



# Culture under Cross-Examination

International Justice and the  
Special Court for Sierra Leone

TIM KELSALL

CAMBRIDGE STUDIES IN LAW AND SOCIETY

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Special Court for Sierra Leone

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## CULTURE UNDER CROSS-EXAMINATION

The international community created The Special Court for Sierra Leone to prosecute those who bore the greatest responsibility for crimes committed during the country's devastating civil war. Tim Kelsall examines some of the challenges posed by the fact that the Court operated in a largely unfamiliar culture, in which the way local people thought about rights, agency and truth-telling sometimes differed radically from the way international lawyers think about these things. By applying an anthropological perspective to the trials, he unveils a variety of ethical, epistemological, jurisprudential and procedural problems, arguing that although touted as a promising hybrid, the Court failed in crucial ways to adapt to the local culture concerned. Culture matters, and international justice requires a more dialogical, multicultural approach.

TIM KELSALL works as an Associate of the Africa, Politics and Power Programme and as a Visiting Fellow at the Berkeley War Crimes Studies Center based in Phnom Penh. In the past he has taught Politics at the universities of Oxford and Newcastle and has been an editor of the journal *African Affairs*.

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## PREFACE

Every weekend in post-war Freetown, members of the international community head out to the fine sandy beaches on the former colony's peninsula at Lakkah, Tokeh and River Number Two. On the way they often stop off to eat fish and lobster at Franco's, an excellent Italian restaurant by the sea. Dotted along the rutted, pot-holed road to these destinations are muscle-bound men, many of them ex-combatants, breaking boulders into piles of gravel with pick-axes, newly built houses clinging to denuded hillsides, decomposing car-wrecks, and small children demanding money at roadblocks made from pieces of string. One often also sees Mercedes Benz vehicles, some antique, some the latest European model, weaving slowly down the road, painstakingly trying to not scrape the red dirt with their low-slung chassis. These prestigious cars are rapidly overtaken, meanwhile, by shiny four-wheel-drive Land Cruisers and Pajeros, and also by podapodas – local minibuses crammed with passengers, that, in spite of their decrepit appearance, bounce past with insouciant speed. I will argue in this book that the Special Court for Sierra Leone was a bit like one of these Mercedes: in many respects a fine vehicle, but not well adapted to the local terrain. Its laws, legal doctrines and truth-finding procedures all lacked traction with local cultural realities, leading to difficult trials and, in some cases, serious questions over the quality of the convictions of the accused. I will argue that the experience of the Special Court holds important lessons for the way international courts should proceed when trying complex crimes in unfamiliar cultures, and that the international justice community needs genuinely hybrid solutions, somewhere between the all-terrain vehicle and the local minibus, if it is to achieve its intended aims.

Many people have assisted in my journey to complete this book. Newcastle University's Arts and Humanities Research Fund provided funding for a pilot project in Sierra Leone in 2003. This was followed by a Larger Grant from the British Academy in 2005. Barbara Oomen, Phil Powrie and Tony Zito all helped in the process of applying for a



