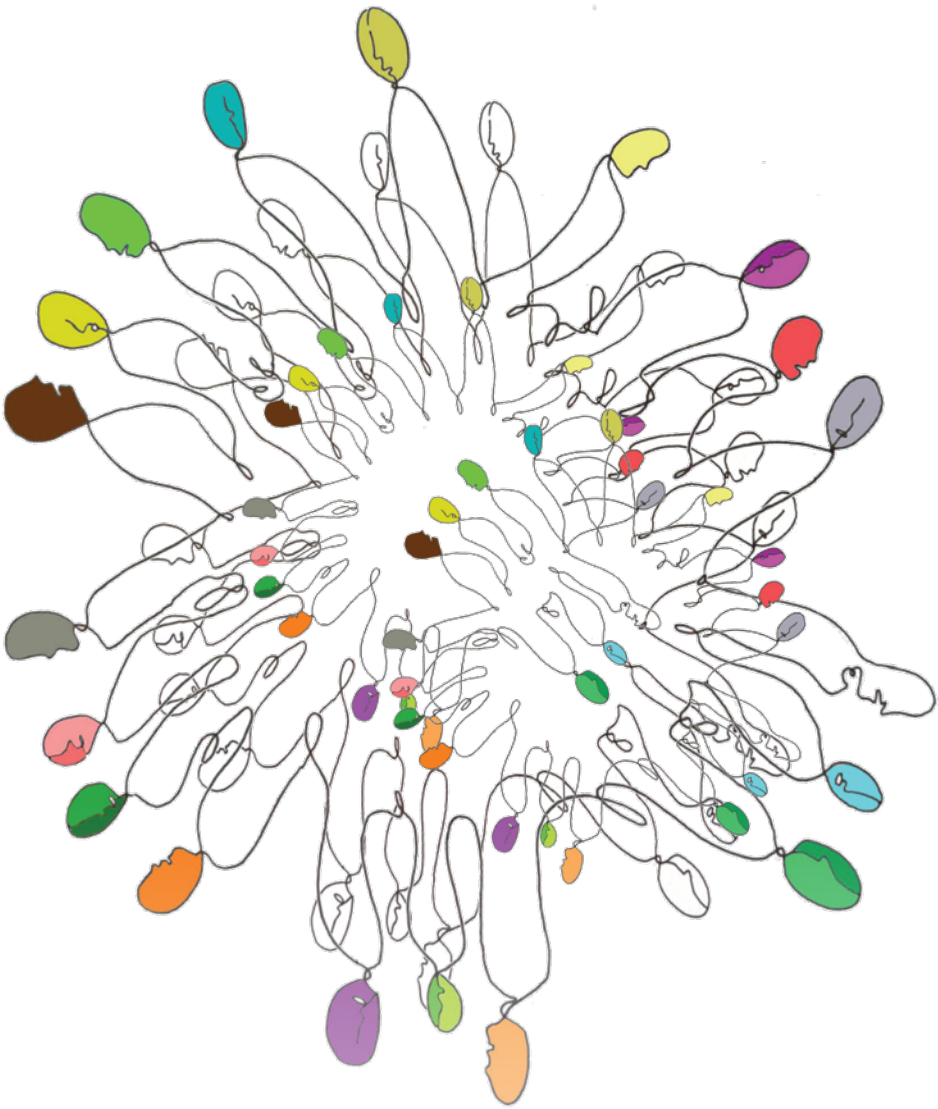
NAVEIÑ REET: Nordic Journal of Law & Social Research
An Annual Interdisciplinary Research Journal, Number 11, 2021

CULTURAL EXPERTISE AND THE LEGAL PROFESSIONS



Edited by: Livia Holden

NAVEIÑ REET:
Nordic Journal of Law
and Social Research

***NAVEIŃ REET:* Nordic Journal of Law and Social Research (NNJLSR)** is a peer reviewed annual research journal.

NNJLSR aims to publish original and innovative legal scholarship in the diverse fields of law. NNJLSR is keen to publish interdisciplinary socio-legal research that examines the interface between law and political science, economics, sociology, philosophy, anthropology, ecology, feminism and legal institutions.

The journal further aims to share research and ideas about legal matters of concern which are common to developing countries; to encourage research in these fields; and to build conventions of academic discourse and publication. The journal encourages work which sees law in a broader sense, and so sees legal matters as including cultural diversity and plural legal realities all over the world.

Moreover, the journal aims to function as a platform for communication on legal matters of concern among the powerless and those who struggle to access justice.

The journal welcomes contributions from judges, lawyers, academics and law students. In addition, given its policy of encouraging interdisciplinary scholarship, it welcomes input from specialists belonging to other disciplines. Contributors are welcome to address issues from national, comparative and international perspectives.

Contributions may be in the form of articles, book reviews, case comments or other forms.

The views expressed in the NNJLSR are those of the authors and they are responsible for their views expressed in the NNJLSR.

Published by the Department of Cross-Cultural and Regional Studies at University of Copenhagen. Cooperation: Bahauddin Zakariya University, Multan and The Islamia University of Bahawalpur, Pakistan.

The name of the journal is *NAVEIŃ REET:* Nordic Journal of Law and Social Research (NNJSLR).

NAVEIŃ REET is a punjabi word meaning "New Tradition". Printed and bound by University of Copenhagen.

Layout by Åse Marie Fosdal Ghasemi.

Cover illustration by Jane Fryer and Frank Straut.

Contact: David Stuligross david_stuligross@yahoo.com for help with copy editing

www.jlsr.tors.ku.dk

Subscriptions: All subscription requests and orders should be sent to:
The Editor
NAVEIŃ REET: Nordic Journal of Law and Social Research
rubya@hum.ku.dk

ISSN 2246-7483 (print)
ISSN 2246-7807 (online)

NAVEIÑ REET:
Nordic Journal of Law and
Social Research

CULTURAL EXPERTISE AND THE LEGAL PROFESSIONS

An Annual Interdisciplinary Research Journal
Number 11, 2021

Edited by: Livia Holden

Contents

Naveiñ Reet: Nordic Journal of Law and Social Research (NNJLSR) No. 11 2021, pp. 7-14

Cultural Expertise and the Legal Professions: Introduction[1]

Livia Holden (CNRS – Institut de Sciences Juridique et Philosophique Paris Sorbonne)

Cultural Expertise and the Legal Professions offers a selected sample of first-hand experiences about the use and usefulness of cultural expertise by a pool of legal professionals and expert witnesses in various jurisdictions ranging from immigration and asylum to Indigenous rights and including family law, international human rights and criminal law. Although the use of anthropological knowledge in court dates back to at least the 19th century, cultural expertise is a relatively new concept which was formulated for the first time in 2009 at a workshop convened in France on the role of experts in matters decided before European jurisdictions and involving South Asian laws and socio-cultural contexts. The first definition of cultural expertise was published in *Cultural Expertise and Litigation* (Holden 2011: 4), a collected book that proposed an epistemological differentiation between cultural expertise and the then better-known concept of cultural defence. In fact, whilst cultural expertise and cultural defence are cognate, cultural expertise is broader in scope and acts as umbrella concept for all the socio-legal instruments that use cultural arguments in the legal processes. According to its current and updated definition, cultural expertise is the use of socio-legal and cultural knowledge for assisting the resolution of conflicts and the claim of rights in court and out-of-court (Holden 2019). Even though cultural defence and cultural expertise are cognate, cultural expertise features the following distinctive components: procedural neutrality and broad application to all fields of law including also out-of-court conflict resolution (Holden 2021).

In the anthropology of law, the link between law and culture is one of long date (among others see Geertz 1973 and Rosen 1977), but, in the socio-legal studies and in the wider panorama of social sciences, debates have recently emerged about the existence, the extent and the usefulness of cultural expertise as well as the appropriateness of the

1 This special issue is a primary output of the European Research Council funded project titled Cultural Expertise in Europe: What is it useful for? (EURO-EXPERT) led by Livia Holden at the CNRS, Paris Sorbonne. The papers published in this special issue were first presented at a workshop convened by the same project at Trinity College at Oxford on the 3-4 October 2019. Heartfelt thanks go to the anonymous reviewers who have helped us in improving the contributions and to Joshua Bishay who has assisted the guest editor of this special issue.

engagement of social scientists in court (Holden 2019, Campbell 2020, Loperena, Mora, and Hernández-Castillo 2020, Rosen 2020). The compatibility of the scientific and legal domains have been interrogated from a perspective of sociology of sciences (Jasanoff 2006) and legal anthropology (Good 2007). Jasanoff's analysis of the use of scientific expertise in court shows that the conflicting internal logics of both science and the law routinely generate misunderstandings over the appropriate interpretation and utility of scientific evidence for dispute resolution (Jasanoff 2006). Good (2008) suggests that lawyers and anthropologists think outrightly in different ways. When cultural knowledge becomes relevant in the legal process, law courts may be perceived to validate, or invalidate, not only scholars' professionalism but also disciplinary fields. Hence, the use of cultural expertise in court can have far reaching consequences and social scientists feel often torn between engagement and abstention (Holden 2021 and Bringa, Bendixen, and Synnøve 2016).

Whilst academia has been involved in theoretical debates, the legal professions have been creative in developing new instruments for addressing social diversity. EURO-EXPERT has endeavoured to systematically record the many practices of cultural expertise that are observable in the everyday practice of law without being necessarily perceived or theorised as cultural expertise.[2] This special issue wants to be a tribute to the creativity and the daily engagement of the legal professions and the anthropologists who have engaged with cultural expertise, by offering an overview of the variety and the articulation of their responses for a more inclusive justice in diverse societies. This special issue includes papers written by judges, experts and academicians involved with cultural expertise to different extents, but all engage with the concept of cultural expertise from a pragmatic perspective aiming at solving everyday issues. The authors' styles are also varied and include self-reflection pieces, commentaries of policies and law-making, studies of case law, and ethnographic case studies.

The special issue opens with "Experts and the Judiciary: Reflections of an Anthropological Expert in The Field of Asylum and Migration Law" by John R. Campbell, an anthropologist with twenty-three year experience as a cultural expert and two decades of ethnographic fieldwork on asylum and immigration law in the United Kingdom's Immigration and Asylum Tribunal (IAT) and in the English Court of Appeal. Campbell positions his experience in the history of applied anthropology

2 See the maps of in-court and out-of-court cultural expertise at https://culturalexpertise.net

and shares his own experience and criticism of the ways in which British courts have constrained the role of cultural experts. His contribution expands on the challenges confronted by the experts whose testimonies are challenged in the legal process and denounces the incongruences of a legal system which features structural inequalities. John Campbell concludes with a plead for engagement to social scientists, who, he argues, can contribute to secure protection for vulnerable groups and refugees.

The second paper of this special issue titled "Intercultural Justice in France: Origins and Evolution" is authored by Martine De Maximy, former president of the assize court in France. She narrates that in the 1990s with her colleague Thierry Baranger, she felt extremely concerned by the difficulty of the courts to successfully communicate with the increasing number of migrant families in France. Such a communication gap prompted her and her colleagues to appoint ethno-psychiatrists, ethno-psychologists and cultural experts to assist juvenile courts for better understanding education and social disadvantage. These experiences of close collaboration between the decision-making authorities and the cultural experts have consolidated with time into institutional appointments in France which see the experts as integral part of the legal process and have now become a potential model for neighbouring countries.

The third paper of this special issue titled "Cultural Expertise: Substantial and Procedural Framework" by Gualtiero Michelini, judge with long term experience at various Italian jurisdictions and abroad, offers an overview of the potential for the systematic adoption of cultural expertise in the legal procedure. The paper argues that both substantial and procedural stakes must be taken into consideration when contemplating the inclusion of cultural expertise in the legal process. Michelini surveys the great variety of the use of cultural expertise in Italy which has generated case law on the practice of wearing the *kirpan*, or the Sikh dagger; the *kafalah*, or sharia compliant guarantee in the interest of minors; the Islamic veil; the earthquake of L'Aquila. The author outlines the stakes of ongoing interactions among the members of the legal professions and social scientists in Italy for advocating a fuller integration of cultural expertise into the legal process.

The fourth paper of this special issue titled "Indigenous Expertise as Cultural Expertise in the World Heritage Protective Framework" is authored by Noelle Higgings who is an academician who engages with the protection of the rights of minorities and Indigenous peoples. The paper focuses on the role of Indigenous peoples in the protective

framework of world heritage. She argues for a better implementation of the inclusion of Indigenous peoples as experts in matters of world heritage including also law making in order to overcome the eurocentrism that has affected the legal regime of world heritage so far. The paper concludes with a call for the explicit recognition of the role of cultural experts that the Indigenous people should play in all the matters concerning international heritage law.

The fifth paper of this special issue titled "Cultural Expertise in Civil Law in Italy" is authored by Giuliana Civinini, the President of the Tribunal of Pisa. Civinini draws from her daily experience in court to describe how law is closely linked with culture at all stages of the legal process including not only expert testimonies but also the judges' cultural backgrounds, the production of documents and the court interactions. Her paper argues that cultural expertise is most significant in those proceedings where vulnerable groups and minors are involved because these matters require a background knowledge that exceeds the ordinary set of references with which the courts are usually familiar with. This paper also examines whether judges could acquire appropriate knowledge that would substitute the appointment of cultural experts and assess the pros and cons of the informal practices of cultural expertise in Italy. The author concludes by advocating the need for adequate training and action in order to institutionalise the use of cultural expertise through the systematic appointment of cultural experts in Italy.

The sixth paper of this special issue titled "Cultural Experts at the International Criminal Cout (ICC): The Local and the International" by Joshua Isaac Bishay focuses on the potential use of cultural expertise at the International Criminal Court of The Hague. As a junior lawyer in the The Hague, Bishay felt strongly on the structural unbalance between the lawyers and judges' community, often belonging to dominant majorities, and post-conflict communities usually appearing in their dockets. By drawing on research on cultural expertise in national jurisdictions, Bishay, identifies specific difficulties that hinder the work of cultural experts at the ICC: namely the isolation of cultural experts, the stereotypisation of cultural knowledge, and the difficulty of ICC to accept and adequately assess cultural expertise provided by the members of the communities affected by the conflict.

The seventh paper of this special issue titled "The Judge and the Anthropologist: Cultural Expertise in Dutch Courts" by Hermine Wiersinga, judge at the criminal court of appeal in The Hague, challenges the usefulness of cultural expertise for judges and

aims to find common grounds between anthropologists and judges. Her paper argues that although cultural knowledge is not per se useful in a criminal court, there are three common grounds on which anthropologists and jurists could develop a fruitful collaboration: cultural knowledge linked to particular social groups, cases in which the cultural context is relevant, and culturally relevant notions. The paper continues with an unprecedented reflexive commentary on the cultural expertise provided by Dr Martjin De Koening in the well-known Dutch "context case" in which Wiersinga was part of the deciding panel. Wiersinga shares her own expectations as judge and the expert's position in court and vis-à-vis the defendants and reflects on the ethical position of the expert. Then she describes how the expert testimony was used by the courts for supporting conclusions that were virtually opposite to the ones of the expert. Eventually she admits that a deeper understanding of the cultural context of the case is useful in court.

The special issue concludes with "An Anthropologist in Court and Out of Place: A Rejoinder to Wiersinga" by Martijn de Koning, the anthropologist and expert of Islam, who acted as expert witness in the "context case" discussed by Wiersinga. De Koning agrees with Wiersinga about the ethical issues which are inherent to the position of the anthropologist acting as expert in court, not only in his specific experience with the Dutch "context case" but more in general for cultural expertise in court. De Koning describes his own sense of alienation when providing cultural expertise in court, his frustration about being unable to fulfil his promise of anonymity to his research participants, and the unexpected feeling of being distrusted or misinterpreted in court in what he terms as appropriation of academic knowledge. It appears evident that De Koning and Wiersinga agree to disagree and as editor of this special issue I am grateful to both for choosing this venue for sharing their own experiences. However, this unprecedented written dialogue between the judge and the expert, appears also as the perfect example of the different degree of authority between the discourse of the law and the discourse of social sciences: the former can claim priority for the public good and in doing so can easily undermine the deontology of the social sciences.

Bibliography

Burawoy, Michel. 2005. For Public Sociology, American Sociological Review 70(1).

John R. Campbell, 2020. Interrogating the Role and Value of Cultural Expertise in Law. Laws, 9(29), p.29.

Bringa, Tone, and Synnøve Bendixsen. Engaged Anthropology: Views from Scandinavia. Cham: Palgrave Macmillan, 2016.

Clarke, Kamari M. 2020. 'Toward Reflexivity in the Anthropology of Expertise and Law'. *American Anthropologist* 122 (3): 584–87.

Fraas, Arthur Mitchell. 2012. "Legal Databases: A Comparative Analysis" Center for Research Libraries.

Geertz, Clifford. The Interpretation of Cultures: Selected Essays. Alexander Street Anthropology. New York: Basic Books, 1973.

Good, Anthony. Anthropology and Expertise in the Asylum Courts. Abingdon: Routledge Cavendish, 2007.

Jasanoff, Sheila. 'Just Evidence: The Limits of Science in the Legal Process', Journal of Law, Medicine & Ethics (2006, Summer): 328-341.

Holden, Livia. 2011. Cultural Expertise and Litigation, Routledge.

Holden, L. 2020. 'Cultural Expertise and Law: An Historical Overview', Law and History Review 38, 1:29-46.

Holden, Livia. 2021. 'Anthropologist as experts: Cultural expertise, colonialism, and positionality', Law and Social Inquiry.

Loperena, Christopher, Mariana Mora, and R. Aída Hernández-Castillo. 2020. 'Cultural Expertise? Anthropologist as Witness in Defense of Indigenous and Afro-Descendant Rights'. *American Anthropologist* 122 (3): 588–94.

Rosen, Lawrence 1977. 'The Anthropologist as Expert Witness', American Anthropologist 79, 3: 555-578

Rosen, Lawrence, Expert Testimony in the Social Sciences: A Historical Overview of Contemporary Issues, Law and History Review 38 no. 1. 2020: 123-142.

Naveiñ Reet: Nordic Journal of Law and Social Research (NNJLSR) No. 11 2021, pp. 15-42

Experts and the Judiciary: Reflections of an Anthropological Expert in The Field of Asylum and Migration Law

John R. Campbell[1]

Abstract

In this paper I draw on my experience as an anthropologist, twenty-six years work as a country expert and extensive research on asylum and immigration law and practice to assess how litigation has shaped the role of country experts and the way their evidence is evaluated by Judges who sit in United Kingdom's Immigration and Asylum Tribunal (IAT) and in the English Court of Appeal. I begin by looking at the history of applied work in Anthropology and my growing involvement as an Anthropological 'expert' involved in asylum and immigration law. I then examine litigation in the British courts which has attempted to define and regulate the role of experts and their evidence. Finally, I discuss my work as a country expert and how the courts have assessed the 'validity' of my evidence by drawing on a diverse range of asylum claims. The paper concludes that while experts confront a range of constraints imposed by the law, they can successfully challenge judges to rethink their assumptions and ensure that vulnerable refugees are granted protection.

In the mid-1990s I received an unsolicited email from a barrister asking me to write an 'expert' report for a child who was claiming asylum in the UK. I had never heard of 'country experts' nor was I aware of the form which the report should take or what issues it should address. It took me an entire week to draft a short report at the expense

1 John R. Campbell is an Emeritus Reader in the Anthropology of Africa and Law at the School of Oriental and African Studies (SOAS), London. He has conducted fieldwork in Ghana, Tanzania and the UK and has spent ten years as a development consultant for international development agencies. He has written about development, refugees and refugee and criminal law. John's publications include Nationalism, Law and Statelessness. Grand Illusions in the Horn of Africa (Routledge, 2014) and Bureaucracy, Law and Dystopia in the United Kingdom's Asylum System (Routledge, 2017) and Entanglements of Life with the Law: Precarity and Justice in London's Magistrates' Courts (Cambridge Scholars Publishing).

of my obligations as an academic in a British university.[2] I never heard the outcome of that appeal. Since that inauspicious beginning I have written over six hundred reports and I have conducted extensive fieldwork and research on the British asylum system. This paper examines the provision of 'cultural expertise', a term which Holden (2019) and Henderson *et al* (2020) have used to describe a specific role take up by academics who provide expert evidence to the courts which enables judges/mediators to better understand key socio-cultural and other issues which are relevant to the case. Holden is particularly interested in the engagement of anthropologists as experts in the legal process. In this sense, cultural expertise should not be confused with the ability attributed to anthropologists of understanding a society's 'culture' based on ethnographic research.

Section (i) examines how my career as an academic anthropologist became intertwined with work as a 'country expert', and how expert witnessing expanded from a part-time preoccupation to become the focus of my professional work and research. Section (ii) provides an overview of litigation which has sought to regulate the work of country experts. In section (iii) I draw on my experience as an anthropological expert to show the tensions between experts and the judiciary and how my work has sought to challenge judicial interpretations in an attempt to secure protection for refugees.

Anthropology, the Academy and Applied Work

The discipline of anthropology has constantly changed since it was introduced as a University subject in the early to mid-twentieth century in the USA and the UK. Throughout the twentieth century the discipline was dominated by university-based academics pursuing 'pure' research, many of whom disdained 'applied' work. This state of affairs persisted despite the fact, as Merril Singer (2008, p. 330) has noted, that during World War II 'three-quarters of all professional anthropologists [in the US] active at the time worked for some war-related government department or program

2 Country experts are drawn from anthropology, sociology, history, journalism, law and so on and are expected to possess an extensive knowledge of the country from which an asylum seeker originates from. Lawyers should send experts the appellants entire case file which includes two interviews with UKVI, UKVIs Refusal Letter, representations by the appellant's lawyers and related UKVI correspondence, witness statements from the appellant addressing issues raised by UKVIs refusal to grant protection and medical reports (if relevant to the claim). A list of experts in the UK gives some idea of the different types of expertise on offer, see: https://www.ein.org.uk/experts.

on a full- or part-time basis'. In North America and in Britain the 1950s and early 1960s witnessed an expansion of university education, including an expansion in the number of anthropology departments, which produced far more graduates than could be employed in the academy resulting in large numbers of graduates working in applied anthropology outside the academy (Akeroyd *et al* , 1980; Briody, 1995). At roughly the same time the rise of the international development industry saw increasing numbers of professional anthropologists employed to devise and implement policy and working in various capacities on development projects. Since that time anthropologists have increasingly been employed in development, community-based organizations, charities and various types of welfare and medical programs including, in recent years, research into pandemic diseases like HIV-Aids and Covid-19.

Henrika Kuklich (2008, p. 3) has pointed out that the impact of cyclic changes in funding has affected the ability of universities to employ anthropologists, undertake research and teach students. Over the past three decades universities have become much more managerially focused in a process that has seen the downsizing and sometimes elimination of anthropology departments, growing job redundancies and the use of increasingly insecure contracts to hire staff (cf. Kok *et al,* 2010; Siltaloppi *et al*, 2019). This process of neo-liberal reform has transformed British universities and has placed growing pressure on staff to bring income into the university by teaching growing numbers of students, securing grant/research income and obtaining consultancies from the public and private sector to shore up university finances.

The university where I obtained my first 'permanent' contract in the United Kingdom in 1991 was in the throes of this process when I arrived following a period of unstable employment including doctoral fieldwork in Africa (1977-78), teaching at an African university (1981-85), work as a consultant for a British charity in Ethiopia (1987-88) and a one-year post-doctoral post (1990-1991). I was encouraged to engage in development consultancy work which was undertaken in addition to standard academic responsibilities. Work as a consultant provided me with a way to escape the increasingly tedious politics of university life and it made considerable money for the university.

Consultancy work, which took up several months each year, occurred at the same time as I was asked to write expert reports for individuals seeking asylum. Unlike development consultancies which involved visits to projects in Africa, expert witnessing primarily involved desk research and required me to draw on my fieldwork and on

published research to write reports for submission to the courts alongside an asylum application. In contrast to consulting, my interest in expert witnessing arose from the obligations I felt towards my informants/friends in Africa which could only be repaid indirectly by assisting individuals fleeing persecution. For me, expert witnessing became a new form of applied anthropology.

There has been extensive criticism within anthropology of applied work. Ill-informed criticism has often reflected the disdain felt by academic colleagues for anything other than 'pure' research on the grounds that meddling in the lives of others is messy and unethical and that it is a-theoretical and does not contribute useful knowledge to the discipline. One of the main critics of anthropological involvement in international development has been Arturo Escobar (1991, p. 676) who argued that anthropologists have facilitated a form of development that: 'has functioned as a mechanism of power for the production and management of the Third World.'

In reply to Escobar and other critics, David Gow (2002, p. 300) has written about this dispute in which some academic anthropologists have referred to development anthropology, and by implications other forms of applied work, as its 'evil twin'. Gow replied that: 'Evil is not a word normally associated with anthropology, academic or applied,' Gow went on to say that 'it is my contention that one way to better understand – and perhaps appreciate – development anthropology is through a critical analysis of the values, specifically the ethics, underlying this subfield, as demonstrated in the writings and practices of those anthropologists actively engaged with development, and the extent to which their work has made a difference, presumably for the better.'

Gow argued that development anthropologists had not taken development for granted nor have they neglected to engage with ethical or professional concerns. Labeling development anthropology as 'evil' is, he says, a reflection of the ignorance of academic anthropologists about applied work. Other anthropologists have weighed into this argument in an attempt to address the critics and rehabilitate the image of anthropologists involved in applied/development work by ethnographically demonstrating anthropology's contribution to development (Grillo and Rew, 1985), by critically evaluating development 'discourse'/knowledge (Grillo and Stirrat, 1997) and by critiquing key aspects of development policy and practice (e.g. Cook & Kothari, 2001). While tensions have remained in anthropology departments regarding the value of applied work, by the mid-to late 1990s anthropological engagement with

development was such that the distinction between pure and applied was no longer sustainable given the growing overlap between research and practice, and policy and theory (Gardener *et al*, 2015, p. 60).

A different approach to this debate, where the central issue is the role of anthropologists as experts, has been taken by David Mosse (2011) who has argued that while an in-depth ethnographic study of expertise based on long-term participant observation etc is not possible, in part because expertise is an extension of certain social roles and because experts do not form discrete and observable social groups, nevertheless a form of para-ethnography is 'capable of exploring the moral ambiguity of expert roles' to understand how experts engage in formulating, brokering and implementing 'global' policy ideas. Mosse acknowledges that international development reflects neoliberal policies which are implemented via a new institutionalism that promotes a specific social engineering agenda. However, he seeks to promote research which makes transparent what is invisible: namely the unanticipated effects of policy (i.e. the illiberal consequences of liberal policy), the underpinning rationale of development policies (i.e. that the institutional mythologies embedded in it fail to understand local realities), the striking capacity of policy to misunderstand and misrepresent complex events and the illusion of certainty found in official policies. The ethnography of aid that he promotes is one which seeks to discover how international development produces 'expertise' and how expert knowledge is formulated, implemented and contested among policymakers, in development organizations, in projects and in local communities.

While anthropologists working in development are undoubtedly engaged in different practices, they work in quite different contexts than country experts, Mosse provides a useful approach to analyse and understand the role of experts as 'a category of practice' (Mosse, 2013). His approach can usefully be adopted to examine the work of expert witnesses. A para-ethnography of expert witnessing also needs to look at how experts negotiate their relationship with the Law. In this respect Livia Holden (2019, p. 190) has called for a 'deontological' approach to expert witnessing which requires drawing a clear contrast between 'the procedural requisites of expert witnessing and their limitations for an effective use of anthropological knowledge', i.e. between the constraints imposed by the law and the ethical demands of one's profession. In this paper I provide a para-ethnographic account of my work as a country-expert – which acknowledges the ambiguities, vulnerabilities and professional dilemmas I have experienced – involved in providing academic knowledge in a process that enhances

the legitimacy of the judiciary. Due to the limitations of space I am unable to deal with the wider context in which anthropological expert witnessing is situated which would require a critical examination of legal institutions and legal reasoning, how law is contested and how migration management is undertaken by governments and resisted by individuals around the world.

The Impact of Litigation on Experts

In 1998 the English judiciary created section 35 in the Civil Procedure Rules which regulates and sets out the duties of 'experts' who provide evidence to the courts. These rules stipulate that 'It is the duty of experts to help the court on matters within their expertise' and that 'This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.' Furthermore, the rules specify the form which an expert report must take. In effect, the Civil Procedure Rules and legislation subordinates experts to the judiciary (Redmayne, 2001; Jones, 1994), requires experts to act as a neutral party in appeals and makes it possible for the law to misuse/misappropriate anthropological knowledge for its own ends (Riles, 2006).

Subsequent litigation has established additional obligations which experts must meet. For example, in November 2002, sec. 101(1) of the Nationality, Immigration and Asylum Act 2002 sharply curtailed the right of appeal by an asylum claimant to material 'errors of law' made by Immigration Judges (IJs) who decide asylum claims. Prior to the Act, many decisions had successfully been overturned when IJ's erred in their analysis of the facts of the case, including errors in assessing expert evidence. As a result of this Act, lawyers have had to be more careful about how cases are argued and how a case is supported by expert evidence.

In 2003 there was growing criticism from lawyers about the poor quality and biased nature of the country reports which the UK's Visa and Immigration department (a department in the British Home Office, UKVI) relied upon in appeals (Carver, 2004; Yeo, 2004) and about the Tribunal's decision to convene country guidance cases to set a precedent on a range of complex issues. Lawyers were concerned that some of the cases chosen by the Upper Tribunal of the IAT (UT) to hear a case, all of which had initially been refused, were factually too weak to provide a reasonable basis for identifying the 'categories of risk' that were to be used to decide whether failed asylum-seekers and Foreign National Prisoners could 'safely' be deported to their country of origin

without breaching their rights under the 1951 Refugee Convention. What is important for this paper is that the IAT required both parties to obtain as much up-to-date evidence, including evidence from country experts, as possible. This requirement placed considerable pressure on country experts whose evidence was to be challenged by UKVI and scrutinized by IJs.

NM and Others (Lone women — Ashraf) Somalia CG [2005] UKIAT 00076 reviewed three asylum claims in which IJs had adopted an inconsistent approach to case law and to the same evidence (¶137). The situation provided the rationale for the UT to convene 'Country Guidance' (CG) hearings with the stated intention of curtailing possible errors of law by IJs. CG cases were not intended to set legally binding 'factual precedents' but to provide a new standard to identify the issues which subsequent, related cases should deal with (see Tribunals Judiciary, 2014, Part 4, 12.2).

Subsequent litigation focused on the role of country experts and the validity of their evidence. Thus, in *LP (LTTE area — Tamils — Colombo - risk?) Sri Lanka* [2007] UKAIT 00076 the UT decided that failed Tamil asylum seekers were not at risk of serious harm from the Sri Lankan authorities. It decided at ¶7 that 'the weight to be given to expert evidence… and country background evidence is dependent upon the quality of the *raw data* from which it is drawn and the quality of the *filtering process* to which that data has been subjected. Sources should be given whenever possible' (my emphasis). Clearly the UT clearly has little understanding about social science research. In this case UKVI sought to curtail the weight attached to the evidence of country experts and it argued that the Home Office/UKVI 'should be able to assess whether a country expert is presenting a balanced picture and/or is exaggerating or presenting a partial or inaccurate account' (¶18). Against this argument counsel for the appellant argued that it was widely recognized that 'experts provide not only factual information but opinions on those facts' and that both should be given appropriate weight by the Tribunal (¶26). This case was one of the earliest attacks by UKVI on experts in its attempt to undermine their evidence and it illustrates UKVIs hostility towards experts who present a more nuanced and in-depth analysis of the situation in an appellant's country of origin than UKVI makes available in its own reports.

In 2006 the case of *CM Kenya v SSHD* (the Secretary of State for the Home Department, the Home Office) was appealed to the English Court of Appeal. It concerned a case where IJs had twice wrongly decided that it was safe to return a

Kenyan woman to Nairobi on the basis that she would not be subjected to Female Genital Mutilation. In this case the IAT had failed to consider and give appropriate weight to all the evidence from the country expert, Professor Aguilar. Since the appellant's case had already been heard twice and IJs had erred in both decisions, the Lord Justices decided that the appellant should be granted asylum. Similar concerns about the tendency of the IAT to be 'too dismissive' of expert evidence can be found in the Court of Appeal's 2007 decision in *SA Syria & IA (Syria) v SSHD* when it dismissed the evidence of Amnesty International (2004) and reports by country experts Dr Alan George and Ms Laizer. The two appeals were allowed and returned to the Tribunal to be reheard.

In *HH & Others (Mogadishu — armed conflict — risk) Somalia* CG [2008] UKAIT 00022, legal counsel for the SSHD mounted a protracted cross-examination of Professor Lewis, Dr Luling and Dr Mullen in an attempt to undermine their evidence and destroy their professional credibility. The case concerned the appeals of three female Somali nationals and whether they could safely be returned to Somalia which was experiencing 'international armed conflict'. The UT found that Professor Lewis 'had strongly held opinions [which] to some extent compromised his ability to be objective' and that he had not read all the objective evidence (¶282). Furthermore, he had 'a jaundiced view of the UN' for its unwarranted support for the Transitional Federal Government, he relied too heavily on his own 'human' sources, and he had not critically read material from two Diaspora websites which he relied upon (¶283-286). With regard to Dr Luling, the UT found that she had failed to 'discharge the duty of an expert' (¶287) and that her reports were 'problematic', often 'unsourced' and that 'in these appeals we have been unable to attach much weight' to her evidence (¶289-291). Finally, with regard to Dr Mullen, the UT stated that he 'was probably best placed to assist the Tribunal' even though 'some of the assertions' in his oral evidence 'did not appear to be supported in the background materials, included those cited in his reports' (¶292).

Indeed, the outcome of asylum litigation favoured the SSHD and her attempts to regulate experts and their evidence. For instance, in *SI (expert evidence – Kurd – SM confirmed) Iraq CG* [2008] UKAIT 00094, the UT decided that the failure of the Home Office/UKVI 'to adduce her own expert evidence cannot imbue expert evidence submitted by an appellant with any greater value than it merits'. In *SD (expert evidence) Lebanon* [2008] UKAIT 00078, the UT stated that experts 'must refer the Tribunal to

any cases which he is aware of and which may detract from what is said about him in cases he has referred to.' In addition, in *FS (Treatment of Expert Evidence) Somalia* CG UKAIT [2009] 00004, the UT stated that 'Immigration Judges have a duty to consider all the evidence before them when reaching a decision in an even-handed and impartial manner. In assessing the evidence before them they must attach such weight as they consider appropriate to that evidence. It may on occasions be appropriate to reject the conclusions reached by an expert. What is crucial is that a reasoned explanation is given for so doing.'

Given the direction of litigation, it is notable that in 2008 *The Times Higher* (Newman, 2008) published an article entitled 'Tribunal experts fear attacks on integrity'. The article reported that fourteen Middle East experts had written to the President of the IAT complaining that Home Office lawyers 'routinely resort to attacking the integrity and credentials of experts'. The experts asserted that part of the reason for these attacks stemmed from the fact that the courts were under pressure to 'deny people entry into the United Kingdom.'

Throughout this period UKVI was also making 'express authorizations' to exempt it from the Race Relations Act 1976 in order to test the 'language of origin' of individuals from specific countries who were applying for asylum. Inconclusive pilot tests in 2001 were followed by extensive testing which required asylum applicants to submit to a phone interview with a language 'expert' employed by a private firm to determine whether s/he was really from 'their claimed country of nationality'. Asylum policy instructions (Home Office 2015) set out very clear procedures which UKVI officials and 'linguists' in the firms contracted to carry out this work were supposed to follow to arrive at an 'expert' analysis of an individual's spoken language. As independent research subsequently discovered, however, neither officials or private firms were following the procedures; the entire process was fundamentally misconceived, problematic and resulted in considerable injustice (Campbell, 2013; Ngom, 2015). Successful challenges to these tests had been mounted using evidence from qualified sociolinguists and barristers – which focused on the absence of qualifications of the 'experts' employed by the firms and the poor quality of their linguistic analysis – which UKVI was unable to effectively counter. However, the situation changed completely after the IAT convened the first, and only, case to hear evidence on how language tests to determine an asylum applicant's country of origin were actually conducted.

In *RB (Linguistic evidence — Sprakab) Somalia* [2010] UKUT 329 (IAC) the Tribunal selected a factually weak case which was heard without the benefit of oral evidence from an independent sociolinguist. Rather than looking at the key issues in this and related cases — i.e. dialect, 'language mixing', claims about deficiencies in linguistic knowledge, the failure of the commercial firm contracted by the Home Office to interview RB in her native language as stated in UKVI policy etc. — the Tribunal focused instead on the need for the firm's personnel to remain anonymous. The evidence provided by Sprakab's director was not questioned, nor were questions asked about whether 'language analysis' was capable of determining the country that an asylum applicant came from.[3] The Tribunal problematically concluded that the 'linguistic analysis reports from Sprakab are entitled to considerable weight', a decision which endorsed UKVIs fundamentally flawed policy.

UKVIs ability to rely on language testing was finally curtailed when the Scottish Court of Sessions — the equivalent of the English Appeal Court — decided the case of *M.AB.N. & Anor v The Advocate General for Scotland Representing the Secretary of State for the Home Department & Anor*, [2013] CSIH 68. In that decision the court held that 'the Sprakab reports were deficient in numerous respects. It was accepted … that the comments in the reports that the applicants had "deficient" knowledge of their home areas was clearly outside the claimed expertise of the report writers and were without any expert foundation. Comments on credibility and demeanor were similarly inappropriate, as they would be in any expert report – this is the domain of the judicial body, not an expert witness. The Court noted in strong terms that being a native speaker of a language does not confer expertise in the identification of dialects within that language, their particular features, or the geographical or social distribution of the dialect. There was no evidence that the analysts in the Sprakab reports had any such expertise.'

I was not targeted by UKVI in the way that the experts identified above were until late 2015 when the Independent Chief Inspector of UK Borders, whose office reviews UKVI policies etc. (UK Government, nd), convened a meeting with UKVI to discuss

3 In 2004 the International Association for Forensic Phonetics and Acoustics set out clear guidelines on 'language determination' which the commercial firm that was contracted to UKVI was not adhering to. See: https://www.iafpa.net/the-association/code-of-practice/ (accessed 21 April 2020).

their recently published Country of Origin (CoI) Reports on Eritrea that I had been contracted to review (IAGCI, 2016a and b). I was highly critical of the reports for their selective citation of objective evidence, because UKVI had failed to observe and follow established guidelines in conducting research and reporting objective evidence for the Refugee Determination System and because the reports clearly reflected the policy of the British government to refuse asylum to Eritreans. UKVI rejected my review and immediately mounted a fact-finding mission to Eritrea to find information in support of their position that it was safe to return Eritrean asylum seekers (their efforts proved unsuccessful) (See the decision for *MST and Others (national service – risk categories) Eritrea* CG [2016] UKUT 00443 (IAC)).

Nevertheless, it remains the case that UKVI does not submit its own expert evidence in asylum appeals and that the principal tactic used by the Home Office is to discredit the expert involved in the case in an attempt to undermine the weight which the Tribunal/ court can attach to their evidence.

Anthropologists, Country Experts and the Law

In this section I draw on my experience as a country expert on Ethiopia and Eritrea to show how my work was affected by government rules and litigation and how my evidence was evaluated. The Horn of Africa is comprised of a number of countries which have produced massive numbers of refugees as a result of regional conflict. For instance the 1998-2000 border war between Eritrea and Ethiopia, which was ruthlessly pursued by a combination of trench warfare and the use of jet fighters and combat helicopters, displaced well over one million people along their shared border, resulted in the death of several hundred thousand soldiers, and produced a massive flow of refugees out of the region towards Europe, the Middle East, North America and beyond (Campbell, 2014). Many of the applications for asylum which are dealt with in this paper concerns individuals who fled from, or were otherwise affected by, this war.

Over the years immigration caseworkers, solicitors and barristers have sought reports from me on a growing range of issues many of which fall within the domain of anthropological study including: kinship, ethnicity, culture, family, religion, the status of children, and female circumcision which is accepted as 'objective' country information. I am also asked to comment about how both governments distinguish between political supporters and members of banned political organizations, the nature

of and access to social/health services, the role of the security services, conscription, conditions in prison, discrimination etc.

When I was first asked to write an expert report in 1997 I was completely in the hands of the lawyer who was instructing me regarding the issues I should address, the format of my report, and questions as to what constitutes 'evidence'. My first case concerned an 'unaccompanied minor' who was said to be 'an illegitimate half-caste'. The question put to me was whether he was a member of a 'social group' as defined by the 1951 Refugee Convention (an issue about which I knew nothing) (UNHCR, 2002).[4] I was specifically asked to address three issues: (1) was the youth a 'dependent' in Amhara culture? (2) was it likely that he was ostracized as a result of his illegitimate birth? Finally, (3) if he were 'returned' to Ethiopia, would he be discriminated against and would he have access to state support?

