commonly possess the skills, tools and know-how suitable for their occupation (indeed, it is a requirement), it cannot reasonably be assumed that the intended beneficiaries are in the same advantageous position. On the contrary, actual participants and affected populations tend to lack some of the skills, tools and know-how

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8 The official languages of the ICTR and the ICTY are English and French (Rule 3(A) ICTY RPE and Rule 3(A) ICTR RPE). It should also be noted that while the newly established ICC has six official languages — Arabic, Chinese, English, French, Russian and Spanish — its working languages are English and French (Art. 50(1) and (2) ICCSt.).

9 See section 3(A) of this article.
deemed essential to make effective use of their rights and opportunities to access international criminal proceedings. Nevertheless, without at least the basic suitable equipment on hand, the prospect of effective participation in international criminal proceedings is radically weakened. Such equipment is required so as to be able to present one's claims, lines of argument, stories and concerns in a way that is readily understood by the court officials.

In this context, cultural equipment is understood as having instrumental (as opposed to inherent) value. Thus, it is assumed that all intended beneficiaries share an interest in possessing the equipment suitable to access international criminal tribunals. However, while it should be possible for anybody to learn or acquire such equipment, this process is known to take time. Given that encounters with these tribunals tend to be rather sudden, unexpected and not necessarily voluntary, it cannot reasonably be expected that the intended beneficiaries would ever be given the opportunity to attain even the basic equipment deemed essential to access international criminal tribunals. The widespread lack of suitable cultural equipment, therefore, must be seen as an inevitable circumstance of international criminal justice that requires considerable efforts on the part of the tribunals to overcome.

B. Socio-cultural Norms

In broad terms, these norms inform and give meaning to the way in which the individuals of a place go about their activities in social and public life (i.e. manners, habits and styles), including on issues such as how to marry, divorce, raise children, care for the elderly and sick, transmit knowledge about events, and how to punish theft, murder or other violent acts. The process of modernization entails an ongoing rationalization, codification and revision of such norms. Still, although all of us adhere to some specific set of norms (whether in a liberal or orthodox spirit), the norms by which we live are not the same. The process of 'multiculturalization' implies a heightened awareness of the prevalence of differences, sometimes radical, in terms of social and public practices across places and peoples, and the specific norms underpinning and sustaining these practices.

The fact of extensive variations in the way we conduct our social and public affairs, including legal affairs, is directly relevant to international criminal proceedings. It indicates the existence of a variety of norms regulating

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10 See section 3(B) of this article.
11 Thus, it does not consider the possibility of particular minorities refusing to broaden their repertoires of cultural knowledge to communicate effectively with the outside world.
13 The latter issues belong to the realm of justice, and because of their special importance from the standpoint of international criminal justice are dealt with separately in this article.
manners of questioning and interrogation, the provision of information (including inhibitions, codes and taboos), the role of the judge, the style of presentation, the status of the victims and lines of defence. Some of the norms are informal (e.g. style of presentation); however, others, such as the manner of examining witnesses (e.g. cross-examination), are embodied in the rules of procedure and evidence of international criminal tribunals. When these tribunals formulate their rules of procedure, they rarely start anew, but tend to draw upon the relevant norms and rules embedded in national legal cultures. The adoption of rules of procedure of an international criminal tribunal inevitably involves making a choice in favour of one particular set of rules and practices at the expense of others — a set that may not be agreeable or even familiar to those whose rights and interests are at stake.14

Differences in terms of socio-cultural norms can evoke strong emotions and feelings upon which the participants in the proceedings judge one another’s reliability, confidence, righteousness and excellence. The reliance on particular socio-cultural norms to judge others is not necessarily confined to the accused, victims and witnesses, but extends to judges as well.15 Thus, while, at first glance, it may seem irrelevant what rules (formal and informal) are chosen to guide an international criminal proceeding, the actual choice has a significant impact on the adequacy (or worth) of the proceeding from the standpoint of the intended beneficiaries.16 For example, a particular mode of interrogation can be perceived as humiliating and outright offensive if the person being interrogated is not accustomed to that mode, and if his culture understands such a mode as precisely being intended to humiliate and offend. Besides adequacy, diverse socio-cultural norms also endanger the accuracy of international criminal proceedings, in particular, the assessment of witness statements. An interrogation might not yield any accurate results unless the interrogator and the judges are familiar with the particular socio-cultural norms of the witness guiding his provision of information.17