Research Leave Grant from the Arts and Humanities Research Council of the United Kingdom, which allowed me to write a draft of the manuscript in 2007 – I am grateful to them all, and also to my former colleagues in Politics at Newcastle, most especially Derek Bell and Andy Gillespie, for facilitating research leave. I am also indebted to a group of West Africa experts who were exceptionally generous in sharing their contacts, insights and advice with me when I first embarked on this project. Deserving of special mention are Thierry Cruvellier, Ron Fennel, Stephen Ellis, Paul Richards and Richard Fanthorpe. Other individuals provided invaluable help and advice on the ground, including Comfort Ero, Allison Cooper, Alice Jay, Vanessa Wruble, David Hecht, Sara Kendall, Vivek Maru, Umarr Kargbo, Paul Allen, Ed Sawyer, Alfred Carew, Taziff Koroma, Wayne Jordash, Andrew Bernard, Saleem Vahidy, Peter Andersen, Tejanie Bah, Esther Kortu, Michael Lansana, Rupert Skilbeck, Rebekka Ehret, Tom Perriello, Eric Witte, Harpinder Athwal, Nancy Sesay, Simeon Koroma and Ahmadu Mannah. Rosalind Shaw gave both help and advice in the field, and included me in a stimulating workshop in Bellagio in 2006; similarly, Martha Carey was a fieldwork confidante and facilitator for an excellent conference on humanitarian intervention in Atlanta in 2007. Returning from the field, Krijn Peters, Bill Murphy, Lans Gberie, Tunde Zack-Williams and Danny Hoffman were kind enough to comment on draft chapters; Harvey Weinstein commented on a book proposal, and on two occasions I stayed with Mariane Ferme in Berkeley, where a little of her deep knowledge of the Mende rubbed off on me, I hope. I thank all these people for their help with this work, and apologise in advance for its limitations, which are entirely my own. Much of the book was written while a visiting scholar at the East West Center in Honolulu. I am grateful to Phil Estermann, Nancy Lewis, and Carolyn Eguchi for making me welcome there, and in particular to David Cohen, who also introduced me to surfing, which proved welcome relief from a daily diet of war crimes transcripts; Peter Maguire, another Hawai'i-based war-crimes expert, was also an inspiration. At Cambridge University Press I am grateful to Finola O'Sullivan and Martin Chanock for supporting this project, and to three anonymous referees, one of whom I later discovered to be Kieran McEvoy, for helpful, critical advice. Philip Stickler of Cambridge University made me a map and Danny Hoffman generously supplied a cover photo.

Most of all I thank Michelle Staggs, whom I was lucky enough to meet in Freetown in June 2005, and even more fortunate to marry in Hawai'i

in January 2007. Not only has she been the most loving, caring and fun companion imaginable during the writing of this book, rarely protesting about my self-absorption and bad moods, but she has also commented on my drafts, tried to keep me the right side of the law and immeasurably improved my thoughts.

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## WHITE MAN'S JUSTICE? SIERRA LEONE AND THE EXPANDING PROJECT OF INTERNATIONAL LAW

The Special Court for Sierra Leone stands on a sprawling site in central Freetown, shielded from the rest of the country by imposing grey walls. An outer wall, ranging between five and eight feet in height, displays signs warning people that to park or even stand in the court's vicinity is forbidden; an inner one, about fifteen feet tall, is crowned by coils of razor wire. A policeman brandishing an AK-47, accompanied by other security personnel, guards the entrance from a sentry post; above it, a sand-bagged gun turret takes aim at the main road. Visitors who pass through the court's steel gate are obliged to acquire a security pass from a razor-wired concrete reception area in the shape of a pill box, then walk through a car park area and into the court's inner compound through two sliding, steel doors; vehicles, meanwhile, are subjected to bomb checks. Inside, to the left, stand the prefabricated huts of the Office of the Prosecutor, reminiscent of a military barracks or prisoner of war camp, ringed by razor wire and a six-foot high fence carrying signs that read 'ID Cards Must be Shown at All Times', 'Restricted Access', 'Authorised Personnel Only', 'Visitors Must Be Escorted'. At various junctures gun-toting Nigerian soldiers stand guard, wearing dark sunglasses, blue helmets and military fatigues; sometimes they conduct drills and simulate combat situations. Past the Office of the Prosecutor and up a path stands the gleaming structure of the courthouse itself, architecturally designed, apparently, to evoke an impression of the scales of justice. It is protected not only by the Nigerian troops, but by blue-uniformed security personnel, the public gaining entrance through a metal detector. Down the hill to the left are the Defence offices and opposite them another set of steel

doors, walls, and razor wire, which guard the entrance to the detention centre where defendants indicted for war crimes are held. Between the prison and the courthouse resides a tank, a UN logo emblazoned on its side.<sup>1</sup>

