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Contested Jurisdictions: Legitimacy and Governance at the Special Court for Sierra Leone

by

Sara Kendall

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

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University of California, Berkeley

Committee in charge:

Professor Marianne Constable, Chair
Professor David Cohen
Professor Wendy Brown

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Abstract

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The Special Court for Sierra Leone, established in 2002 to adjudicate crimes committed during a decade-long conflict, represents a new form of tribunal. Its "hybrid" structure was designed to address the domestic populace more directly than at previous international criminal tribunals. The Special Court's architects claimed that the Court's physical location in Sierra Leone and its inclusion of domestic law would generate greater awareness of and participation in its transitional justice objectives. This study examines the role of the Special Court for Sierra Leone in the emerging field of transitional justice.

The Special Court claims its authority and defines its objectives through appeals to jurisdiction. As the "speaking of law," jurisdiction involves both the language through which a court argues for its legal power and the domain in which it exercises power. In the horizontally structured field of international law, where unprecedented institutions must establish their legitimacy, jurisdiction is particularly contentious.

Chapter one describes the domestic and international factors that led to the Special Court's establishment and discusses its work in the context of the conflict. Chapter two compares the Court's claims of authority to those of earlier generations of international criminal tribunals. Chapter three assesses the self-proclaimed hybridity of the Court and its law. Chapter four shows how the Court's unique character – as a specifically juridical institution whose claims to authority are grounded in hybrid sources of law – makes it especially vulnerable to criticism in its dealings with West African heads of state, as both witness and as defendant. Chapter five argues that the paradigm of post-conflict justice manifested in the Special Court requires it to go beyond narrow retributive aims and to disseminate the rule of law. Such governmental functions, together with the Court's reliance on voluntary state donations, suggest that international criminal justice projects such as the Special Court for Sierra Leone provide conduits for strong states to pursue their own security and governance objectives under the banner of the rule of law.

Acknowledgements

This project began from out of a philosophical interest in international law, and in retrospect it seems surprising that it would end up as a critical monograph of a legal institution. In the process of writing this dissertation I have moved back and forth between theory and site, philosophy and phenomenon, and the conversations I have had with friends, mentors and colleagues along the way have taught me much more about how to think, write and see than I could have possibly anticipated. I feel very fortunate to have inhabited such a rich world of critical discourse, political commentary, and philosophical reflection.

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This dissertation is dedicated to my unusually close and supportive family. None of this would have been possible without their encouragement, understanding, and at times tolerance. The debts we owe to those closest to us are the most profound and the least often acknowledged, and I can't possibly hope to discharge them here. But I can take the opportunity to marvel at the paradox of how this most involuntary relationship – among family – has produced my closest friendships of all.

Introduction

> The ad hoc war crimes tribunals and the proposal for a permanent international criminal court are significant steps toward creating the capacity for international judicial intervention. In the civilized world's box of foreign policy tools, this will be the shiny new hammer to swing in the years ahead.
>
> -David Scheffer, "International Judicial Intervention"[1]

> [H]umanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity instills each of its violences in a system of rules and thus proceeds from domination to domination.
>
> Michel Foucault, "Nietzsche, Genealogy, History"[2]

Why did the field of post-conflict criminal justice undergo an expansion at the turn of the twenty-first century, resulting in unprecedented forms of international legal intervention? What social and political ends are served through international tribunals, and how do they claim their authority as legitimate institutions in the contested field of international law? As the statute of the permanent International Criminal Court was in the ratification process, a separate criminal court was established in 2002 to address mass crimes committed during the decade-long conflict in Sierra Leone in the 1990s. Although prosecuting individuals for crimes under the ICC Statute would have been impossible in the case of Sierra Leone – the crimes were committed before the ICC's temporal jurisdiction took hold – the Special Court for Sierra Leone was presented as more than a stopgap legal institution. For some of its proponents, the Court offered a competing model of justice: it was designed to bring a new "hybrid" dimension to international criminal justice projects by incorporating local laws and personnel with an attunement toward the local population. The Special Court for Sierra Leone may be seen in retrospect as a legal anomaly, a political aberration, or a shift toward local concerns in the unfolding dialectic between international and domestic criminal justice – as part of a "third wave" of tribunals, as some of its commentators have described it. Whether its decisions will be cited as authoritative precedent in the growing body of international criminal law or whether it will recede into relative obscurity, the Special Court for Sierra Leone invites a broader reflection on the field of post-conflict international criminal justice: in particular, on how this field attempts to legitimate its own right to speak law as well as its participation in projects of global governance.

This dissertation focuses on the Special Court for Sierra Leone as a curious and unlikely creature of political will. Although there has been considerable scholarship addressing the UN-sponsored *ad hoc* tribunals for Rwanda and the former Yugoslavia as well as the International Criminal Court, there has been relatively little extensive analysis of the work of the Special Court. Why international legal intervention in this largely neglected West African state? The Court can be seen alternately as a product of the particular security concerns of strong states, as a collective expression of moral outrage by the international criminal justice community in response to the degree of violence in Sierra Leone, or as another opportunity to develop

[1] David Scheffer, "International Judicial Intervention." *Foreign Policy* 102 (Spring 1996): 51.
[2] Michel Foucault, *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 85.

international legal jurisprudence for a growing class of professional stakeholders. A confluence of events and conceptual shifts led to the Special Court's creation – some political, some legal, and some that might be termed cultural, in the sense of the growing normative call to end a 'culture of impunity' and cultivate a 'culture of human rights.' David Scheffer's 1996 comment figuring international criminal justice as a "shiny new hammer" of the "civilized world" is a symptom of its time: a post-Cold War logic of routing governance objectives through international judicial interventions. The qualifier "civilized" reveals the binarism implicit in the very idea of intervention: there are those who swing the hammer and those who feel its impact. As one critic of human rights discourse notes, "Human rights need only be considered as something to be dispensed elsewhere."[3] So too with international criminal justice: the limitations posed by state sovereignty and competing domestic criminal jurisdictions ensures that tribunals such as the Special Court for Sierra Leone are rare creations established to judge what transpired "elsewhere," far from the core of Western states who invest in their operations.

Post-Conflict Juridical Forms

The field of international criminal justice has proliferated in the late twentieth and early twenty-first centuries, both as a form of discourse and as a set of institutional practices. This period corresponded with a rise in the language of human rights together with a form of law, previously known as the law of armed conflict, which is now referred to as 'international' in scope and 'humanitarian' in substance. International humanitarian law is an expanding field. It not only addresses relations between states, as in the Westphalian system of international order that dominated Western approaches from the mid-seventeenth to mid-twentieth centuries: it now also governs the internal conflicts of sovereign states by invoking the figure of the human in addition to the familiar figure of the citizen. Some commentators and international legal textbooks claim that the fields of human rights law and international humanitarian law are growing increasingly close together, both pedagogically (the laws governing each field are often taught in the same courses) as well as linguistically (they employ a shared language in the institutions set up to adjudicate international crimes). In a famous case asserting the jurisdiction of the International Criminal Tribunal for the former Yugoslavia, for example, the tribunal's appellate chamber asserted that the field of international humanitarian law had undergone a shift from a "State-sovereignty-oriented approach" to a "human-being-oriented approach."[4] In the work of the Special Court for Sierra Leone, crimes are often explicitly framed as human rights abuses, and state involvement in the work of this Court is described as a human rights initiative.[5]

Trials against individuals who allegedly violated human rights and international humanitarian law are increasingly carried out in the name of the 'international community,' a rhetorical construct with shifting boundaries.[6] This 'community' is invoked to support claims

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[3] Peter Fitzpatrick, "Terminal Legality? Human Rights and Critical Being," in *Critical Beings: Law, Nation and the Global Subject*, ed. Peter Fitzpatrick and Patricia Tuitt (Burlington: Ashgate, 2004), 120.

[4] *Prosecutor v. Tadic*, Case IT-94-1-AR72, "Appeal on Jurisdiction" (Oct. 2, 1995).

[5] See for instance the British Foreign and Commonwealth Office, "Foreign Policy is More Vital than Ever," press release, 2 October 2003, http://www.fco.gov.uk/en/newsroom/latest-news/?view=PressR&id=2005620 (19 July 2009), where the court is counted among the human rights initiatives supported by the British state.