The appellant's case file was emailed to me, and I was given seven days to write a report. The instructing lawyer emailed me his comments on my draft which I incorporated into my final report. Shortly before the hearing, the lawyer emailed me a note which said: 'We would like to thank you for your thorough and intricate analysis. Our learned adjudicators often fight shy of complexity, preferring to conclude that anything quite so subtle must be outside the scope of the Geneva Convention.' I am still not sure whether he was praising my work or being ironic.

As with the majority of the reports I submitted on behalf of asylum applicants, I was not sent a copy of the IATs decision. It was not until 2008 when I had conducted fieldwork in the asylum system that I began to understand how asylum decisions were processed, argued and decided.

In 2004, I accepted instructions to provide expert evidence for *HB (Ethiopia EDP/ UEDP members) Ethiopia* CG [2004] UKIAT 00235 which was a country guidance

4 The Refugee Convention identifies five `reasons' for persecution namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts. "Membership of a particular social group" is the ground with the least clarity and it is not defined in the Convention. However, it has been invoked with increasing frequency `with States having recognised women, families, tribes, occupational groups, and homosexuals, as constituting a particular social group …' (UNHCR 2002: ¶1).

case. I was given one day to research and submit my report. The case concerned an Ethiopian male who claimed that, as an activist and member of an ethnic-based opposition political party, he had been imprisoned, ill-treated, released on bail only to once again find that he was being sought by the police. At this point he fled to the UK and applied for asylum.

I was asked to address the 'plausibility'[5] of the appellant's account, which was supported by considerable 'objective evidence',[6] and I argued that if he were returned to Ethiopia he would be at risk for a 'Convention reason'. I was particularly concerned about the Tribunal's reliance on a CoI report written by UKVI which provided a detailed overview of political events in Ethiopia at a time when the government had imposed reporting restrictions and had censored the press. How, I asked, was UKVI able to source its report?

The Senior IJs (SIJs) refused the appeal on the basis that the defendant's claim lacked credibility. With respect to my evidence the SIJs stated at ¶25 that: 'We do not find that we can attach significant weight to Dr Campbell's report. Principally because the description in the appellant's history given to Dr Campbell does not accord with the appellant's own account' (this happened because the instructing lawyer had failed to send me a copy of the appellant's Home Office interview). While the Tribunal accepted my evidence that the Ethiopian embassy was monitoring political dissidents in London, they concluded at ¶28 that: 'we are unable to accept that this means that the Embassy's officials are capable of monitoring the activity of every Ethiopian citizen... It cannot be inferred that the Appellant, described by the organisation itself as "discharging his responsibilities by way of attending meetings and paying his membership contribution"

5 `The plausibility of an account is assessed on the basis of its apparent likelihood or truthfulness in the context of the general country information and/or the claimant's own evidence about what happened to him or her.' (Home Office 2015: ¶5.64). The concept is quite different to the notion of credibility which UKVI defines as: "It is the task of the fact-finder, whether official or judge, to look at all the evidence in the round, to try and grasp it as a whole and to see how it fits together and whether it is sufficient to discharge the burden of proof. Some aspects of the evidence may themselves contain the seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence… Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all these points together" (¶5.2).

6 The term refers to different types of documentation/evidence which can be corroborated; it is often used to refer to CoI Information (see Henderson, Moffat & Pickup (2020, sec. 16).

is an obvious target for surveillance.' In dismissing my evidence the UT 'preferred' its own inferences about embassy surveillance to my 'speculative evidence'.

In a 2007 case on which I was instructed, I had reservations about the appellant's narrative of detention and flight from Ethiopia which I raised with his lawyer. Because the lawyer was concerned about his client's mental health, the client was referred to a psychiatrist whose diagnosis was that the appellant was experiencing 'suicidal ideation' caused by serious abuses inflicted on him in detention. The medical report suggested that as a result of trauma, it was to be expected that his account was lacking in detail. The Tribunal accepted both reports and granted the appellant asylum. This case points to the importance of establishing good working relations and clear communication between experts — who rarely interview asylum applicants — and lawyers. However, this rarely happens because collaboration is limited to email (there is no face-to-face contact) and the turn-around time between accepting instructions and submitting a report is short.

In 2007, I secured a research grant to undertake ethnographic fieldwork in the UK's asylum system over a two-year period. Fieldwork took the form of participant observation in law offices, the Tribunal and in the Court of Appeal — where notes were taken of meetings and legal proceedings — as well as in refugee/community organizations. We also interviewed lawyers, barristers, government officials and refugees, analysed large numbers of asylum case files and official documents and used the Freedom of Information Act 2000 to secure government reports etc. (Campbell, 2017). For the first time it became possible to comprehend how different institutions and actors — UKVI officials, government lawyers, independent lawyers, judges, refugees and other organizations in the 'asylum field' — operated. I was able to follow asylum claims to understand how they were argued and decided in the courts including claims alleging statelessness (Campbell, 2011), claims by Eritreans and Ethiopians which invoked the Refugee Convention (Campbell, 2014), and claims involving terrorists (Campbell, 2020). This research informed my work as a country expert.

For example, I became increasingly involved in providing evidence on the issue of disputed nationality, military conscription and war crimes. In late 2010, myself and Gunter Schroder were instructed to provide evidence in the case of *ST (Ethnic Eritrean — nationality — return) Ethiopia* CG [2011] UKUT 00252(IAC). In this case the appellant, ST, claimed that he had been detained by the Ethiopian authorities, held in

harsh conditions, interrogated and beaten. When he was released from detention he was subjected to reporting and residence conditions only to be summoned by the authorities for further questioning. Instead, he fled to the UK in 1999. His initial appeal was refused but this decision was successfully appealed against and was reheard as a CG case. The question before the UT was whether the Ethiopian authorities had unlawfully deprived him of his Ethiopian nationality.

The expert evidence reviewed Ethiopian law, events surrounding the border war and how Ethiopia had treated Eritrean nationals and Ethiopian-born ethnic Eritreans (individuals of Eritrean ethnicity/decent who had been born and raised in Ethiopia). During the course of three days the court heard legal argument from both sides, and spent one day hearing oral testimony from both experts who provided a wealth of new evidence which supported the appellant's claim that Ethiopia had deprived at least one hundred thousand ethnic Eritreans of their Ethiopian nationality. Most of these Eritreans had been stripped of their property and deported into Eritrea, though thousands of others fled Ethiopia. In addition, at least one hundred thousand 'Eritreans' who continued to reside in Ethiopia were deprived of their nationality.

After reviewing Ethiopian, British and international law on nationality and hearing expert evidence the UT accepted legal argument by ST's counsel and decided that if ST were returned to Ethiopia he would no longer be considered a national and that he would not be able to work, own property, engage in public employment or access health and educational services. In addition, he would not be able to vote and would be subject to considerable insecurity. The UT granted ST protection and concluded that he had been persecuted and deprived of his nationality (¶127), a decision which was instrumental in securing status for appellants in a large number of subsequent appeals. The UT's decision also overturned a number of previous CG decisions which had arrived at a radically different view.

The issue of nationality was a pressing one for thousands of Eritrean nationals and for ethnic Eritreans who had been born in Ethiopia and who had fled the border war, many of whom had grown up and/or had been born outside their country of origin in Sudan, Saudi Arabia and elsewhere. When these individuals applied for asylum, western governments disputed their nationality in an attempt to refuse them protection. For instance, in *TB7-05972* and *TB7-05973*, which was heard by the Immigration and Refugee Board of Canada, I provided evidence in the case of two brothers who claimed

that their parents were born in Eritrea and had fled to Sudan in the 1970s from where they migrated to Saudi Arabia. Their family had falsely obtained Ethiopian passports because they opposed Eritrea's ruling party and because they feared deportation to Eritrea in the event that they lost their residence status in Saudi Arabia. The brothers feared 'severe mistreatment in Eritrea because they opposed the Eritrean government and its form of military/national service, and due to their perceived political opinion as failed asylum seekers' (¶3).

My report provided important evidence about: (1) the historical and political context in which Sudan had supported the Eritrean independence movement, in part by issuing United Nations Convention Travel Documents to Eritrean refugees which allowed them to travel to the middle-east; (2) how Saudi Arabia facilitated the migration of Eritrean refugees by issuing Iqama, work permits, thereby loosening the sponsorship requirements for them to enter the country and work (which is why their Saudi identity papers indicated that their parents nationality was Eritrean prior to Eritrea existing as an independent state); and (3) about current political conditions in Eritrea. My evidence, together with documentary evidence and the brother's oral testimony convinced the IRB that the appellants had a 'well-founded fear of persecution' if they were returned to Eritrea and that they were not Ethiopian nationals. The Board granted both brother's refugee status.

Appeal DA/01682/2014 was a fresh asylum application against a decision made in 2008 in which an IJ had decided that the appellant's account of his escape from prison and from conscription in Eritrea was not credible. I provided evidence regarding the appellant's nationality, about military conscription and about how individuals escaped from prison and left the country. My report also reviewed relevant case law. My evidence supported the appellant's claim that he would have been called up for military service in 1995, that in 1998 military service had become indefinite (and that no one had been demobilized) and that without completing military service the appellant would not have been issued a passport or given an exit visa. On the basis of the evidence, the IJ overturned the original decision and concluded that: I find in terms of the Immigration Rules … that there has been such a material change of circumstances since the 2008

deportation order, particularly bearing in mind 'MA', 'MO' and Dr Campbell's reports … such as to make the appellant's deportation order unlawful.[7]

It is important to note, however, that this case is unusual because IJs frequently set aside expert evidence to refuse asylum and deportation appeals. This is particularly the case when, during the course of an appeal, the IJ decides that the appellant had not provided a 'truthful account' to the court, the argument being that the expert has been misdirected by false evidence and their report cannot be accepted.[8]

In *PA/00219/2018* the appellant was facing deportation to Ethiopia. He had arrived in the UK in 1994 from Ethiopia and been given exceptional leave to remain. However, in 2001 he was convicted of a serious offence and imprisoned for two years as a result of which UKVI sought to deport him. He challenged the deportation order by claiming that as an Ethiopian-born ethnic Eritrean he had been stripped of his Ethiopian nationality. He also claimed that he was an Eritrean national and could not be deported to Eritrea because it would violate his Convention rights. The Tribunal identified *ST Ethiopia 2011* as the relevant case law to determine the appellant's nationality; also, at issue was whether his Art. 3 and Art. 8 rights would be violated if he were returned to Ethiopia.[9]

Professor Riggan and I were instructed to provide evidence in this case. Various legal arguments were heard about the seriousness of the appellant's criminal record and social services reported that the appellant was unlikely to reoffend. The expert evidence focused on the deportation of his family from Ethiopia to Eritrea during the border war — we reviewed a wide range of historical material and examined legal documents issued to the appellant's family – how the Eritrean authorities registered deportees and the current citizenship of his family. Based on legal argument and our expert evidence, the IJ found that 'following the deportation of his parents to Eritrea, the appellant

---

7 The reference is to two earlier CG cases addressing the same issue.

8 This occurred in two appeals which I provided evidence in, AA/166100/2010 and DA/00490/2012.

9 Art. 3 of the European Convention on Human Rights states that: `No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Art. 8 is the `Right to respect of private and family life'.

was arbitrarily deprived of his Ethiopian nationality' (¶41) and that he was formally entitled to Eritrean nationality (¶42-43). The IJ accepted that 'the uncontested facts of the appellant's case place him into the category, or categories, of persons who were arbitrarily deprived of their Ethiopian nationality, namely the child of parents deported following the outbreak of war'. The IJ also found that the appellant had made a bona fide application to the Ethiopian embassy for a passport which had been refused. The Tribunal decided that (¶62):

1. The Appellant has demonstrated … that on return to Ethiopia he would face a real risk of persecution, on the ground of ethnicity because he has been deprived of his citizenship of Ethiopia;

2. his claim under Article 3 of the ECHR succeeds for the same reason;

3. alternatively, we find the appellant has demonstrated … that he is entitled to Eritrean nationality and that on return to Eritrea, he would face a real risk of persecution, on the grounds of imputed political opinion, by reason of military service. His Article 3 claim succeeds for the same reason.

This was the only time in my twenty-six years as a country expert when I was able to compare notes with the other expert prior to the appeal. The situation underlines the solitary conditions under which experts work and it also points to the effectiveness of the strategy adopted by the barrister arguing the case to ensure that both experts were thoroughly prepared and singing from the same hymn book.

A recent case involving allegations of war crimes in Ethiopia illustrates how expert evidence provided in support of an asylum applicant was mis-used to refuse his appeal. In *PA/14172/2018* the appellant had entered the UK on a visitor's visa in 2012 and claimed asylum one year later. Five years after he applied for asylum UKVI refused his claim and set out its reasons in a forty-one page 'Refusal Letter' (RFL) which summarized his claim and immigration record and set out the reasons why his claim was refused (Amnesty International, 2004; Hobson *et al* , 2008; Campbell, 2017).[10] Using the information he had provided, the RFL set out his involvement as a junior officer

10 RFLs vary from five to forty pages and are often little more than quick cut-and-paste efforts by case workers who are under pressure to quickly decide claims.

in the Derg – the military junta which overthrew Emperor Haile Selassie – when he was a 'Surveillance and Investigation Officer' in the Interior Ministry and was required to conduct surveillance on alleged enemies of the Derg. Later the appellant served as a civilian Immigration Officer at the port of Assab, Eritrea where he and his agents undertook surveillance against 'valid threats' to public safety. In 1991 the Derg was overthrown, and he was imprisoned without charge for two years. On being released the appellant claimed that he was constantly harassed by officials in the new government who wanted him to work for them, which he refused to do. In 2001, and again in 2009, he was briefly detained for supporting a banned political party.

UKVI relied on limited, publicly available information to argue that the appellant was an officer in the Derg who had been involved in 'crimes against humanity'. It rejected his asylum claim citing Art.1F of Refugee Convention which states that: 'The provisions of this Convention shall not apply to any person to whom there are serious reasons for considering that: Article 1F (a) – he has committed a crime against peace, a war crime or a crime against humanity …' The remaining twenty-three pages of the RFL set out UKVIs legal reasoning for denying the appellant asylum.

Two 'bundles' of documents related to the claim were filed in court: the Home Office bundle contained two hundred plus pages and appellant's bundle contained one hundred fifty pages.[11] The IJ had my report, reviewed the bundles and considered the oral testimony of the appellant and legal arguments made during the appeal. The 'objective evidence' relied upon in UKVI's RFL was flawed. UKVI failed to understand part of the appellant's claim because it misunderstood the Ethiopian calendar causing it to miscalculate the timeline, and its accusations against the appellant failed to fit its assessment of his involvement with the Derg. In addition, UKVI provided a grossly simplified account of the emergence of the Derg, its activities (including atrocities committed by the Derg and by anti-Derg forces) and the way the Derg ruled the country. My report provided evidence that military and civilian officers were required to implement the policies of the Derg, many of which were brutal and led to the death of tens of thousands of individuals. However, junior officers – which the appellant claimed

11 These are bundles of papers submitted by the two parties. They contained the appellants' statements, correspondence between his counsel and UKVI, human rights reports, copies of case law and UKVIs two interviews with the appellant, the RFL and his written asylum statement.

to be – were not members of the Derg and had not devised the policies. I also provided objective evidence which supported the appellant's claim to have been imprisoned, but not tried, in 1991 and about the policies of the new Ethiopian government and the ethnic unrest which its policies had given rise to. There was no independent evidence to corroborate UKVIs accusation that the appellant had carried out crimes against humanity.

Nevertheless, and regardless of accepting much of my evidence, the IJ concluded that there was sufficient evidence to determine that the appellant had committed crimes against humanity. Specifically, during the appeal the appellant had 'failed to answer questions' including whether he had a rank, and he 'gave a convoluted explanation for why he was not in fact a lieutenant' (¶39). The fact that he had 'maintained relationships with former (Derg) colleagues' was also said to have undermined his credibility (¶43).

The IJ observed that, 'considering the evidence in the round it is difficult to assess the appellant's claim. On the one hand he has shown himself to be a less than reliable witness shifting his account in an attempt to react to or predict the respondent's reservations, refusing to answer some questions and being ambiguous in his answers to others' (¶49). The IJ accepted 'the centerpiece' of his story that he was a counterintelligence officer, that after 1993 he lived in peace in Ethiopia and that around the year 2000, he had supported an opposition political party. The IJ concluded the appeal by quoting Lord Brown in *R (JS Sri Lanka) v SSHD* 2010 UKSC 15 who said: 'Put simply, I would hold an accused disqualified under Art 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organization's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose' (¶54). The IJ refused the appeal, in part, because the appellant's oral evidence was found to lack credibility.[12] I am astounded that the IJ refused the appeal by relying upon my evidence which seriously questioned the validity of UKVIs unsubstantiated assertions that the appellant had committed crimes against humanity.

12 The IJ noted that he would have refused the case in any event because the appellant did not have a well-founded fear of persecution on return to Ethiopia (¶63).

Conclusion

The discipline of Anthropology has expressed unease about its members involvement in applied work, though this situation has changed in recent decades as universities have become much more managerial and under pressure to generate income. Indeed, it was partially in response to such pressures that I first became involved as a consultant in international development and as a country expert. The problem which faces anthropologists has been how to juggle the demands of working as full-time academics while simultaneously working as a consultant/expert, and how to ensure that applied work is carried out professionally, ethically and rigorously.

In this paper I have provided a para-ethnography of my work as a country expert involved in providing cultural expertise to resolve asylum claims decided by judges. The work of development experts is quite different from country experts: the latter work in a much more isolated environment and their task primarily involves desk research. Seldom are they involved in face-to-face consultations with lawyers, and they are rarely called to give evidence in court. Country experts submit anthropological knowledge to an adversarial legal system which is dependent upon our expertise to legitimize the authority of the judiciary; though the law always contests the value of our evidence.

My para-ethnography has identified the role of legal discourse and key aspects of government policy which legitimizes how initial asylum claims are uniformly refused and how judges are able to set aside, misuse and misconstrue expert evidence. For instance, the law attempts to regulate experts by requiring them to adopt a position of 'procedural neutrality' which can undermine an anthropologist's responsibility to vulnerable individuals and subaltern groups. The legal process also ensures that expert evidence and the reputations of experts are heavily scrutinized in a process that favours the governments' efforts to refuse asylum.

However, as the cases discussed in this paper show, anthropological expertise constitutes 'a category of practice'. Anthropologists can counter legal constraints by providing research and evidence which addresses key legal issues in a case and which challenges judges to rethink their assumptions and their understandings about the social world which asylum applicants come from to counter assumptions that applicants are not economic migrants, and that their claim for asylum falls within the remit of the Refugee Convention.

Anthropologists are able to remind IJs and the state regarding the law's responsibility to protect the rights of vulnerable applicants. The imposition of procedural neutrality represents an attempt to redefine the very nature of anthropological ethics — which is to provide evidence to defend relatively powerless individuals — in order to bolster the authority of government and the courts; this imposition can and should be resisted.

As the cases discussed in this paper demonstrate, anthropological experts occupy an ambiguous position in the legal process: we are appointed and managed by lawyers, compelled to write reports which conform to specific expectations, our evidence is questioned and our reputations are undermined in a legal process that is weighted in favour of the government. Nevertheless, with our evidence lawyers can successfully challenge legal and bureaucratic decision-making to secure protection for refugees. The process is flawed – by poor legal representation and sometimes by the poor quality of expert evidence – but good working relations and clear communication between lawyers and experts, especially when expert evidence is supported by research, can be an effective combination. In this sense my ethnographic research into the British asylum system has provided me with a significant advantage to understand how the courts argue and decide asylum claims which has proved useful in a wide range of claims. The most notable advantage arose from my involvement in *ST Ethiopia 2011* which overturned previous country guidance cases on the issue of nationality. That case established my reputation as an expert and has enabled large numbers of asylum applicants to secure protection who would otherwise have been deported and transformed into stateless persons.

As the cases also demonstrate, no expert is infallible: we make mistakes. Furthermore, the courts misuse our knowledge in a process that attempts to subordinate anthropologists to the dictates of the law. Even so, work as an anthropological expert can be highly rewarding when it ensures that governments are held to account to fulfill their legal obligations under the Refugee Convention to provide protection to vulnerable refugees.

Bibliography

Akeroyd, A., Grillo, R., & Tapper, N. (1980) 'Training & Employment of Social Anthropologists', *RAIN*, 41, 5–7.

Amnesty International (2004) *Getting It Right. How Home Office decision making fails refugees*. London: Amnesty International.

Briody, E. (1995) 'Making "Anthropologists at Work": Lessons for Anthropologists', *Practicing Anthropology*, 17(1-2), 32–36.

Campbell, J. R. (2011) 'The Enduring Problem of Statelessness in the Horn of Africa: How Nation-States and Western Courts (Re)Define Nationality', *International Journal of Refugee Law*, 23(4), 656–679.

Campbell, J. R. (2013) 'Language Analysis in the United Kingdom's Refugee Status Determination System: Seeing Through Policy Claims about 'Expert Knowledge'', *Ethnic and Racial Studies*, 36(4), 670–690.

Campbell, J. R. (2014) *Nationalism, Law and Statelessness: Grand Illusions in the Horn of Africa*. New York & Oxford: Routledge.

Campbell, J. R. (2017) *Bureaucracy, Law and Dystopia in the United Kingdom's Asylum System*. New York & Oxford: Routledge.

Campbell, J. R. (2020) 'The Role of Lawyers, Judges and Country Experts in British Asylum and Immigration Law', *International Journal of Law in Context*, 16(1), 1–16.

Carver, N. (2004) *Home Office Country Reports - an analysis*. London: Immigration Advisory Services.

Cooke, B. & Kothari, U. (2001) *Participation: The New Tyranny?* London: Zed books.

Escobar, A. (1991) 'Anthropology and the Development Encounter: The Making and Marketing of Development Anthropology', *American Ethnologist*, 18(4), 658–682.

Gardiner, K., Lewis, D., Amit, V., & Garsten, C. (2015) *Anthropology and Development: Challenges for the Twenty First Century*. London: Pluto.

Gow, D. (2002) 'Anthropology and Development: Evil Twin or Moral Narrative?', *Human Organization*, 61(4), 299–313.

Grillo, R. & Rew, A. (1985) *Social Anthropology and Development Policy*. London: Tavistock.

Grillo, R. & Stirrat, R. (1997) *Discourses of development: Anthropological Perspectives*. Oxford: Berg.

Henderson, M., Moffat, R., & Pickup, A. (2020). 'Best Practice Guide to Asylum and Human Rights Appeals'. London: Immigration Law Practitioners Association.

Hobson, C., Cox, J., & Sagovsky, N. (2008) *Fit for purpose yet?: the Independent Asylum Commission's interim* findings. London: Independent Asylum Commission.

Holden, L. (2019) 'Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise', *Studies in Law, Politics, and Society*, 78, 181–204.

Home Office (2015). 'Asylum Policy Instruction Assessing credibility and refugee status. V. 9'. Online: https://assets.publishing.service.gov.uk/government/uploads/system/ uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf.

IAGCI (2016a). 'Minutes from the Independent Advisory Group on Country Information'. Online: https://webarchive.nationalarchives.gov.uk/20160403145639/http://icinspector.independent.gov.uk/country-information-reviews/minutes/.

IAGCI (2016b). '2015 COI Reviews'. Online: https://webarchive.nationalarchives.gov.uk/20160403150259/
http://icinspector.independent. gov.uk/country-information-reviews/reviews-of-country-information-reports/2015-2/.

Jones, C. A. (1994) *Expert Witnesses. Science, Medicine and the Practice of Law*. Oxford: Clarendon Press.

Kok, S.-K., Douglas, A., McClelland, B., & Bryde, D. (2010) 'The Move Towards Managerialism: Perceptions of staff in "traditional" and "new" UK universities', *Tertiary Education and Management*, 16(2), 99–113.

Kuklick, H. (2008). "Introduction". *A New History of Anthropology*. Kuklick, H. (ed.). Oxford: Blackwell Publishing, 1–16.

Mosse, D. (2011) *Adventures in Aidland. The Anthropology of Professionals in International Development*. Oxford: Berghan Books.

Mosse, D. (2013) 'The Anthropology of International Development', *Annual Review of Anthropology*, 42, 227–246.

Newman, M. (2008) 'Tribunal experts fear attacks on integrity', *The Times Higher*.

Ngom, F. (2015). ' Afterward'. *African Asylum at a Crossroads. Activism, Expert Testimony and Refugee Rights*. Berger, I., Hepner, T. R., Lawrance, B., Tague, J., & Terretta, M. (ed.). Athens: Ohio University Press, 225–246.

Redmayne, M. (2001) *Expert Evidence and Criminal Justice*. Oxford: Oxford University Press.

Riles, A. (2006) 'Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage', *American Anthropologist*, 108(1), 52–65.

Siltaloppi, J., Laurila, J., & Artto, K. (2019). 'In the service of a higher good: Resilience of academics under managerial control', *Organization*, 1-22.

Singer, M. (2008). 'Applied Anthropology'. *A New History of Anthropology*. Kuklick, H. (ed.). Oxford: Blackwell Publishing, 326–340.

Tribunals Judiciary (2014). 'Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal'. Online: https://www.judiciary.uk/wp-content/uploads/2014/11/revised-pd-3112014.pdf.

UK Government (n.d.) 'Independent Chief Inspector of Borders and Immigration'. Online: https://www.gov.uk/government/organisations/independent-chief-inspector-of-borders-and-immigration.

UNHCR (2002) *Guidelines On International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugee*. Geneva: UNHCR.

Yeo, C. (2004) *Country Guideline Cases: Benign or Practical?* London: Immigration Advisory Service.

Cases and Legislation cited

Civil Procedure Rules, sec. 35. (UK)

CM (Kenya) v. Secretary of State for the Home Department [2008] EWCA Civ 568 (UK).

Convention Relating to the Status of Refugees (Refugee Convention) 1951 (United Nations).

DB v. Secretary of State for the Home Department [2015] Appeal DA/01682/2014 (UK).

FS (Treatment of Expert Evidence) Somalia v. Secretary of State for the Home Department [2009] UKAIT 00004 (UK).

HB (Ethiopia EDP/UEDP Members) Ethiopia v. Secretary of State for the Home Department CG [2004] UKIAT 00235 (UK).

HH & Others (Mogadishu: Armed Conflict: Risk) Somalia v. Secretary of State for the Home Department CG [2008] UKAIT 00022 (UK).

LP (LTTE Area - Tamils - Colombo - Risk?) Sri Lanka v. Secretary of State for the Home Department CG [2007] UKAIT 00076 (UK).

M.AB.N. & Anor v The Advocate General for Scotland Representing the Secretary of State for the Home Department & Anor [2013] CSIH 68 (UK).

MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC) (UK).

Nationality, Immigration and Asylum Act 2002, c. 41, part 5, s. 101 (UK).

NM and Others (Lone women — Ashraf) Somalia v. Secretary of State for the Home Department CG [2005] UKIAT 00076 (UK).

R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant) [2010] UKSC 15 (UK).

RB (Linguistic evidence - Sprakab) Somalia v. Secretary of State for the Home Department [2010] UKUT 329 (IAC) (UK).

SA (Syria); IA (Syria) v. Secretary of State for the Home Department [2007] EWCA Civ 1390 (UK).

SD (Expert Evidence) Lebanon v. Secretary of State for the Home Department [2008] UKAIT 00078 (UK).

SI (Expert Evidence - Kurd - SM Confirmed) Iraq v. Secretary of State for the Home Department CG [2008] UKAIT 00094 (UK).

ST (Ethnic Eritrean - nationality - return) Ethiopia v. Secretary of State for the Home Department [2011] UKUT 00252 (IAC) (UK).

Naveiñ Reet: Nordic Journal of Law and Social Research (NNJLSR) No. 11 2021, pp. 43-62

Intercultural Justice in France: Origins and Evolution

Martine de Maximy[1]

Abstract

This paper will highlight the mandate of the juvenile judge in the context of intercultural justice in France, in which juvenile judges are at the same time civil judges and criminal judges. Their role is to both pass judgement on juvenile offenders as well as to protect minors who may be at risk. It may even be the same adolescent who has committed a crime who is also a child at risk. Through the guidance process (children at risk), the judge must respect — as is necessary for all judges — the principles that all must have the opportunity to contradict the charges leveled against them. These decisions are made in the context of a hearing where the parties may be present with or without counsel, where reasoning must be given and will be subject to appeal. We therefore have the obligation to listen to the appeals of both parents and children; some juvenile judges will even accept the presence of other members of the family or other persons whose presence is desired and may help to establish a dialogue.

Before we begin it is necessary to outline the main principles that underlie the practices of the justice system in France. As with all democratic states, there is the requirement for the independence and impartiality of judges, the belief that all must have the opportunity to contradict the charges leveled against them, as well as the guarantee of a defence. French judges are part of a secular state with a policy of integration and as such, communities are not considered as separate entities, but rather as individuals with religious and philosophical opinions that are to be respected. It is in this context that a judge will exercise their mandate and this is of particular importance in questions of juvenile justice. The French children's judges have the responsibility for both passing

1 Martine de Maximy is at present an Honorary Judge. She has served as a Juvenile Judge for 22 years, has been the Juge d'Instruction, and President of the Cour d'Assises in Paris. Since the start of her career she has fostered the higher education of judges at the National Judicial Academy (Ecole Nationale de la Magistrature), of social workers and psychologists. Educated in ethnopsychology, she initiated the use of cultural intermediation procedures at the juvenile courts in Paris with her colleague Thierry Baranger, the co-author of a book entitled L'enfant sorcier africain entre ses deux juges. She has introduced the unprecedented appointment of cultural experts in criminal proceedings in France. She has published many articles on intercultural issues in law.

judgement on juvenile offenders (ordinance of 2 February 1945) and for protecting at-risk minors (ordinance of 23 December 1958). It is within the framework of child protection (article 375 and following of the civil code) that the consideration of different cultures has emerged and been developed in the context of the arrival of numerous families from immigrant backgrounds.

How does a juvenile court judge encounter individuals who may come from very different cultural backgrounds? How may the judge come to comprehend just how these families understand their educational and social disadvantage, putting their child at risk or placing them in a position to commit an offense? How can the context of a juvenile judicial intervention be explained in a way that is both understandable and able to convey legitimacy through an explanation of how the decision was made? These important questions have been raised by me and my colleague, Thierry Baranger. We are both in charge of districts which have a high proportion of immigrant families, and have been confronted with the void created by the inability to communicate, where the measures demanded of parents become merely a formality, an empty shell.

To better explain the above, it appears necessary to highlight more clearly the mandate of the juvenile judge: juvenile judges are at the same time civil judges and criminal judges. Their role is to both pass judgment on juvenile offenders as well as to protect minors who may be at risk. It may even be the same adolescent who has committed a crime who is also a child at risk. Through the guidance process (children at risk), the judge must respect — as is necessary for all judges — the principles that all must have the opportunity to contradict the charges leveled against them. These decisions are made in the context of a hearing where the parties may be present with or without counsel, where reasoning must be given and will be subject to appeal. We therefore have the obligation to listen to the appeals of both parents and children; some juvenile judges will even accept the presence of other members of the family or other persons whose presence is desired and may help to establish a dialogue.

The guidance proceedings then impose another constraint on the judge: they must "endeavour to obtain the family's agreement to the measures ordered". It is therefore a question of justice which is in a sense negotiated rather than imposed, leading to a decision which is "co-constructed", while still taking into account that the legal framework allows the imposition of measures if agreement isn't reached. In any case,

this legal requirement changes the tone of the hearing, and is certainly a domain that requires further investigation.

However, if we want to make sure that adherence is not simply a box ticking exercise, it must take into account family difficulties, the elements of risk present in the referral, and that our purpose and role as judges are truly understood. These matters that are already difficult to comprehend for someone with a French background, are often even more so for families who have migrated relatively recently and are familiar with types of assistance and forms of conflict resolution that are very different.

There is a further peculiarity in the nature of the guidance given in derogation from general law: juvenile judges follow the enforcement of their decisions through the ordered measures (guidance or placement). As a result, these judges can see how a measure which did not carry with it genuine participation will be very difficult, if not impossible to implement. Finally, it is necessary once again to mention the duty of the juvenile judge to respect the religious or philosophical beliefs of the families involved.

It is therefore, at the beginning of the 1990s, under the framework of intervention, that we began to sense a real difficulty in being able to provide a full explanation of our decisions to certain families facing considerable difficulties, who found themselves helpless with no recognition, who were not present in the institutional understanding, had no support structures, due to a lack of true assessments of the reality of their needs, as well as being subject to forms of representation that caused them further difficulty, even to the point of abuse. We realised our own powerlessness in this context when a teacher from the educational service of the court invited a consulting therapist in ethnopsychiatry to one of our institutional meetings. The ethnopsychiatrist, Professor Tobie Nathan,[2] invited us to participate in one of his sessions. Returning from this brief introduction, we felt that we had been enlightened as to a possible way to deal with some of our most difficult cases.

2 Tobie Nathan, doctor of psychology, emeritus professor of universities, is one of the main representatives of ethnopsychiatry, a discipline founded by Georges Devereux, who offers a new vision of psychotherapy and of the patient considered in his cultural and family universe.

Similar to what happens in office of the juvenile judge, an ethnopsychiatric session involves a conversation that circulates within the group, under the direction of the primary therapist, with the interpretations of all those present being solicited. Once again, as with the juvenile court, parents and children were accompanied by an educator or social worker if available, or sometimes by one or more family members or neighbours. However, the 'missing link' was having a therapist of the same ethnicity as the family, one who spoke their language and understood their customs and how they conceived of the world. This eureka moment has led us to designate Professor Tobie Nathan as an expert of sorts in cases where a family's culture of origin was unfamiliar to us.

The first case that I submitted for an ethnopsychiatric consultation was that of a child from Sub-Saharan Africa who was being monitored as part of a guidance proceeding. Let's call him Moussa, he was 13 years of age, and had been identified as being violent at school, even to the point at which he punched the principal on school grounds. In the discussions with his son present, his father was perplexed highlighting that at home his son is quiet and respectful, being "the most gifted of his children". In the face of this mutual incomprehension, I had proposed a consultation with Professor Tobie Nathan. Very quickly, the problem that the child had been confronted with began to emerge. He belonged to the caste of griots, who were musicians and poets and were regarded as the custodians of the oral tradition (Laye, 1953).[3] Already within the family he had been identified as his grandfather's — a renowned griot — successor. However, at school no one recognised his talents or status, and being deprived of the ability to communicate this, he became violent. Professor Tobie Nathan spoke to the child explaining that "one does not beat the drum in the water ". Moussa changed schools. His social workers informed his teachers of these issues and Moussa has not reappeared in court. One can legitimately hypothesize that without the particular talk that he had, and without the recognition of his nature, he may have continued to commit violent acts even to the point of being excluded from the education system. Obviously, not all cases that had been directed to a consultation with an ethnopsychiatrist were that simple to treat, however, these sessions provide them with dignity and carry with them at least the recognition of the family's culture and the difficulties that they may face.

3 "The griot settled in, prepared his kora, which is our harp, and began to sing the praise of my father. For me, these songs were always great moments".

In most cases we quickly order the involvement of psychologist to better understand the issues that are being faced by the family and to help them on the path to integration with the customs and values of French society. Procedurally we have framed this work as ordering "ethno-clinical mediations". It is useful to emphasise that even if it is a consultation with an ethnopsychiatrist which led us adopt this new practice, we were working strictly within a judicial frame. This frame, given its strict procedural requirements, and in the respect of individual liberty, has a role in which people can be given a voice, even on subjects that may at one time have been considered incomprehensible or whose evidence was deemed inadmissible by the juvenile judge.

A few years later, though still in the 1990s, at the Juvenile court in Paris, under the aegis of the President Alain Bruel, we also worked with doctoral students from the Laboratory of Judicial Anthropology (*Laboratoire d'Anthropologie Juridique*, LAJP) based at the University of Paris I and directed by Professor Etienne Le Roy, which focused more specifically on the societies of Sub-Saharan Africa. We then set up what we later called hearings "of cultural intermediation" during which a member of LAJP, if possible, of the same ethnicity as the family involved, was included as part of the hearing. It was no longer an issue of directing parents and children to the services of an expert, but rather that expert now participated in the hearing. We therefore developed the status of "cultural intermediator" (Younes and Le Roy, 2002, p. 77).[4] In other words, it was the task of the cultural intermediator to act as a bridge between "the legal world of the French judge and that of the litigant whose culture is not western, through the perspective of the anthropology of law where "law is given form through various struggles and the consensus that results from those struggles") (Alliot, 2003, p. 282). The work of the cultural intermediator is to focus on the fact that "every meeting of cultures presupposes not only the work of translation but also of discovery and of the transposition of contested differences through a common experience that anthropologists of law call 'dialogie"'(Le Roy, 2006, footnote 2). The meeting with and acceptance of "the other" necessitates a negotiation that is both precise and difficult, to avoid the malaise that may emerge from multicultural societies" (Loteteka-Kalala and de Maximy, 2010).

4 The term "cultural intermediation" (intermédiation culturelle) was developed by professor Etienne Le Roy.

Hearings of Cultural Intermediation

This aspect is particularly important because these hearings may bring up certain cultural concepts that are foreign to Western culture; one example is the case of witchcraft, which is widespread in Africa and is often invoked as the primary cause of an individual's or a family's woes. Therefore, two key principles must be respected during a cultural intermediation hearing:

- The session cannot be held without first announcing it by the judge to the family at the preliminary hearing and obtaining the agreement of the parents. At that hearing, it is explained to them that the magistrate wishes to understand their comprehension of the situation, to understand them and, from their perspective, understand which outcome is envisaged and in what context. It is explained that the presence of an individual from their cultural background may not only be useful for the judge, but may also be useful to them as well.

- On the part of the Cultural Intermediator they must guarantee that they will work in a responsible manner that is also ethically sound. It is for this reason that they require a university diploma, and where possible to have completed some preliminary training in the office of a juvenile judge.

Other than the intermediations carried out by PhD candidates who have completed a course that we facilitate and the preliminary training, we have put together a think tank which includes Professor Etienne Le Roy, the director of the LAJP and the intermediators in one part, along with judges who are interested in these experiences.

Legal Reference Texts

In the context of the guidance that is provided, as in every civil proceeding, the juvenile judge could indeed use the expertise of a researcher of the social sciences, referred to as "a cultural intermediator of the justice system" (*Code de procédure civile*, Arts. 232, 256 and 1200). The Juvenile Judge, as part of the measures for the protection of the child, may instruct a cultural intermediator to provide assistance and counsel to the family

de civil, Art. 375-2).[5] However this decision will be made in conjunction with child welfare services who are responsible for carrying out the measures for the protection of the child in question and for the protection of children in general.

Currently the educational services, or the ASE, may approach the juvenile judge for a ruling of cultural intermediation or may even deal with the intermediator directly to help provide them with some clarification. In this case, one may lament the absence of the formal agreement of the family, however the initial meeting in the judge's office allows structure to be given to the work that the cultural intermediator does with the family and the educational services.

The Progress of Cultural Intermediation Hearings

When these forms of hearings are proposed to a family, it is made clear that both parents and the children must participate, with the intention of ensuring the involvement of parents who are used not to come to the hearing . In general this order is respected, even to the point at which the presence of another member of the family or of the group will be accepted. On day of the hearing, everyone introduces themselves, and especially the cultural intermediator. It is made clear to participants that they are welcome to use their mother tongue, even if they understand and speak French perfectly, which is often the case. It is not uncommon for the meeting to begin in French and to continue quite fluidly in their language of origin when more intimate questions regarding history or family life are asked.

Many questions are asked throughout the course of these long hearings (which last on average two hours). Where does the family come from? To which ethnicity or ethnicities do the parents belong? Do the couples have kinship links to one another? How were they married? What is the social status of their own families? What did their fathers and grandfathers do? When and why did they arrive in France? Even more questions emerge throughout the course of these discussions.

---

5 Anytime it is possible, the child should remain in their current context. In this case the judge directs either a suitably qualified person or a service that provides observation, education or re-education in an open environment. They are given the role of proiding assistance and advice to the family to help overcome the material or moral difficulties that they are facing. This person or service is responsible for following the development of the child and to report back to the judge periodically.

