



Paths to International Justice

Social and Legal Perspectives

Edited by MARIE-BÉNÉDICTE DEMBOUR
and TOBIAS KELLY

CAMBRIDGE STUDIES IN LAW AND SOCIETY

PATHS TO INTERNATIONAL JUSTICE

SOCIAL AND LEGAL PERSPECTIVES

Marie-Bénédicte Dembour
Tobias Kelly



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521709200

© Cambridge University Press 2007

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2007

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

ISBN 978-0-521-88263-7 hardback

ISBN 978-0-521-70920-0 paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this book, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

ACKNOWLEDGMENTS

We are indebted to Anne Griffiths who secured funding from the ESRC for a seminar series on 'Developing Anthropology of Law in a Transnational World', spurring Marie Dembour to convene a workshop in this series, on 'Paths to International Justice', in Brighton on 1–3 September 2005. Jane Cowan helped to develop this idea and was generous with advice from beginning to end. Funding from the British Academy made it possible for Kamari Clarke and Lisa Laplante to visit the English seaside and offer contributions. The workshop also greatly benefited from the participation of Richard Wilson and Nigel Eltringham. Thanks to the Sussex Institute, the Sussex Law School and the School of Social Sciences and Cultural Studies of the University of Sussex, we were able to relax and taste, amongst other things, the delights of North African food. Katherine Tomlinson's administrative skills ensured the smooth running of these three days. Later on, Theowen Gilmour edited the manuscript, with the financial help of the Sussex Law School and the School of Social and Political Studies at the University of Edinburgh. We thank the staff at Cambridge University Press for their warm-hearted professionalism, especially Finola O'Sullivan who was encouraging and supportive from the very beginning. Their anonymous reviewers made perceptive comments on each of the contributions initially submitted and thus also directly contributed to this volume.

CONTRIBUTORS

SAL BUCKLER is Research Associate in the Department of Anthropology at the University of Durham and also works as policy and research advisor for local and national government in the UK, specialising in multiculturalism, diversity and equalities. Her PhD fieldwork was carried out with Romany Gypsies in England. She is the author of *Fire in the Dark: Telling Gypsiness in North East England* (Berghahn 2006) and has acted as specialist advisor and expert witness regarding Gypsy and Traveller issues in England.

BAŞAK ÇALI is Lecturer in Human Rights at the Department of Political Science, University College London and a Council of Europe expert on the European Convention on Human Rights and Fundamental Freedoms. Her main area of research is international legal theory and practice focusing on human rights, humanitarianism and laws of war. She has published on legal cosmopolitanism, transnational adjudication of human rights and the interplay between domestic and international formulations of human rights. She is the co-editor of *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Rights Law* (Routledge 2006).

KAMARI MAXINE CLARKE is Associate Professor of Anthropology at Yale University and research associate at the Yale Law School. Over the years, her research has ranged from studies of social and religious movements in the United States and West Africa to related transnational legal movements, to inquiries into the cultural politics of power and justice in the burgeoning realm of international tribunals. She is the author of *Mapping Yoruba Networks: Power and Agency in the Making of Transnational Networks* (Duke University Press 2004), *Globalization and Race: Transformations in the Cultural Politics of Blackness* (Duke University Press 2006) and *Justice in the Making: The Cultural Politics of the International Criminal Court* – a book on an emergent international Rule of Law regime and its challenges.

JANE K. COWAN is Professor of Social Anthropology at the University of Sussex. She is the author of *Dance and the Body Politic in Northern Greece* (Princeton University Press 1990), editor of *Macedonia: the Politics of Identity and Difference* (Pluto Press 2000) and co-editor of *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001). She has also published extensively on gender relations, ritual, popular music, the politics of language and 'tradition' and the emergence of minority identities and claims. She is currently writing a book on the League of Nations' supervision of minorities treaties with respect to the contested territory and populations of Macedonia. She is Associate Editor of *Anthropological Theory*.

MARIE-BÉNÉDICTE DEMBOUR is Senior Lecturer in Law at the University of Sussex. Her doctorate, in Social Anthropology, provided the research ground for her monograph *Recalling the Belgian Congo: Conversations and Introspection* (Berghahn 2000). Her more recent interests include human rights, migration and multiculturalism. She is particularly interested in offering and/or encouraging anthropological understandings of rights and law. She co-edited *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001). She is the author of *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006).

EMILY HASLAM is Lecturer in International Law at Kent Law School and the Brussels School of International Studies, University of Kent. Her recent articles include 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience' in McGoldrick *et al.* (eds.) *The Permanent International Criminal Court: Legal and Policy Issues* (Hart 2004) and 'Silencing Hearings: Victim-witnesses at War Crimes Trials' (*European Journal of International Law* 2004) (with Marie-Bénédicte Dembour). She is currently completing a doctorate on the role of civil society in International Criminal Law.