16 The term ‘worth’ (adequacy) is borrowed from John Rawls. Rawls affirms the existence of obstacles (poverty, ignorance and lack of means) that amount to serious obstacles on the individual capacity to take advantage of rights and opportunities. In his view, such obstacles affect the worth of rights and opportunities from the standpoint of the individual. The worth of rights and opportunities is measured in terms of the individual capacity to advance his ends. See J. Rawls, Theory of Justice (rev. edn, Cambridge, MA: Belknap Press of Harvard University Press, 1999), 179ff; and J. Rawls, Political Liberalism (New York: Columbia University Press, 1995), 324ff. In this context, the fact of differing socio-cultural norms is seen as amounting to an obstacle that undermines the capacity of intended beneficiaries to make use of their rights and opportunities to take part in international criminal proceedings.
17 See also section 3(C) of this article.
C. Culture-specific Convictions about Justice

A third cultural variation with a direct impact on the prospects of successful international adjudication of grave crimes is that of differing convictions about justice which, in this context, refers to differing views on what must be done in response to a serious wrong. Such convictions are seen as cultural inasmuch as they refer to particular settlements on the interpretation of general principles of justice interwoven with the historical and social conditions of a people or a place. The settlements inform their subjects of the more specific meaning of their rights, obligations and opportunities embodied in the law that applies to them. The most significant settlements are those embedded in national public cultures although some religious communities also have their own bodies of law.

Even if we may agree about the importance of bringing perpetrators of serious wrongs to justice, there is no specific agreement across these settlements on what any of this means in concrete terms. Indeed, it cannot be assumed that even the subjects of the same national (or religious) settlement agree on these matters.\(^{18}\) Still, the reality of differing convictions about justice is more accentuated in the international domain. In fact, the intensive international debates over whether, for example, rape, forced pregnancy or acts of aggression should be recognized as grave crimes under international criminal law indicate that there may not even be a clear agreement on what constitutes a serious wrong that gives rise to legitimate demands for international criminal justice. International criminal tribunals must interpret and develop authoritative understandings of the more specific meaning of international law in spite of disagreements. The progressive interpretation of the International Criminal Tribunal for Rwanda (ICTR) to consider rape as a constituent act of genocide\(^{19}\) used in support of endorsing the gravity of this crime in the Rome Statute,\(^{20}\) indicates the significant influence of international criminal tribunals in shaping the more specific understanding of international criminal law and justice.

At the same time, the existence of international criminal law and jurisprudence does not render disagreements about justice irrelevant in the context of international criminal proceedings. Such disagreements continue to surface in the interpretation and application of the relevant law by international criminal tribunals and affect their selection of cases, offenders and victims, as well as their lines of reasoning and judgments. The reality and significance of disagreements among international judges are evinced by the practice of publicizing separate or dissenting opinions. However, also the intended beneficiaries disagree over justice. The disputes in international courtrooms are rarely confined to points of evidence, but extend to matters


\(^{19}\) Judgment, Akayesu (ICTR-96-4-T), Chamber 1, 2 September 1998.

\(^{20}\) Article 7(1)(g) ICCSt.
of principle. Obviously, it is the purpose of international adjudication to settle such disputes in the form of final judgments. Nevertheless, unless these judgments are perceived as acceptable to the parties and others whose rights and interests are at stake, the judgments may fail to serve an important aspect of the purpose of justice, i.e. that intended beneficiaries perceive that justice has been done.