It is often noticed that the children may not know the history of their family. They may, for example, learn that their grandfather was the chief of a village and had considerable authority. One may imagine the impact that such a revelation may have on a child whose father is unemployed and may seem of little worth. The educational work with the adolescent may present the emergence of an identity other than the territorial. They will no longer say that "I am from north Bondy" but rather that they are the "son of X, the grandson of Y, who was the head of the village of Z". The circumstances of their parents' departure and arrival in France may suggest a reason for the family's ill-being situation, as the child had revealed. It may be the case that the departure was brought about by a marriage that was contrary to local customs or where the families of the couple are part of an unresolvable conflict. Sometimes the reasons that emerge would never have done so without the active presence of the cultural intermediator, such as an accusation or fear of witchcraft. Indeed sorcery is central to explaining the traditional world in Africa, with important nuances within the various ethnic groups, however these considerations would not have emerged of their own accord in front of the French judge, if the judge hadn't first introduced to the hearing someone who could comprehend these issues and make comprehensible. In this way, those involved respect the secularism of French justice that the judge makes reference to through his respect for the beliefs of the parents. The question then asked is that of possible care, knowing that the child, born or raised in France, rejects the interpretation given by the parents to their problems, or to the teenager problematic conduct. The educator's presence at the hearing is therefore very useful. The questions raised are frequently anthropological : who is in a position of parental authority? Who is the mother? What is the role of the eldest child? etc.

Often it is appropriate to allow the cultural intermediator to follow the family for three to six months and to provide a report to the judge outlining their intervention. This task, based on an exchange, may in certain cases trigger a rehabilitation of the relations within the family, and help each member find their right place, as can be seen in the example which follows. As explained by Ms J. Loteteka, a cultural intermediary:

> "Outside the judge's office, the task of a cultural intermediator assisting a family is completed alone or through some form of collaboration with guidance teams who are responsible for implementing the measures for the protection of the child and to whom the child has been entrusted. These teams are often composed of educators, social workers and a

> hologist attached to the educational service. Their work consists of providing assistance and advice to the family as per the terms outlined in article 375-2 of the civil code. Each of these measures, the guidance and the cultural intermediation, produce a report which will be given to the juvenile judge to help them comprehend the situation of the child and their actions in the familial context. This collaboration between the cultural intermediary and the social worker guarantees the specific goals will be met: it allows the child to be socialised despite the complexity of their status within the family and the family's heritage."

Here one must make a judicial clarification: cultural intermediation is different from mediation. While both are means to resolve conflicts, they need to be distinguished from one another: mediation involves the engagement of a third party which is neutral in order to help shape a solution that is amenable to and developed by both parties. The cultural intermediator is mandated by the judge and not by the parties themselves. In that sense they represent a judicial institution. Solutions aren't reached with the family, but rather they provide a mutual understanding of both the family's context and workings for the judge, as well as an understanding of the role of the judge by the family.

It is now useful to question the importance and the procedural nature of the judicial context. The mandatory nature, the rituals, the confidentiality within the judge's office among others, allow those who are exposed to them the opportunity to explain aspects of the case that may not have emerged in a less limited context. Furthermore, juvenile justice intervenes in questions of belonging and affiliation and works to establish relations that have been lost or disrupted. The aims of these processes are therefore to allow minors and their families to settle in France, and in doing so to adopt the key foundational principles of the society, notably those which help maintain public order, while still recognising their differences and the modes of thought and organisation of their places of origin. Here we can reiterate the conclusion of Denis Salas, a Lecturer at the French National School of the Judiciary, to whom cultural intermediation is "completely balanced between the need for the recognition of difference and integration" (Maximy *et al* , 2000).

Here there is one example of the measures for the protection of the child which is particularly illuminating:

Laura or "the Child of Lineage"

A case was opened after eleven-year-old Laura[6] ran away and sought refuge at the home of a friend complaining of violence regularly inflicted on her by her mother. Laura was then assigned to a children's home by those prosecuting the case, where she wrote a letter to the juvenile judge exposing her shame in having left her home and having "betrayed her mother", while at the same time reinforcing her decision not to return to live with her, who she also depicted as lacking emotion. A few days following her admission to the children's home she made known to the judge that she had arrived in France at the age of five and half, and that she has never been understood by her mother. In Africa, she had been raised by her aunts and had only seen her father once. She reiterated her demand to continue residing in the children's home.

At the same time Mrs F., her mother, refused a meeting between her and her daughter in the office of the judge who later ordered that Laura continued to reside at the children's home, at least to the end of the vacation that had been organised by the home. Three days later the mother was seen alone by the judge, as the daughter had left on holiday.

She was very emotional, and she started with the following affirmation: "she's my daughter and I love her a lot; maybe too much". She explained that she had arrived in France to study when Laura was three years old. She had another daughter who was very young, the product of a marriage with a man that wasn't Laura's father, with whom she was involved with only very briefly. Laura gets on well with her, but Mrs F. believed that she was jealous of her little sister. She asked for the child to be allowed to return home.

The first report from the children's home, compiled for the hearing between mother and daughter that was to occur in 15 days' time, highlighted that Laura had settled in well to the children's home, and that her behaviour had been both positive and resolute. With regards to the relationship between mother and daughter, Laura continued to refuse any possibility of returning to her mother's home, and was very critical of her during the interviews organised by the home despite the mother's claims of affection.

6 In respect of the privacy of those involved, the names, dates and specific geographic origins of these individuals have been modified.

The most unexpected revelation was made to the social workers by Laura, who explained that her mother was in reality her aunt and her real mother had stayed in Africa. It was with her permission that Laura had arrived under this identity so that she could benefit from an education that her mother could not have provided for her back in Africa. Laura refused to discuss this in front of Mrs F. The juvenile judge raised this question during the hearing in the knowledge that the legal setting was private enough to be able to address an issue as sensitive as descent and the secrets which often surround it.

Mrs F. recognised without reticence this change in Laura's civil status, but explained that she had come to the aid of her sister who could no longer look after her daughter and that she had entrusted Laura to her so that she could complete her education in France. When Mrs F. had arrived in France it had been her father who was responsible for Laura, as Laura's own father had abandoned both mother and child. She emphasised that Laura still had a relationship with her mother via telephone, and that they met up when they visited Africa. When their relationship started to deteriorate she suggested that the girl return to live with her mother, but Laura refused, as did her mother.

Here we quite clearly find ourselves within the realm of the cultural. The locations and roles at the heart of the family are not the same in the culture of origin as they are in the host country. The judge, due to her knowledge of ethnopsychology, knew that the title of "mother" did not have the same meaning in France as it did in Africa, which is more extensive. She also knew that her words would not have the same effectiveness as those of an anthropologist of law, with a similar cultural background, a PhD candidate from the University of Paris I, and with exceptional knowledge of French culture. Laura was already integrated within French society, reasoning according to the customs and laws of her host country, but she still felt that she did not fit in, including with her classmates.

It is in this context that a cultural intermediation hearing was suggested to the family and they quickly accepted. This hearing included Ms L. a cultural intermediator, Mrs F., her husband, Laura, and social workers from social services and from the children's home.

Once the initial introductions had been completed, the judge brought up the issue of descent. Ms L. who had already familiarised herself with the case file, highlighted the principles of customary law: "When two sisters live with their parents, the child

of either of them becomes the child of the grandparents. All the children share that same status. If one of the sisters wishes to leave they may take one of the children. The mother and her sisters are all considered mothers, and they are all called "mother" followed by their first name. Ms L. continued by addressing the question of the travel from one country to another. She explained that in Africa, children do not ask questions, and the same is the case when they arrive in France. Furthermore, she highlighted, that in this case it is dangerous to use the title of "aunt" as it highlights the separation and attracts witchcraft.

Mrs F. explained that she had described her current difficulties to her family that stayed in Africa and Laura's mother replied that she wanted the girl to stay where she was, a wish that she had also shared with Laura. Her mother had once again reiterated to Laura that she was Mrs F.'s daughter. During the hearing it was possible to explain to Laura, that far from being an act of transgression, her Aunt had only respected a law of their culture, which also showed her maternal love for the child. The child was able to both respect her belonging to her culture of origin, while at the same time being able to settle in France as she wished, and had already begun to do. Ms L. had played the role of "ferryman": between the judge and the family, and between the society of origin and French society. The juvenile judge had decided to continue the intervention of Ms L. in the form of family interviews and co-operation with social services. Laura's placement in the children's home ended the following week. Measures to ensure the safety of the child had been put in place, but only lasted a few months, as the situation no longer needed any further assistance, and there was no further danger. Ms L. described her work which provided clarifications regarding the situation.

In her report Ms L. described the anthropological and cultural context of the family as well as her activities:

Interviews

"In our first interviews with the young girl, different explanations of the history of the maternal side of Laura's family challenged us: for her, the reason for her arrival in France was to take her away from her biological father. Laura claimed to know her father who lived in a different African country to her mother. He was married with three other children and was of Muslim faith which explained the existence of differences between her father and her mother who was in fact Christian. In simple terms, the family of the young girl wanted her to be raised in a Christian environment. Laura explained that her

mother preferred to entrust her to her sister, rather than to see her leave with her father. Laura wanted also to be able to maintain contact with him via telephone. He used to call her every year on her birthday. He even demanded that she spend her holidays with him, an offer which the young girl refused due to the fear that in living with her father she would become Muslim and would be forced into marriage.

An Anthropological Analysis of the Situation

The analysis of Laura's case shows to us how "kinship is given as something that seems to come from our biological foundations, which isn't the case […] it is rather social rules which define the belonging of an individual to a group" (Héritier, 1996). Firstly, the interviews with Laura led us to believe that she had accepted to be under the authority of her aunt, but she claimed to feel lost within her family history. Mrs F., despite her genuine desire to provide her niece with a good life, seemed to have some difficulties in doing so. Her professional activities in Africa had not allowed her to fulfil her duties towards the young girl. Secondly, we note that her belonging to a matrilineal ethnic group helps explain why Laura was being raised by her aunt.[7] We have learnt that the ethnic group of the young girl's maternal branch is very Christian, and that the complexity of the kinship system of this group is centred around a system of organisation where matrilineal descent is fundamental (Bonte and Izard, 2000).[8] We also learnt that the inclusion of each individual in the lineage is via the mother.[9] The place of the mother is therefore primordial, it's her who makes the decisions, is responsible for the family as well as the education of the children. This

7 Ethnic group: in current academic usage, the term "ethnicity" designates a linguistic, cultural and, at a particular scale, territorial group; the term "tribe" is reserved for smaller groupings. The category of "ethnic group" is a more recent example and it specifically designates a cultural minority.

8 Kinship systems: Kinship is not simply an expression of "natural" links. It is integrated within a system that is, in the first instance, related to action (defining the rules of conduct) and to thought (defining conceptual structures), kinship above all represents a cultural reality, responding to these correct determinations. One must therefore comprehend that relations of kinship can be approached from a number of diverse angles: emotional, normative, symbolic, strategic, etc.

9 Linage: a group of kinship that is unilineal, so that the members claim either one's paternal line (patrilineal) or their maternal line (matrilineal) in terms of a known common ancestry. The members of this line are able to compile genealogical relations that link different individuals but that also lead back to the founders of the line. In the sense that it provides a form of social unity, the linage combines residence (patrilocal or matrilocal), kinship (patrilineal or matrilineal), the principles of authority (organisation by age, sex, birth right etc.) and patrimony (heritage and lines of succession). Multiple linages form a village.

family organisation also has a system of classification of kinship, where the duties of the mother are also undertaken by her sisters.

Understanding the Status of Laura's Mother and Aunt in light of their Lineage

Kinship in Africa is a set of links that unite groups of people either genetically (kinship, descent) or through will (alliances, blood pacts). The qualification of who is a parent is therefore essentially relative. Lineage is established through systems of kinship. It can be matrilineal, that is to say that children belong to their maternal line, and in this case paternal authority may come from a maternal uncle, who is therefore natural to consider as a father, in the general sense of that term. When kinship is patrilineal, that is to say that children belong to the paternal line, the father is in the position of authority. In western societies, kinship is neither patrilineal or matrilineal, it is undifferentiated, which means that grandparents all share the same title of grandparent for children.

There are two types of nomenclature in the system of naming parents (Mendras, 1989, p. 147): in the West, the naming practices of kinship are descriptive. One uses particular words which describes the situation and the position of the individual. The word "mother" defines a person who gave birth to the child and no one else. In the same manner, the sisters of one's mother or father are all aunts. They are, according to the child, in the same position. However, in Africa, the naming practices of kinship are classificatory. In a system which is classificatory, people are classed by the same name even when they are not in the same position. The mother and her sisters are all considered mothers for the child, and the child treats them in the same way and calls them all "mother"."

It is in this way that we can also understand why Mrs F. presents herself as Laura's mother, having the same title as her sister, the biological mother of the young girl. These two individuals occupy symmetrical positions with regard to the child. In this group, each has a particular role with regards to their lineage. For Mrs F., that is of "Laura's second mother". The objective of the work of the cultural intermediator is to bring Mrs

F. to a point where she can use words to describe her role of mother and aunt. This situation was obvious to her, but not for Laura. It is also the task of the cultural intermediator to help Mrs F. and young Laura to understand the young girl's place in France and with her two parents who still live in Africa, but also the structure

of the family in France. Ms L. described a telephone interview between Mrs F. and Laura's father. He demanded to have her visit for the summer holidays. Mrs F. said to Ms L. that she wasn't opposed to such an idea if Laura agreed, but that she would accompany her as she was suspicious of the father's real intentions. In this way, the cultural intermediator, under the terms of her role concluded: "The work of cultural explanations in the context of this family, and putting their family history into words, seems to have permitted Laura to better understand her position among her family. There have been no further difficulties, with regards to the question of Laura's position within the family and their relationship with one another. She doesn't seem to be in any danger".

Similarly, the social workers underlined that Laura had seemed to have "regained trust in her mother, and that they have returned her to the role of a child of her age". In allowing her to once again recognise her aunt as her mother without the conflicting loyalties between these two cultures, cultural intermediation has also allowed Laura to recognise the legitimacy of Mrs F.'s parental authority. A long and without a doubt difficult placement of the child in another environment was also avoided.

The Intercultural in Criminal Cases

Once we had discovered and experimented with this these tools, it became obvious that they may have applications in other processes. The required investment of time and the considerable financial costs has not allowed us to do so all that frequently, however this has proved to be very useful in cases where specific cultural references are made or that the progress of the file or the process has been blocked by withdrawal or incomprehension of the person being pursued.

When I subsequently changed my role and became an instructing judge in 1997, I had ordered ethnopsychiatric expertises. Furthermore, other instructing judges also used these services. They proved most useful at the moment of judgement, which is something that I was able to verify later when I became president of the criminal court (*cour d'assises*) in 2008. It is true to say that in the majority of case files there were no ethnopsychiatrichal or ethnopsychological expertises . So, when this seemed necessary to me, I ordered such an expertise a few weeks before the hearing. As defined by Sandrine Dekens, a clinical psychologist, and expert to the International Criminal Court at The Hague:

> "Clinical ethnopsychiatry centres the culture of the person as constitutive of their psychological functioning. As everyone has a culture, there is no real cultural specificity. Enthnopsychiatry is a clinical approach that can be used on all people regardless of their cultural origins, whether French, European, African or Asian… It means not thinking of the person as an individual, but rather as someone who belongs to a cultural social group, shaped by their milieu and the collective history that they have gone through.It is a psychology that leads to an archaeology of the self, as one's psychological functioning carries with it traces of their emotional, cultural, political and historical attachments. A person is made by a singular cultural world, which are not reducible as "the same", but are objects in themselves: languages, systems of kinship and alliances, judicial systems, values, a body of techniques and habits that govern daily life, the education of children, what constitutes normal and abnormal…"

To better illustrate these practices of ethnopsychiatry in the context of criminal matters, I will give the example of two cases which were heard in the *cour d'assises* where it provided a more in depth understanding of these cultural elements, allowed a greater freedom of speech for the accused, and enabled the debate to get closer to the truth of the matter.

The first case we will consider involves a Mrs L. who is of Sub Saharan African origin, who was before the court for having struck and injured her four-year-old daughter, occasioning her death. Through the examination of the case files, the fact emerged that one of her very old friends, also African, had convinced her that her daughter had been bewitched and wanted to kill her. It was therefore necessary to remove the dangerous forces that were living inside her, but in doing so she exercised such violence that the child was killed. I had ordered an expert report when I learned about this case, two months before the hearing. It seemed necessary to me to address this question of witchcraft in the court and in front of the jurors, not to excuse the crime, but to better understand the circumstances under which it occurred.

At the hearing, the accused continually referred to her grief in having killed her daughter. For her, her life was now worthless, and prison was her only future. At the hearing, the quality of the testimony of her "friend" was such that it showed that she had the accused under her influence. Still, it remained, at least in the psychological

sense of the term, that she was criminally responsible, and not subject to any mental incapacities. If we consider this from a point of view that is more psychoanalytical, as most French experts would generally do, one might also perceive issues within the mother-daughter relationship.

But these two different readings of the situation, allowed the accused's story to be more fully heard, and also for her to better understand her own responsibility, which she continually highlighted during the hearing. At the trial she had been strongly condemned, but she had explained to her lawyer that it was important for her that she could express herself freely without fear of the incomprehension and contempt from the court and the jurors. With regards to the jurors, the testimony of the ethnopsychological expert allowed them to overcome or even dismiss their prejudices and also draw conclusions on the case in the calmest way possible.

The second case concerned a young Chinese woman who was accused of having occasioned the death of a six-month old baby that she had been minding, by violently shaking him. Throughout the process she had continually modified her version of the events and in the end she denied the fact that the shaking had been violent. In reading the case files, it was not possible to understand the way of life of this woman and her family (she was the mother of three children) as well as her mental state. She had barely said anything during the assessments of the usual experts and the expert psychologist had concluded that she had been unable to complete her evaluation. I had therefore ordered a enthopsychological expert to consider the case some time prior to the hearing. In the initially meeting with the expert, Mrs J. was very cooperative and had an almost therapeutic connection with the expert who was from a western cultural background, but has been trained in ethnopsychological methods. Her way of addressing the various problems and the interest given to her culture, had allowed Mrs J. to truly cooperate as per the method that had been described by Georges Devereaux to whom we can attribute the birth of ethnopsychiatry (Devereux, 1951). She had listened to Mrs J. with the assistance of an interpreter which she had employed not only for the translation of the language, but also as "a cultural mediator able to explain Chinese socio-cultural elements".

The expert had described the poor rural upbringing of Mrs J. who, despite having her education interrupted at a young age, managed to continue her learning independently and spoke Mandarin in a way that gave little indication of her social class. She started

working very early, but described an affectionate family environment. She met the man who was to be her husband at the age of 18, and despite being Buddhist, she converted to his religion of Protestantism. She gave birth to a little girl, but it was required by Mr J. that they have a son, which his brother and sister had not been able to achieve. The Chinese political system of only one child necessitated that they leave the country in order to have another child. Mrs J. explained how she had left her family including her child, and that she had cried a great deal.

Two years following her arrival in France, she had given birth to another girl, to which they gave a French first name that was of Christian origin. Eleven months after that they gave birth to a boy named Christian. Once they were able to leave Mr J.'s sister's apartment, they had their eldest daughter brought to them and had her baptised again, this time with a French first name that was similar to the others. Living in an apartment of 20m2 she sought to improve the family's life by minding the children of other Chinese families. It is under these circumstances that the parents of the child who was killed came to put their infant in her care. This couple lived in the same precarious conditions as Mrs J., and quickly formed the habit of leaving their child with her day and night including when he was sick. As a result Mrs J. was given heavy responsibilities, made worse by the fact that in China, if you are responsible for minding a child, they must prosper (this clarification was given by the expert during the course of the hearing). Throughout the course of the expert analysis across two long sessions, Mrs J. was highly emotional, showed a great deal of guilt as well as symptoms of Post-Traumatic Stress Disorder.

Regarding the situation, she had spoken to the expert of the shaking that had occurred following a malaise of the child, but at the same time expressed both significant guilt and the incomprehension of her actions. One can assume that it was being listened to empathetically by an expert who was not researching the truth of the facts, but who was describing with precision the customs and conceptions of Mrs J.'s society of origin, as well as the manifestations of her emotional suffering, which had provoked Mrs J.'s confession during the course of which she could not stop crying. Collapsing, she recalled having forcefully shaken the baby which would not eat, as a result of which she risked failing in the eyes of the parents, as well as in her own eyes, if the child didn't grow or worse, lost weight.

This confession, uncalculated and born of emotions, as well as her taking of responsibility for these actions, had certainly brought about a sentence that was more lenient than if she had continued to deny what she had done.

Justice humanizes by the stories of those who have committed acts that could be considered monstrous. In order to bring about these speeches, one must search the depths of the particular individual, which may necessitate the consideration of their culture of origin.

Whilst maintaining an awareness of the complexity of the question of cultures, over the last few years, The National School for Judges has been making future judges aware of these issues during the course of their initial training. In the context of ongoing development, I lead and contribute to training sessions on this topic. Judges have shown themselves to be very interested in cultural intermediation and ethnopsychological expertise. However, the resources required for their use, exist unevenly across the country.

In conclusion, these procedures could very easily be considered within the reflections and research that emerged from North America, which are currently being carried out in France on the concept and the practice of therapeutic jurisprudence.

Bibliography

Alliot, M. (2003) *Le droit et le service public au miroir de l'anthropologie* KARTHALA Editions.

Bonte, P. & Izard, M. (2000) *Dictionnaire de l'ethnologie et de l' anthropologie*. Paris: Presses Universitaire de France.

Devereux, G. (1951) *Reality and dream; psychotherapy of a Plains Indian*. New York: International Universities Press.

Etienne, L. R. (2006) *Témoignages réunis* à *l'occasion du quarantième anniversaire du Laboratoire d*. Paris, Juridicités, Karthala.

Héritier, F. (1996) *Masculin/féminin. La pensée de la di*fférence. Paris: Odile Jacob. Laye, C. (1953) *L'Enfant Noir*. Paris: Eitions Plon.

Loteteka-Kalala, J. B. & de Maximy, M. (2010) 'L'audience d'intermédiation culturelle : quand la juge des enfants rencontre les familles venues d'ailleurs', *Enfances & Psy*, 48(3), 95–106.

Maximy, M., Baranger, T., & Maximy, H. (2000). 'Preface'. *L'enfant sorcier africain entre ses deux juges* Odin Éditions.

Mendras, H. (1989) *Eléments de sociologie,*. Paris: Arman Colin.

Younes, C. & Roy, E. L. (2002). 'Médiation et diversité culturelle: pour quelle société' KARTHALA Editions.

Cases and Legislation cited

Art. 375-2 C. civ. du 22 mars 2015, modifié par la loi n°2013-403 du 17 mai 2013 (France).

Art. 232 C. pr. civ. du 1 janvier 1976, codifié par décret 75-1123 1975-12-05 du 9 décembre 1975 (France).

Art. 256 C. pr. civ. du 1 janvier 1976, codifié par décret 75-1123 1975-12-05 du 9 décembre 1975 (France).

Article 1200 C. pr. civ. du 1 janvier 1982, créé par Décret 81-500 1981-05-12 art. 5 du 14 mai 1981 (France).

Naveiñ Reet: Nordic Journal of Law and Social Research (NNJLSR) No. 11 2021, pp. 63-78

Cultural Expertise: Substantial and Procedural Framework

Gualtiero Michelini[1]

Abstract

Starting from the evolution of jurisdictions vis-à-vis European and international law, and the challenges of globalization and immigration, this contribution focuses on the concept and different declinations of multiculturalism, and on the role of social sciences, including anthropology, in treating and adjudicating judicial cases, in particular, from the perspective of the Italian judiciary. As the cultural issue is an aspect that is frequently at stake in judicial decisions, the use of cultural expertise in trials is addressed both through cases which have benefited from it and by examining the substantial and procedural aspects that need to be considered.

Introduction

Legal practitioners, including judges, public prosecutors, and lawyers are impacted by the evolution of the concept of legal system (or legal order), as developed in the 19th-20th centuries. The traditional scheme – territory, community, norms - as well as the coverage of the umbrella of national Constitutions, is no longer sufficient to describe the legal order as the expression of culture, values, and rules of living together in a given State. For judicial actors, the main factor of change is the re-elaboration of sources of law. The harmonization of rules in the EU, the overlapping of civil law and common law, the para-constitutional role of EU Treaties and of the Charter of Fundamental Rights of the European Union have gradually transformed national judges

1 Gualtiero Michelini has served in the Criminal Law and Labour Tribunal in the Courts of Turin and Rome. Since 2012, he has been Judge at the Court of Appeals in Rome. During his professional career, he was detached to the Italian Ministry of Justice – International Relations Department (1998 - 2001) and to the European Commission – DG Justice (2008- 2012). He was a member of the Italian delegation at the Conference for the Statute of the International Criminal Court and the Ad-Hoc Committee for the UN Palermo Convention against Transnational Organized Crime. He has served as an expert in EU, UN, and CoE projects in Europe, Africa, and Latin America, as well as a lecturer on courses organized by the Scuola Superiore della Magistratura and by EU programmes in candidate countries. He was President (2014-2017) of MEDEL - Magistrats Européens pour la Démocratie et les Libertés. He is the author of scientific articles and reports on International Criminal Law and Labour Law.

into European judges (Piccone and Pollicino, 2019). A specific transnational legal order has been realized through the European Convention of Human Rights and the case law of the European Courts of Human Rights. International law and national ratification have turned UN conventions, as well as conventions adopted in the framework of other international organizations, into sources of directly applicable Law. Furthermore, globalization and immigration have changed the scenarios of legal conflicts and introduced new unexplored perspectives, leading post-modern jurists into uncharted territories, including the co- existence within a given territory of different cultural and social traditions (Rordorf, 2017, p. 4), not only in the field of Immigration Law, but also, inter alia, in criminal law, family law, labour and social law.

In Italy, the issue is relatively recent. Traditionally a country of emigration (to Northern Europe, North and South America, Australia) and of significant internal immigration from the South to the North in relation to post-WWII industrial development, only in the last 20 -30 years has Italy become a country of immigration with a foreign-born population now estimated at approximately 10%. Jurists face new challenges related not only to linguistic barriers and to the issue of interpretation (which remain crucial), but also in terms of the response of the justice system when conflicts arise between people's place of residence and their identification with communities with different traditions, values, cultural background, and cultural references (Bisogni, 2017, p. 118).

Legal order and multiculturalism

The relationships between these new challenges in a global perspective of protection of rights (Azzariti, 2017, p. 120) described as the issue of multiculturalism (MD, 2015), and the current legal order can be systemized in three hypothetical scenarios:

1. "Cosmopolitan multiculturalism", involving the possibility of recognizing everybody's rights and traditions: the limits of this approach derive from the needs of limiting individual freedoms, allowing the evolution of legally accepted balances of rights, setting in a given context;

2. cultural colonialism, involving the identification of universal rights, generally the ones established in that state: the limits of this perspective lie in a tendency towards the excessive defence of identities and cultural dominion;

3. new mixed constitutionalism, involving an attempt to discuss and identify how to achieve democracy, pluralism, and solidarity in the current context.

Social sciences and jurisdiction. The notion of cultural expertise

The question of "how to learn from and how to teach to" within different juridical cultures and traditions is not entirely new to the context of jurisdiction: judges and other actors in the justice system learn from and draw upon sciences, including social sciences, including anthropology, in handling and deciding cases before the courts.

The cultural issue is an aspect to be considered in judicial decisions, in particular, in a context of legal pluralism.

However, we must be aware of the dangers inherent to this approach, especially the one defined as the risk of the "anthropologist judge" (Ruggiu, 2017, p. 216), which could result in a cultural prejudgment, thereby blocking the evolution of case law on "open clauses" as well as of legislation. In order to avoid such risks, courts need to make appropriate use of cultural expertise during trials.

From this perspective, "cultural expertise" refers to the "form of expert opinions formulated by social scientists appointed as experts in court and out of court for dispute resolution and the claim of rights". Cultural expertise is scientifically defined as "special knowledge that enables socio-legal scholars, experts in laws and cultures, and cultural mediators—the so-called cultural brokers—to locate and describe relevant facts, in light of the particular background of the claimants/litigants/accused and for the use of conflict resolution or the decision-making authority" (Holden, 2019).

Some Italian problems and experiences

The relatively recent transformation of Italy from a country of emigration, and of internal immigration, to a multi-ethnic country welcoming new communities with very different origins (e.g. Eastern Europe, Western Balkans, North Africa, Sub-Saharan Africa, Latin America, India, Bangladesh, Pakistan, Sri Lanka, Philippines, China) has given rise to interesting legal cases of interaction between national laws and juridical notions with other origins.

To give just a few examples, Italian courts have delivered (sometimes controversial) judgments on:

- The Sikh *kirpan*, i.e. the ceremonial dagger worn by observant Sikhs, the carrying of which may result in violation of criminal laws restricting the use of weapons and knives (Simoni, 2017);

- the Islamic *kafalah*, i.e. the link between a minor and a person outside his/her family, quite different from the institution of adoption, which may be considered in the interest of minors in cases of family law or immigration law (Bisogni, 2016);

- the use of the Islamic veil in the workplace, leading to decisions, before employment tribunals, that have sometimes recognized the existence of discrimination for religious reasons, depending on the nature of the job and relations with the public and the customers (Tarquini, 2018).

A remarkable use of anthropological expertise occurred in the trial regarding the L'Aquila earthquake of 6 April 2009. The responsibility of the members of the National Commission for the Forecast and Prevention of Major Risk was under discussion, in relation to the information given to the local population regarding the severity of the risk in the wake of previous seismic events (ISC, 2015). The Prosecutor before the Tribunal of L'Aquila called upon a cultural anthropologist to give his scientific opinion on the social perception of the risk on the basis of information provided by the experts (Ciccozzi and Clemente, 2013). The Tribunal used this (cultural) expertise in order to assess the juridical link between the scientific communication and its impact in terms of the number of victims of the earthquake.

Other examples of the use of cultural expertise within trials can be found in cases involving members of the Roma community, e.g. in connection with under-age marriages or the tradition of giving money to the family of the bride on the occasion of a wedding. (Simoni, 2019, p. 147)

A difficult paradigmatic cultural issue in Labour Law. The Islamic veil and the workplace in the ECJ case law

The European Court of Justice has repeatedly intervened with regard to the use of the Islamic veil – a typical religious and cultural issue, with complex nuances – generally in the context of preliminary rulings with regard to EU anti-discrimination law, specifically Directive 2000/78 (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation).

It is interesting to quote two decisions on this issue that were pronounced on the same day (14 March 2017), coming to different conclusions regarding the balance between the right of workers to express their religious beliefs by wearing a veil (also a sign of belonging to a given community) in the workplace, and the interest of the employer to appear "neutral".

In the case C-157/15, (JOC, 2017) the Court stated that:

- Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive;

- By contrast, such an internal rule of a private undertaking may constitute indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/78 if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and provided that the means of achieving that aim are appropriate and necessary, which is for the referring court to ascertain.

In the case C-188/15, (JOC, 2017) the Court stated that:

- Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

According to the ECJ, the balance between the rights of the worker and the rights of the employer, within the scope of the Anti-Discrimination Directive in employment and occupation, is to be found by assessing the employer's policies regarding its customers and the tasks to be carried out by workers. The reading of such decisions suggests that limitations to the use of the veil in the workplace may be held to be justified for a receptionist in constant contact with the public, and unjustified for a design engineer with occasional contacts with some customers (Tarquini, 2018).

In the reasoning of its decisions, the European Court of Justice does not deal expressly with cultural aspects (that could be considered to be linked to the specific public visibility of a given religious symbol), but with the meaning of "religion", which is not defined in the Anti-Discrimination Directives.

Nevertheless, the ECJ notes that (*Bougnaoui v Micropole SA*, 2016):

- EU legislature referred to fundamental rights, as guaranteed by the ECHR, provides, in Article 9, that everyone has the right to freedom of thought, conscience and religion, a right which includes, in particular, freedom, either alone or in community with others and in public or private, to manifest his/her religion or belief, in worship, teaching, practice and observance;

- EU legislature also refers to the constitutional traditions common to the Member States and known as general principles of EU law;

- among the rights resulting from those common traditions, which have been reaffirmed in the Charter of Fundamental Rights of the European Union, is the right to freedom of conscience and religion enshrined in Article 10(1) of the Charter;

- in accordance with that provision, that right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance;

- in so far as the ECHR and, subsequently, the Charter use the term "religion" in a broad sense, including in it the freedom of persons to manifest their religion, EU legislature must be considered to have taken the same approach when adopting Directive 2000/78;

- therefore, the concept of "religion" in Article 1 of that directive should be interpreted as covering both the forum internum, that is, the fact of having a belief, and the forum externum, that is, the manifestation of religious faith in public.

In general, on the issue of religion and anti-discrimination law, the Court of Justice of the European Union has developed an original proportionality assessment in order to strike a balance between the autonomy rights of religious organizations, and the right of workers of such institutions to be free of discrimination based on grounds of religion or beliefs (Gori, 2019).

In its judgment in the case C-414/16 of 17 April 2018, the Court ruled that:

- Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case;

- Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality[2].

Cultural expertise in the trial

The issue at stake in those decisions, within the apparently restricted or very specialized perspective of the implementation of the EU Anti-Discrimination Directive in the workplace, is the balance between identities and integration, or between cultural differences and market freedom.

Setting apart the merit of decision, the cases above clearly show the extent of the possible interaction among legal practitioners and social sciences.

Without proposing borders or limits, the knowledge of socio-legal experts in the trials requires some adaptations to procedural rules in order to be fully useful and appreciated.

The "urgent need to conceptualize and investigate cultural expertise as a field of research to comprehensively assess the contribution of sociocultural knowledge to the resolution of conflicts and governance" has been underlined by scholars (Holden, 2020).

Let's try to understand some of the issues that may be at stake in the interaction between jurists and cultural experts appointed by the Court (or by the Prosecutor in criminal cases or by defence lawyers in all cases), from the perspective of the authority in charge of making the decision.

2 In the quoted ruling, the ECJ also states, where dealing with the duties of the national judge, that a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter of Fundamental Rights of the European Union and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

1. The first rule to be taken into account is the need to solve the case according to applicable laws, at least in civil law countries. This need is expressed through the traditional principle of prohibition of *non liquet* (deriving from Roman law). The principle means that a judicial demand cannot be dismissed on the grounds of the uncertainty of the solution. Conversely, a decision of non-admissibility of the case must be adopted on the grounds of applicable procedural rules. The decision is to be grounded on the rules of the burden of proof, meaning the evidence gathered following the contradictory (adversarial) principle, and the request of the defence, of the prosecutor, or *ex officio* according to Civil or Criminal Procedure applicable to the given case.

2. The responsibility for the decision, even in cases involving technical expertise, lies with the judge (or, in general, with the authority tasked with deciding the case). This concept is expressed with the wording of the judge as *peritus peritorum*. The meaning of this notion, of course, is not to refer to the so-called private science of the judge or to pursue the construction of the anthropologist-judge (or engineer-judge or physician-judge, etc.). On the contrary, this concept expresses the rule of motivating the reasoning underpinning a given decision based on the scientific data and information provided for by the experts acting in the trial, and/or on privileging a certain scientific option compared to an adverse one within the contradictory principle.

3. Each case has its specificities, sometimes peculiarities, and needs to be examined with a view to reaching a decision that assesses the concrete controversial issue. *Res iudicata* blocks the possibility of further discussing the case, while judicial precedents (in civil law) are relevant but not entirely binding, and do not necessarily obstruct the evolution of the jurisprudence on a given subject matter.

4. The judicial exercise of balancing the rights at stake requires the identification of the stakeholders in the given case, and therefore the identification of appropriate expertise.

It is a very common practice in courts to call upon the scientific expertise provided by medical doctors, engineers, accountants or psychologists. It is less frequent to find them calling on anthropologists or sociologists. Is there a sort of conflict between the hard sciences versus social sciences? Is there a problem of registration before the courts? Is this

due to the conservative approach of judges, prosecutors and lawyers? Is there a problem of costs? None of these reasons can fully explain the motives for cautious use of cultural expertise, but it is likely that they all play a role. This is further confirmation of the need to refine the conceptualization of cultural expertise.

Jurists are making increasing use of the concepts of multiculturalism and interlegality, with the aim of involving cultural expertise in both court and out-of-court procedures of dispute resolution. Pragmatically, the use of cultural expertise in trials results in a comparative approach, in an exercise of confrontation, which cannot refrain from a diachronic perspective and an accurate description of the context.

For this reason, scholars like Ruggiu (2019) proposes the "cultural test" as a legal test for dealing with culture and means to improve the use of cultural expertise by academics, judges, and lawyers. The proposed cultural test consists of a set of pre-established questions that a judge has to answer in order to decide whether to accept a cultural claim made by a migrant or by a person belonging to a minority community. Some questions in the cultural test refer to typical legal balancing between rights while other questions incorporate anthropological knowledge within the trial, requiring the judge to analyse the cultural practice at issue, its historical origin, the importance it has within the community, and other information about which the judge would not be sufficiently knowledgeable without resorting to anthropology.

The cultural test proposed by Ruggiu (2019), in an effort to bring about the standardization of cultural expertise, thereby helping both the judge and the cultural expert in their tasks, focuses on: description of the cultural practice and of the group; relation and link of the practice with the broader cultural system/web of significances; establishing whether the practice is essential, compulsory or optional; whether the practice is shared or contested within the group; whether the group is vulnerable or discriminated; sincerity and consistency of the cultural practice claimed; existence of a cultural equivalent or of a similar or comparable practice in the majority culture; harm caused by the practice; impact of the practice on the culture and value system of the majority and of the minority.

Ruggiu also replies to the criticisms against the cultural test, mainly related to: its common law origin, not easily transferable into civil law systems; risks of crystallization and distortion; risk of ethnocentrism (2019).

Paths and schemes of cultural reasoning in immigration law and in labour law

The cultural test is proposed as a guideline, subject to adaptation through the observation of judicial practice and dissemination of best practices. A scheme of this kind has the merit of highlighting key issues that must be taken into account where a cultural argument is under discussion in a legal conflict: identification of the cultural issue, alternatives, damage and compensation, gender issue, transformation and evolution (or overcoming) of traditions.

A procedural assessment of cultural issues has been established (in the sense that it has been elaborated and accepted by the relevant jurisprudence) in the field of immigration law.

In fact, "country experts" with various professional backgrounds and roles (cultural mediator, *amicus curiae*, expert witness, assistant to the defence lawyer, etc.) occupy a privileged place in immigration proceedings and in the contemporary management of migration flows (Holden, 2019).

In Italy, proceedings dealing with requests for international protection are civil proceedings where the administrative authorities grant or deny a form of protection. They are characterized by two procedural specificities with respect to general civil procedure rules:

1. The duty of cooperation of the judge in gathering evidence;
2. the attenuation of the burden of proof.

In such trials, the assessment of the credibility of the person seeking asylum or other forms of protection and of so-called COI (Country of Origin Information) plays an essential role and represents the usual scheme of several relevant decisions in this area of law.

In this respect, the Italian Supreme Court has clarified that:

- The assessment of the credibility of the declarations of the person seeking international protection is not merely entrusted to the opinion of the judge but is the result of a legal procedure;

- the rules governing decisions shall not be limited to the lack of objective verifications but shall be based on the criteria established by the law;

- moreover, the administrative authority tasked with making the decision in response to the request, or the judge, in those cases where a negative decision is disputed before the Court, shall fully consider the individual situation and personal circumstances of the applicant;

- secondary contradictions or inconsistencies should not lead to a negative pre-judgment of the request where the substance of the events is considered credible;

- therefore, the judge plays an active role in the relevant trial and may use ex officio investigative powers, namely through acquiring updated information on the country of origin of the applicant, in order to ascertain his/her personal situation (CC 26921/2017).

In addition, returning to labour law (which is in practice not unfrequently connected to immigration law), a scheme of balancing cultural issues may also be found, by analogy, in the principle of reasonable accommodation. The United Nations Convention on the Rights of Persons with Disabilities (United Nations, 2006) regulates work and employment rights (Art. 27). In relation to such rights, States parties undertake (Art. 27.1, i) to: Ensure that reasonable accommodation is provided to persons with disabilities in the workplace. The meaning of this concept is explained, within the EU, by Art. 5 of the (previously quoted) EU Directive 2000/78/EC, which states: "Reasonable accommodation for disabled persons. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned" (CC 27243/2018).

The reasonable accommodation principle may be applicable to the resolution of disputes involving cultural issues, as it allows sufficient flexibility for the assessment of the issues at stake, applying the proportionality principle while protecting fundamental rights. An

added value of such a juridical scheme is the possibility of introducing intermediate or agreed solutions.

Conclusions

In this paper, I have noted, from a practitioner's perspective, how globalization and immigration have changed the scenarios of legal conflicts, introducing new unexplored perspectives.

The co-existence within a given territory of different cultural and social traditions has also raised juridical challenges in countries, like Italy, which have witnessed a relatively recent transformation from a country of emigration to a country of destination of immigration flows.

Most constitutionalists therefore systematize the relationships between the new challenges and the global perspective of the protection of human rights, using the concept of multiculturalism, and promoting a new mixed constitutionalism, with a view to identifying and achieving democracy, pluralism, solidarity, while safeguarding the rule of law, in the current context.