TOBIAS KELLY is Lecturer in Social Anthropology at the University of Edinburgh. He is the author of *Law, Violence and Sovereignty among West Bank Palestinians* (Cambridge University Press 2006), based on fieldwork carried out amongst West Bank Palestinians during the second *intifada*. He has also published on rights claims, identity documents, and forced migration. His current research interests include law and development, the legal recognition of suffering, and techniques of identification. He

received a PhD in Anthropology from the London School of Economics in 2003, and has previously worked at Birzeit University, the LSE and Oxford University.

LISA J. LAPLANTE is Legal consultant for Liberated Innocents in Lima, Peru, and Deputy Director at Praxis Institute for Social Justice. Since 2002, she has followed Peru's political transition and her observations covering different topics related to transitional justice and human rights, appear in *Human Rights Quarterly*, *Yale Human Rights and Development Law Journal*, *Michigan Journal of International Law*, *Health and Human Rights: International Journal*, among others. She focused on the Inter-American System and Peru in the article 'Bringing Effective Remedies Home: the Inter-American Human Rights System, Reparations, and the Duty of Prevention' (*Netherlands Human Rights Quarterly* 2004).

SALLY ENGLE MERRY is Professor in Anthropology at the Institute for Law and Society at New York University. She was the Marion Butler McLean Professor in the History of Ideas and Professor of Anthropology at Wellesley College. She is the author or editor of six books, including *Colonizing Hawai'i: the Cultural Power of Law* (Princeton University Press 2000), which received the 2001 J. Willard Hurst Prize from the Law and Society Association, and *Human Rights and Gender Violence: Translating International Law into Local Justice* (Princeton University Press 2006). Her work focuses on the anthropology of law, colonialism and transnationalism. She is past-president of the Law and Society Association and the Association for Political and Legal Anthropology.

JELENA TOŠIĆ is a Lecturer in the Department for Social and Cultural Anthropology at the University of Vienna. Her doctoral thesis was concerned with 'Global Rights and Local Contexts: Human Rights and Globalization in the Postsocialist Transformation of Serbia and Montenegro' (2005). She is the author of 'Beyond the False Dilemma between Nationalism and Reform-Democracy' which appeared in *Cultural Dynamics of Globalization*, edited by Johanna Riegler (Austrian Academy of Sciences 2005).

FILIPPO M. ZERILLI is Lecturer in Cultural Anthropology at the University of Cagliari. His research interests include the history of anthropology, postsocialism, property relations and the ethnography of law and human rights. He is author of *Il lato oscuro dell'etnologia* (CISU,

Rome 1998) and editor of *Dalle 'Regole' al 'Suicidio'. Percorsi durkheimiani* (Argo, Lecce 2001). He has co-edited *Incontri di etnologia europea. European ethnology meetings* (ESI, Naples 1998) and *La ricerca antropologica in Romania* (ESI, Naples 2003). He is currently finishing a book provisionally entitled *Diritti postsocialisti. Etnografia della restituzione della proprietà in Romania*.

ABBREVIATIONS

ADAD	Association des Avocats de la Défense auprès du Tribunal pour Rwanda
ASP	[UN] Assembly of State Party
ARVs	anti-retroviral
CBO	Community Based Organisation
CEDAW	Convention for the Elimination of all forms of Discrimination Against Women
CSW	[UN] Commission on the Status of Women
DOS	Democratic Opposition of Serbia
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	[UN] Economic and Social Council
FAO	Food and Agriculture Organisation
FIDH	Fédération internationale des droits de l'homme
IACHR	Inter-American Commission on Human Rights
I/A Court H.R.	Inter-American Court of Human Rights
IAS	Inter-American System [of human rights protection]
ICC	International Criminal Court
ICDAA	International Criminal Defense Attorney's Association
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organisation
IWRAW	International Women's Rights Action Watch
IWRAW-AP	International Women's Rights Action Watch-Asia Pacific
KLA	Kosovo Liberation Army
LRA	Lord's Resistance Army

LIST OF ABBREVIATIONS

MINJUS	[Peru's] Ministry of Justice
NGO	Non-Governmental Organisation
NRC	National Resistance Council [Uganda]
NRM	National Resistance Movement [Uganda]
OAS	Organisation of American States
OTP	Office of the Prosecutor of the International Criminal Court
PIR	Plan Integral de Reparaciones
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
SCR	[UN] Security Council Resolution
TRC	Truth and Reconciliation Commission
UAC	Ugandan Amnesty Commission
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children Fund
UNIFEM	United Nations Development Fund for Women
US	United States of America
VMRO	Macedonian Revolutionary Organisation
WTO	World Trade Organisation

CONTENTS

<i>Acknowledgments</i>	xiv
<i>Contributors</i>	xv
<i>List of abbreviations</i>	xix