One example of a deeply controversial issue is the use of the death penalty.\textsuperscript{21} Although international criminal law rules out the death penalty as a form of punishment, it continues to be used in places where grave crimes have been committed. For example, it is seen as the correct form of punishment for genocide in Rwandan courts.\textsuperscript{22} Several members of the international community continue to push for the complete abolishment of the death penalty.\textsuperscript{23} However, in the meantime, the fact that those offenders who are tried in Arusha get away with imprisonment while others who are tried in Rwanda face the death penalty could be seen by victims, witnesses and affected populations as unacceptable outcomes of the workings of international criminal justice.

3. Measures and Responses

If cultural diversity has a serious impact on the prospects of bringing justice with the help of international criminal tribunals, what has been done in response?

A. Translation and Interpretation

Until now, most attention has been paid to the challenge posed by linguistic differences. While the official language practices of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR are shaped by cultures that have dominated international relations for centuries, English and

\textsuperscript{21} See Amnesty International, ‘Facts and Figures on the Death Penalty’, available online at http://web.amnesty.org/pages/deathpenalty-facts-eng (visited 26 October 2005), according to which 76 countries retain and use the death penalty, although the number of countries which actually execute prisoners is much smaller. 24 countries can be seen as abolitionist in practice: they retain the death penalty in law but have not executed any prisoner for the past 10 years or more and are seen to have a policy or established practice of not using the death penalty.


\textsuperscript{23} 85 countries have abolished the death penalty for all crimes. See Amnesty International, supra note 21.
French, the need to overcome the reality of linguistic diversity in the chambers of these tribunals was felt as acute early on. The provision of translation and interpretation is not necessarily solely a matter of expediency; it can also be a matter of human rights. The ICTY and the ICTR recognize the right of the accused to use his or her language.\textsuperscript{24} Also, persons appearing before the two Tribunals, other than as counsels, and who do not have sufficient knowledge of English or French may also use their own language.\textsuperscript{25} Additionally, counsel for an accused may apply for leave to use a language other than the two working ones, or the language of the accused.\textsuperscript{26} The Registrars of the respective Tribunals are charged with the task of making the necessary arrangements for interpretation and translation into and from the official languages.\textsuperscript{27} In both cases, the realization of these rights has required the establishment of special language services sections.\textsuperscript{28}
In a way similar to the ICTY, the challenge posed by linguistic diversity for the ICTR is real and significant, and was noted already in its First Annual Report, submitted to the UN General Assembly in 1996.\textsuperscript{29}

Linguistic diversity has caused enormous delays of trial proceedings before the ICTR.\textsuperscript{30} Indeed:

\begin{quote}
\ldots the interpretation of trial proceedings into three languages, namely Kinyarwanda, French and English, together with cultural and linguistic nuances and unique characteristics associated with understanding questions in Kinyarwanda, cause trial proceedings to take three times longer than a trial conducted in one language.\textsuperscript{31}
\end{quote}

The ICTR introduced simultaneous interpretation of Kinyarwanda into English and French in one of its Trial Chambers only in 2001.\textsuperscript{32} Arrangements are now being made to provide the service to the remaining Trial Chambers in order to speed up the proceedings. Prior to this system of sessions in court. It also translates all kinds of written materials, including witness statements, official documents of the tribunal, as well as audio and videotapes from and into the official languages of the Tribunal as well as from and into Bosnian/Croatian/Serbian, German, Dutch and, occasionally, other languages.