In a scenario of legal pluralism, there is a need to avoid the risk of cultural pre-judgment and of blocking the evolution of case law and legislation; one possible approach involves the emergent concept of cultural expertise, shared by civil law and common law justice systems. In the Italian courts, we can find examples of interaction between national laws and juridical notions of other origins in judgments ruling on the Sikh *kirpan*, on the Islamic *kafalah*, and on the use of veil or headscarf in the working place.

A remarkable example of use of anthropological expertise occurred in the trial on the L'Aquila earthquake of 6 April 2009. Cultural expertise has also been used in trials involving members of the Roma community.

A difficult paradigmatic cultural issue in labour law – i.e. the wearing of the Islamic veil in the workplace –has been the subject of complex and debated decisions by the European Court of Justice, requested for preliminary rulings concerning EU anti-discrimination law, specifically Directive 2000/78, establishing a general framework for equal treatment in employment and occupation.

National and European case law shows the extensive interaction possible among legal practitioners and social sciences, the need to adapt the knowledge of socio-legal experts to procedural rules in trials in order to amplify its use, and the pressing need to conceptualize and investigate cultural expertise as a field of research.

The procedural rules and principles that must be taken into account whenever there is interaction between jurists and cultural experts in trials include: a) the principle of prohibition of non liquet; b) the role of *peritus peritorum* of the judicial organ in charge of the decision; c) the concrete specificities of each case; d) the identification of the stakeholders in the given case, as well as the identification of appropriate expertise.

While it is a common practice for courts to call upon the expertise of medical doctors, engineers, and accountants, it is less frequent to find them calling on anthropologists or sociologists. This is a confirmation of the need to refine the conceptualization of cultural expertise. The "cultural test", as a legal test for dealing with culture, is proposed by scholars as a means to improve the use of cultural expertise by judges and lawyers, in an effort to bring about the standardization of cultural expertise, with a view to helping both judges and cultural experts in their tasks.

Possible paths, schemes, and guidelines for the use of cultural expertise in the justice system may be derived from forms of procedural assessment of cultural issues, as in Immigration Law, or from forms of balancing cultural issues in the light of the principle of reasonable accommodation, as in some areas of labour law.

The first step, as far as the decision-making authority is concerned, regards the identification of a reliable expert; to this extent Academy should play a major role, as well as dissemination and compilation of experiences, possibly through an accessible database.

Secondly, once linguistic barriers are resolved via the implementation of the right to interpretation, the trial will require the description of the context by the cultural expert to be translated into an element of assessment of the merits of the case, as specific illuminating evidence. In more mixed and multi-faceted societies, intercultural dialogue is the way to deliver a democratic justice service in a multi-level legal order where each actor has something to learn from others and something to teach.

Bibliography

Azzariti, G. (2017) 'Multiculturalismo e Costituzione', *Questione Giustizia*. Online: https: //www.questionegiustizia.it/rivista/articolo/multiculturalismo-e-costituzione_424.php.

Bisogni, G. (2016) 'Il diritto di famiglia alla prova dell'immigrazione', *giudicedonna.it*. Online: http://www.giudicedonna.it/2016/numero-tre/articoli/Bisogni.pdf.

Bisogni, G. (2017) 'Introduzione a "Il Multiculturalismo e le Corti"', *Questione Giustizia*. Online: https://www.questionegiustizia.it/rivista/articolo/introduzione-a-il-multiculturalismo-e-le-corti_423.php.

Ciccozzi, A. & Clemente, P. (2013) *Parola di scienza: il terremoto dell'Aquila e la Commissione Grandi Rischi: un'analisi antropologica*. Rome: DeriveApprodi.

Gori, P. P. (2019). 'Between ECHR and Horizontal Effect: the Egenberger Case-Law'. *The Charter and the Court of Justice of the European Union: Notable Cases from 2016-2018*. Pahladsingh, A. & Grimbergen, R. (ed.). Tilburg: Wolf Legal Publishers.

Holden, L. (2019) 'Cultural Expertise: An Emergent Concept and Evolving Practices', *Laws*, 8(4), p. 28.

Holden, L. (2020) 'Cultural Expertise and Law: An Historical Overview', *Law and History Review*, 38(1), 29–46.

Piccone, V. & Pollicino, O. (2019) *La Carta dei Diritti Fondamentali dell'Unione europea- Efficacia ed effettività*. Napoli: Editoriale Scientifica.

Rordorf, R. (2017) 'L'editoriale del n. 1/2017', *Questione Giustizia*. Online: https:// www.questionegiustizia.it/articolo/l-editoriale-del-n_12017_19-04-2017.ph.

Ruggiu, I. (2017) 'Il giudice antropologo e il test culturale', *Questione Giustizia*. Online: https://www.questionegiustizia.it/rivista/articolo/il-giudice-antropologo-e-il-test-culturale_431.php.

Ruggiu, I. (2019) 'The "Cultural Test" as Cultural Expertise: Evolution of a Legal–Anthropological Tool for Judges', *Laws*, 8(3), 15–30.

Simoni, A. (2017) 'La sentenza della Cassazione sul kirpan. "voce dal sen fuggita?". Brevi note comparatistiche sull'adesione della Suprema Corte all'ideologia della "diversità cultural degli immigrati', *Diritto, Immigrazione e Cittadinanza*, 1(2), 1–14.

Simoni, A. (2019) *Rom, antiziganismo e cultura giuridica: Prospettive di analisi*. Rome: CISU.

Tarquini, E. (2018) 'Il velo, il mercato, il corpo delle donne. La giurisprudenza di fronte al divieto di vestizione del velo islamico', *Lavoro Diritti Europa*, 1.

United Nations (2006) 'United Nations Convention on the Rights of Persons with Disabilities', UN Doc. A/RES/61/106.

Cases and Legislation cited

Case 157/15 Achibita v G4S Secure Solutions NV [2017] OJ C 151, p. 3–3 (European Court of Justice).

Case 188/15 Bougnaoui v Micropole SA [2016] ECLI:EU:C:2017:204 (European Court of Justice).

Case 188/15 Bougnaoui v Micropole SA [2017] ECLI:EU:C:2016:553 (European Court of Justice).

Cass., 14 Novembre 2017, n. 26921 (Italy).

Cass., 26 Ottobre 2018, n. 27243 (Italy).

Cass., 21 Maggio 2019, n. 13649 (Italy).

Cass., 28 Ottobre 2019, n. 27502 (Italy).

Indigenous Expertise as cultural expertise in the World Heritage Protective Framework

Noelle Higgins[1]

Abstract

This paper focuses on the engagement of Indigenous peoples with the international legal framework which seeks to protect world heritage. Significant concerns have been raised as to the role which Indigenous expertise can play in this framework.

There have been numerous criticisms regarding the Eurocentric nature of the framework, and concerns over its the decision-making processes, e.g. in respect of inscription of sites on the World Heritage List. All 3 of the UN mechanisms specific to Indigenous peoples (UN Permanent Forum on Indigenous Issues, UN Expert Mechanism on the Rights of Indigenous Peoples and UN Special Rapporteur on the Rights of Indigenous Peoples) have called on the World Heritage Committee, UNESCO and heritage advisory bodies to take remedial measures and to expand the role of Indigenous peoples in the protective framework. There have also been recommendations made as to how the World Heritage Committee, UNESCO and States can align the implementation of the World Heritage Convention with the principles and requirements of the UN Declaration on the Rights of Indigenous Peoples. As part of the move to be more inclusive of Indigenous voices, an Indigenous Peoples' Forum on World Heritage was established in 2017, however an Indigenous expertise deficit still remains within the world heritage framework. As cultural expertise is necessary to appreciate the context and background of cultural sites, and their status as 'culture', deserving of recognition under the world heritage framework, this paper addresses the role of Indigenous expertise as cultural expertise in the world heritage

---

1 Noelle Higgins is an Associate Professor in the Law Department at Maynooth University, Ireland. She currently teaches and researches in a variety of fields of public international law, international humanitarian law, international human rights law and the rights of minorities and Indigenous peoples. Her recent publications focus mainly on the field of cultural rights, e.g. *Cultural Defences at the ICC* (Routledge, 2018) and *The Protection of Cultural Heritage During Armed Conflict: The Changing Paradigms* (Routledge, 2020). She was previously the Vice-Chair of the Ethical, Political, Legal and Philosophical Studies Committee of the Royal Irish Academy in Ireland and a member of the Irish Department of Foreign Affairs and Trade - NGO Forum on Human Rights. She currently sits on the Advisory Committee of International Communities Organisation and is a member of the European Coordinating Committee for Academic Freedom Advocacy of Scholars at Risk, Europe.

framework and underlines why Indigenous expertise is necessary in order to ensure that the framework is representative and valid.

Introduction

The current international framework on the protection and safeguarding of world heritage is a complex and multifaceted one, composed of a web of instruments, overseen and implemented by various bodies. This framework falls within the remit of the United Nations Educational, Scientific and Cultural Organization (UNESCO), a specialised agency of the United Nations (UN), founded in 1945, with the aim of building peace through international cooperation in education, the sciences and culture. The cornerstone of the extant legal framework on the protection and safeguarding of world heritage is the World Heritage Convention, adopted in 1972, and overseen by the World Heritage Committee (Francioni, 2008). The latter consists of representatives from 21 of the States Parties to the Convention, elected by their General Assembly. The Committee, which is advised by the International Council on Monuments and Sites (ICOMOS), the International Union for the Conservation of Nature (IUCN) and the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), has developed criteria for the inscription of properties on the World Heritage List (Anglin, 2008; Rao, 2010). These criteria are contained in the 'Operational Guidelines for the Implementation of the World Heritage Convention' (2019). This document has been amended and revised a number of times by the Committee in reaction to new concepts, knowledge or experiences.

As well as the core World Heritage Convention 1972, a number of other instruments have been adopted by UNESCO in the fields of culture and heritage, including the Convention for the Safeguarding of the Intangible Cultural Heritage 2003, and the Declaration concerning the Intentional Destruction of Cultural Heritage 2003. Some international legal instruments focus on the protection of cultural heritage in times of armed conflict, such as the Hague Convention of 1954, and its Additional Protocols, and others relate to the stealing and export of cultural artefacts, including the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995.

While the legal framework on the safeguarding and protection of cultural heritage is substantial in terms of number of legal instruments and expert bodies, there exists information and expertise deficits with regard to the heritage of Indigenous peoples

therein. Criticisms have been leveled at the current heritage safeguarding system for promoting a Western-centric idea of 'heritage', and overlooking or unacknowledging Indigenous conceptions, including in respect of nomination of sites for inscription on the World Heritage List (Meskell, 2013, p. 160; Brumann, 2018, p. 1211). All 3 of the UN mechanisms specific to Indigenous peoples (UN Permanent Forum on Indigenous Issues, UN Expert Mechanism on the Rights of Indigenous Peoples and UN Special Rapporteur on the Rights of Indigenous Peoples) have called on the World Heritage Committee, UNESCO and its advisory bodies to take remedial measures and to expand the role of Indigenous peoples in the protective framework. One central point which has been emphasised is that bodies charged with a role in heritage safeguarding and protection should ensure the alignment of their work with the principles and requirements of the UN Declaration on the Rights of Indigenous (UNDRIP), adopted in 2007. While several attempts had been made to address these criticisms over the years, by, for example, amendments to the Operational Guidelines for the application of the 1972 Convention, an expertise deficit remains.

This paper addresses the role of Indigenous expertise as cultural expertise in the world heritage framework, tracing how this has changed over time and underlining why it is now time to institutionalise Indigenous expertise within the framework. In the context of this article, Indigenous expertise is the special knowledge and experience of Indigenous peoples which locates and describes relevant facts in light of their particular history, background, and context, and facilitates the explanation of Indigenous concepts to a non-Indigenous audience. Cultural Indigenous expertise illuminates the 'value' of Indigenous cultural objects sites and traditions, for the purposes of the world heritage legal framework, and elucidates how they should be treated and managed.

The first part of this article analyses the international framework on the protection and safeguarding of world heritage, with a specific focus on the World Heritage Convention 1972 and the World Heritage Committee, highlighting a number of concerns in respect of Indigenous culture and heritage within this framework. The article then discusses why Indigenous expertise is needed within this framework before then assessing an abandoned attempted to include Indigenous expertise within the heritage framework through the proposed establishment of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE). The paper recommends that such a body is necessary within the world heritage framework, and is in line with developments in international law concerning the rights of Indigenous peoples.

The International Legal Framework on the Protection and Safeguarding of World Heritage

The deliberate destruction of cultural heritage has been a continuing, and frequently occurring, phenomenon throughout history (Francioni and Lenzerini, 2003), both during times of armed conflict and times of peace, and has been well documented (Higgins, 2020). Attacks on cultural heritage were first prohibited in international law in the period between the close of the 19th century and the start of the 20th century. Following on from the destruction to cultural sites during World War II, several new international legal instruments were adopted which sought to protect cultural artefacts and heritage (Higgins, 2020). The cultural heritage legal framework is 'still a young and evolving one with all the uncertainties that this entails' (Blake, 2015, p. 5), and consists of a complex web of instruments, often including different understandings of cultural heritage, but emanating, almost exclusively, from a Western conception of culture (Lenzerini, 2011). It should be noted that the heritage law framework has been criticised as being Western-centric and prioritising and prizing built heritage over other types of heritage, reflecting Western ideals and values, although it does cover some Indigenous sites and the framework has evolved over time in response to critiques. Later instruments, especially the 1995 UNIDROIT Convention and the 2003 Intangible Cultural Heritage Convention do reflect a more expansive view of heritage (Meskell, 2018).

Indigenous peoples were not well represented at international institutions until relatively recently and the importance of the rights of Indigenous peoples was not recognised until the 1970s at the UN (Anaya, 2004). While Indigenous peoples had previously been the subject of International Labour Organisation initiatives, such as the Indigenous and Tribal Peoples Convention 1957, these were undertaken from a paternalistic and assimilationist perspective (Saul, 2016, p. 5). 1977 marked the first visit of a delegation of Indigenous peoples to the UN in Geneva, and it was only after this that Indigenous peoples were recognised as rights holders in the sphere of international law (ECOSOC, 1981). This led to work on UNDRIP beginning in 1993, although the Declaration was not adopted until 2007 (Willemsen-Diaz, 2009). Therefore, international heritage instruments adopted before the rise in recognition of Indigenous rights are lacking an Indigenous perspective (Logan, 2012). There is no evidence on the face of the *travaux* or the final text of the World Heritage Convention 1972 that Indigenous peoples participated in its drafting and / or negotiation, either as part of the State delegations, experts, or NGOs. The legal framework has not benefited

from Indigenous expertise, and is, therefore, still lacking in a number of ways with regard to Indigenous heritage.

A difficulty at the very core of the legal framework is the disparity in views on the concepts of cultural property and cultural heritage, between the Western focus on the built environment and the Indigenous understanding in respect of cultural sites as heritage (Abdulqawi, 2008, p. 36; Blake, 2015, p. 134), and indeed, the legal framework uses the phrases 'cultural property' and 'cultural heritage' sometimes equally, but other times to mean different things (O'Keefe, 1999). Many of the legal instruments focus on the commercial value of the property, rather than on its cultural or spiritual importance, a stance that is at odds with the understanding of Indigenous peoples regarding cultural heritage, although, some cultural heritage of importance to Indigenous peoples could fall under the extant protective mandate (Yupsansis, 2012, p. 348).

The 1972 World Heritage Convention, as its full titles indicates, seeks to protect both cultural and natural heritage, and is, therefore, more embracive of non-Western conceptions of culture than previous instruments. It includes in its definition of heritage a reference to 'combined works of nature and of man' and to 'archaeological sites' (Art. 1), thus including some non-typical Western perspectives. In addition, Article 2 defines 'natural heritage' as 'natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty' (UNESCO, 1972, Art. 2). While is it an important progression that 'natural' sites are included within its remit, the dichotomous paradigm of culture included in the 1972 Convention is not recognised by Indigenous peoples (Blake, 2015, p. 129). The situation was remedied somewhat by the recognition of 'cultural landscapes' and 'living traditions' as criteria for inscription on the World Heritage List by means of an amendment to the Operational Guidelines to the World Heritage Convention (1994) in the 1990s (paras. 35-42).

The criteria for recognition as cultural heritage have evolved over the years via amendments to the Convention's Operational Guidelines and these developments were

influenced by the Expert Group for a Global Strategy, whose work led to 'conceptual shifts in the scope and application of the notion of "cultural heritage" … [including] a stronger recognition of the link between cultural and natural heritage' (Abdulqawi, 2008, p. 36). Gfeller states that the Global Strategy 'marked an anthropological turn in the global conceptualization of cultural heritage.' She also comments that, in addition, it 'internationalized the concerns of Australia over the inclusion of its long-repressed indigenous minorities' (2015, p. 367), thus inciting changes to the framework which were more embracive of Indigenous peoples. A category of mixed cultural-natural heritage was adopted in 1998 in the Operational Guidelines. According to the Guidelines, properties 'shall be considered as "mixed cultural and natural heritage" if they satisfy a part or the whole of the definitions of both cultural and natural heritage laid out in Articles 1 and 2 of the Convention' (para. 46). This change reflects the understanding of Indigenous heritage in the 1993 UN Report by Irene Daes, the then-Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, entitled Discrimination against Indigenous Peoples: Study on the protection of the cultural and intellectual property of indigenous peoples. This defined Indigenous heritage as including 'everything that belongs to the distinct identity of a people … all those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected' (Daes, 1997, para. 24). Blake comments that 'this … makes clear how deeply the cultural and natural heritage is intimately connected in the indigenous worldview' (Blake, 2015, p. 134). The fact that the 1972 Convention was drafted without the benefit of input from Indigenous experts means that it, without amendments to its Operational Guidelines, could not adequately reflect Indigenous conceptions of culture.

The World Heritage Committee has now acknowledged that international law has developed since the adoption of the 1972 Convention in respect of recognition of the rights of Indigenous peoples, including with regard to their right to self-determination, the prohibition of racial discrimination and the special relationship of Indigenous peoples to their traditional lands, and has accepted that it has obligations in respect of Indigenous peoples. In a report on Kakadu National Park (Logan, 2013), situated on the lands owned, or claimed, by the Mirarr people, the Traditional Aboriginal Owners

of lands in the north of Australia's Northern Territory, the Committee concluded, given such developments in international law, that Indigenous peoples were entitled to 'certain rights vis-à-vis the State where they are located', including respect for 'their collective identity and living culture', and that these rights must be taken into account when interpreting the Convention and its Operational Guidelines (WHC, 1998, p. 6).

However, the Guidelines do not expound on how this is to be done in practice. Indeed, the role of deciding what constitutes heritage, and thus what falls within the Convention's scope, is still vested in the State, with no defined role for Indigenous cultural expertise. The Operational Guidelines provide that 'the participation of local people in the nomination process is essential to make them feel a shared responsibility' with the States Parties in the maintenance of the sites (para. 14). How this is to be achieved is not further explained, and leaves discretion to the State. The State-centric nature of the heritage protective framework does not facilitate groups within a State, such as Indigenous peoples, who have a special connection to a particular site, which may be at odds with, or rejected by, the ruling majority in that State.

The role of 'communities', including Indigenous communities, is expanded somewhat in the context of intangible cultural heritage. Article 11 of the 2003 Convention on Intangible Cultural Heritage provides in Article 11(b) that each State Party shall 'identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations', while Article 15 provides that '[w]ithin the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management'. Unfortunately, there is no definition of the term 'community' in the Convention text, nor is there any explanation as to how communities will interact with the State with regard to the implementation of the Convention, although it seems clear that community input is conceived of at the national, rather than international level, e.g. a dialogue between a community and State authorities regarding the identification of intangible cultural heritage (Lixinski, 2011; Kuruk, 2004). At the international level, the input of communities is restricted

to the requirement of consultation and of free, prior and informed consent (FPIC).[2] Over time, however, revisions to the Operational Directives for the implementation of the Convention have facilitated greater participation of communities. Paragraph 80 of the Operational Directives provides that 'States Parties are encouraged to create a consultative body or a coordination mechanism to facilitate the participation of communities, groups and, where applicable, individuals, as well as experts, centres of expertise and research institutes, in particular in: (a) the identification and definition of the different elements of intangible cultural heritage present on their territories; (b) the drawing up of inventories; (c) the elaboration and implementation of programmes, projects and activities; (d) the preparation of nomination files for inscription on the Lists, in conformity with the relevant paragraphs of Chapter 1 of the present Operational Directives; (e) the removal of an element of intangible cultural heritage from one List or its transfer to the other' (2018, para. 80). These developments could indicate a greater role for Indigenous expertise in the future in the context of decision-making on intangible cultural heritage (Lixinski, 2011).

The shift in understanding of 'world heritage' as reflected in the Operational Guidelines to the World Heritage Convention was the result of the input of a number of experts in the field of heritage at World Heritage Committee meetings. According to Gfeller, '[i]n particular, Joan Domicelj, an expert from the margins of the North in cultural heritage terms—Australia—instigated an indigenous turn in the conceptualization of cultural World Heritage' (2015, p. 373). Gfeller details the impact of Domicelj's contribution to the amendment of the Operational Guidelines and criteria for the World Heritage List in respect of Indigenous peoples and states that her contribution 'reflected the growing responsiveness of Australian heritage practitioners to indigenous claims' (2015, p. 374). Gfeller also points to Isabel McBryde, who pioneered the development of Indigenous archaeology in Australia, as a very influential figure in the context of indigenizing

2 The FPIC requirement has proven to be significant in a number of ways. For example, in 2011 the African Commission on Human and Peoples' Rights adopted Resolution 197 on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage (5 November 2011, available at http://www.achpr.org/sessio ns/50th/resolutions/197). This related to the proposal to designate Lake Bogoria as a World Heritage site by the Kenyan government without the free, prior and informed consent of the Endorois people. The Commission stated that inscription on the list `without involving the Endorois in the decision-making process and without obtaining their free, prior and informed consent' constituted a `... violation of the Endorois' right to development under Article 22 of the African Charter ...'.

world heritage by ensuring that the category of 'cultural landscape' would encompass Indigenous understandings of landscape, including the spiritual value often attached to landscapes by Indigenous communities (2015, p. 374). It is clear that individuals can have a significant impact on the conceptualisation and understanding of heritage if they can have an input to the World Heritage Committee. However, the input should be systematised to ensure that expertise from various viewpoints will be heard, including Indigenous expertise.

The Role of `Cultural Expertise' and the Need for Indigenous Expertise in the Heritage Protection Legal Framework

Indigenous expertise is vital in the field of world heritage, given that Indigenous peoples live in all regions of the globe and own, occupy or utilise 22% of global land area (UNESCO, nd). There are approximately 370-500 million Indigenous people, comprising approximately 5% of the world's total population, and representing the greater part of the world's cultural diversity (UNESCO, n.d.). While there is no universally accepted definition of 'indigenous' under international law, and the concept is treated somewhat differently in different regional legal systems, a study by the former UN Special Rapporteur Martínez Cobo states that 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or part of them' (UN 1986, paras. 379-80). Given that Indigenous peoples are recognised as 'distinct' from other sectors of society, and represent such a significant proportion of the world's cultural diversity, it is vital that they have an opportunity to provide insights on their particular understanding and conception of culture and heritage within the international legal framework.

One of the commonly accepted defining characteristics of Indigenous peoples is their relationship with land (UN, 1986, para. 380). For example, Indigenous groups are acknowledged as having a special physical, spiritual, cultural and social connection with their lands, which differs significantly from the relationship of non-Indigenous people with land (Gilbert, 2007, p. xiii). Therefore, land-related heritage is of particular significance to Indigenous peoples. Indigenous peoples alone 'own' knowledge with respect to land and the natural world that is unknown to others, and without Indigenous voices and expertise in the international heritage framework,

our understanding of 'world' heritage is incomplete. Indigenous cultural expertise is necessary to provide the context and background of sites of importance to Indigenous peoples, and their status as 'culture', deserving of recognition under the world heritage framework. Given the special relationship of Indigenous peoples with the land, their expertise in managing and conserving heritage sites is also vital. Indigenous peoples have been custodians of particular areas of land for millennia, and know how to best protect and preserve it. However, under the current world heritage framework, Indigenous expertise in the maintenance and management of cultural sites is not always recognised despite the fact that numerous world heritage sites are situated on Indigenous lands (Meskell, 2018, p. xix).

Unfortunately, rather than the expertise of Indigenous peoples being prized within the world heritage framework, numerous Indigenous cultural sites and artefacts have regularly been destroyed and disrespected at the hands of colonial powers and are in need of legal protection (Watson, 2015). Yupsansis comments that '[i]ndigenous peoples have historically experienced countless losses of cultural relics and material and spiritual treasures as well as the destruction of their sacred cultural sites, a situation that continues to prevail. This desecration of ancestral sites and the pillaging of sacred objects results in the cultural debasement of indigenous peoples, causing a serious threat to their continuing collective existence as distinct societies' (Yupsanis, 2011, p. 335). Without Indigenous expertise within the world heritage system, the history, culture, and even identity of Indigenous groups can be worn away, leading to significant harm to the groups and diminishing cultural diversity.

The deficit in Indigenous expertise in the world heritage framework has been highlighted in academia and by organisations working in the field of Indigenous rights. Also, as stated above, all 3 of the UN mechanisms specific to Indigenous peoples (UN Permanent Forum on Indigenous Issues, UN Expert Mechanism on the Rights of Indigenous Peoples and UN Special Rapporteur on the Rights of Indigenous Peoples) have called on the World Heritage Committee, UNESCO and its advisory bodies to take remedial measures and to expand the role of Indigenous peoples in the protective framework. In a 2019 report, the Permanent Forum on Indigenous Issues noted that 'the importance of traditional knowledge, indigenous peoples' traditional knowledge remains threatened by misappropriation, misuse and marginalization' (Permanent Forum on Indigenous Issues, 2019, para. 7). The role of Indigenous knowledge in implementing the right to self-determination as promoted in UNDRIP is also

highlighted, with the report stating that '[s]elf-determination is closely linked to the generation, transmission and protection of traditional knowledge, given that indigenous peoples have the right to determine their own conditions for safeguarding and developing their knowledge' (Permanent Forum on Indigenous Issues, 2019, para. 6).

EMPRIP's Advice No. 2 focuses on Indigenous peoples and the right to participate in decision-making, which would include decision-making in respect of heritage. This calls on UNESCO to 'enable and ensure effective representation and participation of indigenous peoples in its decision-making, especially with regard to the implementation and supervision of UNESCO Conventions and policies relevant to indigenous peoples, such as the 1972 World Heritage Convention' (2011, para. 38). It also states that 'robust procedures and mechanisms should be established to ensure indigenous peoples are adequately consulted and involved in the management and protection of World Heritage sites, and that their free, prior and informed consent is obtained when their territories are being nominated and inscribed as World Heritage sites' (2011, para. 38). A 2015 study by EMRIP concerning the Promotion and Protection of the Rights of Indigenous Peoples with respect to their Cultural Heritage noted that 'effective participation in decision-making processes relating to cultural heritage is crucial for indigenous peoples, who are often the victims of both cultural and natural heritage protection policies that fail to take their rights and perspectives into consideration' (para. 34). The Study underlined the UNDRIP provisions which underpin the participation and consent of Indigenous peoples in decision-making. Specifically regarding the World Heritage Convention 1972, the Study stated that there have been 'repeated complaints by indigenous peoples and human rights organizations about violations of the rights of indigenous peoples' in its implementation (para. 38), and it highlighted that there is 'no procedure to ensure the participation of indigenous peoples in the nomination and management of World Heritage sites nor is there a policy to ensure their free, prior and informed consent to the nomination of such' (para. 38).

The Special Rapporteur on the Rights of Indigenous Peoples has frequently underlined the issue of cultural heritage in thematic and country reports. These reports document instances where Indigenous peoples have had major concerns regarding the protection of their cultural heritage, such as the endangerment of their sacred places, heritage languages and cultures (HRC, 2012). Other reports highlight the lack of control of Indigenous peoples over their historical cultural heritage sites (HRC, 2010, para. 64). The Special Rapporteur has also underlined the dearth of inclusion and participation of

Indigenous peoples in the nomination and management of world heritage sites under the World Heritage Convention (Secretary General of the United Nations, 2012, paras. 33–42).

The work of these three expert bodies on Indigenous peoples all underline the importance of Indigenous expertise within the cultural heritage legal framework and highlight the framework's flaws. While the legal framework has evolved from being based on a purely Western-focused conception of culture, additional amendments are required in order to ensure that the understanding of heritage reflects all traditions in the same way. For this to be the case, the framework needs to facilitate the input of Indigenous experts who can act as 'cultural brokers' (Holden, 2020, p. 1) to assess cultural artefacts and sites from an Indigenous perspective and contribute to decision-making processes on cultural heritage. Without such expertise, the world heritage legal framework is essentially assessing culture in the absence of context, and is, therefore, lacking in legitimacy. In addition, in order to fulfill international legal obligations in respect of Indigenous peoples, including the implementation of their right to self-determination, as recognised in UNDRIP, their input is required on decisions impacting on their lives, including their culture, and group identity.

The World Heritage Indigenous Peoples Council of Experts

A significant attempt was made to include Indigenous expertise within the heritage framework in November 2000, when a proposal by Australia, New Zealand and Canada to establish a World Heritage Indigenous Peoples Council of Experts (WHIPCOE) was introduced at the 24th session of World Heritage Committee in Cairns, Australia. The proposed body was intended to provide a mechanism through which Indigenous experts could advise on the implementation of the World Heritage Convention. The WHIPCOE proposal underlined the need to give 'Indigenous people greater responsibility for their own affairs and an effective voice in decisions on matters which affect them' (WHC, 2000, p. 12). This proposal was well-received, a working group with representatives from Australia, New Zealand and Canada was set up, and a feasibility study was presented at the 25th session of the Bureau of the World Heritage Committee in Paris in 2001. During the Paris meeting, a number of States raised concerns over the creation of the proposed body. Zimbabwe and the United States, for example, highlighted the difficulty in identifying who is 'Indigenous' and the definition of 'Indigeneity' (WHC, 2001a). No agreement on the proposal was made by the end

of this meeting, but it was decided that the working group would expand to include Indigenous representatives from Australia, Belize, Canada, Ecuador, New Zealand, the United States, as well as the Secretariat for the Convention on Biological Diversity and representatives from ICOMOS, IUCN and ICCROM, the UN Indigenous Peoples Working Group, the World Heritage Centre and other relevant parties. A decision on the establishment of the body was deferred to the next meeting of the Bureau in Winnipeg in September 2001. During the Winnipeg meeting, further discussions on the proposed body, its role, relationship with other advisory bodies, potential work with stakeholders, potential contribution to the inscription process and to the development of Indigenous site management techniques ensued. ICOMOS, IUCN and ICCROM made presentations on their engagement and work with Indigenous peoples. However, once again no decision was made on the setting up of the proposed body but a recommendation was made that the proposal for the new body should be formally considered by the 25th session of the World Heritage Committee in Helsinki in December 2001. Prior to this meeting, a report on the previous discussions on the proposed body was placed on the World Heritage Centre's internal website, for the 21 member States of the Committee and its advisory bodies. Input was also invited from States Parties to the World Heritage Convention, and a final presentation on the proposed body was made in Helsinki. There was a disparity between the States' comments on the proposal, with some States like Australia, New Zealand, Mexico, Brazil, and Iceland commending and supporting the proposal, while other States such as France and the United States were quite negative.

In the end, the 21 States on the Committee at the time, Argentina, Belgium, China, Colombia, Egypt, Finland, Greece, Hungary, India, Lebanon, Mexico, Nigeria, Oman, Portugal, Republic of Korea, Russian Federation, Saint Lucia, South Africa, Thailand, United Kingdom of Great Britain and Northern Ireland, and Zimbabwe, did not support the proposal. The Committee raised concerns relating to the funding, legal status, role and relationships with States Parties, advisory bodies, the Committee itself and the World Heritage Centre. While a number of States on the Committee, as well as observers, and representatives from the advisory bodies noted the special role of Indigenous peoples with regard to heritage and commented that a network could provide a positive forum for an exchange of information and experience concerning their protection, the Committee did not approve the establishment of WHIPCOE as either a consultative body or as a network to report to the Committee (WHC, 2001b). Instead, they recommended that 'indigenous peoples could meet on their own initiative,

be included as part of State Party delegations to the Committee and were encouraged to be involved in UNESCO's work relating to the intangible heritage' (WHC, 2001b). Meskell comments that this dismissal 'imputes that (1) indigenous people should organize themselves separately since their contributions are not deemed mainstream procedurally; (2) that they resign themselves to the positions adopted by their sovereign states, often likely to be against their own interests; and (3) that indigenous contributions pertain only to intangible "living traditions," rather than tangible heritage sites and places' (Meskell, 2013, p. 166).

Given the concerns voiced by Indigenous peoples regarding their (lack of) role in the heritage protective framework which ignited the WHIPCOE proposal and the extensive work done by the Working Group, the advisory bodies, NGOs and Indigenous peoples themselves during the discussions on the WHIPCOE proposal to highlight the inadequacies in the system and to suggest solutions, it was very disappointing and disheartening that the 'brilliantly conceived' (Meskell, 2013, p. 157) WHIPCOE fell foul of sovereignty concerns, and a deficit in Indigenous expertise remained in the legal framework on safeguarding heritage.

The international legal framework on Indigenous peoples has, however, developed since the WHIPCOE idea was dismissed, with additional emphasis now placed on the participation of Indigenous peoples in decision-making within the UN, and obligations on States with regard to the rights of Indigenous peoples, including the right to self-determination. Could the time now be ripe to reopen the discussion on WHIPCOE?

Recent Developments recognizing the Rights of Indigenous Peoples

The most important development in the recognition of the rights of Indigenous peoples in international law is the adoption of UNDRIP in 2007. This instrument constitutes the most comprehensive universal instrument focusing explicitly on the rights of Indigenous peoples. UNDRIP includes references to cultural heritage throughout its text. For example, Article 12(1) acknowledges the right of Indigenous peoples to maintain, protect and have access in privacy to their religious and cultural sites, the right to the use and control of their ceremonial objects, and the right to repatriation of the remains of their ancestors. Article 12(2) provides that States shall attempt to enable access to and / or repatriation of ceremonial artefacts in their possession, through

fair and effective mechanisms, which are developed in conjunction with the relevant Indigenous peoples. Traditional conservation practices are mentioned in Articles 29 and 31, whereby States are encouraged to ensure the right of Indigenous peoples to develop their heritage and protect the environment according to these practices.

Article 42 calls for support from UN States and State level Indigenous rights agencies for full realisation of the Declaration in its actions and programmes, while Article 43 calls on the UN, its bodies and specialized agencies, including at the country level, and States to promote respect for and full application of the provisions of UNDRIP and follow up with the effectiveness of this Declaration.

UNDRIP is a Declaration rather than an explicitly binding instrument (Davis, 2012; Gover, 2015). Some commentators claim that certain of its provisions are reflective of customary law, although there is not definitive agreement on this issue. In order for a provision of UNDRIP to gain status as customary law, there must be State practice and *opinio juris* in respect of it, which will, no doubt, happen over time, as States are now beginning to implement UNDRIP at a domestic level and courts are beginning to refer to it in their determinations (Gover, 2015; Stoll, 2018). However, Stoll comments that UNDRIP provisions on heritage, especially Article 31, should be understood in the context of other rights espoused in the Declaration, including the right to self-determination (Art. 3), the right to distinct and cultural institutions (Art. 5), to cultural sites (Art. 12.1), to the practice and revitalization of cultural traditions and customs (Art. 11.1) and to protection against destruction (Art. 8.1). He opines that when assessed together that they reflect a general right of Indigenous peoples to their own cultural identity, which he holds to be customary international law (Stoll, 2018). A perhaps stronger argument in respect of obligations flowing from UNDRIP heritage provisions in respect of Indigenous peoples lies in the right to self-determination, which is a well-established right under international law, enshrined in the UN Charter and the Bill of Rights, and recognised as a *jus cogens* norm. The right to identify and determine one's own culture and heritage can be seen to be an aspect of this right (Heinämäki *et al*, 2017, p. 78), and thus Indigenous expertise on decision-making in the spheres of heritage and culture could be seen to flow from the general international right to self-determination.

Further strengthening the trend to include Indigenous expertise in the field of culture and heritage, UNESCO adopted its Policy on Engaging with Indigenous

Peoples in 2017, highlighting, in principle at least, the organization's commitment to implementing UNDRIP and aligning its operation with this instrument, including the principles of FPIC and self-determination UNESCO (2017). The Policy calls on the governing bodies of UNESCO's instruments in the field of culture, along with States Parties to develop and implement mechanisms for the 'full and effective participation and inclusion of Indigenous peoples in the processes' of these instruments (UNESCO, 2017, para. 75). The Policy states that the implementation of UNESCO's cultural policies can help to 'advance indigenous peoples' right to, among others, "maintain, control, protect and develop their cultural heritage"' as provided for in Article 31 of UNDRIP (UNESCO, 2017, para. 75). While the text of the UNESCO Policy links self-determination, participation, and FPIC and reiterates the obligations on UN agencies, including UNESCO, and States in respect of Indigenous peoples, it does not elaborate upon this further, and does not mention expertise. However, participation of Indigenous peoples would provide a valid insight into Indigenous views on culture. The term 'participation' rather than 'expertise' is used in UNESCO's policy, but participation facilitates experts on Indigenous issues, i.e. Indigenous peoples, to speak on their own behalf.

The UN has recently focused its attention on the participation of Indigenous peoples in the organization in general. In 2017, the General Assembly adopted, without a vote, Resolution 71/321, entitled 'enhancing the participation of indigenous peoples' representatives and institutions in meetings of relevant UN bodies on issues affecting them.' This illustrates an understanding on the part of the UN that participation of Indigenous peoples without having to work through the States in which they reside, and outside of the Westphalian framework of State sovereignty, is needed. However, very little has been done in respect of implementing this resolution in practice, and it has been met with some disappointment. The resolution was subsequently reopened for discussion at the UNGA and it is hoped that concrete steps will be undertaken to ensure Indigenous participation in various UN bodies in the near future.

While the adoption of this resolution is a welcome symbol of progression in the recognition of the status of Indigenous peoples, it is hoped that this is not an exercise in what Corntassel calls the 'illusion of inclusion', whereby the UN, which once excluded Indigenous peoples, now includes professionalized Indigenous delegates more loyal to the UN system than responsive to their communities (Corntassel, 2008, p. 161).

As part of the move to be more inclusive of Indigenous voices in the area of heritage, the International Indigenous Peoples' Forum on World Heritage (IIPFWH) was established in 2017 and launched in 2018 during the 42*nd* session of the World Heritage Committee in Bahrain. The aim of this Forum is to elevate the role of Indigenous communities in the 'identification, conservation and management of World Heritage properties' (WHC, 2017). The Forum is modelled on the UN Convention on Biological Diversity and the UN Framework Convention on Climate Change, whose role is to engage with the World Heritage Committee during its meetings, in order to represent the voice of Indigenous peoples concerning the World Heritage Convention. The Forum supports and provides advice to Indigenous peoples regarding various World heritage processes, including nomination and inscription of sites on the World Heritage List, conservation, site management planning and implementation. It also engages with the World Heritage Committee, the World Heritage Centre, advisory bodies and State Parties, and is dedicated to the promotion of rights-based, equitable and sustainable development of World Heritage Sites (UNESCO, 2018). The Forum operates on the basis of 11 Core Principles, with Principle VII confirming that UNDRIP and UNESCO's Policy on Engaging with Indigenous Peoples serve as reference points for engagement. It has been recognised as 'an avenue for Indigenous experts to engage with World Heritage processes' and, to date, has been involved in numerous activities in the field of heritage organised by with World Heritage Centre UNESCO (2020). However, a question arises if the establishment of this Forum has been used to take away the focus from implementing the demands of Indigenous peoples concerning cultural heritage?

The World Heritage Committee had indicated that it would reconsider recommendations concerning the participation of Indigenous peoples in the identification, conservation and management of world heritage sites following on from recommendations made by bodies such as EMRIP, mentioned above (Vrdoljak, 2018, p. 271), which could have facilitated a reconsideration of the establishment of WHIPCOE or a similar Indigenous advisory body. However, during its recent meetings, rather than revitalizing the idea of WHIPCOE, the Committee has instead noted the establishment of the IIPFWH. This is a very unfortunate move, as the Forum is not a formal advisory body to the World Heritage Committee and is, therefore, without power in decision-making processes and proceedings. Vrdoljak thus comments that '[t]he WHC's decision concerning WHIPCOE or its equivalent effectively remains perpetually deferred almost two decades after the initial proposal for the establishment of a specialist Indigenous consultative body and a decade after the adoption of the UNDRIP' (2018, p. 271). It

is hoped that the World Heritage Committee is not using the IIPWFH as a form of lip service or compromise with regard to Indigenous expertise in decision-making processes in the field of cultural heritage. The heritage framework should include an explicit route for such expertise to be funneled to the World Heritage Committee, so that decisions on heritage can be adequately informed.