1 Introduction: the social lives of international justice <i>Tobias Kelly and Marie-Bénédicte Dembour</i>	1
--	---

PART ONE **Paths . . .**

2 The success of failure? Minority supervision at the League of Nations <i>Jane K. Cowan</i>	29
3 Law, civil society and contested justice at the International Criminal Tribunal for Rwanda <i>Emily Haslam</i>	57
4 Transparent broadcast? The reception of Milošević's trial in Serbia <i>Jelena Tošić</i>	83

PART TWO . . . to **International . . .**

5 The limits of international justice at the European Court of Human Rights: between legal cosmopolitanism and 'a society of states' <i>Başak Çalı</i>	111
6 Global justice, local controversies: the International Criminal Court and the sovereignty of victims <i>Kamari Maxine Clarke</i>	134

7	Human rights law as a path to international justice: the case of the Women's Convention <i>Sally Engle Merry</i>	161
 PART THREE . . . Justice		
8	The house of ghosts: post-socialist property restitution and the European Court's rendition of human rights in <i>Brumărescu v. Romania</i> <i>Filippo M. Zerilli and Marie-Bénédicte Dembour</i>	189
9	Entwined paths to justice: the inter-American human rights system and the Peruvian Truth Commission <i>Lisa J. Laplante</i>	216
10	Same old story? Gypsy understandings of the injustices of non-Gypsy justice <i>Sal Buckler</i>	243
	<i>Index</i>	262

PLATE

*Photo: The house at the centre of Brumărescu v.
Romania at the European Court of Human Rights*

188

CHAPTER 1

INTRODUCTION: THE SOCIAL LIVES OF INTERNATIONAL JUSTICE

Tobias Kelly and Marie-Bénédicte Dembour

For many years a woman could be seen sitting almost daily on the steps of the European Court of Human Rights with a placard protesting the lack of justice she had met at Strasbourg.¹ Court employees, lawyers, other applicants and members of the public would pass her without paying much attention.² Her presence and silent protest were tolerated as if they were part of the picture, embodying the recognition that the Court was unfortunately not equipped to ease the pain of all those who had invested their hopes in human rights law. Less tolerable for the Court was the throwing of stones at its entrance on a quiet Sunday afternoon in April 2001. The attack was rumoured to be the act of a lone, disappointed and reportedly deranged applicant. For a few days, the glass-panelled structure of the Court, intended by its architect to challenge 'the notion of law as a closed, formal and intimidating institution' (Rogers of Riverside 2000: 1213), bore the physical marks of the exclusionary character of law, unable to rise to the claims of all who come before it.³

International Justice today is caught on the horns of a dilemma. On the one hand, international conventions, committees, tribunals and courts are proliferating as never before, seemingly holding out the promise of establishing a global order based on law, justice and human

¹ The editors thank Başak Çalı, Jane Cowan, Kim Coles, Emily Haslam and Simon Halliday for their insightful comments on earlier drafts of this introduction.

² Dembour's fieldnotes. The former Registrar of the ECtHR also refers to the woman sitting on the Court's steps (Petzold 2000: 1578).

³ The legal philosopher Wolcher (2006) argues that the principle task of law is to distinguish between suffering that does and does not merit legal attention.

rights. On the other hand, the effectiveness and legitimacy of the institutions of international law are widely questioned – not just by politicians and academics, but also by many potential applicants. Stories such as those of the two women described in the opening paragraph are typically left unrecorded in conventional legal scholarship, dismissed as anecdotes irrelevant to the larger scheme of international law. This volume is built on a different view. We take it for granted that such experiences testify to the limits of international justice for the people directly concerned, and as such need to be reflected upon. If international justice is to be meaningful, and we are to understand the relationship between the proliferation of its claims and the widespread disenchantment with its achievements, we cannot understand it solely as an abstract moral principle or a series of legal texts. Instead we must explore how international justice is manifested and made real through complex social processes.

This collection asks how and why international justice is mobilised, understood and abandoned by concrete social actors and to what effect. International justice is as much a social and cultural process as it is a legal and political one, and it takes place at the intersection of the often contradictory practices of petitioners, litigants, bureaucrats, lawyers, victims,⁴ witnesses, accused, judges and third parties. The title of this volume is adapted from Hazel Genn's book *Paths to Justice* (1999), which examines how ordinary people view, relate to, and either use or do not use civil justice mechanisms in the United Kingdom. Genn asks why people turn to law, which strategies they adopt in doing so, and what they want out of the process (see also Nader 2002). This volume extends Genn's questions to the sphere of international justice, exploring them through nine case studies of various international judicial or quasi-judicial institutions, conducted through anthropological fieldwork or socio-legal analysis. In doing so the book examines why people – applicants and defendants, but also bystanders and officials – choose to turn to (or avoid) international justice and what they expect from it. Understanding how people relate to international justice *must* inform our understanding of international justice. If its aim is to guide political and social life, how people access and receive international justice must be of fundamental concern to everybody, including the most black-letter lawyer and abstract political scientist.