\textsuperscript{30} In April 2004, the ICTR faced a backlog of 2,400 pages requiring translation. See ICTR Report of the Board of Auditors, UN doc. A/59/5/Add.11, 10 August 2004, § 80.


translation, Kinyarwanda could only be interpreted consecutively into English and French.\textsuperscript{33}

An entire section of the judgment in \textit{Akayesu} was devoted to an explanation of the enormous practical difficulties involved in translation and interpretation, and how the ICTR seeks to resolve them.\textsuperscript{34}

The accumulated experiences of the ICTR and the ICTY will be useful to the International Criminal Court (ICC) in developing its language services section.\textsuperscript{35} Unlike the ICTY and the ICTR, whose jurisdictions are limited to specific conflicts, the ICC has a much more far-reaching competence and may be involved in a series of conflict and post-conflict societies, each of which may possibly be composed of diverse linguistic populations. Unlike the ICTY and the ICTR Statutes, the Rome Statute also recognizes a right of victims to participate in the proceedings of the ICC.\textsuperscript{36} Thus, unprecedented efforts will be required by the ICC to overcome linguistic diversity in its day-to-day administration.

\textsuperscript{33} \textit{Seventh Annual Report of the ICTR to the General Assembly and the Security Council of the United Nations}, UN doc. A/57/163-S/2002/733, 2 July 2002, § 111. It must also be noted that since there is no translation/interpretation programme offering courses in the language combination French–Kinyarwanda on the international market, the ICTRs language services section’s Kinyarwanda translators, interpreters and revisers have been trained in-house. See \textit{Budget for the ICTR for the biennium 2004–05}, Report of the Secretary-General to the General Assembly of the United Nations, UN doc. A/58/269, 12 August 2003, at § 30.

\textsuperscript{34} The interpretation of oral testimony of witnesses from Kinyarwanda into French and English into one of the official languages of the Tribunal has been a particularly great challenge due to the fact that the syntax and everyday mode of expression in the Kinyarwanda language are complex and difficult to translate into French and English. These difficulties affected the pre-trial interviews carried out by investigators in the field, as well as the interpretation of examination and cross-examination during proceedings in court. Most of the testimony of witnesses at trial was given in the language, Kinyarwanda, first interpreted into French, and then from French into English. This process entailed obvious risks of misunderstandings in the English version of words spoken in the source language by the witness in Kinyarwanda. For this reason, in cases where the transcripts differ in English and French, the Chamber has relied on the French transcript for accuracy. In some cases, where the words spoken are central to the factual and legal findings of the Chamber, the words have been reproduced in the judgment in the original Kinyarwanda language (judgment, \textit{Akayesu} (ICTR-96–4-T), Chamber 1, 2 September 1998, § 145. But see also §§ 146–154, in the same judgment which explain the specific meaning of various terms used in the judgment, and have been reproduced in this judgment in the original Kinyarwanda). Moreover, efforts have been made to reduce the need for translation of documents. For example, during trials, many motions have come to be dealt with orally — a procedure that reduces the need for translation as such decisions are interpreted in the court room (\textit{Budget for the ICTR for the biennium 2004–05}, supra note 33, § 37).


\textsuperscript{36} Article 75 ICCSt.
Besides, in the context of investigations and trials, concerns about translation and interpretation are present in the outreach programmes of the Tribunals.

**B. Counselling and Assistance**

A consideration of differing cultural equipment is not limited to language issues, but extends to concerns about discrepancies, sometimes vast, in the possession of skills, know-how and tools deemed essential to access, participate or otherwise benefit from international criminal proceedings.

To the extent that attention has been paid to the obstacles created by lack of these kinds of cultural resources, the main focus has been on legal skills. Indeed, the two ad hoc Tribunals accord the accused and, in the case of the ICC, also victims and witnesses who appear before the Court a right to counsel and assistance. Moreover, one part of the work of the Victims and Witnesses Sections of the two ad hoc Tribunals and of the ICC is to inform victims and witnesses of the proceedings and their reasonable expectations within those proceedings and maintain close contact with them.

Also worth mentioning in this context is the proliferation of local associations aimed at assisting victims, witnesses and others in their preparation for participation, or else in their contributions of materials, evidence and stories to the cause of international criminal justice.