[6] Michel Feher, *Powerless By Design: The Age of the International Community* (Durham: Duke University Press, 2000).

that criminal justice projects are global in scope rather than mere conduits of state power. In this way, discourses of international criminal justice profess a universal moral authority, much like projects carried out in the name of human rights, that seeks to transcend particular political origins and conditions.[7]

This rhetorical rise of international criminal justice – and of the international community as its agent – has been accompanied by a number of new institutional forms. The post-Cold War period witnessed the development of two UN-sponsored tribunals for Rwanda and the former Yugoslavia, the establishment of the International Criminal Court in the Netherlands, and the emergence of various juridical forms to address crimes committed in East Timor, Cambodia, Kosovo, Iraq, Lebanon, and in the case of Sierra Leone considered here. Although these courts vary widely in scope, structure, the bodies of law that they apply, and in their access to financial and material resources, they mark a growing international interest in post-conflict legal accountability. Once considered a novel response to the excesses of conflict, war crimes trials in international or hybrid tribunals are now a familiar method for bringing criminal law to bear on alleged violators of human rights and international humanitarian law. As legal scholar Mark Drumbl notes, the criminal law response to mass atrocity "has gained ascendancy as the dominant regulatory mechanism for extreme evil."[8] Drumbl's choice of language is revealing: evil (rather than crime) is now regarded as something to be *regulated* (as opposed to judged), and international criminal law is considered to be the appropriate regulatory mechanism. Moral discourse is mixed with instrumental, managerial language, as in Scheffer's description of judicial intervention as a "shiny new hammer" in the "box of foreign policy tools." Within contemporary forms of human rights and humanitarian legal discourse, law is an instrument for protecting human rights – a phenomenon that takes its most extreme form in the evolving doctrine of the "responsibility to protect," which seeks to justify armed intervention to prevent human rights abuses.[9] In this regulatory response to "evil," the "human" (rather than the "citizen") is seen as a subject to be protected by the international community, by way of a humanitarian law deployed through new legal institutions that move beyond the jurisdiction of sovereign states.

For many of their proponents, international courts represent an increasing legal cosmopolitanism – a form of justice that is meant to extend across state borders and adjudicate some of the most appalling crimes. These courts may do the work that states are unwilling or unable to do; for example, the International Criminal Court's principle of complementarity ensures that it will only act when domestic prosecutions are unlikely to take place, and it is designed to serve as a court of last resort for states that do not have the political will or resources to carry out prosecutions on their own. Proponents of these courts point to the signs of consent given by states – either directly through signatures and ratifications of court statutes by domestic legislatures, or indirectly through UN resolutions – as a basis for claiming the legitimacy of international criminal courts and their work while also upholding the principle of state

[7] For a critique of human rights discourse's presumed universalism, see Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002).
[8] Mark Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007), 3.
[9] See *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) and Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington: The Brookings Institution, 2008).

sovereignty upon which the international legal system is built. They also argue that judicial institutions can work in the service of promoting peace.[10]

To critics, however, the work of international criminal courts reveals the selective application of a confused body of law. Furthermore, critics frequently understand these courts as political creatures advancing particular state interests or as symptoms of an ever-expanding juridical regime that seeks to secure liberal (democratic, capitalist) objectives. For evidence of the partiality and inherent political dimensions of the work of these courts, critics point to breaches of international humanitarian law by nationals of strong states that remain unpunished; within tribunals they point to parties that are not indicted for reasons of political expediency.[11]

Between Utopianism and Skepticism

The following chapters question what has become, particularly in some legal circles, an uncritically utopian view of law's work in the context of post-conflict criminal tribunals like the Special Court for Sierra Leone. Tribunal proponents generally believe that post-conflict problems can be solved (or indeed prevented) through legal mechanisms: a more developed body of international criminal law and more enforcement mechanisms. A caricatured version of this view appears in the common phrase "no peace without justice" – we cannot achieve peace without holding individuals to account for their crimes. Questioning this utopian view does not necessarily amount to adopting a realist approach, which would reduce the work of these courts to an extension of the domestic power politics of the states that support them. Reducing the discourse and practices of international criminal justice to strictly humanitarian concerns or to the vicissitudes of power politics misses a significant rhetorical dimension of their work. Both of these approaches give little attention to how these courts attempt to assert their authority in the unsettled sphere of international law. While much of the scholarship on the work of international criminal courts falls into either utopian triumphalism or realist skepticism, there are ways between these two poles.[12] Although this dissertation argues that the Special Court for Sierra Leone's work can be linked to the objectives of strong states that support it financially, I do not claim that the realist critique can fully account for other dimensions of the Court's work.

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[10] See for example Paul Williams and Michael Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Lanham: Rowman & Littlefield Publishers, 2002).

[11] For example, some commentators have pointed out the contradiction between U.S. involvement in the Special Court for Sierra Leone and its reluctance to sign the ICC statute. Former British Ambassador to Sierra Leone, Peter Penfold, notes the "incongruous" role of the U.S. government vis-à-vis the Special Court: "I believe it is no coincidence that the one major country which does not support the ICC is the main country supporting the Special Court. The US is the leading funder of the Court to the tune of around $60 million and its [then] Chief Prosecutor is a retired US military prosecutor. At the very time when the Americans are pushing the work of the Special Court, they have signed an agreement with the Sierra Leone government (and other governments around the world) exempting US citizens from being sent to the International Criminal Court for committing atrocities and human rights violations." Lansana Gberie, "An Interview with Peter Penfold," *African Affairs* 104 (2005): 123. Others have noted that this position is not incongruous at all, as the U.S. may have had an interest in demonstrating that a case-by-case approach to tribunals would be more effective than the ICC.

[12] Victor Peskin's exhaustive account of state cooperation offers another way between realists and what he terms "human rights champions," though he does this by evaluating the politics of state cooperation rather than by analyzing the legitimating discourse of tribunals themselves. See *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008), 8.

Martti Koskenniemi's description of international law is one example of an attempt to chart a path between what he calls realist "apologists" (for whom law is constituted by the state and its interests) and "utopians" (who regard law as external to politics) by focusing on the argumentative structures that underpin both accounts. According to Koskenniemi, international law aims to depoliticize international relations by transforming political questions into presumably neutral, apolitical legal problems. International legal discourse is something "between politics and natural morality (justice) without being either."[13] Koskenniemi's account does not allow for an autonomous sphere of law and its apolitical claims,[14] and he focuses instead on the kinds of assertions that are made in international law and how they navigate this space between politics and moralizing discourse. Following Koskenniemi, I turn to the discursive dimensions of international criminal justice: the claims international criminal courts make about their right to adjudicate, and what this reveals about their perceived audience as well as the fragility and tenacity of such claims.

The Problematic of Jurisdiction

The claims that these courts make about their own authority often take place through the language of jurisdiction, which serves as their legitimating discourse. International criminal courts are legal anomalies. They do not form part of an enduring juridical structure, which is why they are often referred to as tribunals rather than courts, yet they must explicitly claim their rights to adjudicate violations of international criminal law. Jurisdictional challenges are certainly not unique to this area of law – they are also routine aspects of domestic legal procedure. What makes the form of the jurisdictional challenge different in this instance is the less settled authority of temporary criminal courts in the first place. In claiming jurisdiction, courts such as the Special Court for Sierra Leone must confront such contentious issues as the politics of their foundations and the extent of their sphere of authority in relation to the legal jurisdictions of sovereign states.

The term jurisdiction is polysemous: it refers to both the existing power a court has as well as the claim to that power. In the first sense, jurisdiction is a form of power exercised over bodies and territories and through institutional mechanisms. In the second sense, jurisdiction is an authoritative discourse – a claim that takes place within language. The first sense of jurisdiction as power can be evaluated legally and politically, namely whether it is right and lawful. It involves questions of whether a court's authority is properly grounded (in a positive law framework) or politically justifiable. The second sense of jurisdiction as a claim can be evaluated through *how* it is asserted: what authorities are invoked in this effort to ground, and what ends they are presumed to serve. Jurisdictional assertions by tribunals often have the political effect of stifling questions about institutional legitimacy – they insulate tribunals from critique by providing a forum for a party to challenge a tribunal's authority while simultaneously preserving a tribunal's power to adjudicate those challenges for itself. Jurisdiction is also a rhetorical field: in the words of one legal scholar, it reveals "debates about community

[13] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989), 8.