A salient issue is what would an effective 'Indigenous Expertise' body, such as a reconceived or reframed WHIPCOE look like and how would it operate? One body which could be used as an example is the 'Evaluation Body' attached to the Committee for the Safeguarding of the Intangible Heritage. This body is appointed by the Committee, and is comprised of six experts representing States Parties who are non-members of the Committee and six representatives of accredited non-governmental organizations. In the case of an Indigenous Expertise body for the World Heritage Committee, the members could consist of members of an Indigenous group, with a specific expertise in the field of heritage. The appointment of such experts could be guided by the appointment of experts to bodies of the UN, including EMPRIP, and issues such as geographic and gender representation should be considered, along with issues such as qualifications and disciplinary knowledge. This body could then provide expertise on nominations for the World Heritage List, as well as on Indigenous methods of conservation for heritage sites to the World Heritage Committee on a regular basis, in order to ensure that decisions on Indigenous issues are evaluated by Indigenous people. In the past, and, indeed, still up to today, non-Indigenous people were often called on for expertise on Indigenous heritage and culture in legal proceedings e.g. non-Indigenous historians and anthropologists have regularly been appointed as experts in land claims in Australia under the *Native Title Act* 1993 (Cth) (NTA). While non-Indigenous experts have been important to success in land claims for Indigenous peoples, Holden states that there is an 'intimate connection between colonialism and anthropology' and underlines 'the need for a new method of self-reflection in anthropology to recognize and address the imbalance of power between the anthropologist and their subjects' (2019, p. 188).

This is why it is suggested that members of the Indigenous expert body would be members of an Indigenous group, to avoid any potential power imbalance or misinterpretation of Indigenous culture and heritage. Sapignoli, in discussing the influence of Indigenous experts in the context of the UN's Permanent Forum on Indigenous Issues, comments that their influence 'varies greatly, depending on their

ambition to effect change, the extent of their networks in the UN system, their experience, and, perhaps above all else, their personal charisma and commitment to the indigenous cause' (2017). She further comments that '[a]t a certain point, expertise ceases to be defined by formal education or official status and is considered a capacity for intervention' (2017). This underlines that while it is important for the world heritage framework to facilitate Indigenous expertise, those experts must fully exploit the opportunities to have their voice heard, and be active in ensuring that their expertise is used wisely.

Conclusion

The international heritage framework was designed from a Western perspective and based on Western understandings of culture and heritage. Engagement with non-Western ideas and the inclusion of Indigenous expertise is needed in all spheres of research which have a connection to the natural world (Oviedo, 2012). In the context of climate change, for example, Watson and Huntington comment that 'research is formulated exclusively through the assumptions of Enlightenment thought, without sufficiently engaging non-Western subjectivities' (Watson and Huntington, 2014, p. 721). This is a waste of knowledge and expertise accumulated over millennia. While the heritage framework has become more embracing of non-Western culture over time, especially through amendments made to the Operational Guidelines to the 1972 World Heritage Convention, there remains a deficit in terms of Indigenous expertise. While there have been a number of improvements undertaken to make the UNESCO understanding of culture and heritage more universal, Brumann comments that even after twenty years of the Global Strategy which sought to 'anthropologize' World Heritage, 'it is still overwhelmingly architectural conservationists who pronounce on the "Outstanding Universal Value" of World Heritage candidates. National delegations in the World Heritage Committee sessions have become adept at fighting down the expert judgments but the combination of Northern and disciplinary biases continues to produce uneven outcomes, to the disadvantage of non-European countries' (2018, p. 1225). He concludes that the changes made to the world heritage framework have not adequately redressed its Western-centric nature, stating that 'the elite conception of culture is nowhere near dead' (2018, p. 1226).

In order for Indigenous expertise to play its rightful role in the heritage protective framework, 'nation-state desires and residual colonial sentiments' (Meskell, 2013,

p. 156) must be erased. In a bold move, UNESCO recently recognised Palestinian sovereignty, illustrating its ability to work outside the Westphalian framework. It is hoped that the organisation, and, in particular, the World Heritage Committee, can push boundaries further, see beyond a Statist-agenda, and embrace Indigenous communities and Indigenous expertise within its sphere of operation. Currently, however, the 'primary role of Indigenous peoples in the heritage framework remains as stakeholders (named or not, consulted with or not) in the nomination dossiers or state of conservation reports prepared by States Parties and brought before the Committee' (Meskell, 2013, p. 161). Until Indigenous peoples are properly and fully recognised as rightsholders, rather than just stakeholders, in the heritage framework, then the importance of their expertise will not be adequately understood or valued. Strides have been made in this regard with the adoption of UNDRIP and the subsequent acknowledgement of State obligations in respect of the Indigenous peoples, including in the field of the right to self-determination, but more remains to be achieved. It is suggested that the time is now ripe for the reconsideration of WHIPCOE or a similar body, given emerging customary law in the field of Indigenous heritage rights, and a growing appreciation on the part of the UN and other bodies that Indigenous peoples should participate (and thereby provide expertise) in UN bodies and in decisions concerning them.

The issue of Indigenous expertise in the operation of UNESCO and heritage bodies must, however, be assessed in terms of general expertise in the organisation. The original idea behind UNESCO was an organisation of experts in various fields, including archaeology, education, culture, heritage, in order to oversee the protection of these important facets of life on behalf of the UN. However, in recent times, expertise has given way to political concerns, lobbying and geo-political alliances. Meskell comments that 'State agendas now eclipse substantive discussions of the merits of site nominations in tandem with issues raised over community benefits, the participation of indigenous stakeholders, or threats from mining, exploitation, or infrastructural development. Since delegations are now populated by politicians, not heritage experts, many are uninterested in conservations issues and the specificities of sire borders, buffer zones, and management plans' (2018, p. 80). State sovereignty politics now, unfortunately, dictates the decision-making processes within the organisation. This has resulted in the situation that World Heritage is now considered "'too serious" a matter to be left to mere experts' (Meskell, 2018, p. 140). If this continues to be the case, decisions in the sphere of heritage will be ill-informed and will reflect the will of a small number of

powerful (Western) States, to the detriment of Indigenous peoples and their heritage. It is hoped that UNESCO can make a return to the original vision, of an organisation of experts, who will appreciate and institutionalize the role of Indigenous experts in order to ensure that the world heritage protective framework is effective and representative of all.

Bibliography

Abdulqawi, Y. A. (2008). 'Article 1 - Definition of Cultural Heritage'. Francioni, F. (ed.). *The 1972 World Heritage Convention - A Commentary*. Oxford, New York: Oxford University Press), 23–50.

Anaya, S. J. (2004) *Indigenous Peoples in International Law*. USA: Oxford University Press.

Anglin, R. (2008) 'The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide', *Yale Journal of Law and the Humanities*, 20, 241–75.

Blake, J. (2015) *International Cultural Heritage Law*. Oxford: Oxford University Press.

Brumann, C. (2018) 'Anthropological Utopia, Closet Eurocentrism, and Culture Chaos in the UNESCO World Heritage Arena', *Anthropological Quarterly*, 91(4), 1203–1233.

Corntassel, J. (2008) 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse', *Alternatives: Global, Local, Political*, 33(1), 105–32.

Daes, E. I. A. (1997) *The Protection of the Heritage of Indigenous People*. Geneva/New York: United Nations.

Davis, M. (2012) 'To bind or not to bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On', *Australian International Law Journal*, 9, 17–48.

ECOSOC (1981) *Study of Problem of Discrimination against Indigenous Populations: Final Report (First Part) submitted by the Special Rapporteur, J. R. Martinez Cobo, Chapter IV: Other International Action* UN Doc. E/CN.4/Sub.2/476/Add.5, 17 June.

EMRIP (2011). 'Advice No. 2: Indigenous peoples and the right to participate in decision-making'. Annex to UN Doc. A/HRC/18/42 of August 17.

EMRIP (2015) *Promotion and Protection of the Rights of Indigenous Peoples with respect to their cultural heritage* UN Doc. A/HRC/30/53 of 19 August.

Francioni, F. & Lenzerini, F. (2003) 'The Destruction of the Buddhas of Bamiyan and International Law', *European Journal of International Law*, 14(4), 619–51.

Francioni, F. (2008) *The 1972 World Heritage Convention. A Commentary*. Oxford: Oxford University Press.

Gfeller, A. E. (2015) 'Anthropologizing and indigenizing heritage: The origins of the UNESCO Global Strategy for a representative, balanced and credible World Heritage List', *Journal of Social Archaeology*, 15(3), 366–86.

Gilbert, J. (2007) *Indigenous Peoples' Land Rights under International Law*. Leiden: Brill/ Nijhoff.

Gover, K. (2015) 'Settler–State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples', *European Journal of International Law*, 26(2), 345–73.

Heinämäki, L., Hermann, T., & Green, C. (2017). 'Towards Sámi Self-determination over Their Cultural Heritage: The UNESCO World Heritage Site of Laponia in Northern Sweden'. *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*.

Higgins, N. (2020) *The Protection of Cultural Heritage During Armed Conflict: The Changing Paradigms*. Oxford/New York: Routledge.

Holden, L. (2019). 'Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise'. *Cultural Expertise and Socio-Legal Studies*, 78, 181–204.

Holden, L. (2020) 'Cultural Expertise and Law: An Historical Overview', *Law and History Review*, 38(1), 29–46.

HRC (2010) *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Situation of Indigenous Peoples in the Russian Federation* UN Doc. A/HRC/15/37/Add.5 of 23 June.

HRC (2012) *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, The Situation of Indigenous Peoples in the United States of America* UN Doc. A/HRC/21/47/Add.1 of 30 August.

Kuruk, P. (2004) 'Cultural heritage, traditional knowledge and indigenous rights: an analysis of the convention for the safeguarding of intangible cultural heritage', *Macquarie Journal of International & Comparative Environmental Law*, 1(1), 111–34.

Lenzerini, F. (2011) 'Intangible Cultural Heritage: The Living Culture of Peoples', *European Journal of International Law*, 22(1), 101–20.

Lixinski, L. (2011) 'Selecting Heritage: The Interplay of Art, Politics and Identity', *European Journal of International Law*, 22(1), 81–100.

Logan, W. (2012) 'Cultural diversity, cultural heritage and human rights: Towards heritage management as human rights-based cultural practice', *International Journal of Heritage Studies*, 18(3), 231–44.

Logan, W. (2013) 'Australia, Indigenous Peoples and World Heritage from Kakadu to Cape York: State Party Behaviour Under the World Heritage Convention', *Journal of Social Archaeology*, 13(2), 153–76.

Meskell, L. (2013) 'UNESCO and the Fate of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE)', *International Journal of Cultural Property*, 20(2), 155–74.

Meskell, L. (2018) *A future in ruins: UNESCO, world heritage, and the dream of peace*. Oxford: Oxford University Press.

O'Keefe, R. (1999) 'The Meaning of "Cultural Property" under the 1954 Hague Convention', *Netherlands International Law Review*, 46(1), 26–56.

Oviedo, G. (2012) 'Traditional knowledge, the Convention on Biological Diversity and World Heritage', *World Heritage Review*, (62), 62–5.

Permanent Forum on Indigenous Issues (2019) *Report on the eighteenth session*. New York: UN Economic and Social Council, UN Doc. E/2019/43-E/C.19/2019/10.

Rao, K. (2010) 'A new paradigm for the identification, nomination and inscription of properties on the World Heritage List', *International Journal of Heritage Studies*, 16(3), 161–72.

Sapignoli, M. (2017). 'A Kaleidoscopic Institutional Form: Expertise and Transformation in the UN Permanent Forum on Indigenous Issues'. *Palaces of Hope: The Anthropology of Global Organizations*. Niezen, R. & Sapignoli, M. (ed.). Cambridge: Cambridge University Press.

Saul, B. (2016) *Indigenous Peoples and Human Rights: International and Regional Jurisprudence*. Oxford and Portland: Hart Publishing.

Secretary General of the United Nations (2012) *Note by the Secretary General, Rights of Indigenous Peoples* UN Doc. A/67/301 of 13 August.

Stoll, P.-T. (2018). 'Intellectual Properties and Technologies: Article 31'. *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*. Hohmann, J. & Weller, M. (ed.). Oxford: Oxford University Press.

UN (1986) *Study of the Problem of Discrimination against Indigenous Populations*, Cobo, J. M. (ed.). Geneva: UN Doc, E/CN.4/Sub.2/1986/7Add.4, 1986.

UNESCO (2017) *Policy on Engaging with Indigenous Peoples*. Paris: UNESCO, UN Doc. 202 EX/9 of 9 August.

UNESCO (2018) 'Indigenous peoples launch Forum on World Heritage'. Online: https://whc.unesco.org/en/news/1841.

UNESCO (2020) *Report submitted by UNESCO for the 19th Session of the United Nations Permanent Forum on Indigenous Issues (UNPFII)*. Paris: UNESCO.

UNESCO (n.d.) 'Indigenous Peoples'. Online: https://en.unesco.org/indigenous-peoples.

Vrdoljak, A. F. (2018) 'Indigenous Peoples, World Heritage, and Human Rights', *International Journal of Cultural Property*, 25(3), 245–81.

Watson, A. & Huntington, O. (2014) 'Transgressions of the man on the moon: climate change, Indigenous expertise, and the posthumanist ethics of place and space', *GeoJournal*, 79(6), 721–36.

Watson, I. (2015) *Aboriginal Peoples, Colonialism and International Law: Raw Law*. London: Routledge.

WHC (1998) *Information Document: Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*. Paris: UNESCO, UN Doc. WHC-98/CONF.203/INF. 18.

WHC (2000) *Supporting Paper to the Submission of the Indigenous Peoples Forum Presented to the 24th Session of the World Heritage Committee*. Paris: UNESCO, UN Doc. WHC-2001/CONF.205/WEB.3 Annex 1.

WHC (2001a) *Report of the Rapporteur*. Paris: UNESCO, UN Doc. WHC-2001/CONF.205/10.

WHC (2001b) *Report of the Twenty-fifth session*. Paris: UNESCO, UN Doc. WHC-01/CONF.208/24.

WHC (2017) *State of Conservation of the Properties Inscribed on the World Heritage List*. Paris: UNESCO, Decision 41 Com 7.

Willemsen-Diaz, A. (2009) 'How Indigenous Peoples' Rights Reached the UN', *Making the Declaration Work*, 16–31.

Yupsansis, A. (2011) 'Cultural Property Aspects in International Law. The case of the (still) inadequate safeguarding of indigenous peoples' (tangible) cultural heritage', *Netherlands International Law Review*, 58(3), 335–61.

Yupsansis, A. (2012) 'The Meaning of "Culture" in Article 15(1)(a) of the ICESCR - Positive Aspects of CESCR's General Comment No. 21 for the Safeguarding of Minority Cultures', *German Yearbook of International Law*, 55, 345–83.

Cases and Legislation cited

Australia: Native Title Act 1993 (Cth) (Australia).

Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (Paris, 16 Nov 1972) 1037 U.N.T.S. 151 (1973), entered into force 17 Dec. 1975.

Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, and its Additional Protocols of 1954 and 1999 (The Hague, 14 May 1954), 249 U.N.T.S. 207 (1956), entered into force 7 Aug. 1956.

Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) 1760 U.N.T.S. 79 (1993), entered into force 29 Dec. 1993.

Operational Guidelines for the Implementation of the World Heritage Convention (Baku 10 Jul. 2019) WHC.19/01.

Revision of the Operational Guidelines for the Implementation of the World Heritage Convention (Paris, 24 Oct. 1994), WHC.94/CONF.003/09.

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 17 Oct. 2003). 2368 U.N.T.S. 3 (2007), entered into force 20 Apr. 2006.

UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (Paris, 17 Oct. 2003), 86(854) I.R.R.C. 447.

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995), 2421 U.N.T.S. 457 (2007), entry into force 1 Jul. 1998.

United Nations Framework Convention on Climate Change (New York, 9 May 1992), 1771 U.N.T.S. 107 (1993), entered into force 21 Mar. 1994.

United Nations Declaration on the Rights of Indigenous Peoples (New York, 13 Sep. 2007), A/RES/61/295.

Naveiñ Reet: Nordic Journal of Law and Social Research (NNJLSR) No. 11 2021, pp. 107-122

Cultural Expertise in Civil Proceedings in Italy

Maria Giuliana Civinini[1]

Abstract

This paper emphasises the use of cultural knowledge and cultural expertise in court, with specific reference to civil proceedings. It adopts background scenarios characterised by the presence of ex officio judicial powers that introduce knowledge into trials regarding family and juvenile proceedings, guardianship of ill and elderly people, and immigration and asylum proceedings. The assumption of this paper is that when a situation involving intercultural elements is brought to the attention of the court, the usual background knowledge of the judge may be insufficient to render meaningful judgement. In this situation, thanks to ex officio powers (in introducing facts, gathering evidence, raising legal and factual questions), the judge should be able to establish the elements to be examined through the lens of cultural diversity. The paper uses examples to illustrate judicial practices and then draws a set of initial conclusions about the status of cultural expertise in Italian civil procedures, the challenges of the present, and initiatives to be taken in a short-term perspective (training, panels of experts, deontological requirements for experts).

1 Dr Maria Giuliana Civinini has been a member of the judiciary since 1983. She has been a civil, criminal and labour judge in Modena and Pistoia, and a referendar at the Court of Cassation. She was elected to the High Council for the Judiciary for the 2002–2006 mandate. From 2008 to 2011, she was President of the Assembly of European Judges in the CSDP mission EULEX Kosovo, leading a unit of 40 judges coming from all EU countries, supporting the Kosovo judicial system, and judging war crimes, terrorism and organised crime cases. From 2011 to 2017, she was President of the Civil Section, the Criminal Section, and acted as President of the Tribunale di Livorno. Since 2018 she has defended Italy before the ECrtHR and handled the execution of sentences against Italy before the Committee of Ministers in Human Rights composition of the CoE. Since August 2019 she is President of Tribunale di Pisa. As a member of the Scientific Committee of the HCJ and then of the training commission, she has been a judicial trainer at both national and international levels since 1993. She is the author of articles and books on procedural law, family and juvenile law, judicial organisation, and European law. An expert in judicial training and judicial organisation, she has taken part in various projects supporting the judicial systems of Kosovo, Bosnia Herzegovina, Tunisia and Albania. She has been called upon as an expert in judicial matters for CCEJ, TAIEX, and OSCE. She is strongly committed to defending the independence of the judiciary and to ensuring the realisation of justice for citizens that is effective and transparent, and a guarantor of rights.

Cultural Knowledge in Court

I adopt Professor Livia Holden's (2019) definition of cultural expertise: "special knowledge that enables socio-legal scholars, experts in laws and cultures, and cultural mediators – the so-called cultural brokers – to locate and describe relevant facts, in light of the particular background of the claimants/litigants/accused and for the use of conflict resolution or the decision-making authority." The idea of cultural expertise and of the intervention of a 'cultural expert' in trials is substantially new to the Italian judicial system. On the contrary, the theme of introducing cultural knowledge in adjudication is well-known.

In his Eulogy of Judges, lawyer Piero Calamandrei (2006), one of the greatest Italian scholars of procedural law of the last century, speaks about "[t]he ever-changing heart of the judge who ... commands in the margin of choice that the exegesis of the laws leaves to the interpreter." The use of cultural knowledge in court falls within that margin of choice and, therefore, is closely related to the quality and nature of the substantive law rule applied by the court to the rules of procedure. These rules are derived directly from the court's obligation of impartiality and thus are among the consubstantial limits to the action of judging.

In civil law systems, the 'entrance' of cultural knowledge is often represented by open rules (i.e., public order, public policy and morality, best interests of the child, unjust harm, due diligence, bona fides), key concepts (i.e., fairness, reasonableness, equality), maxims of experience (i.e., a 50- year-old has more difficulty in finding a job than a 20-year-old; water boils at 100° *C* at sea level; 'Cosa Nostra' is a criminal organisation; a witness without ties to the parties is more credible than one who has business links or other relationships with them). In particular, the maxims of experience are the basis of the inductive reasoning typical of the judicial reconstruction of the facts; they are criteria of inference and, simplifying somewhat, one can say that they constitute the major (factual) premise of judicial syllogism (i.e., ex-wives who are not economically independent are entitled to alimony; women over 50 are unable to find a job; X is unemployed and over 50; X is therefore presumed unable to find a job and, for this reason, entitled to post-divorce maintenance.

The maxims of experience feed on general knowledge or acceptance, including cultural knowledge, and notorious facts, meaning facts that can (or rather shall) be the basis of the judicial decision without the need of proof. These are facts which, even though they

consist of events that have taken place once in a while (such as the facts of history and the social and political facts of current public life) or just once (such as those whose topography and descriptive geography give a notion to belong to the stable heritage of knowledge of a citizen with the average cultural level in a historically determined society (the one to which the judge belongs).

The average cultural level should then be understood as resulting from the excluding specialised acquisition of technical and cultural experience, due to personal inclinations, Endemann (1860); Betti (1936); Calamandrei (1925).

Cultural knowledge, impartiality, contradiction and equality of the parties

It is a generally accepted principle that judges should not make use of their personal knowledge and private science. Only notorious facts, those that do not need proof, are exceptions to this principle. That statement implies that judges cannot introduce into the proceedings extrajudicial knowledge – whether cultural or technical-scientific – that they 'accidentally' possess as a result of a private interest or formal study.

Judges who use their private knowledge can be compared, *mutatis mutandis,* to judges who decide a case that turns on a fact they personally witnessed. It is clear that these judges jeopardise the right of defense of the parties; the frustrate the principle of the adversarial process and undermine its 'legitimation'. Judges are the expression of the current society and its culture. If a judge living before Copernicus were to have stated in a judgement that the earth orbits around the sun, he would have been an excellent astronomer but an incomprehensible judge, unacceptable to the society. The same would happen today with a judge claiming to know about medicine or informatics or customary law in central Africa, and using such knowledge to solve and decide cases.

We are not pleading for a 'neutral' judge wrapped in a robe under which individuality disappears, blindfolded, indifferent to the throbbing, living reality beneath the files.

Some cases require background knowledge. Some decisions should be based on equity and others should be adopted in the exercise of discretionary powers in relation to a primary interest; a particular technical and/or factual knowledge should inform still other decisions. Good judges need extra-legal knowledge, which they can acquire through specialisation of judicial function (e.g. family or juvenile judge), repetition (decision of cases based on similar facts, e.g. a pathology, the 'rites' of a criminal

organisation, a typology of pollution), and training (e.g. psychology of testimony, hearing the child and the victims). Franchi defines the knowledge acquired through professional experience as *tecnica riflessa (mirrored technique),* referring to the

> organised experience that the judge has in a matter that does not relate to his or her professional education due to the fact of repeatedly becoming aware, in the act of judging, of events and phenomena that belong to the said matter…

In fact,

> as a rule, repeated technical integration leads to the formulation of decisions containing technical evaluations of the same kind, and knowledge of previous decisions … leads to knowledge of the technical criteria … of evaluation, that is, to the absorption by the judge of the particular experience and … to the transformation of a particular experience, through the decisions of those who are not technical, in common experience (vulgarisation). (Franchi, 1959)

This process of vulgarisation, as a process from technical to common knowledge / general acceptance, takes time and is often associated with cultural changes and rising awareness within society. In addition to the average cultural level of an entire society, we also observe knowledge common to a profession; for example, following a series of rulings later confirmed by the Supreme Court (Lupo, 1989; Grassi, 1989), prosecutors now must prove only that a defendant belongs to Costra Nostra. The existence and organisational qualities of the Mafia no longer require proof.

In the absence of such general acceptance, knowledge shall be introduced to the court through the ordinary procedural channels: allegations of facts and presentation of evidence under the rules of adversarial procedure, in full respect of the right of defence of all parties involved in the trial. This requires, among other things, that the parties and their defence counsels have the possibility of knowing which facts and which evidence are relevant for the judge, of challenging them, and of proposing counterevidence.

Knowledge of intercultural elements

When cases present transnational or intercultural elements, the cultural knowledge necessary to reach a decision cannot be obtained through the common knowledge mechanism. The 'common knowledge' of the judge does not include the stable heritage of knowledge of the citizen of average cultural level in a historically determined society. In these cases, an expert is needed.

When a completely different world (to the one familiar to those present) enters the court, it gives rise to a situation similar to that of two people sitting in a room and wishing to communicate, but speaking different languages or not speaking the other's language well enough; so, they call in someone who speaks both languages to explain, in turn, what each is saying. The metaphor of the interpreter helps us to understand both the role of the expert and the difficulties and the challenges associated with it: is the expert a bridge between two worlds, or a window into yet another world? Are they expected simply to deliver a faithful and non-partisan 'translation' or a much more comprehensive and expanded picture? Are they accurate, neutral, almost invisible agents, or do we expect their help (and their biases) as we search for 'relevant' information and 'necessary' answers?

For a better understanding of how cultural knowledge interacts with procedural rules (especially during evidence-gathering), reconstruction of facts and the contents of decisions, we should consider some scenarios. Situations with transnational elements occur in all areas of civil law. Nevertheless, culture has a particular role to play in the following areas: family and juvenile proceedings, guardianship of ill and elderly people, immigration, and asylum proceedings.

In the Italian legal system, the judge is attributed significant ex officio powers for the management of these cases. The basis of these powers lies in the public nature of the interests at stake. When the usual background knowledge of the judge is challenged, the presence of ex officio powers (in introducing facts, gathering evidence, raising legal and factual questions), enables the judge to establish: a) which elements should be examined through the lens of cultural diversity; b) how to introduce cultural diversity in trial; and c) when and how and to what extent 'culture' can contribute to a fair decision.

Knowing diversity

For the judge, acknowledging and knowing diversity is both a duty and a necessity. The language of the Brussels II bis Regulation 2201/2003 in matrimonial matters and matters of parental responsibility makes clear that the judge must be open to diversity when recognising and enforcing foreign judgments, specifying that:

> For the purposes of this Regulation: 1. the term 'court' shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1; 2. the term 'judge' shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation; (…) 4. the term 'judgment' shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision.

The conflict-of-laws rules[2] that determine when foreign law is applicable (e.g., personal and property regime of spouses from different countries; the law applicable to filiation and parental responsibility in the case of parents of different nationalities and/or living in a third country; the succession of the foreigner; recognition of statuses acquired in another country; adoption by a same-sex couple; surrogacy; polygamous marriage) require the judge to be familiar with the law of other countries and capable of applying it while taking into account its regulatory, cultural and applicative context.

When the internal order – through international civil law on conflict rules – is open to other legal systems, allowing the application of the law of a different State in civil lawsuits (or civil cases) adjudicated by national courts, we find an 'open door' to cultural diversity. This is the case in Italy, especially in the areas identified above (family, children, youth, elderly, non-citizens).

2 We refer to the field of law dealing with choice of rules when a lawsuit involves the substantive laws of more than one jurisdiction (so-called conflict of laws: conflict between the applicable laws of different States or jurisdictions regarding the rights of the parties in a case) and the court must determine which law is most appropriate to the case.

Judicial practices

Culture can enter the court through different channels: the judge's knowledge, the lawyers' motions, testimonies, the parties' declarations, cultural mediation, formal expertise, production or acquisition of documents and reports, and interpretation and translation. The Italian experience, although still very limited, can be understood through the following direct accounts of judicial practices I have collected.

The first examples involve adoption cases. The President of the Person, Family and Minors section of the Rome Court of Appeal reported that many cases demand the appointment of a cultural mediator to assess the extent (if any) of parental dysfunction in families with different religious and cultural values. In some cases (mostly concerning adoption), the appointment was arranged following referral by the Supreme Court, which considered the services of a cultural mediator to be needed because the case involved not only addressing a linguistic deficit but also understanding the cultural differences between family models. Without the presentation of relevant cultural knowledge, there was a serious risk of discrimination in the evaluation of parental ability. In such cases, the expert (*consulente tecnico d'ufficio*), often a psychologist, asked for the assistance of a cultural mediator.

The Court of Appeal has identified critical issues with regard to the choice of the professional and the compensation to be paid, especially when the parties are eligible for legal aid. The Court is trying to reach an agreement with the municipality of Roma Capitale for the provision of the support of specialised social services (the initiative was interrupted by the health emergency related to Covid-19).

The second examples involve unaccompanied children. A judge from the Tribunal of Trieste reported:

> When I summon unaccompanied children with problems in order to listen to them, I always ask for the support of a cultural mediator (who then also acts as an interpreter). The host structure almost always sends their own cultural mediator and, therefore, there is no economic burden for the State. If they are Pakistanis or Afghans (in my region, Friuli Venezia Giulia, the majority of unaccompanied children belong to these two ethnic groups), I often call on the support of an Afghan cultural mediator who speaks both Urdu and Pashto and who was himself an

> unaccompanied child; given that he has gone through similar experiences to the children being summoned, he helps me a lot during interviews, also by 'explaining' their attitudes or behaviour.

A judge from the Tribunal of Benevento reported:

> In one case I asked for the help of a cultural mediator in dealing with some unaccompanied children and it seemed very useful to me. I believe the young of the same nationality as the children. As a result, they saw the judicial authority as being closer to them and, therefore, they listened to me and it seemed to me that they had more trust in the institutions.

The third set of examples involves parental conflict. A judge from the Tribunal of Reggio Emilia reported:

> Years ago I arranged an expertise (*consulenza tecnica d'ufficio)* in the context of a separation between an Italian and a Japanese citizen who had a son of 6/7. The father did not want the son to go and live in Japan. He claimed that the culture and legislation of Japan – where they had also wanted to give birth to the child according to a couples project initially based on the sharing of the two cultures – posed a threat to the maintenance of his relationship with his son. We decided to request a transcultural expert, and a very helpful consultant enabled us to unblock the situation, to authorise the child's travel abroad and the decision to maintain his residence in Italy.

A fourth example involves support for the elderly and for people with health problems (*amministrazione di sostegno):*

> I remember a rather delicate situation that involved giving support to a woman with mental health problems, where the examination of the interested party was facilitated by a mediator who was Nigerian, like her, and just a little older in age. The two girls spoke English, so I could understand what they were saying.

> The intervention of the mediator was offered without any request from me (and without any economic burden to the office) by the psychiatric ward where the girl was unfortunately hospitalised, in collaboration with the association supporting the victims of trafficking.

While it is difficult to find judgements of merit (decisions regarding the appointment of an expert or a mediator normally have only intra-procedural relevance), the jurisprudence of the Court of Cassation is innovative to the point that it is possible to speak of 'Supreme Court activism' (at least as far as family matters are concerned).

Concerning a case of recognition and enforcement in Italy of a sentence of repudiation (t.*alāq*) by the Sharia Tribunal of Western Nablus (Palestine). The Court of Appeal had denied recognition on the grounds that the sentence was based on the unilateral will of the husband (*Court of Cassation n. 6161/2019*). The husband appealed (*ricorso*) to the Supreme Court, stating that the jurisprudence of the Sharia Tribunal had evolved and that, currently, in order to pronounce the divorce, the effective loss of communion between the spouses must be ascertained. The Supreme Court decided to request information on the law in force in Palestine from the Ministry of Justice and a report on the jurisprudence of the European Courts and of the countries in which the problem of the recognition of t.*alāq* has arisen from the Research Office of the Court of Cassation. This decision is highly innovative because the Court of Cassation decides only on matters of law violations, and it is unusual for it to order a kind of inquiry (Court of Cassation n. 6161/2019). The case is pending.

A fifth set of cases concerns two declarations of adoptability. In the first, the biological mother filed an appeal *(ricorso)* complaining that interpretation was not available in Court and that she had not been able to make her family and cultural context understood. The Court of Cassation quashed the decision and referred the case to the Court of Appeal because the procedure was not adequate: the (failed) project to recover the parental relationship and to return the child to his (biological) family had not included the aid of cultural mediation (*Court of Cassation n. 16175/2014*).

In another adoptability case, the biological mother complained, among other things, that her right of defence had been infringed because she had not been able to avail herself of a cultural mediator. The Court of Cassation ordered the Court of Appeal to carry out an expert evaluation of the mother's parenting capacity within a project

involving the extended family, and to provide cultural mediation, which the court considers an indispensable tool to ensure that the mother and other family members willing to care for children are examined with an adequate degree of information and awareness of the role they are performing.

However, the Court's sensitivity to cultural issues in family matters is not reflected in the field of international protection and asylum (*Court of Cassation n. 6552/2017*). Concerning a request for international protection of a Gambian who claimed to be afraid that he would be devoured by his vampire uncles if he returned home (*Court of Cassation n. 10226/2019*). The Tribunal rejected the request. The reason given was that the plaintiff's story was not credible. The Supreme Court dismissed the appeal (*ricorso)* on the grounds that the credibility assessment was a factual assessment referred to the court of merit:

> The Tribunal ruled that the applicant's account having reached a sufficient degree of credibility [...] regardless of the absolute improbability of the vampire nature of the uncles. The same plaintiff rules out the possibility that his uncles could create any problem for him during the day. …The only plausible explanation is that the plaintiff suffered from nightmares. (*Court of Cassation n. 10226/2019)*

By dismissing the asylum seeker's statement as an unbelievable story, the decision does not take into account the fact that witchcraft exists in many countries as a belief and practice, and is foreseen as a crime in their respective Criminal Codes, which establish that practicing witchcraft or being a victim of it can expose individuals to serious risks and even threaten their lives (Sorgoni, 2012, p. 26).

Initial conclusions

The preceding observations allow us to come to certain initial conclusions, which will have to be developed in the future:

First, there is an urgent need for cultural knowledge in court proceedings. Changes in society, freedom of movement and residence within the borders of the European Union, the growing phenomenon of migration, the arrival of asylum seekers, and the growth of mixed families composed of people from different countries and cultures mean that,

every day, national judges face the challenge of obtaining sufficient information about different cultures, customs, practices and legal regimes.

Second, Italian judges and lawyers are becoming increasingly aware of this need.

Third, this awareness is very present among judges who deal with family and migration cases, even though – as suggested by the cases quoted above – there is a greater awareness in the family sector than in the area of migration. A possible explanation is that it is relatively easy for Italian judges (at least for judges used to analysing their biases and capable of going beyond prejudices) to recognise the connection between – on one side – parental (or marital) behaviour, educational styles, educational models, assisting and supporting elderly parents' needs and family conflicts, and – on the other side – mistreatment of and violence against women and children, parents' inability to properly exercise their childcare duties, and the need for support and assistance. It is more difficult for them to understand scenarios that are completely alien both to the judicial and common culture of European countries, like witchcraft, but also persecution of minorities or living in conditions endangering survival because of war, terrorism, famine and food shortages. As a consequence, it is more difficult for them to understand the need for greater knowledge before assessing the background reality of the asylum seeker and the credibility of his or her statements.

Fourth, the general principle that the private knowledge of the judge cannot be the basis for a judicial decision must be respected. Sometimes, a factual situation submitted to the court is distinguished by intercultural elements that require knowledge of "laws and cultures … to locate and describe relevant facts, in light of the particular background of the claimants/litigants/accused" (Holden 2019), in order to be analysed and understood. In these cases, relevant albeit contestable facts and knowledge shall be introduced in the trial in full respect of adversarial principles and the right of defence.

Fifth, specific legal tools are yet to be developed. Knowledge enters the trial through the evidence that is gathered, following the request of the parties or an order of the judge, and concerns (*id est*: is intended to prove) the facts alleged by the parties or that have lawfully emerged in the course of the proceedings (e.g. facts reported by the party in the course of his/her examination or by a witness in the course of his/her examination). The Civil Procedural Code contains rules on the collection of evidence (oral evidence such

as that provided by witnesses and the hearing of the parties; written evidence such as documents presenting certain formal requirements; inspections of things and sites).

Atypical evidence (meaning a source of evidence that is not typified by the Code) is admissible but its evidentiary effectiveness is equivalent to that of circumstantial rather than full evidence. The expertise (*consulenza tecnica d'ufficio*) ordered by a judge and carried out by a professional chosen by the judge from the register of court experts is not a source of evidence, but an instrument that helps the judge to evaluate the collected evidence and to rule on its weight and accuracy. Nevertheless, there are facts that cannot come to be known through the typical evidentiary machinery because the facts must be filtered or revealed through scientific knowledge (i.e. the cause of disease, the incidence of the disease depending from exposure to a putative cause, the relationship between a sickness and working conditions, the risk of congenital malformation, DNA testing, etc.); in these cases, the expertise is increasingly not so much a tool for the evaluation of facts, whose knowledge has already been acquired at the process, but a tool for the acquisition of knowledge of facts (mostly secondary) whose real scope would remain unknown without the mediation of particular methods and techniques.

Since this is the framework of evidentiary tools in Italian civil trials, one can better understand how cultural knowledge can enter the trial and how uncertainties can still exist in judicial practice.

Very different tools (in terms of effectiveness and reliability) are used in judicial practice: documentary evidence (i.e. reports of NGOs, human rights activists or international organisations) and cultural mediation play a privileged role. Given the vagueness of the figure of cultural mediator as a profession (ranging from skilled and well-trained professionals to specific figures in the context of social assistance services or hosts of centres or communities who have acquired a knowledge of administrative proceedings involving foreigners and who have a more or less relevant acquaintance with the society, history and situation of the interested person) and the very different degrees of reliability of reports (depending on the quality, seriousness, professionalism, working methods, neutrality or partisanship of the NGO or HR organisations concerned), there is the risk that the informal use of cultural expertise could endanger the right of defence of the parties.

Judicial practices are still uncertain and judges are still looking for standard procedures and reliable solutions. In this respect, the following guiding principles should be implemented: a) the balance between the introduction of cultural knowledge in trials and respect of procedural human rights shall be granted; this means that the judge should avoid using atypical evidence that has not been assessed through the adversarial procedure; b) the parties have the right to introduce factual elements related to cultural diversity, and to try and prove them; and c) the judge is obliged to evaluate those factual elements.

Sixth, cultural expertise is still unexplored. Among the various procedural possibilities, the appointment of an expert (*consulenza tecnica d'ufficio)* is the procedure most likely to guarantee and respect the rights of the parties. In fact, through a query, judges must specify the issues they wish to entrust to the expert; the parties can argue about the professionalism and independence of the expert and the query that is submitted to him/her and can appoint their own experts to follow the operations. However, the potential outcomes of this procedure have yet to be fully explored.

The proposals presented above have not yet been fully implemented, for three main reasons:

1. *Difficulties in identifying the situation when an expert is needed*. Because the judge normally has only a basic knowledge of the background situations of the persons concerned, it can be awkward to identify which cases are located within a social, political, economic, cultural, and legal context of such complexity that expert help is required. Only training can give judges the necessary awareness and ability to ask themselves: Am I capable of understanding this factual situation? Do my beliefs (and my prejudices) about family, filiation, education or political and religious issues interfere with my ability to judge, or prevent me from recognising if and with regard to what there is a need for further investigation? Am I sure that I have properly analysed and understood all the questions that the parties have represented to me? Could an expert shed light on problematic facts, enable the Court to gain a deeper understanding, overcome the legal limits of the assessment of the individual credibility of the party or witness? What kind of expert do I need? *Training* should: (1) be directed at a *mixed target* of family and juvenile judges, judges from specialised sections for international protection, prosecutors, lawyers, professionals (anthropologists, sociologists, psychologists); (2) have as *training goals*: awareness-

raising; gathering of best practices; analysis of the main problems; analysis of possible solutions and best practices; (3) adopt as *educational methods*: case-studies; interactive discussions; simulations; and mock trials. The pilot training action should ideally be preceded by field research based on a questionnaire and interviews on training needs and best practices.

2. *Impact of the expert's fees.* Often, in family and migration/asylum cases, the parties have a right to legal aid and are assisted by a legal counsel paid for by the State (*patrocinio a spese dello Stato*). These cases are very numerous and a generalised use of expertise would entail significant costs. On the other hand, the repeated recourse to expert opinions on similar issues and their subsumption within the judicial reasoning may give rise in the medium term to general acceptance resulting from the mirrored experience we have talked about. Often, foreign communities or migration flows from specific countries are concentrated in limited territories, which can make it easier for the relevant courts to learn about them.

3. *Difficulties in identifying the professional who should perform the function of expert.* Certainly, many Italian universities employ lecturers in anthropology, sociology or law who could be appointed, but problems remain: who is an expert and what are the boundaries of their expertise? What is the basis of their qualifications? What kind of relationship do they have with the group/community/minority/country to which the person concerned belongs? A roster (even a simple list) should be created – with the personal details of experts/mediators, their contacts, their field of specialisation supported by a short *curriculum vitae* – and made available to judges in every court.

This last point of the expert's position vis-à-vis the lawyer's client is of the utmost importance. Judges cannot take the risk of crossing an unsafe bridge. One of the most beautiful novels by Javier Marias, *A Corazon tan blanco* (A heart so white), takes its title from Shakespeare's Macbeth and alludes to the guilt of those who, without committing a crime, are accomplices ("My hands are of your colour; but I shame/ To wear a heart so white"). In a key scene from the book, during a meeting between Margaret Thatcher and Felipe González, the interpreter, Juan, deliberately chooses to invent the translation and drive the conversation between the two politicians, thus winning the love of Teresa, another interpreter who is present, and who will be his future wife.