**C. Cultural Sensitization**

In contrast with diverse cultural equipment, not least in terms of language, the reality of differing socio-cultural norms and its impact on international criminal proceedings was noted only recently. The ICC is the first international criminal tribunal to give some formal recognition of the immediate relevance of differing socio-cultural norms. According to the ICC Rules of Procedure and Evidence, the Victims and Witnesses Unit is responsible for ensuring:

... training of its staff with respect to victims’ and witnesses’ security, integrity and dignity, including matters related to gender and cultural sensitivity.

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37 Art. 18(3) ICTYS, Art. 18(3) ICTRS. and Art. 55(2)(c) ICCS. (investigation and preparation of indictment: right of suspect to counsel of his own choice, including the right to legal assistance without payment in case of lack of insufficient means); Art. 21(4)(b) ICTYS, Art. 21(4)(b) ICTRS. and Art. 67(1)(b) ICCS. (right of the accused to communicate with counsel of his own choosing); Art. 21(4)(d) ICTYS., Art. 21(4)(d) ICTRS. and Art. 67(1)(d) ICCS. (right of the accused to defend himself in person or through legal assistance of his own choosing); Arts 43(6) and 68(4) ICCS. (appropriate counselling and assistance for victims and witnesses who appear before the Court).

38 Rule 34(A)(ii) ICTY RPE; Rule 34(A)(ii) ICTR RPE; Rule 16 ICC RPE.

39 Rule 18(d) ICC RPE (emphasis added).
Moreover, the unit ‘may include, as appropriate, persons with expertise in (e) gender and cultural diversity’. However, no similar provision has been made to regulate the Defence Counsel’s relationship with the accused, victims and witnesses.

Notwithstanding the lack of attention to differing cultural norms in its Statute or Rules of Procedure, the ICTR has come to experience difficulties. In particular, its witnesses have complained about the practice of cross-examination — a practice that is unfamiliar to the Rwandan people. As the spokesperson for the tribunal explains:

What . . . [the witnesses] are complaining about is what you might call a clash of traditional cultures. These witnesses, who are mostly witnesses for the prosecution, are not used to being robustly cross-examined in a court of law. And they don’t like that and sometimes they interpret that as mistreatment.

The difficulties are highlighted in a report by the International Federation of Human Rights according to which most witnesses are upset by the cross-examination conducted by defence lawyers. Given that the subject of sex is taboo in Rwanda, the witnesses are especially disturbed about the intimate questions asked about rape scenes and about having to describe sexual acts, organs, etc. As a result of cross-examination, witnesses feel that they are treated with scorn, considered to be liars, cheats, mentally disturbed or fools and as themselves being accused. This effect may be unintended by a Defence Counsel with an Anglo-Saxon legal training and accustomed to a certain mode of interrogating witnesses. However, for those who have no previous experience, and have a different understanding of acceptable forms of interrogations, this effect is nevertheless deeply regrettable, especially if we consider that many witnesses are actual victims of the Rwandan genocide. From this standpoint, the ignorance of differing socio-cultural norms has a detrimental impact on the worth of taking part in international criminal proceedings.

40 Rule 19(e) ICC RPE.
43 Indeed, in Akayesu, the ICTR acknowledged the cultural sensitivities involved in public discussion of intimate sexual matters and the inability of witnesses to disclose graphic anatomical details of the sexual violence they endured. Judgment, Akayesu (ICTR-96–4-T), Chamber 1, 2 September 1998, § 687.
44 International Federation for Human Rights, supra note 42, at 8.
45 See also ICTR Newsletter, June 2004, especially at 12–14 concerning the ICTR seminar on Gender Sensitivity held on 14 May 2004.
The fact of differing socio-cultural norms also affects the prospects of making accurate assessments of witness statements. As noted in the Akayesu case:

Most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed by the witnesses or recounted by someone else. Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazard of distortion of the information each time it is passed on to a new listener.46

Moreover:

It is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answer will very often have to be 'decoded' in order to be understood correctly. For example, many witnesses when asked the ordinary meaning of the term Inyenzi were reluctant or unwilling to state that the word meant cockroach, although it became clear to the Chamber during the course of the proceedings that any Rwandan would know the ordinary meaning of the word. Similar cultural constraints were evident in the difficulty to be specific as to dates, times, distances and locations. The Chamber also noted the inexperience of witnesses with maps, film and graphic representations of localities.47

The need for cultural sensitization in relation to differing norms for the sake of accuracy cannot be underestimated. Without understanding the local culture, i.e. the specific norms regulating the transmission and dissemination of knowledge as well as culture-specific taboos and inhibitions, interrogators and international judges face a serious risk of making erroneous assessments of points of evidence.