Inside this enclave the Special Court is implementing a global project to bring accountability under the rule of law to a region formerly destabilised by conflict and war. In this book I discuss some of the challenges posed to that project by the fact that the Court is surrounded by an unfamiliar social and legal culture, in which the way people think about human rights, human agency and appropriate social conduct often differs radically from the way international lawyers think about these things. I do so by focusing on the trial of the alleged leaders of the Kamajors, a popular militia that fought on the side of the democratic government in the country's eleven-year civil war. The Kamajors, several thousand strong, were widely believed to be able to make themselves immune to bullets through magic, a technique which allowed them to defend their communities from rebel attack, won them widespread applause, and even helped them to restore civilian rule.<sup>2</sup> The Kamajor Society, however, was far from being universally benign. Some of its members reputedly looted and burned Sierra Leonean towns, indulged in acts of cannibalism, and committed violent acts of a grotesque and terrifying nature, such as decapitating victims and dancing around with their heads on poles.

The Civil Defence Forces (CDF) trial, as it was called, is a case with tremendous significance for the expanding global project of international criminal law, as well as for other post-conflict justice modalities. For reasons explained below, we are unlikely in the near future to witness international prosecutions in developed Western nations: international trials will focus mainly on countries that are part of the 'Third World', a trend already indicated by the first arrest warrants of the International

<sup>1</sup> Adapted from fieldnote, September 2004. By 2006 Mongolians had replaced the Nigerians. Vivek Maru, an astute observer of justice in Sierra Leone, once remarked to me that looking down on the Court from the Freetown hills, its saucer shaped roof glowing in the darkness, one could be forgiven for thinking that an alien spacecraft had landed in Sierra Leone. Prosecutor David Crane appears to have picked up on this imagery in a speech he gave in 2007 entitled, 'The spaceship has landed' (Crane 2007).

<sup>2</sup> Precise figures for Kamajor and CDF membership are hard to come by. After the war some 37,216 CDF were officially demobilised, the majority among whom would have been Kamajors (Humphreys and Weinstein 2004, 13). However, the real figures are likely to be much larger, since in some areas fewer than one in five CDF fighters possessed a modern weapon that would qualify them for demobilisation.

Criminal Court, all of which target African individuals.<sup>3</sup> As in the CDF case, witnesses and defendants in these trials will come from societies with very different cultures or cultural mixes to those that predominate in the West, with varying ideas about morality, responsibility, evidence and truth. International justice, because of this, needs to learn the lessons of working with unfamiliar cultures fast.

Although the Special Court is regarded in some circles as 'a promising hybrid' (Dougherty 2004; Stromseth, Wippman and Brooks 2006), suggesting that it successfully blends elements of international and indigenous law and expertise,<sup>4</sup> I will argue in this book that it failed in crucial ways to adjust to the local culture in which it worked. In its prosecution of the crime of enlisting child soldiers, for example, it levelled an inappropriate and ethnocentric charge at the CDF defendants. In its handling of the phenomenon of bullet-proofing, it proved deaf to an enormously important system of local magical belief. In its ruling on superior responsibility, it drew on an unrealistic Western norm. And in its assessment of evidence, it failed to find convincing means for assessing the credibility of witnesses, some of whom deployed, I argue, culturally grounded strategies of concealment in court. These failures had profound implications: they contributed to a laborious trial-process that dragged on for more than two years – one of the defendants dying before a verdict could be returned – and they raised serious questions about the quality of the convictions of the two surviving accused. Meanwhile, at a societal level, these failures threatened the Court's legacy in Sierra Leone.

In light of these depressing results, critics of the international justice project will doubtless find in my study more evidence that the aspiration to globalise law's rule is not only malign but misconceived. Supporters of the project will hopefully find stimuli to rethinking and reform.

## AN EXPANDING PROJECT

Today, international criminal justice (ICJ) casts a wider net and has a longer reach than at any time in previous history. Inaugurated at Nuremburg and Tokyo with the International Military Tribunals to try the top leaders of the defeated Axis powers, ICJ was re-animated in the 1990s with the creation of the International Criminal Tribunal for the

<sup>3</sup> The countries concerned are Uganda, Democratic Republic of Congo, Central African Republic and Sudan.

<sup>4</sup> For a less sanguine view, see Sriram (2006).





Figure 1. The Court compound and environs.