Experts shall not be cultural eunuchs, entomologists of sorts, giving the judge a collection of butterflies to admire in their deadly coldness. In weaving the canvas of the facts and choosing those relevant and significant for the case, contextualising them, experts make choices guided by their schools of thought, the doctrinal lines to which they adhere, their research experiences, probably even their beliefs. What is essential is that experts do not play the role of the partisan for the vulnerable subject in the trial (these subjects already have their lawyers for this, and possibly also party consultants). Rather, by means of judiciously harnessing their expertise, experts shall place the judge in a position to understand the facts, their roots, the existence of different foundations of these facts, thereby providing a scientific justification for judicial conclusions.

Bibliography

Betti, E. (1936) Diritto processuale civile italiano. Roma 317–317.

Calamandrei, P. (1925) 'Per la definizione del fatto notorio', Rivista di Diritto Processuale Civile, I, 273–304.

Calamandrei, P. (2006) Eulogy of Judges. Clark: The Lawbook Exchange, Ltd.
Endemann, W. (1860) Die Beweislehre des Zivilprozess. Heidelberg: Bangel und Schmitt. Franchi, G. (1959) La perizia civile Padova.

Grassi, A. (1989). 'Combating Organized Crime: The Maxi Trials in Sicily'. 3rd Annual Symposium on International Criminal Justice Issues. Smith, H. E. (ed.) 37–46.

Holden, L. (2019) 'Cultural Expertise: An Emergent Concept and Evolving Practices', Laws, 8(4), p. 28.

Lupo, S. (1989). 'History of the Mafia'. New York: Columbia University Press, 37–46.

Sorgoni, B. (2012) 'La stregoneria non è un concetto particolarmente complesso: storia di una richiesta di asilo', Primapersona, 26, 74–81.

Cases and Legislation cited

Brussels II bis Regulation 2201/2003, OJ L338, 23.12.2003, p. 1 (European Union).

Cass., 1 Maggio 2019, n. 6161 (Italy).

Cass., 15 Iuglio 2014, n. 16175 (Italy).

Cass., 12 Maggio 2017, n. 6552 (Italy).

Cass., 11 Aprile 2019, n. 10226 (Italy).

Naveiñ Reet: Nordic Journal of Law and Social Research (NNJLSR) No. 11 2021, pp. 123-150

Cultural Experts at the International Criminal Court (ICC): The Local and the International

Joshua Isaac Bishay[1]

Abstract

This paper extends existing research on cultural expertise in domestic settings to international courtrooms where several cultures, religions and worldviews are represented. This exercise reduces the widespread knowledge gap on the cultural particularities of post-conflict communities. In the interim, such research also can bridge the gap between the Western lawyers who currently are the most prevalent in international courts, and the members of post-conflict communities who usually appear on its docket. This article suggests that by including cultural expertise, the ICC can take one more step toward becoming a truly international court.

Introduction

The International Criminal Court (ICC or 'the Court') has the difficult and unique task of transcending borders. It is the first of its kind, a permanent court aimed at ending the individual impunity that has followed so many violations of international criminal law (ICL). Unfortunately, like previous international tribunals, it is often in the midst of diplomatic squabbles. The ICC has been the object of intense and growing criticism from academics and practitioners, and even from the communities it claims to protect; it is accused of being neo-colonial, ignorant to the situation on the ground and, decades after its founding, still suffering from growing pains (Clark, 2018; de Vos, 2013; Owiny, 2019; Ochs, 2020; Swart, nd).

There is a common thread among these criticisms: the ICC, and more specifically the Office of the Prosecutor (OTP), have a deficit when it comes to cultural (and

1 Joshua Isaac Bishay, a doctoral candidate at the Université Paris 1 Panthéon-Sorbonne under the supervision of Dr. Livia Holden carries out ethnographic research on the specialised terrorism trials in Paris. He is an international lawyer with experience before the International Criminal Court, the Special Tribunal for Lebanon, and the Extraordinary Chambers in the Courts of Cambodia, and has defended victims before regional human rights mechanisms. He earned his LLM from Universiteit Utrecht's Legal Research Master's programme in 2020, and his JD from the John Marshall Law School in Chicago in 2013.

political) knowledge of the affected communities and situation countries with which they interact. This may be because legal practitioners are more likely to misunderstand individuals who are from different backgrounds. Further, institutional processes in courtrooms structured in the Western common and civil law traditions offer few opportunities for cultural experts to share their expertise with the courts (Cooke, 2019, p. 14).

This contribution explores the role cultural experts could play in improving the ICC's relationship with the affected community by identifying some of the types of cultural experts that have appeared before the ICC, analysing their roles and, on the basis of this analysis, offering some tentative recommendations about how they can be better integrated into the court structures to better transmit relevant cultural knowledge to judicial decision-makers.

For the purposes of this contribution, and in context of international criminal tribunals, cultural expertise will be defined as "the special knowledge that enables … cultural mediators – the so-called cultural brokers, to locate and describe relevant facts in light of the particular background of the [affected communities and the tribunals]" (Holden, 2019a, p. 1). Cultural experts can be integrated throughout the Court's institutional functions, with the prosecution and defence teams, as victims' representatives, and more. Every stage of an ICC case – from preliminary examination up through the appeals – is steeped in cultural context and layered in meaning. The benefits of using cultural experts, as clearly demonstrated by previous researchers, is a growing necessity in our globalising world (Black, 2019; Lopes *et al.*, 2019; Cooke, 2019; Holden, 2019a; Ciccozzi & Decarli, 2019).

Several forms of cultural experts could be valuably incorporated into the ICC, with some more directly connected to the legal process than others. They may include intermediaries, investigators, translators, resource people, locals who work at the Court and expert witnesses. The focus in this article will be on resource people, investigators, interpreters, expert witnesses and legal professionals. The numerous cultural experts who already fill those roles are in the best position to provide guidance to courtroom actors and communicate with and for the affected community throughout the trial process.

The hypothesis of this thesis is that the highly bureaucratic structure of the prosecutorial teams places those who are from the affected community, and are willing to share

their cultural knowledge, at a distance from the legal staff who must make courtroom decisions.

This contribution does not suggest that ICC staff are in any way incompetent or that the ICC lacks cultural experts or cultural expertise. Rather, there is a lack of communication and effective delivery of cultural knowledge. This is because some courtroom actors may misunderstand, misinterpret or misattribute the value and potential of these cultural experts in favour of expert witnesses such as anthropologists or sociologists.

Furthermore, although other courtroom actors will be discussed, this thesis will take the perspective of the defence practitioner. Not only have I worked on and with defence teams that have appeared several tribunals come from working on and with defence teams, but also, as will be discussed below, defence teams have taken the lead in harnessing the resources of cultural experts. This also presents an important opportunity to approach such research from an often-ignored perspective. Within international tribunals, the defence tends to be viewed as outsiders to the institution; the entire defence apparatus is weakly institutionalised in the Court and team members are not staff of the Court. Indeed, many court actors view defence teams with trepidation. Those who defend people who have been charged with heinous crimes are often believed to be diametrically opposed to the advancement of human rights, and to be willing to accept any device, subterfuge or legerdemain that might lead to the acquittal of their client.

To explore this, the contribution will look at various types of cultural experts, the way they are integrated with and utilised by the various legal teams, and how the OTP's trial team, specifically, may have experienced a break in the lines of communication between those who have cultural knowledge, and those who (may not know they) need it. This contribution relies on academic sources, ICC court documents and the personal experiences of myself and three other ICL practitioners with experience before the ICC. As noted by other scholars on cultural expertise, much of the cultural knowledge presented to the international courts is brought forward by the defence (Cooke, 2019, p. 23). Collectively, the interviewees, referred to as ICL Practitioners one through three, and I have decades of experience on defence teams before the ICC and several other tribunals, and one has also helped to represent victims.

This contribution suggests that the difference between the victims, defence and prosecution teams' approaches to the various cultural experts available to them may be a direct result of the way the OTP is structured, the way it conducts investigations and the way it views what it may see as extraneous facts in the face of a clear-cut legal case. In other words, those whom the OTP deem cultural experts – often relying on intermediaries, human right activists and NGO's as local experts as opposed to members of the affected community – and their over-reliance on building a universal system of prosecution that can be copied and pasted from one situation to another efficiently.

As many have argued in the past, international law needs to take a more contextual approach, whether it be in courtroom procedure or during the investigation (Bostian, 2005; Bishay, 2020; Fraser, 2020). One way to achieve this is for all courtroom actors to allow for better flow of cultural knowledge from cultural experts – not only in the courtroom, but in their investigations and trial teams preparations for litigation. Doing so will improve the quality of ICC prosecutions, meet the ICC's goal of becoming a translocal solution in the eyes of affected communities (*Ruto & Sang* Transcript of Hearing on 16 September 2014, p. 64, lns. 6–12; *Ruto & Sang* Transcript of Hearing on 29 September 2014, p. 12, lns. 13–21; *Ruto & Sang* Transcript of Hearing on 12 January 2015, p. 26, lns. 13–18).

Key Terms and Concepts

Some key terms and concepts used throughout this thesis carry different meanings for anthropologists than for lawyers. Other terms, such as culture, are vague in their vernacular usage, have no uniform definition within the anthropological community, and hence are shunned in contexts where legal precision is highly valued. The definition of 'culture' used in this contribution and by cultural scholars is 'a taught, inherited and patterned system of meaning, built on ideas which "communicate, perpetuate and develop a group's knowledge and attitudes towards life"' (Geertz, 1973, p. 89).

The term 'affected community' – the group of people which the international criminal law trials directly touch and concern – will appear throughout this contribution. Affected communities generally include the victims, witnesses and perpetrators of crimes. Another term often referred to in this article is 'situation country', the term used by the ICC to refer to the country or region where the investigation or prosecution is concerned. For example, Omar al-Bashir's trial is part of the "Darfur Situation", and

William Samoei Ruto's indictment was under the "Kenya Situation". Some countries are under investigation for more than one situation stemming from more than one conflict. For example, the Central African Republic currently has CAR I and CAR II.

Another community often grouped together is that of the 'Westerner'. This term is admittedly problematic, especially when discussing law. The Western world's diverse law practices can be classed into two major categories: the common law tradition and the civil law tradition. Within each tradition, however, approaches to law vary from one country to another. Nonetheless, it is both fair and common to say that international tribunals are mostly a hybrid of these traditions and that most practitioners in these tribunals have been trained in North America, Europe or Australia.

Finally, a distinction must be made between cultural knowledge and cultural defences. The cultural defence, sometimes known as cultural arguments or cultural evidence, asks the Chambers to assess the degree to which the Court should consider religious, social or cultural context when weighing the facts and evidence before them (Holden, 2019b). Simply put, the cultural defence can be defined as:

> an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act, nevertheless, is within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation. (van Broeck, 2001, p. 5)

Such arguments are not without strong criticism, especially in international criminal justice. For example, if a person is allowed to act with impunity as long as the actions are consistent with cultural norms and expectations, then a pillar of the judicial process – equality before the law – is called into question (Lopes *et al.*, 2019, p. 62). In other ways as well, within the context of the ICC (and international criminal law in general), the cultural defence brings into question the universality of the international legal framework.

In comparison, cultural knowledge is what I will call the information that might be relevant to the courtroom proceedings or the investigatory process. This may include culturally informs interpretations of the language and body language, and the way witnesses may react to direct questions. Cultural experts also can provide information

about the geographical and historical context of the situation country and even nuances of religious expression. Cultural experts do not hold a monopoly on this knowledge, certainly many in the Court are aware of many aspects of the affected community's culture; however, cultural experts are unique in their holistic and intuitive understanding of it.

The Structure of the OTP versus defence and victims' teams

Before discussing the various types of cultural experts that have appeared before the ICC, it is necessary to discuss the internal structures of the Court's legal teams.

The interests of the defence and legal representatives of victims (LRV) are represented internally via the Office of the Public Council for the Defence and the Office of the Public Counsel for Victims. However, defence and LRV practitioners are not staff of the Court (although many are paid by the Court) and are referred to as 'External Parties', thus leading them to be structured very differently from the internal OTP, Chambers[2] and the Registry[3]. The typical defence team has four to eight members; the OTP, during trials, typically utilises the combined resources of the entire office for all cases simultaneously (Fedorova, 2012, p. 303). Arguments related to equality of arms and fair trial rights aside, this means that an individual on a defence or LRV team must work multiple roles simultaneously (Fedorova, 2012, pp. 315–6). On the other hand, many on defence and LRV teams are dedicated to one case and one client, while OTP staff may be working simultaneously on multiple cases involving multiple situation countries.

The OTP is broken up into three divisions: (1) the Jurisdiction, Complementarity and Cooperation Division, which handles issues related to "jurisdiction, admissibility and cooperation, and coordinates judicial cooperation and external relations for the OTP"; (2) the Investigations Division, "providing investigative expertise and support, coordinating field deployment of staff and security plans and protection policies, and providing crime analysis and analysis of information and evidence"; and finally (3) the Prosecution Division, which "prepares the litigation strategies and

2 Chambers is the term the ICC gives to the judicial organ of the Court.

3 The closest domestic analog to The ICC's Registry would be a combination of a court clerk, an administrator, liaison with external parties and, borrowing from the French civil system a *huissier*.

conducts prosecutions, including through written and oral submissions to the judges" (International Criminal Court, 2020).

Finally, as counsel for the defence and LRV are not hired directly by the Court, but are often selected by the accused in the case of the defence, or through local NGOs in the case of victims. Note that individuals from the country and/or the affected communities are sometimes represented by counsel (this was the case for *Ongwen* and in *Ruto & Sang*). The OTP's trial lawyers, on the other hand, work on a variety of cases and therefore might have limited or no knowledge of a specific cultural context. As will be discussed later, this knowledge can provide an advantage to the defence or LRV team, as they can source cultural knowledge themselves.

Cultural Experts before the ICC

Intermediaries and Resource Persons

Intermediaries before the ICC (usually referred to as 'resource persons' on defence and victims teams) are individuals or organisations, usually based in the situation country, who act as 'contact points' for the legal teams by assisting in locating witnesses and working with investigators in the field. They either come from the affected community or region, or have worked there in the past with a Non-Governmental Organisation (NGO) or an International Governmental Organisation (IGO), and thus are viewed as being on-the-ground experts. In my experience, OTP intermediaries are usually recruited because of their network of social contacts, and are often treated as local experts (some are even called as witnesses). A resource person differs from an intermediary as they are usually individuals who speak the language, have contacts in the area and have background knowledge of the situation. They are sometimes the investigator of the team as well, conducting the investigations on the ground. (ICL Practitioner 3, 2020)

The ICC, historically, has relied on investigations teams composed mainly of individuals of European, North American or Australian origin (Clark, 2018, p. 67), although some more recent recruits come from Africa (ICL Practitioner 1, 2020). Given their limited cultural knowledge, compared to someone from the affected community or situation country, intermediaries end up playing a "critical role" in the ICC's ability to investigate, locate witnesses and gather information for trial (Women's Initiative for Gender Justice, 2012; ICL Practitioner 1, 2020). They are "often essential to Court functions" and can

be the objects of uncomfortable questions regarding their impartiality. Many had been "insiders who may have been involved in criminal activities themselves" and "facilitate locating and/or contacting other insider witnesses for the prosecution or defence" (Open Society Justice Initiative, 2011, p. 2). The overdependence on an intermediary, as opposed to more intimate contact with the affected community by investigators and trial staff in the Democratic Republic of the Congo (DRC), left many in the local community feeling that the ICC had not attempted "to foster relationships with local actors", something that hurt their standing in such communities (Clark, 2018, p. 131). Additionally, this heavy reliance on intermediaries leaves OTP staff "rarely be able to see the full picture" and often limited to "the relevant and often preselected information" (Hieramente *et al.*, 2014, p. 1134).

To mitigate many of the aforementioned issues, it is OTP policy to try and control the information being sent to intermediaries – i.e. avoid prosecutorial strategy from reaching them – however, it was established as judicial fact in Lubanga that the intermediaries, who in fact were activists, were keeping themselves appraised of the developments in International Criminal Justice and the objectives of the OTP's Investigations teams (*Lubanga* Judgment pursuant to Article 74 of the Statute, 2012, paras. 183–4).

It is, however, necessary to explain why the OTP feels it so necessary to hold such distance between itself and the local community. In the past, the OTP has explained that their witnesses risk (and some have experienced) reprisals when they were discovered to be cooperating with the ICC or the OTP (*Bemba* Public Redacted Version of "Decision on in-court protective measures for Witness 45", 2016). This problem has plagued several international tribunals, including as the Special Tribunal for Lebanon (STL), which has done a much better job of integrating Lebanese staff into their court structure, and which maintains a permanent and open presence in Lebanon (*Al Jadeed S.A.L. & Al Khayat* Redacted version of Decision in proceedings for contempt with orders in lieu of an indictment, 2014; RSF, 2015).

Investigators

As previously described, the Investigations Division of the OTP is an organ within an ICC organ. This administrative organisation has some unusual effects on investigations. First is the relatively stringent control the Prosecutorial Division exerts over its investigation teams, in comparison to control levels traditionally associated with

criminal investigations (Fedorova, 2012, p. 143–4; Whiting, 2013). Secondly, the OTP continues its investigations well after the trial has begun (Fedorova, 2012, p. 15; Whiting, 2013), which means the investigations conducted by the defence and the LRV also continue well into the Trial Phase. Thirdly, as the Prosecutor is the arbiter of what should and should not be investigated, there is often a conflict of interest between her role as prosecutor and her mandate to investigate all facets of a case, including potentially exonerating information (Fedorova, 2012, p. 145–6)

In my experience, as well as that of those interviewed, it appears that the OTP's institutionalised structure, which features strict divisions between prosecutorial tasks, creates tension within the OTP and may have caused a break in effective communication. In effect, the trial attorney is often left unaware of the "factual minutiae of the specific case" (Fedorova, 2012, p. 160), and oftentimes the left-out details are culturally relevant, but may appear as less important than facts that a cursory glance suggests prove the elements of the crime. As investigators may understand the value of certain cultural knowledge, sometimes there appear to be "disagreements between the senior trial attorneys and the investigators", regarding what is important to the trial and what is extraneous, with suggestions that these disagreements may have an effect on the quality of litigation (ICL Practitioner 2, 2020; *Katanga* Judgment pursuant to article 74 of the Statute, 2014).

Finally, as previously described, the investigators hired by the OTP are predominately from North America, Europe or Australia. This increases the reliance the investigators have on the intermediaries and increases the risk of politically charged or partisan evidence and allegations making their way to the courtroom. Additionally, there is a preference for investigators who have a history of working with potentially activist human rights organisations, NGOs and IGOs, which further influences the orientation of those who build the evidence for the trial team. When considering that the average Senior Trial Attorney is less likely to be in direct contact with individuals based in the field than their defence counterparts (ICL Practitioner 2, 2020; Clark, 2018, p. 148), and the reliance on intermediaries who have a vested interest in the result of the trials (*Ruto & Sang* Transcript of Hearing on 1 November 2013, p. 12, lns. 15–22), it may be possible that the distance put between a trial team and the cultural experts on its investigation team may contribute to theinvestigatory shortcomings of the Prosecution's case.

Translators and Interpreters

Translators and interpreters before the ICC are members of the Registry's Language Services Section (LSS) – previously known as the Court Translation and Interpretation Section (STIC, derived from the French acronym *Section de traduction et d'interpretation de la Cour*). They are under immense pressure to deliver important and exact legalese into their target language. Translators, especially those whose target language is a local language, often come from the affected communities and hold an immense wealth of cultural knowledge.

To accurately interpret tribunal proceedings, both a solid foundation in the grammar and vocabulary of a language and an in-depth knowledge of its cultural aspects are essential. While many in the courtroom expect the delivery of a 'true' interpretation of the testimony, question or statement, "every act of translation involves interpretation and judgement" and is never a "purely technical matter" (Edwards, 2010, p. 96). Language is ordinarily layered in meaning, subtext, nuance and allusion; to a native speaker, full comprehension requires one to "read between the lines" (*Ibid*., p. 96–7). In order to produce the most accurate interpretation, including the associated nuance, subtext and full range of intended meaning, the interpreter must invariably access their knowledge of two cultures, that is, of both the source language and the target language (*Ibid*.).

I have had informal conversations with interpreters and translators who were able to share cultural knowledge with me. In one example, it was explained to me that in the affected community with which I was interacting, meetings and appointments could be more accurately planned in reference to the Islamic prayer schedule – which shifts daily based on the position of the sun – as opposed to the precise time of day on the 12- or 24-hour clock. In another example, during one trial, several interpreters were hired on week-by-week contracts to assist the Defence in translating evidence. However, interpreters for languages such as Zaghawa or Swahili were from the affected community, and were able not only to provide interpretation to whichever team needed it, but also were to explain the subtext to the legal teams. One phrase that came up from trial preparations was to 'never cross the *wadi* in the winter.' This phrase meant that crossing a *wadi* or a dried river / valley during the winter (which is in the rainy season) is dangerous as water may suddenly arrive and deluge the traveller. Without the interpreter, the legal team would have had to conduct extensive research of the

geography, climatology and colloquial history of the situation country to gain this knowledge, and even then, its importance may not have been as easily grasped.

In the future, the ICC presumably will bring these temporary contract interpreters and translators under more permanent engagements as the trials move into later stages. However, as demonstrated, these individuals were able to contextualise the meaning behind wording which is shrouded in cultural nuance. Such knowledge is just as important before the trial as it is during.

Legal and Registry Staff

In addition to the language staff, many individuals in the Registry, defence teams, victim's teams, Chambers, and even Prosecution come from the affected communities or countries. This is because after a conflict, individuals from the affected communities often come forward to offer their first-hand knowledge of their communities and the conflict (Elias-Bursać, 2015, p. 27).

An early example of cultural expertise being used by the prosecution is the Nuremberg trials. The US chief counsel hired an individual named Robert Kemper, a German, who assisted the prosecution not only with his legal skills, but also with his knowledge of Germans and Germany. Of note, he was the head of the Defense Rebuttal Section, which was tasked with "anticipating the defence strategies of the accused and for preparing cross-examination" (Holocaust Encyclopedia, 2020). Similar steps were taken in the Tokyo trials as American lawyers "worked closely" with Japanese lawyers to become "acquainted with the various Japanese mentalities, nuances in languages, and customs" (Glazer, 2017, p. 82).

Defence teams are more likely to have a counsel who comes from the country or the affected community. This means that some court actors themselves may have the advantage of holding cultural expertise that opposing counsel or judges may not have. As noted by Cooke, much of the cultural knowledge is brought forward by defence teams (Cooke, 2019, p. 23). In this case of international courts, it is no different. This is because the defence, and to an extent the LRV, have clients who can offer clarifications, provide cultural context and/or guidance for the field when navigating the evidence which the prosecution have laid out in their allegations – becoming an immediate "in-house advisor" who can offer "contextual, cultural and historical" expertise, which the

defence teams then go out and confirm in the field independently (ICL Practitioner 2, 2020).

At the ICC, the convention that nationals from the affected community will represent their clients is also practised. As an example, Mr Dominic Ongwen, a Ugandan who was Joseph Kony's number two in command of the Lord's Resistance Army (LRA), accused of being responsible for the decades of war in Northern Uganda, had a lawyer from Uganda. Another example is Mr Joshua Sang, a Kenyan radio host accused by the ICC of stoking Kenya's 2007 post-election violence, who was represented by a Kenyan lawyer. The latter lawyer at times stopped their own questioning on the record, as they noticed the interpretation was different from the meaning trying to be conveyed by the witness and wanted to clarify this for the ICC judges (*Ruto & Sang* Transcript of Hearing on 3 October 2013, p. 5, lns. 3–7).

Some of these lawyers have cited their cultural expertise as giving them an advantage, especially when questioning witnesses in court. Before the ICTR, a Rwandan defence lawyer explained that because he was Rwandan, he could properly "read somebody's demeanour", their body language and their tone (Sindayigaya, 2008, part 5, 01:58). Additionally, and as described in the previous section on language assistants, some defence counsels have pointed to their ability to more effectively interview or question their clients and witnesses (as opposed to an individual who relies on an interpreter). Before the ICTR, Counsel Sindayigaya explained that sometimes interpretation can only transmit 80% of the full intended meaning (Sindayigaya, 2008, part 5, 01:33) suggesting that tone, body language and the intentions behind word choice account for the remaining 20%. Having members of the affected community serve as counsel is especially prevalent in ICTY and ICC, where they are not hired directly by the Court, but are often selected by the accused or the victims they will represent. Before the ICTY, social scientists have pointed out that the international lawyers and consultants who worked with the prosecution's legal team had a limited knowledge of the legal traditions and culture, which "undermined the courts' legitimacy and effectiveness" (Lowry and McMahon, 2010, p. 110).

Expert Witnesses

This class of cultural experts falls most in line with the traditional view of the courtroom expert. They can be "anthropologists, academics, or leaders or elders from a particular traditional community", pretty much anyone who meets the Chamber's qualifications

of an expert on a particular matter (International Criminal Court Regulations of the Court, 2018, reg. 44; Holden, 2019b, p. 182; Rautenbach, 2019, p. 161). Additionally, expert witnesses, including those on cultural matters, can be called by any party, including the Chambers (International Criminal Court Regulations of the Court, 2018, reg. 44; *Lubanga* Decision on the procedures to be adopted for instructing expert witnesses, 2007; *Bemba* Decision on the procedures to be adopted for instructing expert witnesses, 2010; *Ongwen* Decision on Prosecution Request in Relation to its Mental Health Experts Examining the Accused, 2017).

Sociologists and anthropologists have a history of being involved as cultural experts who provide guidance to ICC judges. For example, in the Ngudjolo and Katanga cases, which relate to the allegations of war crimes and crimes against humanity committed in the Democratic Republic of the Congo (DRC) since 2002, sociologist Julien Seroussi was instrumental in assisting the judges to appreciate the cultural context in Bogoro, DRC and had aided them in deliberations. In another example from the ICC, once it became apparent that Acholi cosmology would play a major role in the trial of the Northern Ugandan conflict, the Ongwen trial saw the Prosecution, LRV and the Defence calling for expert witnesses to provide cultural and historical knowledge in regard to the historical, cultural and spiritual aspects of the LRA (Nistor *et al.*, 2020). In that case, it was brought to the Court's attention that Joseph Kony had exploited a feature of Ugandan spiritualism during his military campaign: "the general population of Uganda, particularly the Acholi, believes in practices such as witchcraft or *cen*". *Cen* is a spirit that can possess people. The Ongwen Defence put forward the argument that spiritual indoctrination was part of a 'brainwashing' process suffered by Ongwen and many other child soldiers (Nistor *et al.*, 2020). Unfortunately, both parties called on these experts to "further elaborate on cultural concepts that had been extensively explained by the local population" and instead found them trying to place the cultural concepts with equivalents from Western society, with one even referring to 'we in the west' or trying to equate *cen* possession with PTSD (Nistor *et al.*, 2020).

In a particular example, during the Ongwen trial, the Defence called Mr Jackson Acama, a "clerk to the spirits" (another term for witchdoctor), to testify on the cultural knowledge he picked up during his 17 years with the Lord's Resistance Army and its predecessor, the Holy Spirit Mobile Forces (Maliti, 2019). During his testimony, Mr Acama described the various spirits that LRA leader Joseph Kony would commune with, and the various powers associated with them – including their influence on

spiritual operational commanders (*Ongwen* Transcript of Hearing on 25 October 2018, p. 20, lns. 2–4). Mr Acama also explained that the failure of a subordinate in the LRA to comply with Mr Kony's orders would result in the spirits notifying Mr Kony of the insubordination (*Ongwen* Transcript of Hearing on 25 October 2018, p. 19, ln. 13). However, there appears an overwhelming tendency by the trial teams (on all sides of the courtroom) to try and force the testimony provided by these cultural experts into the 'neat little boxes' delineated by the international criminal law framework. In the example of the Ongwen trial, the Defence and Prosecution tried to fit the testimony about spirits into Western ideas of mental health, suggesting that some spirit possessions could be equated to post-traumatic stress disorder (Samson, 2019). This is especially problematic when considering the historical and cultural complexity which can be found in all cultures – complexity that can lend itself to virtually any legal argument (Wilson, 2011, p. 70; Eltringham, 2013, p. 339; Nistor *et al.*, 2020).

A Lack of Expertise, not of 'Experts'

In general, defence and LRV teams are structured and function quite differently from their OTP counterparts. While an OTP Case Manager is primarily responsible for organising and digitising evidence, and communicating with the defence and LRV, the defence and LRV counterparts must not only complete these tasks but also serve as legal researchers and drafters, in-court assistants, contact persons for witnesses and resource persons, and on-site investigators who travel frequently to the field. Defence and LRV's legal assistants, counsel and investigators are expected to perform a similar variety of tasks. Unlike the OTP, all members of the defence and LRV staffs share and assist each other in the same tasks. This usually means that all members of LRV and defence teams have constant contact with witnesses, cultural experts, and one another. This translates to a faster rate of transmission of cultural knowledge from one team member to all team members on the smaller and more intimate defence and LRV teams than the more bureaucratic OTP.

Defence and LRV teams may (but do not always) hire resource persons or investigators who are from the situation country or are locals from the crime base. The OTP has, so far, avoided the use of investigators who are nationals of the situation country (Clark, 2018, p. 67), although there is no specific Regulation of the OTP against it (Regulations of the Office of the Prosecutor, 2009). In my experience, investigators,

lawyers and support staff are based in The Hague and perform "Field Missions" to the situation country (or a neighbouring country) for investigatory activities.

The two examples below were selected because they demonstrate places where the ICC could benefit from cultural expertise. For example, adjusting the manner in which the passage of time is described or measured, although it may seem unimportant to some, can improve the relations between the Court and witnesses. The second example represents a larger shortfall of all parties before the ICC; it illustrates the tendency to take cultural knowledge and force it to fit into typical Western legal categories.

Telling time

As Clifford Geertz once wrote, "There are many ways in which men are made aware, or rather make themselves aware, of the passage of time" (Geertz, 1973, p. 389). In today's 'modern' world, the Gregorian calendar has come to be a temporal *lingua franca* of sorts, even as many societies use their own calendar alongside the Gregorian. All trial teams – OTP, Defence and LRV – have had the difficult task of 'factually' establishing the timeline of alleged events in parts of the world where time may not be measured the same as in The Hague.

This is not to say that the ICC has engaged in trials where the witnesses are unaware of Gregorian months, or have not heard of them; they most certainly have. I refer to the internalised sense of time – how we 'feel' the time of a year pass – whether it be through seasons, months, or work schedules, and how that in turn affects how we remember the chronology of the events that fill our lives. For many around the world, the linearity of time is predominantly felt by the changing agricultural seasons, the alternation of dry/wet seasons (perhaps accompanied by flooding of bodies of water) and the passage of religious holidays or markers.

An interesting example of this before the ICC, which demonstrates how cultural knowledge – not just local knowledge – could have been applied, appeared during *The Prosecutor v. Dominic Ongwen* trial. At the beginning of the trial, the Prosecution trial lawyers asked their witness for specific dates or months of events, but were sometimes unsatisfied with the witnesses' responses. The following excerpt is from the Prosecution's questioning of one of their witnesses, number P-0205:

> Q: All right. Now we'll discuss the bay in detail, but just before that, around when did Ngora happen? The event at Ngora, around when did it happen?
>
> A: It was around I believe October, November.
>
> Q: All right. And just as a reminder, of course if at some point you don't know or you don't remember, don't try to please me, just say you don't know. All right. But that's just as a warning for the future... (*Ongwen* Transcript of Hearing on 6 March 2017, p. 25, lns. 10–15).

The Defence, however, took a very different approach when asking witnesses for a temporal range: they tried to tie them into the local method of keeping track of time by referring to agriculture and the timing of the rainy season. A defence counsel explained to me that the witnesses many times found it easier to associate time with what fruit was in season, what agricultural products had been planted, how tall the grass was, if the tall grasses had been burned yet, etc. rather than a strict date (ICL Practitioner 1, 2020). Furthermore, although the Defence used the Gregorian calendar for the benefit of the court and judges, it offered the witness the option to answer in either Gregorian, in terms of the growing seasons, or in terms of the dry/wet seasons. For example, during the Defence cross-examination of witness P-0142, after establishing for the judicial record when certain 'seasons' Uganda would correlate to the Gregorian calendar, counsel proceeded as follows:

> Q: Now, Mr Witness, the reason for this discussion is so that over these next few sessions if we ask you for dates or times, if you can't remember the year or the month, please feel free to describe it by dry season, rainy season, or whether any type of agricultural product are in – are being harvested. Is that okay, Mr Witness?
>
> A: That's fine. (*Ongwen* Transcript of Hearing on 8 May 2017, p. 14, lns. 17–21).

This propensity for marking time by agriculture or rainy season does not seem to be limited to those who work directly in agriculture. This strategy was eventually picked up by the OTP trial lawyers as the case progressed, as it became clear it was easier to extract

relevant information in this way than than by using the Western approach of eliciting exact, Gregorian calendar dates from witnesses (ICL Practitioner 1, 2020).

In my own experience, when I had to contact individuals in an Islamic country, after advice from a resource person on our team, I learned to keep track of the daily Islamic prayers, as many fighters marked the passage of time in a day by which of the Islamic prayers had passed or were to come. As the time of each prayer changed with the changing position of the sun against its zenith or the horizon, I found that a person who gladly accepted a phone call at noon one day would ignore a call at the same time a week later. Understanding this made it easier to communicate with witnesses and enabled me to demonstrate a degree of respect for their culture and beliefs. I found more success in planning a call after salat al-duhr (after the sun's zenith) or *salat al-'asr* (mid-afternoon) as opposed to planning one at 12h00 or 15h30.

Rituals, religion and Worldviews during Investigation and in Trial Narratives

The Cambodia Chambers has also criticised the OTP for failing to further explore cultural and spiritual elements that "warranted special attention" and could have produced a "more nuanced interpretation of certain facts" (*Katanga* Judgment pursuant to article 74 of the Statute, paras. 66–7).

Recently, scholars have criticised the ICC's efforts to translate cultural knowledge into the Court's legal language, which "oftentimes turns into mutilation during the course of legal argumentation" (Nistor *et al.*, 2020). Earlier, when the OTP referred to cultural or spiritual elements of a crime, such as a ceremony, it appears they did so only when they felt the ceremony could be used as evidence to prove the commission of the crime (ICL Practitioner 3, 2020). It has been observed "that local cultural concepts related to spirituality are often amputated from their context or stretched beyond their original meaning to fit the legal framework" (Nistor *et al.*, 2020). In other words, the pieces of local culture, when they must fit into the international laws presented in the ICC Rome Statute, are "selectively broken down by prosecution, defence, and victim's representatives into pieces that can fit within the puzzle of the international criminal law framework" (*Ibid.*). In other examples, the OTP has entirely ignored cultural realities because in the Western traditions at the base of the ICC trial process, the law is hermetically calculated and a stigma is placed on introducing into the courtroom

anything that might undermine the image of the court as a "laboratory where the science of law is performed" (Levenson, 2008, p. 574).

A prominent example of the importance of understanding Ugandan spirituality comes from the Ongwen trial. From the beginning of the trial, it became apparent that Acholi spiritualism would play a larger role than the OTP had foreseen. According to the Defence, the events in Northern Uganda could not be separated from the Acholi cosmology – which mixes elements of Christianity with animism and human interactions with ghosts, witches and spirits (*Ongwen* Transcript of Hearing on 18 September 2018; *Ongwen* Transcript of Hearing on 25 October 2018; *Ongwen* Transcript of Hearing on 19 November 2018; Nistor *et al.*, 2020). However, as a former member of Mr Ongwen's legal team pointed out "[the OTP] knew [the belief in witchcraft] was present [in Uganda], they just didn't understand how it played into the context of the LRA" (ICL Practitioner 1, 2020). They also pointed out that many of the witnesses were afraid because they believed Mr. Kony's powers of witchcraft enabled him to know what they did, where they were and what they were thinking. One interviewee is confident that these beliefs "could have played a role in their willingness to testify" (ICL Practitioner 1, 2020). Not only was the OTP's trial team unprepared (and uniformed) as to the importance of the Acholi spiritual beliefs in the trial, some OTP staff were later heard on a Ugandan radio broadcast, laughing about how some believed that witchcraft would have a bearing on the trial (ICL Practitioner 1, 2020).

Another example, this time from Kenya, was from the Ruto & Sang case, where the Defence referred to the OTP's allegations that post-election violence was "organised around pre-existing traditional Kalenjin rituals and structures" (*Ruto & Sang* Transcript of Hearing on 11 November 2013, p. 15, lns. 8–9). As defence counsel Katwa explained: "The Prosecution has put a sinister spin on all aspects of Kalenjin culture, [and] pre-existing [Kalenjin] structures including circumcision, getting engaged to get married … [and] the ag[ing] process of getting to become an elder" (*Ruto & Sang* Transcript of Hearing on 11 November 2013, p. 18, lns. 15–17). For example, during the trial, the Prosecution alleged that there was a cleansing ceremony where a bull was sacrificed to "chase away curses", resulting from alleged Kalenjin ejections of the Kikuyu from the Rift Valley in May 2008. The Chambers, in its decision to withdraw the charges, admonished the OTP's assumptions that such ceremonies were not part of a criminal conspiracy:

Cleansing or reconciliation initiatives are common practice in numerous cultures and religions. It cannot be assumed that participation in such ceremonies, especially by persons of significance within an affected community, is evidence of acquiescence or approval of the atrocities for which absolution is sought. (*Ruto & Sang* Public Redacted Version of "Decision on Defence Applications for Judgements of Acquittal", paras. 114–17)

In another example from the Ruto & Sang case, the Chambers questioned what the OTP alleged were Kalenjin "war cries", as witness identified these "war cries" as alarm cries, calls for help, or songs traditionally used during Kalenjin circumcision ceremonies (*Ruto & Sang* Public Redacted Version of "Decision on Defence Applications for Judgements of Acquittal", para. 66).

Enhancing the Dialogue between Cultural Experts and Courtroom Actors

The OTP's main problem seems to be an overreliance on intermediaries and a bureaucratic structure that isolates cultural experts from more integrated participation in the analysis of evidence and vital trial preparations for the trial teams. As demonstrated, this means intermediaries end up having a larger influence on the direction of investigations, the contacting individuals and the information which is transmitted from the field to the legal teams in The Hague. The use of intermediaries per se is not the problem and many can be cultural experts. The problem comes when the legal team fails to appreciate the importance of certain cultural knowledge provided by the wide variety of cultural experts already embedded in the Court structure, or fails to verify/corroborate the information it receives from the field. More attention and in-depth appraisal of cultural expertise could give the OTP a more nuanced approach to prosecution, something the defence and victims are more apt to accept.

Both the defence and the OTP have the same problem when they over-rely on their resource persons and intermediaries, or failing to verify or corroborate the evidence or narratives received with personal knowledge or experience of the local culture from the legal team: successfully transmitted cultural knowledge is often 'amputated', 'manipulated', 'mutilated' or possibly subjected to racial stereotypes of those on the legal team who may be unfamiliar with the reality of the affectedcommunities (Sagan, 2010; Nistor *et al.*, 2020). This problem is exacerbated for the OTP, as opposed to the

defence and LRV, because the OTP has much less access to embedded cultural experts can offer clarifications, explanations and/or guidance when navigating the evidence. In addition to other formal duties, many defence and LRV staff serve as immediate in-house advisors who can offer "contextual, cultural and historical" expertise, which the defence teams then go out and confirm in the field (ICL Practitioner 2, 2020). Hence, the OTP may be failing to properly challenge evidence that is inconsistent with their preconceived narratives (ICL Practitioner 1, 2020; ICL Practitioner 3, 2020).

Future research into the subject of cultural expertise before the ICC, and international tribunals in general, would greatly benefit from a more detailed exploration of how ad hoc courts such as the STL, ICTY and ICTR's sole focus on one country assisted legal practitioners in becoming more familiar with the nuances of the affected communities. For example, how integrated members of the affected community were in their respective tribunals. Such research could clarify the importance of cultural experts, and the benefits of their assistance to the success of trials.

I argue for a change in how the ICC approaches cultural knowledge, and a change in how they handle the wealth of information provided by the variety of cultural experts that interact with the Court. Just because a certain belief may, from the Western perspective, be "contrary to the laws of biology, chemistry and physics" (*Ongwen* Transcript of Hearing on 19 November 2018, p. 71), does not mean they cannot add clarity to the totality of evidence being presented by a witness. In my opinion, the ICC will not be able to take another step toward becoming a truly international court until the institution as a whole, and in the OTP particular, come to appreciate the full range of cultural expertise available to them.