4. The Promise of Cultural Proximity

While international criminal tribunals seek to mitigate some of the problems related to cultural diversity, we may hesitate about the likelihood of overcoming the difficulties involved in a satisfactory manner. The question arises whether it is possible to avoid cultural diversity and achieve cultural proximity in the adjudication of grave crimes under international criminal law.

It may seem like a paradox to explore the possibility of something like 'cultural proximity' in the adjudication of cases involving individual rights and obligations under international criminal law. The 'international' nature of these cases seems to render cultural diversity inevitable. However, not all disputes of international significance are inherently diverse, but accrue in local settings and involve people with similar or neighbouring cultural backgrounds and attachments. This may be especially true for disputes arising in

46 Judgment, Akayesu (ICTR-96–4-T), Chamber 1, 2 September 1998, § 155.
47 Ibid., § 156.
the context of genocide and other grave crimes under international law. The possibility of cultural proximity is a reason for considering whether national jurisdictions could offer a more appropriate site for adjudication compared to international ones.

**A. Relocalizing International Justice Efforts**

The idea of situating justice efforts in the place where the crimes were committed takes on particular relevance in the light of the recent trend to reinforce a primacy of national jurisdictions in the context of genocide, war crimes and crimes against humanity. The trend is manifested in the report of the UN Secretary-General concerning the rule of law and transitional justice in conflict and post-conflict societies. According to the Secretary-General, the international community should not build international substitutes for national structures, but assist in the building of domestic justice capacities. In giving such assistance, it is necessary to eschew the importation of foreign models, and base international justice efforts on national assessments, national participation, and national needs and aspirations. The most important role of the international community is to support domestic reform constituencies, help build the capacity of national justice sector institutions, facilitate consultations on justice reform and transitional justice, and help fill the rule of law vacuum that exists in so many post-conflict societies.

Also the completion strategies of the ICTY and the ICTR reflect this trend. Moreover, the recognition of the *complementarity principle* as defining the conditions for the ICC to exercise its jurisdiction strengthens a primacy of national jurisdictions.

**B. The Primacy of National Jurisdictions**

The ongoing process of reinforcing the role of national courts is motivated by practical considerations, such as financial problems, and a strongly felt need of some states to reaffirm their sovereign status in the international community; however, it is also the result of accumulated experience indicating that international peace-building efforts, including a concern with transitional justice, require a more sustained focus on the rebuilding of national judicial institutions. Though cultural concerns surface in support of this trend, no independent consideration has been given to the question as to whether

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the initiatives serve to reduce cultural diversity in the adjudication of grave crimes.

A predominant understanding of culture as essentially referring to community and, above all, the nation indicates the possibility of cultural proximity in adjudication. In fact, influential contemporary political and legal philosophers assume that the members of a nation share a culture.\(^{50}\) A shared understanding of justice enables the national judicial authorities to deliberate and resolve disputes involving citizens in a way that is reasonable in the eyes of all citizens (who are reasonable). From this standpoint, the adjudication of disputes among citizens in the national courts serves to secure legitimacy in judgment in the eyes of the disputing parties and others whose rights or interests are affected.