[14] Jürgen Habermas similarly argues that law never dissolves its internal relation to politics and morality in *Between Facts and Norms* (Cambridge: MIT Press, 1998).

definition, sovereignty, and legitimacy."[15] Jurisdiction is the language through which political power is translated into legal terms.

Dissertation Structure

This dissertation draws upon a year of fieldwork in Freetown, Sierra Leone from 2004-2005 and several months in The Hague, the Netherlands in 2007 and 2008, where I worked at the margins of the Special Court as a trial monitor for the UC Berkeley War Crimes Studies Center. The monitoring team that was intended to provide an ongoing external presence at the trials, analyzing court operations and producing weekly reports on trial proceedings. As a consequence of this work, I spent months in the public gallery of the courtroom observing witness testimony, judicial behavior, and the practices of the Special Court for Sierra Leone. Although my dissertation takes a textual rather than anthropological approach, this year of fieldwork informs my interpretation of the Court's work.

The following chapters focus on the rhetorical practices and visions of governance of the Special Court for Sierra Leone, paying particular attention to textual accounts from the Special Court itself and from scholarly and professional commentary on its work. I refer to official court documents throughout the dissertation, including trial chamber and appellate chamber decisions, transcripts of witness testimony, and judgments. I also engage with academic commentary, policy literature, and civil society analyses of the Court's work. This project does not fall within traditional Anglo-American understandings of criminology, the socio-legal field that analyzes crime and mechanisms of crime control. Nor is it a work of international legal scholarship, which would focus on the developing jurisprudence of the Court or on its legal similarities to and differences from other international tribunals. Rather than engaging in a legal analysis of the Special Court for Sierra Leone, my project turns to the presuppositions and aspirations that underpin its work. This largely overlooked court offers an opportunity to examine a new form of legal cosmopolitanism designed to relate the global to the local in a deliberately structured 'hybrid' relationship.

Transitional justice institutions such as tribunals and truth and reconciliation commissions attempt to analyze the past in order to initiate a break from it. Chapter one introduces the Special Court for Sierra Leone as a mechanism of transitional justice. It offers an account of the conflict that the Court was set up to address before turning to a general discussion of the Court's work. The chapter discusses the prosecutor's mandate to indict those bearing the "greatest responsibility" for the crimes committed during the Sierra Leonean conflict, how the mandate was interpreted, issues that arose at trial, and broader political considerations arising from the Court's work.

Chapter two relates the Special Court for Sierra Leone to the international criminal tribunals that preceded it. It addresses the various forms of authority that courts draw upon in order to try to legitimate their own foundational acts. I argue that jurisdictional challenges

[15] See Paul Schiff Berman, "The Globalization of Jurisdiction," *University of Pennsylvania Law Review* 151(2) (2002): 319. Berman argues that "the idea of jurisdiction provides a particularly fruitful cross-disciplinary site for investigating the effects of globalization on legal systems" (328). See also the edited volume *Jurisprudence and Jurisdiction* (ed. Shaun McVeigh, New York: Routledge-Cavendish, 2007).

provide an occasion for a court to both declare its authority and to call that authority into being. This chapter reads the Special Court's jurisdictional claims in relation to other post-conflict tribunals that preceded it, noting how the Court both draws upon a narrative of institutional continuity as well as on claims of difference due to its supposedly hybrid form.

Chapter three takes up the issue of the 'hybridity' of the Court by tracking the various ways in which the Court's hybrid form has been described in its institutional history. What began with the Sierra Leonean President's vision of a blended legal jurisdiction eventually resulted in a purely international legal form that did not employ any Sierra Leonean law in its indictments. What purpose does this claim to a hybrid legal institution then serve? Through tracing a history of the colonial-era law that was included in the Court statute but subsequently excluded in Court practice, I argue that this relationship of inclusion/exclusion is structurally similar to colonial legal forms in Anglophone West Africa. The claim to a 'hybrid' legal structure forms part of the Court's legitimating discourse, but it substantively re-inscribes a relationship of dependence upon an external power – in this case, the international community – as the bearer of political authority and of techniques of reform.

Chapter four considers how the Special Court for Sierra Leone addresses two former West African heads of state. I argue that these two figures are charged with meanings that animate the Court's work in different ways, revealing the political and jurisdictional ambiguities that arise from the Court's 'hybridity.' As the initial proponent of the Court, the former Sierra Leonean president inhabits a foundational role, and a series of decisions reveal the Court's reluctance to compel the President to appear before it. In contrast, former Liberian president Charles Taylor's presence before the Court is critical in order for the Court to be perceived as a viable legal body. In order to assert its *own* legal sovereignty, the Court needs to overcome Taylor's claims to sovereign immunity. Yet the Court's 'hybridity' produces a deferential attitude toward the Sierra Leonean president as a guarantor of the Court's authority.

Chapter five considers the ways in which the Special Court for Sierra Leone's work exceeds the retributive task of determining accountability for a handful of indicted individuals and is directed at the Sierra Leonean population more broadly. Addressing depictions of Sierra Leone as a "lawless land" by the Court's first prosecutor, I argue that the Court takes an expansive view of its jurisdiction to include security concerns and pedagogical tasks that form part of a broader governance agenda. I further contend that the Court's work can be read as a symptom of encroaching neoliberal market-driven rationalities in the sphere of international criminal justice, which raises questions of who the stakeholders are and what they are attempting to recover from their 'investments.'

As a whole, this dissertation investigates the vision of justice offered by the Special Court for Sierra Leone. As part of what has been referred to as a "third wave" of post-conflict tribunals, the Court both builds upon and departs from the legitimating discourses of its predecessors. Its proponents argue that the Special Court's novel hybrid structure brings it closer to the population that it was designed to serve, though as the following chapters show, the work of the Court appears to reflect the objectives of its donors and professional stakeholders more than the interests of the people of Sierra Leone. Its work reveals more about the values of what Duncan Kennedy terms jurisdictional "sites of production," or what David Scheffer refers to as

the "civilized world" in the above epigraph, than it does about the "sites of reception"[16] where justice will presumably be done. Rather than focusing on the Sierra Leonean conflict's perpetrators or victims or on the Court's own successes or failures as a mechanism of transitional justice, the following chapters explore the Court's own struggle to assert its authority in the contested international legal realm: how it attempts to legitimate itself and how it is conceived as a form of governance through judicial intervention.

[16] Duncan Kennedy, "Two Globalizations of Law & Legal Thought: 1850-1968," *Suffolk University Law Review* 36 (2003): 635.

Chapter One
Transitional Justice in Sierra Leone

The Special Court for Sierra Leone is regarded by many of its proponents as a form of transitional justice – a legal mechanism designed to help Sierra Leone move from a state of conflict to a state of peace. Transitional justice conventionally refers to a form of legal accountability that is designed to instill a more peaceful or democratic culture, and its work is noteworthy for its Janus-faced approach to time. This form of justice is not merely a retrospective exercise of assigning blame, but also a prospective, forward-looking attempt to mark a break from the past. Although the literature on transitional justice characterizes the move away from the past in various ways – from an undemocratic past under military dictatorship, for example, or from a past of violent conflict, as in the case of Sierra Leone – the literature overwhelmingly shares this approach to temporality. Transitional justice mechanisms are thought to provoke a kind of rupture or break from what came before, oriented toward a future that is able to close itself off from past violence.[17] Post-conflict judicial intervention thus assumes the prospective dream of extending the rule of law to a region through a retrospective determination of facts in a contemporary legal framework. Critical commentary on the field notes this prospective orientation: Mark Findlay claims that transitional justice "holds that post-conflict justice must go wider than retribution,"[18] and Robert Meister explains that "a desired outcome of transitional justice is the creation of a vibrant civil culture of human rights activism – groups in civil society that will be vigilant in calling future abuses to the attention of the general public."[19] In the case of a tribunal, as with the Special Court for Sierra Leone, this transitional work entails examining past deeds through the prism of legalism.[20] Looking forward requires looking back - through carefully circumscribed techniques that craft a particular form of truth of events and actions. This retrospection is not an end in itself, as a historical approach would be; it is an instrumental move made in the service of a proposed future that will be distinguished from the past. Tribunals such as the Special Court are intended to perform and model 'the rule of law' for their addressees, who are comprised of both affected populations and external stakeholders.