Bibliography

Bishay, J. I. (2020). 'Solemnly Declare to tell the Truth': Internationalising the Solemn Undertaking Before the International Criminal Court'. In *Intersections of Law and Culture at the International Criminal Court*. B. McGonigle-Leyh and J. Fraser (eds). Cheltenham: Edward Elgar, 127–46.

Black, A. (2019) 'Cultural Expertise in Australia: Colonial Laws, Customs, and Emergent Legal Pluralism', In *Cultural Expertise and Socio-Legal Studies (Studies in Law, Politics, and Society, vol. 78)*. Bingley: Emerald Publishing Limited, 133-55.

Bostian, I. L. (2005) 'Cultural Relativism in International War Crimes Prosecutions: the International Criminal Tribunal for Rwanda', *ILSA J. Int'l & Comp. L*, 12, p. 1.

Ciccozzi, A. & Decarli, G. (2019) 'Cultural Expertise in Italian Courts: Contexts, Cases, and Issues', In *Cultural Expertise and Socio-Legal Studies (Studies in Law, Politics, and Society, vol. 78)*. Bingley: Emerald Publishing Limited, 35-54.

Clark, P. (2018) *Distant Justice: The Impact of the International Criminal Court on African Politics*. Cambridge: Cambridge University Press.

Cooke, T. (2019) 'From Invisible to Visible: "Cultural Expertise" in Finnish Courts', In *Cultural Expertise and Socio-Legal Studies (Studies in Law, Politics, and Society, vol. 78)*. Bingley: Emerald Publishing Limited, 13-33.

de Vos, C. M. (2013) 'Investigating from Afar: The ICC's Evidence Problem', *Leiden Journal of International Law*, 26(4), 1009–24.

Edwards, J. (2010). 'The Treason of Translation? Bilingualism, Linguistic Borders and Identity'. In *The Translator as Mediator of Cultures*. H. Tonkin and M. E. Frank (eds). Amsterdam / Philadelphia: John Benjamins Publishing Company, 89–106.

Elias-Bursać, E. (2015) *Translating Evidence and Interpreting Testimony at a War Crimes Tribunal: Working in a Tug-of-War*. New York: Palgrave Macmillan.

Eltringham, N. (2013) 'Illuminating the Broader Context': Anthropological and Historical Knowledge at the International Criminal Tribunal for Rwanda', *Journal of the Royal Anthropological Institute*, 19(2), 338–55.

Fedorova, M. I. (2012) *The Principle of Equality of Arms in International Criminal Proceedings*. Belgium: Intersentia.

Fraser, J. (2020) *Social Insitutions and International Human Rights Law Implementation*. Cambridge: Cambridge University Press.

Geertz, C. (1973) *The Interpretation of Cultures: Selected Essays*. New York: Basic Books.

Glazer, M. (2017) 'Americans on the Defense Team in the Tokyo War Crimes Tribunal, 1946–1948: Understanding the Mentality Behind Defending the "Enemy"', *Ezra's Archives*, 76–91.

Hieramente, M., Muller, P., & Ferguson, E. (2014) 'Barasa, Bribery and Beyond: Offences against the Administration of Justice at the International Criminal Court', *International Criminal Law Review*, 14(6), 1123–49.

Holden, L. (2019a) 'Cultural Expertise and Socio-Legal Studies: Introduction', In *Cultural Expertise and Socio-Legal Studies (Studies in Law, Politics, and Society, vol. 78)*. Bingley: Emerald Publishing Limited, 1-9.

Holden, L. (2019b). 'Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise'. In *Cultural Expertise and Socio-Legal Studies (Studies in Law, Politics, and Society, vol. 78)*. Bingley: Emerald Publishing Limited, 181-204.

Holocaust Encyclopedia (2020). 'Reversal of Fortune: Robert Kempner'. https://encyclopedia.ushmm.org/content/en/article/reversal-of-fortune-robert-kempner.

ICL Practitioner 1 (2020). '1'. 27 March & 11 April. Phone interview.

ICL Practitioner 2 (2020). '2'. 2 April. Phone interview.

ICL Practitioner 3 (2020). '3'. 5 April. Phone interview.

International Criminal Court (2020) 'Office of the Prosecutor', *ICC*. https://www.icc-cpi.int/about/otp.

Levenson, L. L. (2008) 'Courtroom Demeanor: The Theater of the Courtroom', *Minnesota Law Review*, 92, p. 573.

Lopes, J. T., Leão, A. C., & Ferro, L. (2019) 'Assessing Cultural Expertise in Portugal: Challenges and Opportunities', In *Cultural Expertise and Socio-Legal Studies (Studies in Law, Politics, and Society, vol. 78)*. Bingley: Emerald Publishing Limited, 57-74.

Lowry, R. M. & Mcmahon, P. C. (2010). 'Transitional Justice in Bosnia and Herzegovina'. In *The Development of Institutions of Human Rights*. L. A. Barria and S. D. Roper, (eds). New York: Palgrave Macmillian.

Maliti, T. (2019) 'The Ongwen Defense: Evidence Presented so Far', *International Justice Monitor*. https://www.ijmonitor.org/2019/11/the-ongwen-defense-evidence-presented-so-far/.

Nistor, A. L., Merrylees, A., & Holá, B. (2020). 'Spellbound at the International Criminal Court: The Intersection of Spirituality & International Criminal Law'. In *Intersections of Law and Culture at the International Criminal Court*. J. Fraser, J and B. M. Leyh (eds). Cheltenham: Edward Elgar, 147–68.

Ochs, S. L. (2020) 'Leveling the Playing Field or Razing it? The ICC's Investigation into Afghanistan', *JURIST*. https://www.jurist.org/commentary/2020/03/sara-ochs-icc-investigation-afghanistan/.

Open Society Justice Initiative (2011) 'Intermediaries and the International Criminal Court: A Role for the Assembly of State Parties', *Open Society Justice Initiative*, https://www.justiceinitiative.org/publications/intermediaries-and-international-criminal-court-role-assembly-states-parties.

Owiny, T. J. (2019) 'ICC is Being Manipulated to Suffocate Africa's Justice Systems – British Scholar', *Daily Monitor*. https://www.monitor.co.ug/Magazines/PeoplePower/ICC-manipulated-suffocate- Africa-justice-systems-British-scholar/689844-5131626-8pwuc5z/index.html.

Rautenbach, C. (2019) 'Cultural Expertise in Litigation in South Africa: Can the Western World Learn Anything from a Mixed, Pluralistic Legal System?', In *Cultural Expertise and Socio-Legal Studies (Studies in Law, Politics, and Society, vol. 78)*. Bingley: Emerald Publishing Limited, 157-78.

RSF (2015) 'Special Tribunal for Lebanon put Journalist and TV Station on Trial', *Reporters without Borders*. https://rsf.org/en/news/special-tribunal-lebanon-puts-journalist-and-tv-station-trial.

Sagan, A. (2010) 'African Criminals/African Victims: The Institutionalised Production of Cultural Narratives in International Criminal Law', *Millennium*, 39(1), 3–21.

Samson, K. (2019) 'Spirits on Trial? The Case of Dominic Ongwen in the International Criminal Court', *London School of Economics*. https://blogs.lse.ac.uk/africaatlse/2019/02/19/spirits-on-trial-the-case-of-dominic-ongwen-in-the-international-criminal-court/.

Sindayigaya, C. (2008). 'Transcript of Video'. *Voices from the Rwanda Tribunal*. Utter, R. & Slye, R. (ed.) http://www.tribunalvoices.org/voices/transcripts/transcript_SINDAYIGAYA_Claver_full.pdf.

Swart, M. N. (n.d.) 'Is the International Criminal Court a Colonial Institution?', *Georgetown University Qatar*. https://cirs.georgetown.edu/community-outreach/international-criminal-court-colonial-institution.

van Broeck, J. (2001) 'Cultural Defence and Culturally Motivated Crimes (Cultural Offences)', *European Journal of Crime, Criminal Law & Criminal Justice*, 9(1), 1–32.

Whiting, A. (2013) 'Dynamic Investigative Practice at the International Criminal Court', *Law & Contemporary Problems*, 76, 163–89.

Wilson, R. A. (2011) *Writing History in International Criminal Trials*. Cambridge: Cambridge University Press.

Women's Initiative for Gender Justice (2012) 'Lubanga Judgement – The Prosecution's Investigation and Use of Intermediaries', *International Justice Monitor*. https://

ijmonitor.org/2012/08/lubanga-judgement-the-prosecutions-investigation-and- use-of-intermediaries.

Cases and Legislation cited

International Criminal Court, Regulations of the Court, Doc No. ICC-BD/01-05-16, adopted 26 May 2004, Last updated 12 November 2018. (International Criminal Court).

International Criminal Court, Regulations of the Office of the Prosecutor, Doc No. ICC-BD/05-01-09, adopted 23 April 2009.

In the case against Al Jadeed [Co.] S.A.L. & Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05, Redacted version of Decision in proceedings for contempt with orders in lieu of an indictment, Contempt Judge, STL-14-05/I/CJ F0001/20140131/ R000001-R000030/EN/af (31 January 2014). (Special Tribunal for Lebanon).

The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Transcript of Hearing on 6 March 2017, Trial Chamber, ICC-02/04-01/15-T-47-Red-ENG. (International Criminal Court).

The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Transcript of Hearing on 8 May 2017, ICC-02/04-01/15-T-72-Red-ENG. (International Criminal Court).

The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Decision on Prosecution Request in Relation to its Mental Health Experts Examining the Accused, ICC-02/04-01/15-902 (28 June 2017). International Criminal Court.

The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Transcript of Hearing on 18 September 2018, Trial Chamber, ICC-02/04-01/15-T-179-Red-ENG. (International Criminal Court).

The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Transcript of Hearing on 25 October 2018, Trial Chamber, ICC-02/04-01/15-T-188-ENG. (International Criminal Court).

The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Transcript of Hearing on 19 November 2018, Trial Chamber, ICC-02/04-01/15-T-197-ENG. (International Criminal Court).

The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3436-tENG (7 March 2014). (International Criminal Court).

The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the procedures to be adopted for instructing expert witnesses, ICC-01/05-01/08-695 (12 February 2010). (International Criminal Court).

The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Public Redacted Version of "Decision on in-court protective measures for Witness 45", ICC-01/05-01/08-2063-Red (29 January 2016). (International Criminal Court).

The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the procedures to be adopted for instructing expert witnesses, ICC-01/04-01/06-1069 (10 December 2007). (International Criminal Court).

The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842 (5 April 2012). (International Criminal Court).

The Prosecutor v. William Samoei Ruto & Joshua Arap Sang, Case No. ICC-01/09-01/11, Transcript of Hearing on 3 October 2013, Trial Chamber, ICC-01/09-01/11-T-41-Red2-ENG. (International Criminal Court).

The Prosecutor v. William Samoei Ruto & Joshua Arap Sang, Case No. ICC-01/09-01/11, Transcript of Hearing on 11 November 2013, Trial Chamber, ICC-01/09-01/11-T-28-ENG. (International Criminal Court).

The Prosecutor v. William Samoei Ruto & Joshua Arap Sang, Case No. ICC-01/09-01/11, Transcript of Hearing on 16 September 2014, Trial Chamber, ICC-01/09-01/11-T-137-Red-ENG. (International Criminal Court).

The Prosecutor v. William Samoei Ruto & Joshua Arap Sang, Case No. ICC-01/09-01/11, Transcript of Hearing on 29 September 2014, Trial Chamber, ICC-01/09-01/11-T-146-Red-ENG. (International Criminal Court).

The Prosecutor v. William Samoei Ruto & Joshua Arap Sang, Case No. ICC-01/09-01/11, Transcript of Hearing on 12 January 2015, Trial Chamber, ICC-01/09-01/11-T-175-Red-ENG. (International Criminal Court).

The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11, Public Redacted Version of "Decision on Defence Applications for Judgements of Acquittal", ICC-01/09-01/11-2027-Red-Corr (5 April 2016). (International Criminal Court).

Naveiñ Reet: Nordic Journal of Law and Social Research (NNJLSR) No. 11 2021, pp. 151-168

The Judge and the Anthropologist: Cultural Expertise in Dutch Courts

Hermine C. Wiersinga[1]

Abstract

As a judge, I have the feeling that culture is related with anything and everything – and with nothing at all. In most criminal cases, it hides underground, not visible, not recognized and is rarely, if ever, brought up as an argument by the participants. In my experience, even though an anthropologist can see remarkable cultural features given the way proceedings are organized, the judge, in managing the proceedings, will try to keep such features out of sight. As such, in my view, anthropologists offer an outsider's view whilst the judge, as part of the legal system, is an insider. This paper starts from a sceptical standpoint about cultural knowledge, in which I argue that the judge, as a legal professional, does not need to take into consideration that law and procedures are embedded in a dominant culture because they are more interested in a case-by-case approach, trying individuals for their concrete deeds. This paper elaborates on the potential common ground between anthropological and legal methods and concludes with my first-hand experience on the so-called Context case in which an anthropologist was appointed as expert for a well-known terrorism case in the Netherlands. This case epitomizes, in my view, the challenges and the potential benefits of integrating cultural expertise in court.

Introduction

In my experience, culture and criminal law are hardly companions. In some rare cases, culture is unmistakably at the surface (i.e., so-called honour cases); however, culture is largely hidden in micro- or macro-narratives, in a more contextual way. This paper asks what Dutch judges are confronted with, and how they make decisions, especially

1 Hermine C Wiersinga worked from 1990 to 2005 at the Department of Criminal Law, at the Faculty of Law at Leiden University, as an Assistant Professor. In 2005, she decided to practice law as a judge. Since 2010, she has been a judge in the Criminal Court of Appeal at the Hague, and from 2015 onward, Hermine has participated in a team of specialists who deal with large, international cases in relation to jihadism, terrorism and international criminal law.

concerning cultural factors? This paper offers my reflections as a judge working at the Criminal Court of Appeal that sits in The Hague.

I will start with some short remarks about my experience of cultural expertise and the potential fields of its application in the Dutch legal system. For the sake of comparison between the ways of thinking of anthropologists and judges, I will formulate some generalisations. These are based on my own research and observations over the last 15 years, during which I worked as a judge in criminal law. From this perspective, I will focus on the way judges decide, our mindset, the way we approach a case and solve 'culture-informed' problems in order to make a decision. Our approach is different, perhaps even the opposite, to the approach of cultural experts. Judges, when meeting issues in court, focus on the individual case, and narrow their view to the relevant elements in those specific cases; meanwhile, cultural experts connect the case with culture, from the individual story to common narratives. Yet, judges and anthropologists still work in some common areas that I call in this paper "common grounds", of which I have identified three: culture on the surface, casus looking for context, and group responsibilities. These common grounds that judges and anthropologists share show both similarities and differences in our ways of thinking. The last section of my paper focuses on a case in which I was involved as Appellate Judge known as the Context case. This case illustrates the point I want to make regarding the potential danger of the meeting between the judge and the expert due to the opposite ways of our reasoning. These reflections are not conclusive, but I do hope that they bring some insights in the clashes that can be the result of using cultural expertise in court.

Before delving into the content of this paper, I wish to make two preliminary remarks. First of all, I am addressing the domain of criminal law and I ask whether there is any room for the judge to 'colour' our decisions? Criminal law is regarded as a closed field. As noted by Hoekema and Van Rossum, when making 'cultural' judicial decisions in Dutch civil law: "(…) we feel that in some legal domains, like criminal law, not many pluralizing developments are to be noted apart from hot public debates. Judges, commentators and practitioners feel that matters of criminal law mostly reflect fundamental elements of Dutch legal culture and do not offer much space for distinct views (save for serious problems in understanding the behavior of an accused from a distinct culture and deciding on the appropriate punishment)" (Hoekema *et al* , 2010, p. 863). The case that I will outline in this paper provides an example of what can happen in criminal cases where cultural expertise is used. Since the case concerned

terrorism, one can discuss the typical features of terrorist cases and trials. Some see terrorist cases as completely different from other cases. The claim of this particularity is familiar for judges and it similarly made for cases regarding human trafficking, sexual offences, offences against authorities, money laundering, and cybercrime. Judges, however, seem to prefer bringing such terrorist cases under the scope of ordinary criminal law and criminal procedures. De Graaf argued how 9/11 changed the law, calling this the 'precautionary turn in criminal law'. But at least as far as she is referring to the concept of a criminal organization, this was already punishable in the previous century; and also in the 20th century there was no need to have formally defined roles for members of an organization or a developed structure in order for such an organization to qualify as a criminal organization (De Graaf, 2019, p. 98). The intention of a terrorist, which connects the belonging to a criminal organization with a harsher sentence, is an extension of an already existing criminal provision, and thus not a completely new penal provision (De Hullu, 2018, p. 426).

Secondly, culture is incidentally — and not in a very foreseeable way — popping up in judicial practices. As far as my experience goes, there is nothing whatsoever like an operational formal, legal, or clearly defined concept of culture. The use of the concept is very much dependent on the interpretation of individuals. I will not try to produce a definition myself (Hoekema *et al* , 2010, pp. 860-863). However, Geertz gives an inspiring orientation, and a feeding reflection: "Believing (…) that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning. It is explication I am after, construing social expressions on their surface enigmatical". He positioned culture as related to context, interpretation, and giving meaning to words and deeds of perceived others. The anthropologist gives meaning to the meaning others give to words and deeds. The word 'give' underlines the fact that the meaning is given by a particular someone; there is reciprocity. It means that interpreting another culture may reveal — and sometimes inevitably does — something about the culture of the interpreter. Even leaving things as unsaid or undone is telling. Interpretation is the code word in earlier research, and that runs in alignment with Geertz's use of the concept of culture, investigating it through 'thick description' (Geertz, 1973, Ch. 1).

Judges, cultural expertise and culture: limitations

In most criminal cases, culture is neither recognized nor raised as an argument by any of the participants. Where an anthropologist - from a perspective which is external to the legal process – may see remarkable cultural features in the way legal proceedings are organized in the Dutch legal culture, or astonishing components in the behaviour of the defendant, insiders like the judge, being so familiar with the setting, may fail to give meaning to these cultural features in an individual case. Perhaps, there is some knowledge about the cultural content also in the roots of the Dutch criminal procedure (see for example medieval Spanish inquisitorial methods), or concepts of so-called honour and the meaning of apologies and regret for one's own wrongdoing. But how important are those factors in the daily routine of justice? And why stir up these components when every party seems content with the current procedure, even if the defendants themselves are not fully understood? Most of the time, from the insider's point of view, there is no need to focus on cultural assumptions. And since judges are interested in a case-by-case approach, namely trying and sentencing individuals for their concrete deeds, many do not reflect on the context as long as there is no need. And there is no need, if the perception of all parties in court is that context and background are more or less shared. If there is no cultural gap addressed, there is hardly a need to give culture any further consideration. In this respect, urgency is only occasionally felt.

Now, I make some remarks about the Dutch context in general. Decisions about the kind of information needed during a trial, about what is required to reach a final decision, are in the hands of professional judges. For instance, judges can decide whether or not there is any need for cultural expertise. Judges are bound by codes, the rules of the procedure, the jurisprudence of the supreme court and, in a broad sense, the law. The prosecutor is the *dominus litis* during the first phase of the trial and decides which cases are brought to court, and in which way, pressing charges that are decisive, making explicit and formal what the accusation is. Meanwhile, the prosecutor is processing the case. In fact, the police, lawyers and their clients, forensic experts and probation officers are highly interdependent. But everybody is sensitive to what the judge decides.

With regards to final decisions, sections 348 and 350 of the Dutch Code of Criminal Procedure present the judge a decision tree, where previous decisions influence sentencing. The victim's input is also of direct importance in sentencing by the exercise of their rights. It is a mandatory and decisive system. On the other hand, sentencing is

sometimes highly influenced by the facts grounded on earlier decisions. Judges in the Netherlands have pretty much discretion according to the law. Making final decisions about competence, guilt, justification, qualification and sentencing is what judges do. Also, relevant for the Dutch practice, is the way in which Legislator of 1886 rewrote the Criminal Code, in order to facilitate short, pragmatic and sober decisions, and f.e. described capital crimes without specification. Taking the life of another person is manslaughter or murder. In this regard, motives can be important, but it is more or less up to the judge to fill in. This is completely different from the German Criminal Code, that specifies — besides maximum penalties — the minimum penalties and relates manslaughter to murderousness, greed, lust or other deficient motives. So, decisions about the behaviour of an accused from a distinct culture and deciding on the appropriate punishment have a wider 'free' scope in the Netherlands, since the judge can relate the crime and the appropriate punishment to any sort of motive. On the other hand, a German judge has to investigate and discuss the motives of the defendant in general.

Dare I say that being explicit about culture, that of others, or of one's own, is not part of the culture of judging in the Netherlands. There might be more specific reasons for this. Perhaps culture is seen — and I am simplifying Geertz's thick description — as 'drama', that is, comparable with a piece of theatre, a dynamic, interactive course of events, where bodies, gestures, practices, words, roles, rituals, beliefs within a meaningful context are acted out and understood by actors (performers) and the audience (also performing their role - as in an old Greek *choros*) Geertz (1983). 'Understanding' is much more than 'knowing'. Ascribing words to create meaning can be a distortion — or at least a reduction — of some 'truth'. Truth is not an independent category. As Geertz says (1973, p. 20): "Cultural analysis is (or should be) guessing at meanings, assessing the guesses, and drawing explanatory conclusions from the better guesses, not discovering the Continent of Meaning and mapping out its bodiless landscape". In this perception of culture, there are limitations for a judge: practicing law is practicing the language of law, 'playing with words', and the correct, precise, and concise use of language is an important tool for the judge. For a judge, it becomes difficult if things are unsaid, not outspoken, implicit, not conscious, or 'theatrical', added with gestures. The judge uses words to constitute a 'truth'. That 'truth' is perception, of course; every jurist knows that, but nevertheless it is something that must materialize in a decision which in the Dutch term conveys a meaning or finality. The judge decides about what is relevant and needs to be accepted as 'true'. The significance of this may also make a

judge unresponsive to cultural arguments. Judges may not be willing to judge culture. Needless to say, formulating cultural arguments in the Netherlands can be very hard for the defendant, for other obvious reasons. Defendants will miss the *choros*, any reciprocity about their feelings and emotions brought up. This is illustrated by the research of Yesilgöz (1995) according to whom Turkish defendants have a different timing of expressing their emotions during trial.

Another issue is the *a priori* look of the professional participants involved in a legal procedure. Realities come to the judge not as such, but always in a kind of presentation and related to something else, at least if you want the judges' attention. Information or knowledge has to be proceeded, that is processed in the 'narrative mill' of law. This means that a connection must be made between the facts and the law. During the procedure, people watch realities through these converging lenses, or concepts of law. If they are not relevant, their content will be lost during the action processing the narratives into the files.

To create a *narratio*, a plot is needed. In the words of a judge, and also a professor in law and literature: "Judges are themselves narrators in the active, authorial act of comprehending the facts and circumstances of the case, and deciding in any presented succession of events what is and what is not relevant for the legal plot. This plotting in the form of a selection is always done with the aim of arriving at a decision (…) the judicial configurational act has as its ultimate goal the (re)structuring of reality; like drama, it is aimed at a (…) solution of the problem". In doing this, the judge is not just listing the facts, but is telling us a story about those facts, putting them together in a meaningful way. And therefore, she needs "narrative, situational knowledge" (Gaakeer, 2019, p. 144 and p. 140). In fact, Gaakeer, focusing on law and literature, pleads for the knowledge that literature can help provide. My interpretation is, that when legal plotting is difficult, due to a lack of 'satisfying narrativity', the judge may cross the line explicitly and let cultural expertise come into their decisions. The *casus* is looking for (more) context, yet still within the frame of 'legal realities'.

The observations of the anthropologist, on the other hand, are not at all limited *a priori* (Barley, 2011). On the contrary, it is a 'reverse look'. Anthropologists try to open up, to broaden their lenses so to speak. Their goal is to pick up all kinds of information. Small pieces of 'realities' can be obtained, which are potentially relevant in the future, when — as late as possible — interpretations are given. Maybe some small detail

will be important in unravelling a whole new web of meaning. Discussions between anthropologists can touch on ways to avoid selective observation, and to forget the usual frames of interpretation. The anthropologist's vision is just the opposite to the ordinary view of the judge: limitless, pointed at the future instead of 'finalising' the past.

When both professions meet, it is important to respect those differences; misunderstandings happen easily. When judges and anthropologists meet in court, and they sometimes do, it is important to see how they differ in methods and how they perceive things differently. Their 'reverse look' can easily lead to misinterpretations. Only if they both realize this can damage be controlled, more or less.

Common ground I: Culture on the surface

Sometimes culture can appear on the surface. Participants in court (prosecutors, judges, lawyers, defendants, expert witnesses) may want or have to give meaning to a situation or argument that indicates or refers to a cultural gap. If one cannot sharpen their focus and find any 'truth', or any substantial legal plotting, it might be because one has not been able to pinpoint certain cultural factors. Realizing this might make a case participant feel a certain urgency to know more about the culture of the defendant. For example, if the Albanian Kanun is the guidance in life for a defendant, or at least a reference point, judges will probably need some expertise to see what 'really' happened and to weigh the *mens rea*. The written *Kanun* has played a role in some European cases. In cases of honour or blood revenge, the cultural background of the case might bring forward proof of premeditation (with the highest maximum penalty: a life sentence). If judges want to understand the mental predispositions of religiously inspired deeds, they might try to understand something about the religion of those on trial. If the mental state is important for how to ground our conclusions about the punishment or measures justified, we might be interested in the cultural background of the subject examined by psychologists or psychiatrists.

In court cases like the above example, cultural background can come to the forefront, that is if it is noticed when the case bundle is prepared. Timing is important, too. Once a case arrives at a court of appeal, standpoints and arguments about all factors, including cultural ones, are often already crystallized. There are not many options for judges to change their mindsets about these. In the beginning of the process, police work is relevant. I think that the police are particularly sensitive to cultural details

that may make things like an interrogation more effective; they know that an accused will respond better if their interrogation is clear on specific details thus matching the concrete situation and mindset of the accused. Even when a so-called cultural crime or cultural defence is explicitly in question, specific knowledge is not always produced by an anthropologist. Judges may believe that there is no need because the defendants and their lawyers, or the prosecutor, can come forward with cultural arguments whether or not they are successful. On the other hand, there is the possibility that a judge will invoke a cultural expert, because of their official capacity to do so. Therefore, they need cultural sensitivity — and the understanding that their own expertise is potentially not enough. Since they might feel a bit like an anthropologist — at least they may pretend to know about the thoughts of 'the man on the Clapham omnibus' - and especially since the use of the language can be misleading, it is a balancing act.

Common ground II: Casus looking for context

Relevant, a bit confusing, and also a bit of an explanation for the aforementioned sloppiness of decisions about cultural arguments in daily practice, is the fact that judges and anthropologists are working partly in the same field also in cases where culture is not perceived immediately. Judges often focus on the specific acts of individuals and concrete evidence and proof, but have to do so using certain frameworks — common knowledge and narratives — in order to reach their judgments, i.e., the conceptual framework of the man on the Clapham omnibus. Here is common ground. Anthropologists are trying to find out those stories told within a group: the narratives that are binding or dividing people and shared within a culture. Abstractions — group knowledge, collective memories, shared cultural perceptions and assumptions become visible, come to life, through sharing, by stories that people tell one another, in scenarios of the drama involved in society, within the narratives. These may be big narratives (f.e. religious) or small ones (f.e. about remorse and regrets). When we put it like this, judges share something in common with anthropologists. Admittedly, judges do not look at narratives the way anthroplogists do. A judge's way of using narratives is most of the time almost subconscious: they categorize people in those micro-narratives hardly knowing how or why, as revealed by the research of Van Oorschot (2018a and 2018b). In her PhD research about how judges make decisions, she mentions a case concerning discrimination by judges. Van Oorschot investigated the controversy of ethnic discrimination by judges and argued about the way social scientists had organized their research: identifying all kind of factors and measuring the weight and influence of those

factors on the custody decision made by the judge. Van Oorschot discovered that judges made their decisions in a more holistic way: looking at the whole picture and using standard blueprints when doing so. And so, for example, a drug addict's remorse might be perceived as completely irrelevant whilst in other situations and in another format, it may be a major factor. Weighing those factors using a single scale, as the social scientists did, mistook the nature of judicial decision-making, and more specifically the micro-narratives used by judges.

The research by Van Oorschot described the discrimination as cutting across law and social sciences — but this was not very successful, or at least not fruitful, since the misunderstanding was hindering a satisfactory explanation of the discrimination factor. My point here is that it is true that there is a shared field of interest for both anthropologists and judges. In individual cases, both the micro-narratives used by the defendants and the micro-narratives that the judges perceive, are informed by the culture of the judges and the culture of the defendants. It could be clarifying to rethink those matters, and to realize — for example — how we weigh utterances of remorse. Are there different cultural narratives? And how are these received in court?

The input of anthropologists on the subject can be significant. Some critical reflections by judges about their own narratives might also be recommended. In certain individual cases — when narratives do not fit at all — the input of an anthropologist is required. Again, the judge can walk alone on those common grounds, or choose to invite cultural expertise. Common ground is the starting point for the involvement of an anthropological extra.

Common ground III: Group responsibilities and again: Casus looking for context

Another correspondence between judicial and anthropological knowledge can be found in the development of new legislation. Since 1995 in the Netherlands, belonging to a criminal organization can be punished, even in the absence of specific criminal acts by the accused. Not only in the Netherlands, but also in other European countries, collective responsibilities are constituted. For instance, motorcycle gangs (e.g., Hells Angels) are forbidden, as well as a paedophilic interest group. There is a debate in the Netherlands about forbidding so-called Salafi groups, sponsored by Saudi Arabia, because of their antidemocratic rhetoric and the possible indoctrination of children.

Here judges and anthropologists are again on common grounds. What does it mean, to belong to a group? And when is a group an organization? These cannot be answered by looking simply at membership linked to an annual contribution, and remains the subject of research for anthropologists. Who belongs to what? How free or bound are the members of the group? What and where are their loyalties? And what about the culture of the group? Are the Salafists really antidemocratic? How do they think and talk about democracy? What does it mean, when someone is cast as a *murtadd* (an apostate) or a *kuffar* (non-believer)? Interpretation and the search for meaning are inextricably bound up with narratives. The use of words and language might require expertise on this specific culture or group and anthropological evidence might be essential, to avoid naïveté or unjustified mistrust.

Casus looking for context: a meeting in court

The opposite methods of judges and anthropologists appeared evident in an important criminal case, known as the Context case in Dutch jurisprudence.[2] The case concerned jihadis, travelling to Syria to fight with terrorist groups, or staying at home, and encouraging others to go. A central theme was about being members of a criminal organization.[3] And whether the organization existed at all? The case was brought to the Court of Appeal in The Hague in 2018 which later became irrevocable after the final judgements of the Dutch Supreme Court. I cite only from parts of the procedure in the first instance as far as the procedure was accessible to the press and public. In 2014 (the year the 'Caliphate' was announced by Abu Bakr al Baghdadi) De Koning and other anthropologists published their research in an IMES report, which was the result of many years of fieldwork concerning activist jihadis in Belgium, Germany and the Netherlands. These results happened to form important information for everybody in the court. What kind of shared ideology, shared struggle in Syria, and what kind of jihadi organization was at stake? What does jihadi mean? How — and about what — could be communicated to these assertive defendants? And — something I focus on — is this a criminal organization, as understood by the criminal law? The court accepted the defence's request of appointing De Koning as expert witness; in the files are the

2 This year, the Dutch Supreme Court gave final decisions in ECLI:NL:HR:2020: 447, 448, 449, 450; see for the unofficial translation of ECLI:NL:RBDHA:2015:14365 : ECLI: NL:RB-DHA:2015:16102 verdict in first instance).

3 Dutch Criminal Code, art. 140 (a).

official IMES report, a written explanation of De Koning (answering specific questions asked by the lawyers) and reports of hearings by the judge. The judges relied heavily on his testimony in their verdicts[4]. The Court of Appeal differs in some respects. I will pay attention only to this first verdict and information that has been related and shared publicly during the trial in first instance. Nine suspects have been convicted and issued prison sentences for up to six years.

During the process, the appointed witness and expert De Koning was forced to talk about individuals, mentioning names. The official report (the IMES report) was anonymized for good and valid reasons. De Koning, however, was held to answer specific questions: he had no right to refuse to testify. In the public hearing, he was asked about individuals. We can read this in the files of the public hearing:[5]

> [Court: *"U heeft gezegd dat u de participanten aan uw onderzoek niet wil de-anonimiseren, terwijl u, met name bij de rechter-commissaris, wel veel over de verdachten hebt verteld. Kunt u ons niet gewoon zeggen wie welke participant is?*
>
> De Koning: *Ik wil dat met name niet doen, omdat daarmee ook de overige personen met wie ik heb gewerkt bekend kunnen worden.*
>
> Court: U *heeft geen verschoningsrecht*
>
> De Koning: *Dat heb ik ook begrepen. Dat wist ik niet toen ik met het onderzoek begon. Het gaat meer over mijn eigen ethische normen. Ik heb er goed over nagedacht, maar ik ga de namen van de participanten niet bekend maken. Ik heb er ook met collega's over gesproken. Ik blijft het onwenselijk vinden en ik doe het niet ter bescherming van de mensen die niet terecht*

4 Quite interesting is de Koning, M. (2020) reflecting en detail about his role in the Context trial and (p. 220) "how academic knowledge about Salafism and militant activisme is used in a process of racialised categorisation and closure". His article is, in my opinion, illustrative for the above mentioned 'reverse looks'. Also about the Context case: de Graaf, B. (2019), see p. 109-111, she stated "the testimony of expert Martijn de Koning (..) was *appropriated* (curs. HW) by the prosecution and the judges (…)".

5 Rechtbank Den Haag, Proces-verbaal van het horen van getuige-deskundige De Koning ter terechtzitting op 7 en 8 september 2015, p.5 (testimony in court) ; answers De Koning in italics, translation HW).

> *staan. Ik denk ook dat het voor de beantwoording van uw vragen niet noodzakelijk is.*
>
> Court: *Bent u wel bereid vragen per verdachte te beantwoorden?*
>
> De Koning: *Voor zover het gaat over hun publieke rol en de indruk die ik van hen heb gekregen, kan ik op uw vragen antwoorden".*]

Translation:

> [Court: You said you did not want to disclose the names of the participants in your research, though you have said – especially in front of the examining judge – a lot about the defendants. Can't you just tell us who the participants are?
>
> De Koning: I don't want to do that, because by doing so also other persons I worked with might be known.
>
> Court: You don't have a right to refuse to testify.
>
> De Koning: Understand. I did not know that when I started the research. It is more about my own ethical norms. I did think it over, but I am not willing to make public the names of the participants.
>
> I also discussed it with my colleagues. I still think it is undesirable and I won't give their names because I want to protect the people who are not on trial. And I don't think it is necessary for answering your questions.
>
> Court: Are you willing to answer questions per the defendant?
>
> De Koning: *As far as it is about their public role and my perception of them, I am prepared to answer your questions.*]

It seemed a rear-guard action to me; that possible harm was already done at the pre-trial stage before the examining judge. I have no doubts about this expert's integrity — f.e.

before his testimony, he asked permission from the defendants — but the point seemed to be not really under discussion.

A second point was about the trustworthiness of the expert. It was brought up by the parties, regarding the presumed partiality of the anthropologist. During the hearings, the judge asked De Koning about sympathy syndrome, an understatement meaning something like Stockholm syndrome. The lawyers had explicitly made up their minds about how trustworthy the cultural expert really was, and — as it seems — depending on strategic goals and insights (that is: related to their own interests in court, which is — for lawyers — understandable since their partiality is given). Their problem, *in nuce*, was what to expect from the judge? Would disbelief work to their advantage? Hence, the minutes of the public session of the hearing report the judge asking De Koning: "The defence has announced that the public prosecutor will reproach you for not keeping enough distance to the suspects. With hindsight, do you agree?" De Koning did not agree and explained that the position of the anthropologist during fieldwork is subject to an ongoing debate between anthropologists; namely that everybody in the field is aware of the danger of going native and that he himself had to justify his conduct and actions for his colleagues.[6] Reading the verdict, it becomes clear that the judge saw De Koning as very trustworthy and as a matter of fact, as a sort of super witness:[7]

"The Court regards De Koning as an exceptionally valuable expert witness. Because of his profession he is a professional observer, has an extensive knowledge of denominations within Islam, more particularly Salafism, and has been in close contact with many of the accused for a prolonged period of time (…) The court has no cause whatsoever to doubt his expertise, reliability and credibility. More particularly, the court finds that there is no evidence that a lack of distance would have compromised the value of his observations and statements. As a witness he answered all questions about the accused (…)".

De Koning had given them insider knowledge about the behaviour and mindset of the defendants. They used this knowledge in the verdict, and they used it to communicate with the defendants during the trial.

---

6 ECLI: NL:RBDHA:2015:16102, 4.15.

7 Rechtbank Den Haag, Proces-verbaal van het horen van getuige-deskundige De Koning ter terechtzitting op 7 en 8 september 2015, p.5 (testimony in court De Koning) p. 3-5.

The third point — which was very problematic at least for the expert himself — was the fact, that the court used his explanation to give reasons to their judicial statement that an organization — in terms of the law — did exist and that the defendants had been members of that criminal organization. In the official IMES report, the word 'group' for the defendants has been used in a more or less common sense meaning. The formulation of the problem and methodology are in terms of 'activist networks', identities and subjectivity, and the research is about specific events, about the world of the individual who is not acting in an evident structure with hierarchical features. The report did not use any definition concerning a clear-cut, well-defined group.

We now know about the issues that De Koning had with the use of his testimony by the court because a highly-regarded Dutch magazine published an interview with De Koning after the trial. The paper described that he was in the courtroom, hearing the verdict, and was completely overwhelmed by the fact that the judge had used his own words to condemn the defendants as an organization. "I did not think of them as an organization. In my opinion, it was just a bunch of friends", he said. He did not agree at all. His other remarks were about his supposed partiality and about the above-mentioned supposed lack of distance between him and the jihadis. "As an anthropologist you hang around as much as possible with the people you are doing research on. Were it been Papua's, nobody would have thought it was a problem. But playing soccer with jihadis – no way. Actually, what they are blaming me for is being an anthropologist", said De Koning Kamerman and Kouwenhoven (Kamerman and Kouwenhoven, 2015).

Some afterthoughts and conclusion

Was this a constructive meeting or a cultural clash between judge and anthropologist? On the one hand, there is a solid, reasoned and grounded conviction. On the other hand, there had been damage done to the anthropologist himself, no doubt, but also for anthropologists trying to work in this field. In Germany, the suspicion within *jihadi* groups against *all* outsiders made real, participating fieldwork already impossible. At least during the period of research of colleagues of De Koning before 2014 in Germany, they did not get access to activists or jihadist preachers. In other words, the *jihadis* in Germany did not communicate with interested outsiders. And when there is no open communication with interested outsiders (like anthropologists), information might come from other sources, like undercover agents. We will be more dependent

on information, given by intelligence, which means from a completely different perspective. I see some damage to anthropology, but also on a higher level. I was myself struck by something De Koning did not complain about in the interview - the overruling of academic ethics and the breaking of the code of anonymous publication of research, by forcing the anthropologist to give information about individuals (even if he himself sort of 'waivered'). This was perhaps inevitable, I do not know. But was it possible to at least prevent damage? Was there a third way? This is hard to tell. Even complete awareness of the different ways in which professionals view realities and give meaning and interpretation to them, will not always lead us to constructive options. On the other hand, I would plea for an attempt to come to more insight and more interest in both the judicial and the anthropological view and more reflection and evaluation. It is the only thing we, that is judges and anthropologists, can do. A good thing for myself as an appellate judge, was that I felt very informed - after reading all the minutes of the sessions in the bundle and especially the IMES Report – a must for anyone interested in jihadi cases. The damage mentioned above regarding privacy was already done, but I am not blind to the benefits, at least concerning the enriched understanding of the mindset of the defendants. 'Verstehen' is not only the mission for the anthropologist within this type of fieldwork, but also – at least, a challenge - for a judge. I do not know myself what the best way is, in general, to profit from anthropological views, and what to advise judges. It is hard to overcome my perspective as a judge in criminal cases; the framing of trials by De Graaf and De Koning was out of our ordinary routine. On the other hand, I found it useful to be informed about existing research, views based upon, and sustained by, evidence and thoroughness, and the discussions raised in society. Judges should not live in cages or ivory towers. Serious interest in what is going on in society and more specifically in different approaches of law is fundamental for fairness and the integrity of the application of law in court since justice has to be seen to be done.