The open texture of international law allows for cultural accommodation of a range of differing national interpretations of the more precise meaning of fair trial, reparation and punishment. From an international legal standpoint, several of these differences are legitimate; indeed, the complementarity principle is believed to allow for a broad margin of appreciation of differing sentencing traditions and cultures, also in relation to core crimes.\(^{51}\) The broad discretion given to states may legitimize various possibilities or methods of obtaining justice, not all of which are retributive in outlook and spirit, but more forward-looking and restorative. These differences are presumably acceptable, even warranted, from the standpoint of international criminal law and justice. In the words of one group of commentators, it may simply exhibit ‘the adjustability of international justice to differing post conflict circumstances.’\(^{52}\)

Besides promoting the use of national understandings of justice, the primacy of national courts implies the use of national cultural equipment and national rules for social interaction as interpreted and applied in a judicial context. While it cannot be expected that all citizens adhere to the same set of culture-specific norms in social and public affairs, it is reasonable to assume that most are accustomed to the norms underpinning the public rules of conduct in their territorial location. Moreover, although it cannot be expected that all citizens cherish the official interpretation of how to bring justice in

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case of grave crimes, it is reasonable to assume that all are at least familiar with that interpretation.

C. The Limits to Proximity

Notwithstanding the claim about the possibility of cultural proximity in national settings, it may have limited application with respect to the prosecution of grave crimes.

1. Inter-cultural Conflicts

A primacy given to national jurisdictions cannot mitigate the cultural diversity resulting from the adjudication of disputes involving, for example, soldiers of an intervening power and civilian victims. Such disputes are inherently multicultural in character. Neither may national courts be well suited to deal with disputes involving subjects of differing national or cultural backgrounds and attachments, especially when those differences are at the root of their disputes. In the latter situations, there is a serious risk that prosecutors and judges of national courts make decisions that constitute outright discrimination. A recent report of Human Rights Watch on war crimes trials in the former Yugoslavia (Croatia, Bosnia and Herzegovina, and Serbia and Montenegro) attests to ethnic bias on the part of national judges and prosecutors.53

2. Human Rights Concerns

One manifestation of the possibility of achieving cultural proximity in real-life adjudication of disputes arising in the context of genocide could be the gacaca jurisdictions in Rwanda.54 As one observer notes, the proximity among the participants achieved by the gacaca jurisdictions renders the criminal process less adversarial, less retributive and instead more forward-looking, more restorative and more individualized. Cultural proximity creates the conditions

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53 Human Rights Watch, Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro, Vol. 16, No. 7 (D), October 2004. Such bias is not significant in the war crimes trials in Bosnia and Herzegovina, where multiethnic panels of judges try most war crimes, or in Serbia and Montenegro, where, in the past three years, only Serb defendants have been prosecuted by Serb judges and prosecutors. However, war crimes trials in Croatia demonstrate a direct correlation between conviction and acquittal (on the one hand) and the ethnicity of the defendants (Serb affiliations) (on the other). The same problem pertains with respect to the prosecution. So far, there are only a limited number of war crimes prosecutions against members of the dominant ethnic group in Croatia and Republika Srpska.

54 The Gacaca courts began their operation on 10 March 2005.
to enhance community participation, trust and solidarity. The *gacaca* jurisdictions are informal courts that operate parallel to the Rwandan state court system in the adjudication of crimes against humanity, and were established by the Rwandan government in response to the overall dissatisfaction with the ICTR. In traditional *gacaca* proceedings, respected community figures served as ‘judges’ and involved the entire community in a dispute resolution process. While the recent *gacaca* jurisdictions are based on this traditional practice, their procedures have been adjusted to deal with the challenges posed by the adjudication of crimes of severe magnitude, such as genocide and crimes of humanity.

Nonetheless, there is a risk that a concern with cultural proximity comes into conflict with basic human rights guarantees in international law. This is a critique that was mounted against the *Gacaca* jurisdictions at an early stage. Amnesty International reports that there is a lack of legal protection in these proceedings. Suspects do not have the right to a Defence Counsel and judges lack sufficient competence. Whether the exclusion of defence lawyers is the result of the lack of lawyers in Rwanda or whether it is an expression of its traditional culture remains uncertain. In any case, an overriding international interest in the need to secure at least a minimum provision of respect for persons must prevail over considerations of cultural diversity.