This chapter introduces the work of the Special Court for Sierra Leone as a project of transitional justice. The first section briefly describes the conflict that the Court was set up to address, establishing some of the key events and individuals that feature prominently in the Court's work. The second section describes the establishment of the Court itself. Many factors contributed to its creation: the growth of a professionally invested class (legal practitioners and administrators who move from tribunal to tribunal), an increase in civil society organizations that

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[17] For examples of this literature, see Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction, 1997), and Ruti Teitel, "Transitional Jurisprudence: the Role of Law in Political Transformation," *Yale Law Journal* 106 (1997), and "Transitional Justice: Postwar Legacies," *Cardozo Law Review* 27 (2006).

[18] Mark Findlay, *Governing through Globalised Crime: Futures for International Criminal Justice* (Portland: Willan Publishing, 2008), 36.

[19] Robert Meister, "Human Rights and the Politics of Victimhood," *Ethics and International Affairs* 16 (2) (2002): 96.

[20] For a discussion of this dynamic in relation to the work of the Nuremberg Tribunal, see Judith Shklar's *Legalism* (Cambridge: Harvard University Press, 1964). Shklar defines legalism as "the sanctity of rule following," a political ideology that frames moral conduct as a matter of impartially applying fixed rules.

press for legal accountability, a leader in Sierra Leone with an existing history with international institutions, and a broader cultural climate that fostered the use of internationalized legal mechanisms for post-conflict accountability. The third section outlines the work of the Court as part of a transitional effort to address the past in light of an emergent post-conflict present and future. It considers who was indicted, legal developments, and evidentiary issues that surfaced during the trial process.

Much of the scholarly literature and civil society documentation addressing what transpired in Sierra Leone between 1991 and 2002 refers to these events as "the conflict." The term appears to be widely used because it is broad enough to cover a number of possible interpretations of events during this period in Sierra Leone's history. "The conflict" appears geographically and politically neutral, unlike "civil war," which suggests that the events were restricted to the territory of Sierra Leone; "armed insurgency," which misses the plurality of groups involved; and "rebel uprising," which presumes that the rebels were an identifiable group with a clear agenda. "Conflict" is also a familiar term in regional policy literature, which frequently employs phrases such as "conflict diamonds" and refers to Sierra Leone as a "post-conflict state." I follow this dominant convention of referring to what transpired in Sierra Leone from March of 1991 to the declared end of hostilities in January of 2002 as "the conflict," though this term seems to reify and unify the many episodes of violence in this period by suggesting that they constitute a single event or entity. Historical scholarship on Sierra Leone suggests otherwise, although this section does not offer an extensive historical account. The section that follows introduces a few key episodes and actors from this period that are necessary for understanding an analysis of the Special Court's work.

The Sierra Leonean Conflict, 1991-2002

The territory now known as the state of Sierra Leone was formed following independence from Britain in 1961. After nearly two decades of post-colonial rule as a one-party state, Sierra Leone became the site of widespread violence in the last decade of the twentieth century, with repercussions in neighboring Liberia and Guinea. Over the course of a decade, an estimated 50,000 Sierra Leoneans were killed and over a third of the population was displaced in a small country of roughly five million inhabitants. There are competing accounts of the roots of the conflict, the extent of casualties, and the roles played by external parties.[21] Most academic commentary notes that the conflict was causally complex and historically influenced by social residues from the colonial period and from post-independence political struggles, including a long period of one-party rule. Some recent scholarship has argued that the objective of the conflict was partly an "assertion of power by the powerless" after years of exclusion and government refusal to take their grievances seriously or a product of "governance failures" in the region.[22] While some accounts center on the role of diamonds, including statements from the

[21] Lansana Gberie, *A Dirty War in West Africa: the RUF and the Destruction of Sierra Leone* (Bloomington: Indiana University Press, 2005); Paul Richards, *Fighting for the Rain Forest: War, Youth and Resources in Sierra Leone* (Oxford: James Currey, 1996); Ibrahim Abdullah, "Bush Path to Destruction: The Origin and Character of the Revolutionary United Front (RUF/SL),"*The Journal of Modern African Studies* vol. 36 (2) (1998); John Hirsch, *Sierra Leone: Diamonds and the struggle for democracy* (Boulder: Lynne Rienner, 2001).

[22] David Keen, *Conflict and Collusion in Sierra Leone* (Oxford: James Currey, 2005); Amos Sawyer, "Violent conflicts and governance challenges in West Africa: the case of the Mano river basin area," in *Journal of Modern African Studies* v. 42 (3) (2004). Sawyer argues that "African intrastate conflicts typically reveal complex patterns

Court's first prosecutor,[23] the account of Sierra Leone's own post-conflict Truth and Reconciliation Commission claims that "unsound governance provided a context conducive for the interplay of poverty, marginalization, greed and grievances that caused and sustained the conflict."[24]

There is general agreement that the Sierra Leonean conflict began with an invasion by an armed group known as the Revolutionary United Front (RUF), which entered the country from Liberia in March of 1991 with the support of Charles Taylor and his National Patriotic Front of Liberia (NPFL).[25] Some accounts point out that the RUF had its origins in a political movement organized in part by educators and students who sought to reform the corrupt Sierra Leonean government and unseat the dominant All People's Congress party, which had outlawed all other political parties under the rule of Siaka Stevens during the 1970s.[26] The original aim of the group is disputed, however, and it is widely agreed that any revolutionary ideology that may have existed in the group's early stages was promptly abandoned. Some commentary disavows any ideological component to the RUF; for example, Lansana Gberie writes that the RUF was "conceived as a mercenary enterprise, and never evolved beyond banditism."[27] Regardless of its stated objectives, the RUF was widely considered to have committed the most egregious and extensive atrocities of the conflict.[28]

President Momoh of the All People's Congress party was overthrown in a military coup in 1992, and coup members set up a temporary government known as the National Provisional Ruling Council (NPRC). RUF influence in the country increased, particularly in the diamond-mining areas in eastern Sierra Leone, and by 1995 the RUF was in a position to attack Freetown. As the Sierra Leone Army (SLA) was considered too weak to repel the RUF, the governing NPRC engaged a private South African security force to fight the RUF and secure the diamond-rich mining areas. The NPRC government and the South African mercenaries also began forging ties with a nascent militia group that was later known as the Civil Defence Forces (CDF). The militia drew upon existing hunting societies to form a pro-government military force that was mobilized to defend local populations from RUF attacks. By late 1995 the NPRC leadership was under pressure to hold elections, and Sierra Leone People's Party candidate Ahmed Tejan

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in which issues of identity, greed and the consequences of a changed global order may all be interlinked in contexts laden with injustice, predation and repression" (439).

[23] According to the Court's first prosecutor, David Crane, "Fundamentally the cause of this war was to control a commodity and that was diamonds." Press conference in Freetown, 18 March 2003, as quoted in International Crisis Group Africa Briefing, "The Special Court for Sierra Leone: Promises and Pitfalls of a 'New Model'" (2003): 14.

[24] Sierra Leone Truth and Reconciliation Commission Report, Executive Summary, para. 16.

[25] William Reno, "War, Markets, and the Reconfiguration of West Africa's Weak States," *Comparative Politics* 29 (4) (1997): 501. On the Liberian connection, see Stephen Ellis, *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War* (New York: New York University Press, 1999) and Mark Huband, *The Liberian Civil War* (London: Frank Cass, 1998).

[26] See the RUF's policy statement in their pamphlet *Footpaths to Democracy: Toward a New Sierra Leone*, which pairs an opening quotation from Frantz Fanon with a statement by the RUF leader Foday Sankoh. Writing around the time that the statement was released, Richards claimed that "the RUF sees itself as a people's movement for national recovery" (1). However, a Sierra Leonean scholar criticized Richards' efforts to find an underlying logic in RUF actions (see Gberie, 145).

[27] Gberie, 153.

[28] Sierra Leone Truth and Reconciliation Commission Report.

Kabbah, "a retired United Nations bureaucrat,"[29] was elected President of Sierra Leone in March of 1996. CDF leader Sam Hinga Norman was incorporated into Kabbah's government as his deputy minister of defense. After foreign pressure prompted Kabbah to terminate his contract with the South African security force, the Sierra Leonean government came to depend more on CDF militia groups to supplement the work of the Sierra Leonean Army, which produced increased tension between the government and SLA forces.