Bibliography

Barley, N. (2011) *The Innocent Anthropologist: Notes from a Mud Hut*. London: Eland Books.

de Graaf, B. A. (2019). 'Foreign Fighters on Trial: Sentencing Risk 2013-2017'. *Radicalization in Belgium and the Netherlands. Critical Perspectives on Violence and Security*. Fadil, N., de Koning, M., & Ragazzi, F. (ed.). London: I.B. Tauris, 97–130.

de Koning, M., Roex, I., Becker, C., & Aarns, P. (2014) 'Eilanden in een zee van ongeloof: Het verzet van de activistische dacwa-netwerken in België, Nederland en Duitsland.', *IMES Report Series*.

de Koning, M., 2020. "For them it is just a story, for me it is my life." Ethnography and the Security Gaze: Academic Research with "Salafi" Muslims in the Netherlands. *Journal of Muslims in Europe*, 9(2), pp. 220-239.

Gaakeer, J. (2019) *Judging from Experience (vol. 1)*. Edinburgh: Edinburgh University Press.

Geertz, C. (1973) *The Interpretation of Cultures*. New York: Basic Books.

Geertz, C. (1983) *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books.

Hoekema, A. J., van Rossum, W. M., Foblets, M. C., Gaudreault-Desbiens, J. F., & Renteln, A. D. (2010). 'Empirical conflict rules in Dutch legal cases of cultural diversity'. *Cultural diversity and the law : state responses from around the world : proceedings of the colloquium "The Response of State Law to the Expression of Cultural Diversity," Brussels, September 2006*. Foblets, C., Gaudreault-Desbiens, J., & Renteln, A. D. (ed.). Bruxelles: Bruylant, 851–88.

De Hullu, J. (2018) *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*. Deventer: Wolters Kluwer.

Kamerman, S. & Kouwenhoven, A. (2015). 'Ja, ik voetbal met jihadisten', NRC, 12 December.

Van Oorschot, I. (2018a) 'Gelijke Gevallen? Over Factoren, Verhalen, en de Performativiteit van Methoden', *Nederlands Juristenblad*.

Van Oorschot, I. (2018b). 'Ways of Case-making'. Online: https://repub.eur.nl/pub/104082.

Yesligöz, Y. (1995) *Allah, Satan en het recht*. Arnhem: Gouda Quint.

Cases and Legislation cited

HR 24 Maart 2020, Zaaknummer 18/02493, ECLI:NL:HR:2020: 448, RvdW 2020/462. (The Netherlands).

HR 24 Maart 2020, Zaaknummer 18/02548, ECLI:NL:HR:2020: 449, NJ 2020/241 met annotatie van N. Keijzer. (The Netherlands).

HR 24 Maart 2020, Zaaknummer 18/02560, ECLI:NL:HR:2020: 450, RvdW 2020/463. (The Netherlands).

HR 24 Maart 2020, Zaaknummer 18/02561, ECLI:NL:HR:2020:447, NJ 2020/240 met annotatie van N. Keijzer. (The Netherlands).

Rechtbank Den Haag 10 December 2015, ECLI:NL:RBDHA:2015:16102. (The Netherlands).

Rechtbank Den Haag, Proces-verbaal van het horen van getuige-deskundige De Koning ter terechtzitting op 7 en 8 september 2015. (The Netherlands).

Strafgesetzbuch (StGB). (Germany).

Wetboek van Strafrecht (Sr.). (The Netherlands).

Naveiñ Reet: Nordic Journal of Law and Social Research (NNJLSR) No. 11 2021, pp. 169-188

An Anthropologist in Court and out of Place: A Rejoinder to Wiersinga

Martijn de Koning[1]

Abstract

In this rejoinder to Wiersinga's article which deals with my role as an Expert Witness in a Dutch terrorism trial, I will respond based upon my notes at the time and my subsequent reflections about it. As I will show, the anthropologist and the judge can, and should, meet but this also turns the neutrality of the researcher into a matter debate. Furthermore, in this meeting anthropological knowledge becomes entangled with other logics and methods which raises many ethical questions as Wiersinga has rightfully pointed out. These questions and issues are not specific for the case I was involved in but has a bearing on the issue of cultural expertise in a broader sense for the time. I end my contribution with two pleas: one for more reflection among anthropologists on ethical issues in relation to cultural expertise and another to academic institutions to support their scholars in court.

It is a pleasant surprise to be given the opportunity to respond to Wiersinga's article and take part in a discussion on the position of expert witnesses and the use of cultural expertise in court appearances. In her article on the meeting between judges and anthropologists in court, Wiersinga makes the important point that, albeit with different methods and different goals, both have a shared interest in the narratives of individuals. Yet, as she sets out to explain, there is also another way of looking at narratives and contextual matters, an "opposite way of looking by judges and anthropologists". To substantiate her argument, she describes a court case in the Netherlands that has come to be known as the Context case: "It was about jihadis, travelling to Syria to fight with terrorist groups, or staying at home, encouraging others

1 Martijn de Koning is an associate professor at Radboud University Nijmegen, the Netherlands. He works on themes such as Islam in Europe, activism among Muslims, Islamophobia, Salafism and counter-radicalization. In 2019, together with Nadia Fadil and Francesco Ragazzi, he published Radicalization in Belgium and the Netherlands – Critical Perspectives on Violence and Security (London: IB Tauris), and with Carmen Becker and Ineke Roex he published the book Islamic militant activism in Belgium, the Netherlands and Germany - 'Islands in a sea of disbelief' (London, Palgrave, 2020).

to go." Wiersinga's particular interest was the role of an anthropologist expert's witness testimony. That anthropologist happens to be me.

As Feldman (1980, p. 246) notes in his article about an Alaskan trial and his work as an expert witness in that trial, "A fundamental incongruence appears between anthropological (and science) research methods and evidentiary rules of our court system." According to Feldman, ethnographers rely on the verbal accounts given by participants which may be set aside in court as 'hearsay', but also, and more fundamentally I think, what Rosen points to in his seminal article from 1977 is the following: expert testimonies in courts are performed in adversarial contexts in which a reconstruction of truths is made based upon evidence which, through judicial reasoning, legal precedents and the court's assessment of what it regards as facts, has to lead to a clear verdict of guilty or not guilty, win or lose, proven or unproven (Rosen, 1977). This is obviously quite different from how anthropologists and other social scientists ideally work: focusing on contingencies, ambiguities, a person in her or his socio-political context, a suspension of value judgements, and so on. Another issue Rosen (1977, p. 557; Rosen, 2020) points out is the mutual effect that courts and anthropologists have on each other and the anthropologist's own conception of his or her role in the proceedings:

> "Are anthropologists really the providers of information from which judgments are actually derived, or are they merely personages whose presence in court is simply useful for rationalizing judgments founded on other, perhaps judicially less palatable, bases? How, if at all, should anthropology as a profession approach the ethical implications of expert testimony?"

I think the court case that I was involved in, and Wiersinga's reflections on it, are a good starting point to explore these questions as they provide some insight into the 'laws of anthropological expertise' (Zenker, 2016). In this contribution, I will respond to Wiersinga's remarks about my role in the case, in particular, and then I will try to relate this to some of the ideas and critiques I have about the idea of cultural expertise itself and connect this to the theme of this special issue. I will draw from some of the reflections I wrote about the research that was done with my colleagues Carmen Becker and Ineke Roex, in particular about my role in court (de Koning, 2020a) and the use of academic knowledge in this particular court case (de Koning, 2018). First,

however, I will use this opportunity to give some explanation about the research project I conducted with Carmen Becker and Ineke Roex which will draw from our Dutch research report (de Koning *et al*, 2014) and the revised and updated version that was published in our book (de Koning *et al*, 2020).

Project Islamic Mission: Research on Jihadism and Militant Activism

Now, one could argue, of course, that every anthropologist is an expert witness. Part of the anthropological method is to be where our interlocutors are, to talk with them in informal ways and make observations within a particular context, and base our analyses on this. As such, an anthropologist is, by definition, a witness and an expert. This was no different in our Project Islamic Mission.

We started our research in 2011 after Ineke Roex and I noticed that we had 'lost' some of the interlocutors we had interviewed during our previous work on Dutch Salafism (Roex, 2014, 2013; de Koning, 2013) and that they had resurfaced in the networks of Sharia4Belgium in Belgium and Behind Bars in the Netherlands. Both networks engaged in what we call 'spectacle activism', albeit in different ways. We use this term to describe a type of activism that is meant to create situations to which third parties are almost forced to respond. The aim is to create controversy through spectacle and to relay their vision through, and because of, the spectacle. On wider examination, we found similar spectacles occurring in Germany too and, with Carmen Becker and a student assistant, we started a small project looking at these three countries. The project was funded by Radboud University, the National Coordinator for Counter-Terrorism and Security (Nationale Coördinator voor Terrorisme en Veiligheid - NCTV) and The Dutch Research Council (NWO) via the Forces that Bind and/or Divide Project of the University of Amsterdam.

The point of departure for our project was the daily reality of the lives of members of networks of European Muslim militant activists in Belgium, the Netherlands and Germany during a crucial, but underexamined, period of time in their existence, namely, the years before their departure to Syria. We focussed on the activists who remained in (or returned to) Belgium, Germany and the Netherlands. Our aim was not to analyse why people migrated to Syria, or how and why a potential radicalization process took place, or who might be responsible for this. What we wanted to know

was how the activism of the militant networks from 2009 to 2014 interacted with the practices of, and the attention given by, the state and media. Our research perspective focused on a particular form of activism and resistance: counter-conduct (Davidson, 2011; Death, 2010; Odysseos *et al* , 2016). This redirected our attention toward the less visible practices of resistance and to those that are very visible as deviant acts to the public and the state but which do not appear to follow an obvious political agenda with clear demands and objectives. Instead of looking at claims-making, collective identities, and trajectories of radicalization, we focused on the practices, mentalities and subjectivities of resistance, and on the interaction between power/conformity and resistance/dissent. In particular, we interrogated specific dissenting practices often categorised by the state and media as repugnant, dangerous or unacceptable that aim to resist the governance of Muslims in Belgium, the Netherlands and Germany.

In so doing, we were able to analyse how Muslim militant activists in Belgium, the Netherlands and Germany (often having become the principal targets of counter-radicalization policies) understand and constitute themselves as Muslims and as activists. This perspective allowed us to examine people's agency and active participation without imposing a particular set of positions on them (such as moderate or radical, Salafi or otherwise) and gave us the opportunity to take into account the ambiguous, ambivalent and, at times, contradictory positionalities that people adopt. Our focus on counter-conduct also meant that we moved away from heroic, emancipatory interpretations (or claims) of resistance and revealed the unstable, contradictory, and sometimes downright intolerant and aggressive practices and subjectivities. Furthermore, our focus has not just been on the protests of militant activists against the regulation of Muslims but also on activism which centred on finding alternative ways of engagement and the care of the self that comes with it: how people fashion themselves as 'steadfast' Muslims and activists. The internal disputes and social control, the differences of opinion and practices toward unbelievers, how to dress oneself, how to convey a message, are all parts of this 'care of the self ' that is created through interaction with the state and media.

After many of our interlocutors left for Syria to join the violent struggles in 2012 and 2013, we decided to maintain our research focus on activism. But (or perhaps therefore) we became caught up in the politicization and securitization of our interlocutors and our work. In our book, we focused on academic boundary maintenance, complicity, and on the ethical questions which emerged during, and in the aftermath of, the project, when many of our interlocutors were either dead, missing or still active in Syria,

and others had been arrested and were facing charges of being members of a criminal organization with terrorist intent in the Netherlands. The Dutch Syria volunteers were not simply a marginal group anymore but were considered to be a direct threat to national security.

They had become, to use Harding's (1991) famous phrase: the 'repugnant cultural other'. In her article, Harding argued that fundamentalist Christians had become the anthropologist's Other. According to her, these cultural others should be studied with the same care and consideration as other minority positions based on class, race, gender and sexual orientation. During her research on fundamentalist American Christians, Harding noted something which was similar to what happened to us during our project. Not only did her colleagues question her topic of choice, but she also felt scrutinized and interrogated by them for perhaps being 'one of them'. Interestingly, the three of us, as white non-Muslim academics were not questioned about being 'one of them' but definitely about being 'too close to them'.

Entering the trial

In this rejoinder, I will deal mostly with the first so-called Context trial, as Wiersinga's points are related to that trial (although, by raising some broader issues, they also pertain to the appeal). Two of my colleagues, at my request, were amongst the audience during the public sessions to provide me with critical feedback and Roex, Becker and Aarns reviewed and commented upon my Expert Witness Report before its submission to court. The trial itself can be divided into the formal and informal part. I will focus on the formal part of the trial, but a few notes on the informal part are useful too, I think, to provide a clear picture of the scene I found myself in.

The trial took place in a separate courthouse, the so-called Bunker in Amsterdam, where high-profile cases requiring stringent security measures take place. Upon entering the building everyone was searched and then went into a common room where journalists, experts and witnesses, defendants who were not incarcerated, lawyers, police officers, family and friends of the defendants and others who were interested in the case, could freely mingle: only the judges were not present there.

On the first day of the public hearings, most of the friends of the defendants were there as well; I was not entirely sure then if I should go up to them to greet them as I did not

know what kind of impression that would make. But then, as one of them stepped up to me, shook my hand and greeted me, I decided to greet the rest as well. During the breaks I kept distant from them but on a few occasions, they approached me to inquire how I was doing and what I thought about the proceedings so far.

On the morning of the first public hearing, I was asked to come to the judges' room. They wanted to discuss the proceedings with me, make clear (as they said) that I had understood everything about how things would go and if I had a preference for the order in which they would address the themes they wanted to discuss with me. I told them I preferred to start with the methodological questions, including distance and proximity and requested that I be given ample time to basically give a lecture on the anthropological methods. They agreed. The meeting took place at a large table, with coffee and biscuits and the judges sitting in their chairs leaning forwards on the table.

After that I returned to the common room and was then called into the courtroom. There everything happened in strict accordance with the formal procedure and agreements. I was sitting on my own at a separate table, with the judges directly in front of me. The prosecution team were also in front, but to the left, and the defendants and their lawyers at their own tables directly on my right and behind me.

What is he doing there?

This, admittedly, brief introduction into the court proceedings provides some clue to the sense of alienation I was experiencing. I was forced to talk to the judges about my interlocutors while they were in the same room. And, as well as questions from the judges, at the end of the hearing, the lawyers and defendants could also ask me questions. So – that is the background; let me now turn to the specific issues Wiersinga raised about my role in the court procedures.

"(1) First remarkable point: during the process, the appointed witness and expert De Koning were forced to talk about individuals, mentioning names." It is completely correct that Wiersinga should raise this issue. Testifying in court and writing the Expert Witness Report in which I had to answer an extensive list of questions, were both difficult decisions to make. After all, I had promised my interlocutors full anonymity and that I would protect their privacy. Even though their lawyers asked me to testify, I told them that I would only do so (or consider it) if their clients allowed it. And if

they would, I would have to be able to disclose all I knew about the defendants as I regarded giving a more opaque testimony as undermining my own credibility. But more importantly, and I had discussed this extensively with my colleagues in the research project and with others I work with, I questioned whether I should do this at all in the first place? The anthropological principle of 'do no harm' guided all my decisions, but it did not determine one particular outcome. As the defendants were accused of forming a terrorist organization, and anticipating a lack of control over my own testimony, would testifying harm them? Probably. But not testifying could also harm them as that would mean that specific details which may have exonerated them from particular charges, or reduced their culpability, would be left undisclosed. And there was no way of telling what exactly would happen. Furthermore, one could argue that an academic also has a responsibility to society and that testifying about a group of interlocutors who were seen by many Muslims as tarnishing the name of Islam and whose aggressive and intolerant practices also damaged society, was an ethical obligation. And, moreover, as social scientists have no legal professional privilege, I was obliged to testify. Of course, I could have chosen to appear in court and remain silent, but I decided that that would be a last resort option. After discussing it with my colleagues and getting permission from several defendants (not all of them were my interlocutors) I decided to go ahead and start writing my Expert Witness Report, which was subsequently checked by, and discussed with, my colleagues in the project.

Although the questions in the Expert Witness Report did not relate to specific individuals (with the exception of one) I did realize, contrary to what Wiersinga implies, that I would be asked about my interlocutors as individuals during the closed and public hearings. In both hearings I provided information that I had about their public performances and details of my observations and informal talks and interviews with them. The specific occasion Wiersinga points out in her note 5 is important though as it relates to a number of questions asked by the Public Prosecutor, in particular, that I refused to answer. And Wiersinga definitely has a point when she qualifies my initial strategy as a "rearguard action". The questions concerned the identity of the person who made a video in which a pledge of allegiance to IS was inserted in a report about a demonstration in The Hague (when no such pledge was made). The person who made the video was among my interlocutors but not among the defendants. I did not have his permission to disclose his identity and I therefore refused to do so on two occasions during the trial. After the first, however, I was quite annoyed. First of all, with myself, as I realized I was completely unprepared for these questions and had struggled to find

a good answer when put 'on the spot' while I realized I should and could have seen this coming. "Rearguard action" is an apt description here, to my own annoyance. Secondly, I did not believe that the Public Prosecutor did not know who the video maker was, so

I was wondering what their aim here was. After being asked the first time I rehearsed this question in the evening after the hearing so that I would be better prepared for the next day. Which I was, although I found the question from the court intimidating as I knew that it was possible for me to be 'taken hostage' by the court. It was one those moments I felt 'out of place' but, in the end, the court decided not to pursue it.

Trustworthiness, expertise and the expert

The second important point Wiersinga raises pertains to the "trustworthiness of the expert." She quotes:

> "The defence has announced that the Public Prosecutor will reproach you for not keeping enough distance from the suspects. With hindsight, do you agree?" (The answer is: "No: not at all" (…)) De Koning had to explain that the position of the anthropologist during fieldwork is subject to constant debate between anthropologists; that everybody in the field was aware of the danger of 'going native' and that he himself had to justify his conduct and actions to his colleagues."

Interestingly, as an anthropologist, my work – to some extent - involves being where my interlocutors are. This allows me not only to talk with them about how they think they act, and how they think they should act, but also to observe their actions. In short, being a witness is part of the job and the reason that I was asked to attend court to testify. But being a witness means having proximity to one's interlocutors which provided the grounds for the Public Prosecutor to attack me for 'being too close'. I was prepared for this line of questioning as it had been an important line of inquiry in several media reports published before the case began and all of the colleagues with whom I discussed the case had warned me about it.

So, I took a defensive line with the Public Prosecutor, basically arguing that 'closeness' is always important and that, in fact, I had not been close enough: my access to their private circles was limited and although I knew who travelled to Syria no one

ever disclosed their plans before their departure. With the judges I had a different conversation, and I was able to take the opportunity (clearly granted by the judges) to explain anthropological methods and ethics. In this rejoinder, I will briefly highlight a particular perspective on distance and proximity which we explained in our book (De Koning *et al*, 2014, pp. 20-39; 321-3) and which I believe is relevant to how cultural expertise works in a courtroom: complicity. In discussing the issue of ethics, trust and representation, Marcus (1997) points to the other side of rapport:

"Despite their very different values and commitments, the ethnographer and his subjects in this project are nevertheless broadly engaged in a pursuit of knowledge with resemblances in form and context that they can recognize. This constitutes the most provocative and potentially troubling sense of complicity in the fieldwork relationship." (Marcus, 1997, p. 103).

What matters here, in court, is that ethnographers and interlocutors are embedded within a broader framework which not only acknowledges the affinities between the ethnographer and the interlocutor but also their interaction with an external 'third' (Marcus 1997, p. 100). One may argue, as Marcus does, that ethnographers and interlocutors share a 'speculative wonder' (Marcus 1997, p. 103) for particular themes in different, but also familiar, ways. As researchers, we shared a deconstructive logic about particular events, with a critical perspective on authority and the state; a logic which married together my interlocutors' "illicit discourse" (Holmes, 1993) and my aim for academic knowledge production. Yet, I would suggest, during the proceedings in a courtroom, the external third (which, for example, could be the state) is no longer external. In court procedures, the judges, the Public Prosecutor, the lawyers, the defendants, the journalists, family and friends and other people in the audience, all share this 'speculative wonder' and try to work out what is 'really' going on.

This shared 'speculative wonder', however, does not negate the fact that the production and use of knowledge by the parties involved differs. The academic knowledge about the defendants, or about the Islamic branch of Salafism which played an important role, which was volunteered during the trial was re-appropriated into legal knowledge in a process where legal fact-finding and achieving a verdict of guilty, or not guilty, were the essential primary goals rather than gaining insight into the workings of militant activism and its interaction with state and media. The differences in analyses and interpretations made by Van Koningsveldt and Peters (the second and third expert witnesses) and me

were not treated as part of an academic debate but were re-appropriated and absorbed into the logic of the judicial process. A short example will make this point a bit clearer.

As Schiffauer (2014, p. 201) points out, academic knowledge is constructed in ways which are very different to those employed in the construction of bureaucratic knowledge which emphasises political and policy-oriented usability and accountability.[2] Categorization is, as Schiffauer shows in the case of the Verfassungsschutz and its focus on Islamism, an inevitable part of political and policy-oriented knowledge: first a distinction between Islam (as a religion) and Islamism (as an abuse of religion) is made, then a distinction between different levels of danger is determined and the networks put into subcategories. Finally, the size of the organization is estimated. During the Context trial, prosecutors followed a similar path. First, they clearly stated that "It is not Islam that is on trial, but the actions of nine defendants because of their interpretation of the Quran and the hadith".[3] They pointed out that the nine defendants constituted an organization whose aim was to recruit people for a 'violent jihad struggle' and that:

"This struggle is not waged by 'Islam' or by 'Muslims', but by a limited fundamentalist Jihadist current which is not representative of Islam or of the Muslim community here in the Netherlands and the rest of the world. It is about inciting, stimulating and calling for violence and terror. These are serious punishable facts." (PPCS, p. 3)

The Public Prosecutor's use of the distinction between Islam and a 'limited fundamentalist Jihadist current' can be seen as an attempt to avoid stigmatizing the entire Muslim community and to enable people's actions to be connected to their beliefs and to interpret that action through a particular security perspective on those beliefs. The Public Prosecutor makes a distinction between Islam and 'Jihadism' to make it absolutely clear that the trial was not against Islam and Muslims in general (as the defendants' lawyers claimed). In a more academic analysis, however, the Public Prosecutor's perspective could be discussed in terms of how the problematic distinction between an acceptable and unacceptable Islam forms part and parcel of the legal and security logic (de Koning, 2018; Mamdani, 2005). Furthermore, while the Public Prosecutor tried to make the case that the defendants were part of a criminal

2 This could be different depending on the academic disciplines.

3 The author has the full text. I will refer to it as PPCS.

organisation with terrorist intent, my colleagues and I consistently dealt with them from the perspective of spectacle activism, resistance (counter-conduct) and converted the state's views and actions into 'one of the parties' involved in shaping and interacting with the militant actions of our interlocutors. This was regarded by several (both in and out of court) as apologetic as these people were 'terrorists'. Our rebuttal, namely, that this 'game' of labelling was part of our analysis rather than using one label as an analytical tool, was regarded as problematic and, by the Public Prosecutor, as a sign of being too close. The court however, as Wiersinga rightfully points out, saw my testimony as highly trustworthy, factual and insightful. But here, we can also see an appropriation of academic knowledge as Wiersinga's third point makes painfully clear.

Expertise and techniques of assemblage

Wiersinga's third point refers to the court's use of my explanation that the groups involved could not be seen as an organization in the classical sense (of having a clear identity, division of tasks and hierarchy) to argue that they did constitute an organization in a legal sense. It was an important issue in the verdict. Several other accusations (pertaining to incitement and recruitment) were rejected by the court but this was the main charge and the court argued that there was sufficient proof that the defendants were members of an organization. In particular, my analysis of the communication, the loosely-coupled network that they had, and my contextualisation of their ideological thoughts in relation to Salafi preachers and ideas about Jihad, were used for that purpose.

And to be fair and balanced, the defendants and their lawyers did exactly the same, for example, by using my report and labelling as tools to argue that they were not jihadis or that they were 'peaceful jihadi Salafi activists'. It is here that we see a difference between the legal 'speculative wonder' about an issue and the anthropological 'speculative wonder' related to the same issue. Wiersinga aptly articulates the confusion and surprise I felt during an interview shortly after the verdict.4[4] The academic knowledge about the defendants, or the Salafism phenomenon itself, which was volunteered during the trial was re-appropriated into legal knowledge in a process where legal fact-finding and achieving a verdict of guilty, or not guilty, were the essential primary goals, and not the

4 Interview with De Koning, published in NRC 12 December 2015, https://www.nrc.nl/nieuws/201 5/12/12/ja-ik-voetbal-met-jihadisten/

gaining of insight into the workings of militant activism and its interaction with state and media.

In the end, to reach a verdict, the court relied upon my testimony and the other witness testimonies as well as the evidence provided by the Public Prosecutor. My academic knowledge and that of my colleagues was reframed as expertise in order to determine a guilty/not guilty verdict. As such it became part of what the historian and terrorism researcher de Graaf (2019) calls, 'the techniques of assemblage' which are used by the court to determine whether a criminal act with terrorist intent is being planned:

"combining associative reasoning and premeditation (invoking virtual violent futures) to build a unified body of evidence out of a disparate and inchoate set of activities and acts (social media postings, legal acts (marriage), utterances, leafleting, possession of IS flags). This assemblage is forged together by suggesting a 'reinforcement' and cumulation of a series of illegal and legal activities alike." (De Graaf, 2019, p. 111)

De Graaf regards the Context trial as an exemplary trial in which evidence was based on the idea of preparatory actions. Although Wiersinga rightfully criticizes De Graaf for suggesting that this is a new development, what is more important here is that De Graaf's exploration and analysis of the Context trial explains what happens to academic knowledge when it is passed through the changing legal logics of a trial focused on security and terrorism. And, in particular, how referring to the spectre and spectacle of terrorism can play such an important role. The reference to terrorism is significant in itself, in the sense that it is the security and terrorism frame that has enabled a (if you will, further) transformation of the penal law, according to Graaf, who also based her

conclusion upon two other landmark trials. In the Context trial, the verdict of the judges is telling in this regard. After the judges made it very clear that sympathizing with Al Qaeda or IS, gathering for da'wa activities, attending demonstrations and so on, were not illegal in themselves, they stated:

"The court also wishes to make sure that there is no misunderstanding that criminal law, subject to the freedoms referred to above, plays a limited but important role in countering terrorism. From an international point of view, terrorism is one of the worst crimes and it is incumbent upon all states to combat it. Criminal law is instrumental

in both preventing acts of terrorism as much as possible and in prosecuting and trying them." (Verdict, my translation).

This reasoning illustrates how criminal law works in regard to terrorism and risk. This preventive aspect of criminal law is an important feature of securitisation which does not only operate within or outside the law, or suspends or creates new laws (Butler, 2006), but also transforms the already existing law (de Goede, 2008). Furthermore, it also expands the idea of what security is and, therefore, how it can be protected, as already noted by Bigo (2002) in his critique on the securitisation of migration. In this particular case, what security is and what it is not is (at least in the framing by the Public Prosecutor) directly related to what is an 'acceptable' or 'unacceptable' religion. The latter in particular refers to his understanding of 'Salafism' and 'Jihadism'.

Although many of the statements made by the defendants in the Context trial were not, by definition, illegal, the judge concluded (following the prosecution) that the purpose of the network extended beyond 'mere' propaganda. The aim, according to the court, was to incite, recruit, finance and facilitate young people to travel to Syria and join the Jihadist factions. Something, by the way, that our research did not say much about as it was only a minor part of our research material. Two of the defendants were indeed still living with foreign fighters in Syria and two had returned. The court argued that, if their documents, social media postings, WhatsApp messages, and public statements on websites and in the media, were taken together, these (often legal) acts 'reinforced' one another and prepared the hearts and minds of the targeted young people for a violent struggle (18.87, Verdict).

Although several individuals had their charges of recruitment dropped, the continuous flow of messages of support that they sent to IS and Jahbat al-Nusra were also considered to be a mode of recruiting, according to the judges and the Public Prosecutor. Although no one committed any violence in the Netherlands and while there was no evidence to suggest they were planning anything to that effect, the court believed that their actions could lead to possible violence in the future. By invoking the possibility of terror attacks, the prospect of a potentially violent future was created which legitimizes and allows legal activities in the present to be curbed (ranging from borrowing money, lending and reading books, bragging or writing provocative material) (de Graaf, 2019). The activities we analysed as part of people's activism, were now taken as proof of the possibility of terror attacks.

When knowledge becomes culturalizing

All in all, I think we can see that the Context case, and the points brought forward by Wiersinga and my rejoinder, show some of the complexities of providing cultural expertise in legal cases. In this instance, academic knowledge about one theme (the interaction between the state, media and militant activists in Belgium, Germany and the Netherlands, from the perspective of the activists) was reframed into another logic (deciding whether or not the individuals were guilty of the crimes, in the Netherlands and Syria, that they were accused of) and from one method (ethnography) into another (legal fact-finding). The transformation is, I suggest, related to other issues that arise when giving evidence in court as an expert witness (Goldberg, 2002; Good, 2008; Loperena *et al* , 2020; Wilson, 2016). For example, the 'scientific objectivity' of an expert may be attacked (as I was) and, therefore, lawyers, and even the expert, may be tempted to conceal the particularistic nature of academic knowledge, hiding the social construction of concepts when necessary and highlighting it when convenient, glossing over the ambiguities and complexities of everyday real-life situations in favour of presenting a decontextualized pattern that fits the 'proven guilty or not' horizon. Culture and religion are, however, often not the cause of particular behaviour but a framework for meaning-making (as inconsistent as it may be) that is not predictive in any way even though some correlation between behaviour and culture and/or religion may be proven. However, such a constructionist view could be detrimental to people's human rights and the quest for justice.

Furthermore, I actually hesitate to qualify my testimony as a form of cultural expertise. Because what is meant by that in this particular setting? What kind of culture was I talking or writing about? The culture of activism? The culture of a bunch of young guys, most of whom came from the region of The Hague in the West of the Netherlands? Or does it have something to do with Islam, as other experts were also asked to discuss aspects of Islamic traditions and Salafism? The idea of 'cultural expertise' is often used in relation to groups who are deemed to be the 'cultural Other' in relation to the dominant majority in a given society. What stands out here is that the defendants in the Context case consist of a group of Dutch citizens who are highly racialized and securitized as an ontological security risk, not only in relation to the risk of potential clandestine political violence that they pose but also as a part of religion. In many debates, Islam is regarded as not yet incompatible or even an incommensurable threat to Dutch identity and core values (de Koning, 2020b; van Liere, 2014). Categorizing my testimony not just as a form of expertise but as cultural expertise taps into those processes of Othering

and may exacerbate it. Yet, as Wiersinga makes clear at the same time bringing in such knowledge may indeed help the courts to reach a fair and balanced verdict, informed by an analysis of people's daily lives and processes of meaning-making which could be beyond the court's frameworks of understanding and expertise. Interestingly, I believe several of the papers in this special issue illustrate this tension between cultural expertise as challenging the taken-for-granted frameworks of the courts and the tendency to reify and essentialize cultural differences which may reinforce certain pre-existing stereotypes and patterns of racialization.

Closing remarks

The Context case in appeal went much the same way as the first trial. My role, however, was much smaller as I appeared at only one public hearing for half a day. During this hearing, the Public Prosecutor did not ask any questions but the court itself had many, mostly on the order and interpretation of specific facts and events. As I had ample opportunity to explain my findings and methods, as well as to engage in a discussion with the court and with the defendants, and because it had much less media attention, the issues of politicization and securitization seemed to play a less obvious role here.

In the first case, as Wiersinga's comments also make clear, the issue of neutrality was important. But the case also shows how neutrality is in and of itself politicized (Holden, 2011). In a heavily politicized field, the issue of loyalty and taking sides is important and especially in a court case where the basic framework is about guilty and not guilty, this two-party frame almost, by definition, implies that your neutrality will be questioned.

Note however, that no one dared to question my neutrality based upon beliefs, descent or gender. We know by now that this situation is very different for people racialized as black or Muslim or both and definitely also for women. Another court case in which I played a very minor role serves as an example of this. In this case, a junior researcher with whom I (together with my colleague Annelies Moors) cooperated in a project on marriages among female migrants to IS held areas, was falsely accused of being sympathetic to IS. It was clear that her identity as a Muslim played a major role in creating this suspicion. The worldviews and religiosity that Annelies and I had were never an issue (Moors, 2019).

When we want to draw a distinction between academic knowledge (as produced in, and through, scientific methods) and expertise (as produced, in this case, with a specific legal objective in mind through the court's procedures), we can see that predicting how academic knowledge will be used and assessed is impossible because this knowledge immediately becomes part of an assemblage of different types of knowledge. This also creates potential epistemological clashes regarding the interpretation of ethnographic data by anthropologists, judges, the Public Prosecutor and lawyers. All parties in the trial tried to create hermetically sealed categories that opposed the other side's claims and everyone did this, at least partly, on the basis of my Expert Witness Report.

I would like to end this rejoinder with two appeals. The way academic knowledge is used in policies and during trials tends to transform knowledge in such a way that it serves the purposes of that policy or trial. Even knowledge that is not intended to be used in this way can be appropriated with grave consequences for the people we work with. This is not meant to say we should not conduct research with Muslims who affiliate themselves with ISIS or Al Qaeda, or that we should not act as Expert Witnesses. But it is to say that we need to reflect deeply on the complicated ethical, strategic and methodological issues of this research and our efforts to create a public impact. Related to that is my second call. Our funders, universities and research institutions all want academics to play a public role and to make an impact. And I completely agree with this, but it should also be clear that the Public Prosecutor, in attacking not just my work itself, but my academic integrity, shows that public exposure like this in a high profile case can be detrimental and even dangerous for researchers. Strong support from academic colleagues and institutions is therefore necessary, certainly for those among us who are less well positioned than I am as a white, male academic with tenure. I regard Wiersinga's article and the special issue as a welcoming and necessary intervention with regard to both appeals and I would like to thank the editor Holden and Wiersinga for this opportunity to engage.

Bibliography

Bigo, D. (2002) 'Security and Immigration: Toward a Critique of the Governmentality of Unease', *Alternatives: Global, Local, Political*, 27(1_suppl), 63–92.

Butler, J. (2006) *Precarious Life: The Powers of Mourning and Violence*. London: Verso.

Davidson, A. I. (2011) 'In praise of counter-conduct', *History of the Human Sciences*, 24(4), 25–41.

de Goede, M. (2008) 'The Politics of Preemption and the War on Terror in Europe', *European Journal of International Relations*, 14(1), 161–85.

de Graaf, B. (2019). 'Foreign fighters on trial: Sentencing risk'. *Radicalization in Belgium and the Netherlands: Critical Perspectives on Violence and Security*. de Koning, M., Fadil, N., & Ragazzi, F. (ed.). London: I.B. Tauris, 97–130.

de Koning, M. (2013) 'The moral maze: Dutch Salafis and the construction of a moral community of the faithful', *Contemporary Islam*, 7(1), 71–83.

de Koning, M. (2018). 'Ethnographie und der Sicherheitsblick: Akademische Forschung mit >>salafistischen<< Muslimen in den Niederlanden'. *Der inspizierte Muslim: Zur Politisierung der Islamforschung in Europa*. Amir-Moazami, S. (ed.). Bielefeld: Transcript Verlag, 335–66.

de Koning, M. (2020a) '"For them it is just a story, for me it is my life." Ethnography and the Security Gaze', *Journal of Muslims in Europe*, 9(2), 220–39.

de Koning, M. (2020b) 'The racialization of danger: patterns and ambiguities in the relation between Islam, security and secularism in the Netherlands', *Patterns of Prejudice*, 54(1-2), 123–35.

de Koning, M., Becker, C., & Roex, I. (2014) ''Eilanden in een zee van ongeloof' - Het verzet van activistische dacwa-netwerken in België, Nederland en Duitsland', *IMES Report Series*.

de Koning, M. & Roex, I and Becker, C. (2020) *Islamic Militant Activism in Belgium, the Netherlands and Germany - 'Islands in a sea of disbelief'*. London: Palgrave Macmillan.

Death, C. (2010) 'Counter-conducts: A Foucauldian Analytics of Protest', *Social Movement Studies*, 9(3), 235–51.

Feldman, K. D. (1980) 'Ethnohistory and the Anthropologist as Expert Witness in Legal Disputes: A Southwestern Alaska Case', *Journal of Anthropological Research*, 36(2), 245–57.

Goldberg, S. B. (2002) 'On Making Anti-Essentialist and Social Constructionist Arguments in Court Social Justice Movements and LatCrit Community', *Oregon Law Review*, 81, p. 629.

Good, A. (2008) 'Cultural evidence in courts of law', *Journal of the Royal Anthropological Institute*, 14(s1), S47–S60.

Harding, S. (1991) 'Representing Fundamentalism: The Problem of the Repugnant Cultural Other', *Social Research*, 58(2), 373–93.

Holden, L. (2011) *Cultural expertise and litigation: Patterns, conflicts, narratives*. Abingdon: Routledge.

Holmes, D. R. (1993). 'Illicit discourse'. *Perilous states: Conversations on culture, politics and nation*. Marcus, G. E. (ed.). Chicago: Late Editions, 255–81.

Loperena, C., Mora, M., & Hernández-Castillo, R. A. (2020) 'Cultural Expertise? Anthropologist as Witness in Defense of Indigenous and Afro-Descendant Rights', *American Anthropologist*, 122(3), 588–94.

Mamdani, M. (2005) *Good Muslim, bad Muslim: America, the Cold War, and the roots of terror*. New York: Three Leaves Press Doubleday.

Marcus, G. E. (1997) 'The uses of complicity in the changing mise-en-scene of anthropological fieldwork', *Representations*, 59, 85–108.

Moors, A. (2019) 'The trouble with transparency: Reconnecting ethics, integrity, epistemology, and power', *Ethnography*, 20(2), 149–69.

Odysseos, L., Death, C., & Malmvig, H. (2016) 'Interrogating Michel Foucault's Counter-Conduct: Theorising the Subjects and Practices of Resistance', *Global Society*, 30(2), 151–6.

Roex, I. (2013) *Leven als de profeet in Nederland: Over de salafi-beweging en democratie*. Amsterdam: Amsterdam University Press.

Roex, I. (2014) 'Should we be Scared of all Salafists in Europe? A Dutch Case Study', *Perspectives on Terrorism*, 8(3), 51–63.

Rosen, L. (1977) 'The Anthropologist as Expert Witness', *American Anthropologist*, 79(3), 555–78.

Rosen, L. (2020) 'Expert Testimony in the Social Sciences: A Historical Overview of Contemporary Issues', *Law and History Review*, 38(1), 123–42.

Schiffauer, W. (2014). 'Vor Dem Gesetz. Der Staatliche Umgang Mit Dem Legalistischen Islamismus'. *Subjektbildung. Interdiszpilinäre Analysen Der Migrationsgesellschaft*. Bielefeld: Transcript Verlag.

van Liere, L. (2014) 'Teasing 'Islam': 'Islam' as the Other Side of 'Tolerance' in Contemporary Dutch Politics', *Journal of Contemporary Religion*, 29(2), 187–202.

Wilson, R. A. (2016) 'Expert evidence on trial: Social researchers in the international criminal courtroom', *American Ethnologist*, 43(4), 730–44.

Zenker, O. (2016) 'Anthropology on trial: exploring the laws of anthropological expertise', *International Journal of Law in Context*, 12(3), 293–311.

Information for Contributors

Contributions must be complete in all respects including footnotes, citations and list of references.

Articles should also be accompanied by an abstract of 100-150 words and a brief biographical paragraph describing each author's current affiliation.

Articles usually are expected to be in the range of 3000 to 6000 words and presented double-spaced in Times New Roman 12pt. Longer or shorter articles can be considered.

Please use British English orthography (of course, do not change orthography in quotations or book/article titles originally in English). Use the ending –ize for the relevant verbs and their derivatives, as in 'realize' and 'organization'.

Italics are used only for foreign words, titles of books, periodicals, and the names of organizations in the original language (except when the original is in English).

Dates are written in this format: 11 April 2013.

For numbers please use the following formats: 10,500; 2.53 for decimals; 35%; 5.6 million.

If a footnote number comes together with a punctuation mark, place it after the mark.

Please prepare figures and illustrations in a way apt for black and white printing and please secure necessary permissions for publishing before submitting your manuscript.

Standards for Source Referencing

It is essential that source referencing provides full and accurate information so as to enable a reader to find exactly the same source that is being referenced. Equally there needs to be pedantic consistency of presentation.

Please use the Harvard system of referencing which has grown in popularity in academic writing in education and the social sciences. In the main text, a reference or quotation is annotated in parentheses with the surname of the author, the date of publication of the work and the page number from which the quotation was taken. The full bibliographic details are then provided in a list of the references at the end of the work.

Contributors are requested to submit a soft copy of their article and abstract to rubya@hum.ku.dk in Word format.

ARTICLES