⁴ The term 'victim' is problematic, not least in that it may be taken to deny agency (Hirsch 2007; Clarke, this volume).

UNDERSTANDING 'INTERNATIONAL JUSTICE'

The expression 'international justice' can be understood in a variety of ways. In the first instance, its appearance in the title of this volume signals our intention to examine processes of adjudication which happen in structures set up by international law. This does not mean that we are not interested in the other ways in which the expression is used, including a sense of political and moral accountability, or the possibility of a distinctively post-national order.⁵ Indeed we think the latter two senses are of crucial importance for an appreciation of how the institutions of international law develop, are given meaning and take purchase in people's lives. But we also believe that international justice, however broadly conceived, only takes shape in the context of the seemingly prosaic settings which are therefore put at the heart of this volume. We have restricted ourselves to studying international human rights and international criminal courts (a term which we use broadly to cover both judicial and quasi-judicial institutions).⁶ Before we explain why we feel entitled to do so, we present a brief history, primarily intended for the non-lawyer, of the way these courts have developed.

For centuries, international law was widely understood as concerned with relationships between states – and states only. Individuals were denied the ability to make direct claims. This conception of international law prevailed virtually unchallenged for centuries. It is present in works historically as distant as Grotius' *On the Law of War and Peace* and Oppenheim's *International Law*, first published in 1625 and 1905 respectively. It was only with the development of the human rights regime after World War II that the individual started to be in a position to *directly* defend individual interests under international law (McCorquodale 2006).⁷ With its mention of human rights for all, the adoption of the Charter of the United Nations (UN) represented a key

⁵ Such considerations are rarely examined under the term 'international justice'. Favoured expressions include 'global justice' (Pogge 2001; Nagel 2005), justice 'beyond borders' (Caney 2005), 'justice without borders' (Tan 2004) and 'cosmopolitan justice' (Hirsh 2003). For an appearance of the term 'international justice', as we use it in the first instance in this volume to refer to international courts and tribunals and without restricting it to international criminal justice, see Lauterpacht (1991).

⁶ Thus, we have not sought contributions dealing with international adjudication concerned for example with more economic matters, such as the European Court of Justice or the WTO system of dispute settlement.

⁷ Cowan's contribution (this volume) shows, however, that the League of Nations' minority petition procedure paved the way for this individual encounter with international law, since it allowed anyone – individual or group – to submit a petition. Admittedly, this was very circumscribed – considered as it was as 'information only' and thus not seen as an individual

watershed. It was soon followed by the proclamation of the Universal Declaration of Human Rights (UDHR) on 10 December 1948 and, in time, the adoption of the two UN Covenants and another four human rights conventions.⁸ The European Convention on Human Rights, signed in 1950, constituted the first so-called 'regional' system of human rights protection and proved a model for subsequent American and African initiatives. In parallel to the post-World War II development of international human rights law, a revolution in the way international criminal law is conceived was instigated by the Nuremberg and Tokyo trials. The treaties which established the Nuremberg and Tokyo tribunals at the end of the war allowed the prosecution of individual Nazis and Japanese before international military courts for war crimes, crimes against peace and crimes against humanity (Taylor 1992). This unique historical experience was revived in the 1990s when international criminal law suddenly developed in an unexpected way: first two ad-hoc international criminal tribunals were established in respect of the former Yugoslavia and Rwanda, and then the Rome Statute adopted in 1998 gave way to the establishment of the International Criminal Court.

In 1945, there was only one international court: the International Court of Justice, established by the UN Charter to decide cases brought by a state against another state.⁹ In stark contrast, multiple international courts exist today. On the human rights front, there are the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human Rights and Peoples' Rights. There are also quasi-judicial institutions, such as the committees established to monitor the six UN human rights treaties.¹⁰ In terms of international criminal law, there are currently two ad-hoc tribunals, the International Criminal Tribunal for the former Yugoslavia

Footnote 7 (cont.)

litigation – but at the time, the treaty-bound states saw it as violating precisely this foundational idea that only states had the right to 'speak' in the international arena.

⁸ International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of Racial Discrimination (1966); Convention on the Elimination of all forms of Discrimination Against Women (1979); Convention against Torture (1984); Convention on the Rights of the Child (1989). For an excellent black-letter law introduction to international human rights law, see Smith 2003.

⁹ The International Court of Justice is a successor to the Permanent International Court of Justice, established in 1920 through the League of Nations.

¹⁰ Other courts, such as the European Court of Justice (established to rule on what was originally called European Economic Community matters), are also sometimes listed amongst the international courts which deal with human rights issues.