A peace agreement negotiated in Abidjan, Cote d'Ivoire in November of 1996 between the RUF and the Sierra Leonean government produced a brief break from the fighting (the date is juridically significant, as it forms the beginning of the Court's temporal jurisdiction). The agreement was breached, however, when Kabbah's government was overtaken by a coup of junior Sierra Leone Army (SLA) officers in May of 1997. The group identified itself as the Armed Forces Revolutionary Council (AFRC), and under the leadership of former SLA soldier Johnny Paul Koroma, it invited the RUF to join in a military and political alliance. President Kabbah fled to Guinea, and he appointed his defense deputy Norman as national coordinator of the CDF to organize actions against the junta. During late 1997 and early 1998 CDF forces participated in several attacks on suspected junta collaborators, and in the process a number of civilians were killed and mutilated in what were later found to be "widespread and systematic" attacks constituting a crime against humanity. In February of 1998, a largely Nigerian regional peacekeeping force known as ECOMOG unseated the junta and restored Kabbah to power.

After the junta forces were expelled from the capital the restored Sierra Leonean government brought treason charges against some of the combatants, including RUF leader Foday Sankoh. The RUF and AFRC forces invaded Freetown again in January of 1999 in what was arguably the most brutal episode of the conflict, resulting in an estimated 6,000 civilian deaths at minimum, thousands of amputations, abductions of civilians and widespread property destruction. After briefly gaining control of the capital, the rebels were pushed out by ECOMOG troops. A new controversial peace agreement with significant international participation was signed in Lomé, Togo in July of 1999. The agreement stipulated that all combatants would be granted amnesty under Sierra Leonean law and a Truth and Reconciliation Commission would be established; UN troops were deployed to enforce the ceasefire. The Lomé agreement was breached when RUF members took a large number of UN peacekeepers hostage in the spring of 2000, and in the aftermath of the hostage crisis a British intervention force was deployed in Sierra Leone.[30] In July of 2000 President Kabbah sent a letter to the United Nations requesting assistance in establishing a 'Special Court' to try leaders of the RUF "for crimes against the people of Sierra Leone and the taking of United Nations peacekeepers as hostages."[31] Kabbah formally declared the conflict over in January of 2002 following a successful UN disarmament program.

Establishing the Special Court for Sierra Leone

[29] Paul Richards, "War and Peace in Sierra Leone," *The Fletcher Forum of World Affairs* 25(2) (2001): 44.
[30] Gberie claims that "it was the robust presence of the British troops that prevented the total collapse of the UN mission and a relapse into violence" (176).
[31] United Nations, *Fifth Report of the Secretary General on the United Nations Mission in Sierra Leone*, UN document S/2000/751, 31 July 2000, para. 9.

Approximately a year and a half after Kabbah's initial request for a court and shortly after he declared an official end to the conflict, representatives of the United Nations and the government of Sierra Leone signed an agreement establishing the Special Court for Sierra Leone on January 16, 2002. The Court was the first tribunal to be established in response to an invitation from a sovereign state. The Court was structured to avoid the perceived shortcomings of the international criminal tribunals that had preceded it.[32] It was designed to operate more efficiently than the *ad hoc* tribunals through a restricted mandate that would limit indictments to high-level commanders. Unlike the two UN-backed tribunals for Rwanda and the former Yugoslavia, which were criticized for their expensive operations funded by the United Nations, the Special Court would be funded directly through voluntary contributions from U.N. member states. Approximately fifty countries have contributed to funding Court operations. The United States is the largest contributor, covering a little more than a third of the total budget to date, followed by the United Kingdom and the Netherlands.

The Court was also deliberately located in the country where the conflict took place, in contrast to the more remote locations of the ICTR in Tanzania and the ICTY in the Netherlands, which were established far from the affected populations in Rwanda and the former Yugoslavia. The Court's geographical location in Sierra Leone and the inclusion of domestic legal elements in its Statute were meant to make it more attuned to the local context, in the words of the former Sierra Leonean president, while also more capable of engaging in a broader pedagogical project of governance. The Court has been lauded throughout its operation as an innovative 'hybrid' form of post-conflict justice.[33] As this dissertation shows, however, the "hybrid" character of the Special Court for Sierra Leone remains unclear and contested throughout the Court's history.

The jurisdiction of the Special Court for Sierra Leone is established through its statute. Article I states that the court shall "have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." Article I locates the Court's jurisdiction in law, place, time, and over individuals: it addresses certain domestic and international crimes committed in the territory of Sierra Leone beginning from the time of the breached Abidjan Peace Accord of 1996. The Statute permits the prosecution of international crimes such as crimes against humanity, violations of Article 3 common to the Geneva Conventions, and other serious violations of

[32] See International Crisis Group: "Concerns to avoid appearing to be another overly large, cumbersome and virtually open-ended tribunal largely determined how the Special Court was set up. Its mandate to handle only a limited number of cases is tied directly to the desire of all states that supported its creation to keep it much smaller and less costly." In "The Special Court for Sierra Leone: Promises and Pitfalls of a 'New Model'" (4 August 2003): 3.

[33] See for example Laura Dickinson, "The Promise of Hybrid Courts," *American Journal of International Law* 97 (2) (2003); Beth Dougherty, "Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone," *International Affairs*, 80(2) (2004); Padraig McAuliffe, "Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone Trial to The Hague Defeats the Purposes of Hybrid Tribunals," *Netherlands International Law Review*, 55 (2008); Jelke Mayr-Singer, "Hybridgerichte –eine neue Generation international Strafterichte (I). Der Sondergerichtshof für Sierra Leone," *Vereinte Nationen*, 56(2) (2008); Stephen Rapp, "The Compact Model in International Criminal Justice: the Special Court for Sierra Leone," *Drake Law Review*, 57.

international humanitarian law in addition to crimes under two colonial-era Sierra Leonean laws. The Statute restricts the temporal and geographical jurisdiction of the Court: although the conflict began in 1991 and spilled over into neighboring Liberia, the Court was only able to adjudicate crimes committed in the territory of Sierra Leone since late 1996, the date of the Abidjan accord. These temporal and geographical restrictions would raise challenges for Court prosecutions generally, and particularly in the case against former Liberian president Charles Taylor, who was ostensibly linked to actions in Sierra Leone without being physically present.

The Statute provided the Court with a limited mandate – to try only those individuals who allegedly bore the "greatest responsibility" for the conflict – in contrast to the broader mandates of previous tribunals that brought lower-level commanders within their jurisdiction. The threshold of "greatest responsibility" governing jurisdiction over persons was adopted to restrict the number of indictments the court would issue, reserving accountability for those at the highest command levels of the fighting forces. Although the Sierra Leonean president had originally requested a court to try members of the Revolutionary United Front (RUF), the Court's original lead prosecutor followed a convention that had been adopted at the UN *ad hoc* tribunals for Rwanda and the former Yugoslavia of indicting representative members from each major faction of the conflict. Of the thirteen indicted individuals, most of the key rebel leaders were never held accountable: RUF leader Foday Sankoh died in custody before his trial began, senior RUF commander Sam Bockarie was killed by Liberian troops before he was apprehended, and AFRC leader Johnny Paul Koroma was presumed dead, also thought to be a casualty of Liberian troops. The prosecutor controversially unveiled Charles Taylor's indictment at a regional peace conference among African leaders in 2003. Taylor abandoned his presidency shortly after and fled for Nigeria, where he remained for several years despite diplomatic efforts to secure his transfer to the Court.

Trials began in Freetown in June of 2004 with only nine of the original thirteen indictees in custody. The individual cases were combined into three joint trials: one against Issa Sesay, Morris Kallon, and Augustine Gbao of the Revolutionary United Front (RUF), one against Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu of the Armed Forces Revolutionary Council (AFRC), and one against Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa of the Civil Defence Forces (CDF), the pro-government militia that had been mobilized to fight against RUF and AFRC rebels.