3. The Continued Role of International Criminal Tribunals

Notwithstanding the recent trend to emphasize the importance of national courts, international criminal tribunals continue to perform a critical function in delivering justice. For a start, although an essential component of the...
completion strategies of the ICTY and the ICTR is to transfer cases to national courts, the two ad hoc Tribunals will continue to prosecute high-level officials. Moreover, while the creation of the ICC was coupled with an affirmation of the central role of national courts in the actual implementation of international criminal law, the ICC nevertheless assumes a complementary role. Furthermore, as in the case of Sudan, the Security Council may refer a situation in which one or more such crimes appears to have been committed on the basis of Chapter VII of the UN Charter. Additionally, the submission of the report of the Commission to the Security Council, entailing a call for the creation of an international criminal tribunal for Timor-Leste, is a further indication that not even ad hoc international criminal tribunals may be outmoded. Thus, the pronouncement of the ICTY in 1996 about the importance of an international criminal tribunal continues to have validity.

5. Conclusion

The challenge of cultural diversity facing international criminal tribunals is significant. These tribunals operate in an environment characterized by a broad range of cultural differences, sometimes radical, not only in terms of language, skills and tools, but also with respect to socio-cultural norms and

60 Article 17(1)(a) ICCSt.
63 In one of its first cases, the ICTY held that its primacy over national jurisdictions was urged as a result of a deep mistrust towards the ability of the relevant national courts to bring justice: ‘When an international tribunal, such as the present one, is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger to international crimes being characterized as “ordinary crimes” or proceedings being “designed to shield the accused” or cases not being diligently prosecuted’ (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-I), Appeals Chamber, 2 October 1995, § 58). However, the primacy given to the ICTY (and the ICTR) was also motivated by the nature of the crimes involved: ‘The crimes that the ICTY has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State…. [I]n such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.’ (Decision on the Defence Motion on Jurisdiction, Tadić (IT-94-I), Trial Chamber, 10 August 1995, § 42; also see. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-I), Appeals Chamber, 2 October 1995, § 59).
convictions about justice. Each of the cultural differences, if ignored, seriously undermines their efforts of bringing justice to victims and others who are affected by grave crimes. In creating a risk of mis- (or lack of) understanding, alienation and disagreement, cultural diversity is particularly damning for the work of international criminal tribunals.

The Tribunals themselves have sought to redress some of the most urgent culture-specific concerns stemming from a lack of common language and are engaged in extensive translations and interpretations. Furthermore, there is an increasing awareness in the tribunals about the need for cultural sensitization in the conduct of their investigations and proceedings, in their assistance programmes to victims and witnesses, and in their assessment of evidence. However, the emerging debate on the way in which international criminal tribunals should (and can) tackle the impact of cultural diversity is not near a close. In this light, the possibility of avoiding some of the cultural differences facing international criminal tribunals by situating international criminal justice efforts in the location where the crimes took place emerge as an alternative worthy of serious consideration. Indeed, unlike international criminal tribunals, national courts are assumed to conduct their work in more culturally homogeneous settings — settings that might secure something like an ideal of cultural proximity in adjudication.

Nevertheless, as this article has sought to demonstrate, the recent trend to reinforce a primacy of national jurisdictions does not render the challenge of cultural diversity less significant; though this primacy might, occasionally, secure cultural proximity between parties, affected populations and judicial authorities, the trend does not take seriously the reality of multinational and multicultural states, the existence of national judicial authorities that are unable or unwilling to bring justice, the lack of guarantees for a fair trial and the continued importance of international criminal tribunals as a symbolic manifestation of the gravity of certain crimes, and as a complementary safeguard. Given these realities, it will be necessary to engage in a more constructive debate on how to tackle the problems posed by cultural diversity in the adjudication of grave crimes at the international level.