The absence of some of the most notorious figures of the conflict – RUF leaders Foday Sankoh and Sam Bockarie as well as AFRC leader Johnny Paul Koroma – meant that the remaining indictees might appear as lesser stand-ins. For example, prior to Taylor's transfer to the Court, Lansana Gberie noted that "the Special Court is left in the curious position of having Norman as the most prominent figure to face trial in the Court. The likes of Sesay and Gbao, in spite of their vicious records, were clearly largely marginal figures until very late in the war, and both fade beside the charismatic figure of Norman. It is an irony that can hardly be lost on Sierra Leoneans – the man who fought to resist the murderous rebels will now be the main focus of interest in the trial of those bearing the 'greatest responsibility' for violations of international law."[34] The absence of these high-level commanders placed even greater pressure on the Court to obtain custody of Charles Taylor. Taylor's capture and eventual transfer to the Court

[34] Lansana Gberie, "Briefing: The Special Court of Sierra Leone," *African Affairs* 102 (2003): 646.

following a formal request to the Nigerian government from the newly elected Liberian president in 2006 brought increased international attention to the Court's work, including additional infusions of resources and capital.[35]

The Court's first prosecutor David Crane made a number of controversial interpretations of the Court mandate through his choice of indictments. Most noted was his decision to indict CDF leaders, and in particular Sam Hinga Norman, who had served as President Kabbah's deputy minister of defense and was regarded as a war hero by many Sierra Leoneans. The Court took special security precautions following Norman's indictment out of fear of reprisals from the Kamajors, a Mende hunting society from the southeastern part of the country that had formed the largest group within the CDF. Norman actively engaged in challenging the Court's constitutional and legal foundations at trial, though the judges of Trial Chamber I frequently dismissed his critiques as "political" in nature. Norman's team called a number of high profile witnesses in his defense, including the former Vice President of Sierra Leone, a British army general and NATO commander, and the former British High Commissioner to Sierra Leone, who contentiously stated before the Chamber "I feel, like many others, [Norman] is a hero, not a war criminal and I believe his indictment here is a grave misjustice."[36]

Norman died while undergoing medical treatment in Senegal during the defense phase of his trial in 2007, leaving only two CDF members on trial with more ambiguous positions within the organization. The indictment of CDF "Director of War" Moinina Fofana appeared to over-interpret Fofana's responsibility based on his official title, and the evidence presented at trial did not seem to justify his place at a comparable level of responsibility as other key figures. The third CDF accused, Allieu Kondewa, the "High Priest and Chief Initiator" of the CDF, was more directly implicated in crimes committed during the conflict. Yet Kondewa's role in initiating CDF recruits, which would presumably protect them during combat, remained obscure – it appeared as an amalgamation of social tradition and financial opportunism, and the Court struggled to relate initiation to the crime of enlistment of child soldiers.

Some critics felt that if CDF members were indicted, the prosecutor should have also indicted President Kabbah in his capacity as the Minister of Defence in addition to indicting his Deputy Defence Minister Norman. Although the judges refused to issue a subpoena for Kabbah to testify in the CDF trial about the command structure, as I discuss in chapter four, Judge Itoe's separate annex to the CDF judgment claimed that "President Kabbah occupied and played a central role in this conflict," adding that from exile in Guinea, "[Kabbah] encouraged late Norman and his Kamajor collaborators like the Accused, Moinina Fofana and Allieu Kondewa and other CDF personnel who were engaged in this struggle to restore him to power."[37]

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[35] As former prosecutor Stephen Rapp claimed, Taylor's trial raised the profile of the Court and helped it to secure additional resources. See "The Compact Model in International Criminal Justice: The Special Court for Sierra Leone," 57 *Drake Law Review*: 31.

[36] Trial transcript of 8 February 2006, p. 51 lines 12-14. In an earlier interview, Penfold claimed that Norman "played a key role in the subsequent peace process. In the eyes of most Sierra Leoneans, and me, he is a hero. That he should now find himself indicted for 'war crimes' is an outrage and an injustice." Lansana Gberie, "An Interview with Peter Penfold," *African Affairs* 104 (2005): 122.

[37] *CDF Judgment, Annex A – Separate and Partially Dissenting Opinion Only on Count 8 of Hon. Justice Benjamin Mutanga Itoe*, 2 August 2007, paras. 84 and 90. A separate opinion by Judge Boutet argued that the role of Kabbah was immaterial to the case against the CDF indictees.

Furthermore, although members of the Economic Community of West African States Cease-fire Monitoring Group (ECOMOG) forces were rumored to have killed civilians and allegedly participated in illegal diamond mining, there were no indictees from this group.[38] Some Sierra Leoneans felt that if the Court indicted pro-government CDF leaders, ECOMOG leaders should be indicted as well; the British general who had testified in Norman's defense noted that the Nigerian generals affiliated with ECOMOG were responsible for the daily conduct of the war and were receiving instructions from President Kabbah, and some witnesses testified that Kamajors operated under ECOMOG control. The Court Statute rules out the possibility of indicting peacekeeping forces, however, without a request from the troop-contributing country.

Other interpretations of the Court mandate seemed largely symbolic, such as the indictment of RUF member Augustine Gbao, whose involvement in the UN hostage-taking was regarded as sufficient for the prosecutor to consider him among those "bearing the greatest responsibility" for the conflict. As one U.S. senator pointed out at a policy hearing in 2000, well before the Court had been established, "it took the hostage crisis of the spring to refocus serious attention on the issue [of Sierra Leone]."[39] It appeared that Gbao's indictment was meant to highlight the impact of the UN troop abduction on the peace process, though the question remains as to whether Gbao's crimes were extensive enough to justify including him with other high-level RUF leaders such as Foday Sankoh and with the AFRC indictees responsible for ordering the atrocities committed during the 1999 invasion of Freetown. For example, one of the AFRC indictees – Brima Kamara – was also accused of UN hostage taking, but he was additionally alleged to be the main architect of the 1997 coup against Kabbah's government and one of the commanders of the Freetown invasion.

The choice of indictees raises the problem of prosecutorial discretion, or how the initial prosecutor chose to interpret the Court's mandate to try those meeting the "greatest responsibility" threshold and chose to focus on those at the head of a chain of command responsibility. Given the irregularity of the armed factions during the course of the Sierra Leonean conflict, which were not always organized into clear chains of command, deciding standards for issuing indictments was challenging. Military experts for both the prosecution and the defense addressed the question of whether the irregular fighting forces of the conflict were structured in clear chains of command. Some notoriously brutal commanders who may have ordered or committed violent atrocities were not indicted, and other commanders appeared to be indicted more as a consequence of their titles or formal positions than from their *de facto* command over troops and ordering of atrocities. The prosecutor considered Gbao's involvement in the UN hostage crisis sufficiently grave in the context of the overall conflict to warrant his indictment, though other RUF commanders may have been more responsible for ordering and committing atrocities against noncombatants.

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[38] Lansana Gberie notes Nigerian soldiers' retaliatory attacks on junta forces "with gunboat shells, many of them missing and hitting civilian targets" in "ECOMOG: The Story of an Heroic Failure," *African Affairs* 102 (2003): 150. Richards notes the report of a former UN commander alleging ECOMOG involvement in diamond mining – see "War and Peace in Sierra Leone," 45.

[39] Senate Committee on Foreign Relations, *United States Policy in Sierra Leone: Hearing and public meeting before the Subcommittee on African Affairs of the Committee on Foreign Relations*, 106th Cong., 2d sess., 11 October 2000, 4.

Other indictments raised questions about how the prosecutor drew boundaries between indictees and insider witnesses. Members of the prosecution had approached former interim RUF leader Issa Sesay with a possible insider witness deal in the days following his arrest, suggesting that the distinction between insider witnesses and accused individuals was not particularly clear.[40] Sesay was widely believed to have played a key role in the peace process by encouraging the RUF to disarm and demobilize, and the International Crisis Group noted that some Sierra Leoneans were troubled by his indictment.[41] Meanwhile, defense counsel for some of the accused claimed that the prosecution had effectively offered amnesty to individuals who had committed similar offences as those allegedly committed by their clients, speculating that those individuals may have been offered immunity as a result of working as witnesses for the prosecution.[42]

While testifying at trial, some insider witnesses described ordering troops to commit crimes under the Statute, and others have described personally committing brutal crimes without any indications of remorse. In the CDF case, examples include a high-level commander who planned one of the most notorious CDF attacks on suspected collaborators and who testified that he participated in acts of cannibalism; the head of a CDF group that allegedly participated in torturing and killing suspected junta collaborators; and appearing on behalf of Norman's defense, a Kamajor commander who allegedly participated in commanding one of the more brutal attacks attributed to the CDF.[43] In the RUF and AFRC cases, a former senior commander of the AFRC gave evidence of his own high level involvement in operations and leadership, and other witnesses noted how he had ordered attacks on towns and ordered killings of suspected CDF collaborators.[44] In the case against Charles Taylor, several high-level insiders admitted to directly participating in atrocities that included killing civilians, ordering amputations, engaging in cannibalism, and keeping women as sexual slaves.[45] Under cross-examination, one insider in the Taylor case agreed with a defense statement that he was one of those most responsible for the war in Sierra Leone until his imprisonment in 2000; another witness admitted that he had personally killed hundreds of people, including infants and pregnant women, stating that "I don't regret an inch." Insider witnesses at the Court benefited from a number of material privileges, which in some instances included relocation outside Sierra Leone along with related expenses, such as school fees for their children in addition to rent and transportation costs, and some

[40] Sesay's arrest appears to have violated a number of fair trial provisions, as was revealed in a *voir dire* hearing before the Court that aired the circumstances surrounding his apprehension and subsequent offers of an insider witness deal. For a full account of the hearing and related issues, see Penelope Van Tuyl, "Effective, Efficient and Fair? An Inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone," September 2008, released through the UC Berkeley War Crimes Studies Center and available online at http://socrates.berkeley.edu/~warcrime/SL.htm.

[41] International Crisis Group, 5.

[42] *Decision on Challenge to Jurisdiction: Lome Accord Amnesty* Case No. SCSL-2004-15-AR72(E), 13 March 2004, para. 59.

[43] Albert Nallo, former CDF Director of Operations for the Southeastern Region and National Deputy Director of Operations; Borbor Tucker, head of the CDF "Death Squad"; and Osman Vandi, former CDF batallion commander.

[44] AFRC Operations Commander George Johnson.

[45] Isaac Mongor, former RUF commander and member of the RUF/AFRC Supreme Council; Alimamy Bobson Sesay, officer in the Sierra Leonean Army and later the AFRC; and Joseph Marzah, Taylor's former Chief of Operations.

insider witnesses may have strategically opted to disclose their identities and testify openly in order to be relocated.

The problem of the use of insider witnesses appears so striking at the Special Court for Sierra Leone precisely because of the Court's limited prosecutorial mandate and its subsequent interpretation by the initial prosecutor. Although the Court was deliberately structured to hold a small number of individuals accountable, the prosecutor chose to interpret this mandate even more narrowly, indicting only thirteen individuals for a number of complex crimes that are difficult to prove. This means that a number of high-level commanders who were involved in planning and ordering operations and who were directly implicated in participating in crimes under the Statute were able to escape legal accountability. Furthermore, the prosecution's decision to pursue complex modes of liability ensured that these insiders became valuable sites of knowledge; many were absorbed into the Court process as insider witnesses.

Evolving Law and Evidence at Trial

The prosecution's dependence on insider witnesses can be largely attributed to the elaborate modes of liability that the cases required them to demonstrate. In addition to the form of liability known as command responsibility that is provided in the Court Statute, each of the prosecution's cases asserts a relatively under-theorized form of liability known as "joint criminal enterprise" (JCE), an outgrowth from the Appeals Chamber of the ICTY that remains controversial in both its authority and its application. The charge of JCE comprises three elements: first, a plurality of persons; second, the existence of a common purpose that involves committing a crime included in a court's statute, and third, the accused's participation in the common purpose, which can take the form of assistance in, contribution to, or execution of the purpose.[46] In all of its cases, the prosecution has alleged that there was a "common plan or conspiracy" between members of various factions of the conflict to gain political control or access to the resources of Sierra Leone, though the nature of what the common plan entailed is not the same between cases nor sometimes even within cases. For example, the variation posited by the prosecution in the CDF case alleged a joint criminal enterprise "to defeat by any means necessary the [RUF] to include the complete elimination of the RUF and members of the [AFRC], their supporters, sympathizers and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone."[47]

A number of questions arose at trial regarding the nature of the alleged common purposes of the enterprise and whether these purposes needed to entail crimes from the Court Statute (attempting to gain and exercise political control, for example, is not a crime under the Statute). Both Trial Chambers operating at the Special Court for Sierra Leone rejected the forms of JCE pled by the prosecution for different reasons: in the AFRC case, for not including crimes within

[46] For ICTY jurisprudence on joint criminal enterprise, see *Prosecutor v. Vasiljevic*, Judgment, Appeals Chamber, ICTY, Case No. IT-98-32-A, and *Prosecutor v. Tadic*, Appeal Chamber, ICTY, Case No. IT-94-1-A. The most contentious form of joint criminal enterprise – JCE III, or "extended" JCE – applies if the crimes can be demonstrated as a "foreseeable consequence" of the enterprise, and if it can be shown that the accused individual knowingly took the risk of participating in the enterprise with the knowledge that the crimes were a foreseeable consequence.

[47] Prosecutor v. Norman et al., Indictment, SCSL-04-14-PT, 4 February 2004, paragraph 19.

the Special Court's jurisdiction as part of the alleged common plans, and in the CDF case, on the basis that there was insufficient evidence demonstrating the existence of a common plan.[48] Had this rejection of JCE pleadings been upheld at the appellate level, the case against Charles Taylor would have been more difficult to prove because the indictment alleges that the purpose of Taylor's activities was control over the territory of Sierra Leone, which is not a crime under the Statute. Yet the Appeals Chamber ruled that the JCE common purpose did not need to be a crime under the Court's Statute as long as the means to achieve that common purpose included crimes under the Statute, and it dismissed the charge that JCE had been improperly pled in the AFRC indictment.

In addition to employing novel modes of liability, the Court also added to the growing body of international criminal jurisprudence by handing down convictions on new international crimes. The Court produced convictions on the charge of forced marriage as a crime against humanity. It explicitly criminalized the use of child soldiers in its Statute. It also produced convictions on the charge of "terrorizing the civilian population" as a war crime. The Court was empowered to prosecute crimes such as "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence" as crimes against humanity, and "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced pregnancy, and any form of indecent assault" as violations of Common Article III to the Geneva Conventions and Additional Protocol II (war crimes).[49] According to the UN Secretary General, sexual violence against women and girls was widespread throughout the conflict.[50] The prosecution brought the novel charge of forced marriage as a crime against humanity, arguing that the phenomenon of forcing a woman into being a combatant's "bush wife" should be considered a new and separate category of crime apart from the existing crime of "sexual slavery." The prosecution argued that "forced marriage" was not a predominantly sexual crime; although it may include sexual intercourse, it also included extensive domestic duties. Although the Trial Chamber judgment rejected forced marriage as a new crime and instead considered the evidence as an "outrage upon personal dignity" under the Geneva Conventions, the Appeals Chamber found that "forced conjugal associations" were of sufficient gravity to be considered crimes against humanity, and the Chamber upheld forced marriage as a new category of crime.[51]

Unlike "forced marriage," which was read into the Statute as a crime, the use of child soldiers was explicitly provided for under Article 4(c) of the Court Statute, which empowers the Court to prosecute individuals for "conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities."[52] Although the customary law status of the use of child soldiers was contested – it had been criminalized in the ICC Statute, but not preceding the Court's temporal jurisdiction – the form of "conscripting or enlisting" was clearly an expansion of existing customary international law. The Court's holdings regarding the use of child soldiers was particularly significant in the CDF case, where

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[48] AFRC Judgment, paragraphs 61-68.

[49] Statute of the Special Court for Sierra Leone, Articles 2(g) and Article 3(e).

[50] United Nations, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Document S/2000/915, 4 October 2000, para. 12.

[51] SCSL-04-16-A, Appeals Chamber Decision in Prosecutor vs. Brima, Kamara, and Kanu, 22 February 2008, para. 196.

[52] Statute of the Special Court for Sierra Leone, Article 4(c).

the Trial Chamber held that Allieu Kondewa's initiation of a child into the Kamajor society was tantamount to enlisting him in an armed force.[53] The Appeals Chamber reversed this decision on the basis of finding that the child had been previously enlisted when he was forced to carry supplies for CDF forces, and thus Kondewa's initiation practices did not constitute the moment of enlistment. The process of assessing this evidence revealed the tensions of applying the analytical framework of international criminal elements to poorly understood social and spiritual practices in Sierra Leone.

Some evidence elicited in the CDF case involved details of practices tied to the Kamajors, a Mende society located mainly in the southeastern part of Sierra Leone. Although there were other groups operating in the CDF, the Kamajors featured most prominently in the evidence heard at trial. Kamajor practices were among the most inscrutable evidentiary elements for foreign participants in the trial process, including the judges and the adversarial parties, and the Court struggled to determine their relevance and significance; namely, whether to regard them as "traditional" and "cultural" (and thus to maintain a respectful distance) or to treat them as instrumental perversions in the name of Kamajor culture intended to serve the war effort (in which case they are more readily evaluated as elements of crimes). Even Sierra Leone specialists grant that the Kamajors evolved through the process of the conflict, becoming more organized and militarized while retaining some practices from the Mende hunting society to which they are nominally tied. Anthropologist Mariane Ferme notes that the Kamajors historically "acquire protective powers against harmful attacks on their own lives through medicines and amulets," but

> these latter-day hunter-warriors were more than a grass-roots resistance movement inspired by local history. Quite to the contrary, the Sierra Leone case suggests that notwithstanding the legitimizing narratives and rituals from hunting lore circulating among fighters, they are by and large a modern guerilla force trained and armed for modern warfare.

Ferme grants that the growing militarization of the Kamajors following the 1997 coup may have contributed to shifts in the cultural practices of the CDF, though she suggests that Kamajor society before this shift was historically and culturally complex. In contrast to Ferme's account, however, the Court's first prosecutor posited a simplified narrative in the service of his case, reducing Kamajor practices to simple terms to conform to what the legal framework seemed to necessitate. In his opening statement at the start of the CDF defense case, for example, Prosecutor Crane characterized the Kamajors as follows:

> The Kamajors, it must be noted, were merely a group of ordinary local hunters before the emergence of Allieu Kondewa; simple folks of the countryside used to hunting deer, rodents, and other bush animals for domestic consumption. There were no special initiation rites, nor military objectives. [Norman, Fofana and Kondewa] schemed to take a traditional spiritual belief system and manipulated it to their own ends. Vulnerable young men, desperate for survival in a devilish

[53] Trial Chamber I found that children as young as 10 or 11 had been initiated into the Kamajor society after fees were paid to a district initiator, who sent the fees to Kondewa

war, fell easy prey to these men.[54]

Crane's reductive narrative effaces any cultural complexities of pre-CDF Kamajor society. Instead it advances an interpretation that highlights the alleged manipulation of these practices by the three CDF accused. The CDF case presented the Court with substantial interpretive challenges and questions of how evidence should be limited to the counts of the indictment, as the prosecution led evidence of cannibalism and other practices that did not appear to be material to the alleged crimes. The CDF indictment states that "Victims were often shot, hacked to death, or burnt to death. Other practices included human sacrifices and cannibalism." These practices are not crimes under the Statute, however, but rather elaborations on the method of the crimes and on what happened after they were committed. In a separate dissenting opinion dismissing all charges against the CDF defendants, the sole Sierra Leonean judge of both trial chambers, Judge Bankole Thompson, objected to the factual findings made by the majority "in respect of alleged ritual killings or cannibalism carried out by Kamajors but not specifically charged in a count or counts" and relating to "the initiation process to the extent to which they might have appeared to serve as the basis for the tribunal to pronounce on the permissibility or legality of initiation either as a cultural imperative for membership of the Kamajor society or as a prerequisite for military training for combat purposes in the context of the said society."[55] Though his dismissal of all charges against the CDF under the defense of necessity may have been oriented toward domestic political concerns, Judge Thompson points out the tension between legal reasoning and cultural analysis that plagued the Chamber during the CDF trial. As arbiters of what evidence could appear in the courtroom, the judges of Trial Chamber I adopted a principle of "flexible admissibility," permitting an extensive introduction of evidence that would be vetted in theory by the judges themselves. Yet the Chamber tacitly accepted metaphysical evidence as indicating the culpability of the accused for crimes under the indictment.

The Special Court for Sierra Leone handed down convictions for all of the accused individuals in the RUF, AFRC, and CDF cases. The majority of these convictions were upheld on appeal with a few alterations. In the RUF case, the Appeals Chamber dismissed one count against Augustine Gbao of abducting UN peacekeepers and upheld the remainder of the counts. There were some revisions to sentences for specific counts, but the total years of imprisonment were upheld. The Chamber dismissed all counts of the defendants' appeals in the AFRC case, granting the prosecution's appeal on the count of forced marriage as an "other inhumane act" and holding that joint criminal enterprise was properly pled, but the sentences remained the same. In the CDF case, the Chamber overturned convictions against Fofana and Kondewa for collective punishments and against Kondewa for recruiting child soldiers. The Chamber also entered new convictions against both for murder and inhumane acts as crimes against humanity and increased their sentences. RUF commander Issa Sesay received the longest sentence of 52 years, followed by Alexander Tamba Brima and Santigie Borbor Kanu of the AFRC, who both received 50 years. AFRC commander Brima Bazzy Kamara was sentenced to 45 years, RUF commander Morris Kallon received 40 years, and Augustine Gbao received 25 years. Allieu Kondewa and Moinina Fofana of the CDF were sentenced to 20 and 15 years respectively. The trial against Charles Taylor continues in The Hague.

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[54] The Opening Statement of David M. Crane, Special Court for Sierra Leone, 3 June 2004, p. 16.

[55] *CDF Judgment, Annex C – Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson*, 2 August 2007, para. 3.

Objectives of the Special Court: Transition and Security

If the Special Court for Sierra Leone was designed as a mechanism of transitional justice that could hold a small number of individuals accountable for crimes committed during the conflict, the Court also has taken on a number of prospective aims directed more broadly at the population of Sierra Leone. The Court was not alone in attempting to re-craft the Sierra Leonean polity: a Truth and Reconciliation Commission was also established in the country under the authority of the 1999 Lomé Agreement. The Commission began researching and taking statements in 2003, and for a time its operations occurred simultaneously with the early stages of the work of the Special Court. These two forms were somewhat in tension with one another in practice, however, as the Court refused to allow the indictees to appear before the Truth and Reconciliation Commission.[56] Despite this tension, they are often regarded as complementary transitional justice techniques, as in this "Citizen's Handbook" directed at educating the Sierra Leonean populace:

> Experience from other countries, like South Africa, indicates that it can be useful to have bodies like courts and truth commissions, which examine the past. If the past is forgotten and not confronted, it may be difficult to change things and prevent such crimes from happening again. We can move forward only if we address the conditions that caused the war. It also requires punishing those with the greatest responsibility, to show that people cannot mastermind terrible acts in our country and get away with it. We also need to understand the experiences of both victims and perpetrators, and help communities to heal. We must deal with the past so we can enjoy the future.[57]

This publication aims at creating a public morality in the present through a particular relationship to the past. The past is to be "examined" and "dealt with" so that "we" as a polity can move forward collectively – in the therapeutic discourse of the text's authors, progress requires "understanding" the positions of both perpetrators and victims, as a truth commission would aim to discern.

Unlike a truth commission, however, the Court deals primarily in the currency of international humanitarian law, a field that is oriented more toward punishing transgressors than toward discerning the truth or rehabilitating the social body. Even so, the Court is envisioned by some of its agents as inhabiting a therapeutic and transitional role in this post-conflict society. At the Court's public opening, for example, the presiding judge of the Court's first trial chamber announced that "the mission of this Court and the process we are about to embark upon today is to contribute to the peace and reconciliation process within Sierra Leone," adding that the Court was determined to achieve "the re-establishment of the rule of law which is capital for the

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[56] For instance, the Executive Summary of the Truth and Reconciliation Commission report notes that "tensions arose following the refusal of the Special Court to permit the Commission to hold public hearings with the detainees held in custody" (para. 69).

[57] Paul James Allen, Sheku B.S. Lahai and Jamie O'Connell, *Sierra Leone's Truth and Reconciliation and Special Court: A Citizen's Handbook* (Freetown, 2003), 48, quoted in Gberie, *A Dirty War in West Africa*: 207.

survival and development of all contemporary societies."[58]

This language of rehabilitation – of crafting a law-abiding citizenry conforming to the standards of a discursively constructed international community – reveals a broader reform project at work in the court, a project that exceeds the work of a retrospective institution. For the court's first prosecutor this work assumed a near-spiritual dimension, as the legal process will presumably transform the people of Sierra Leone from victims of anarchic violence to empowered subjects. At the Court's opening, for example, the first prosecutor described the work of the Special Court in *pathos*-driven transitional terms: "A people have stood firm, shoulder to shoulder, staring down the beast of impunity. The jackals of death, destruction and inhumanity are caged behind bars of hope and reconciliation. The light of this new day, today, and the many tomorrows ahead are the beginning of the end to the life of that beast of impunity which howls in frustration and shrinks from the bright and shiny specter of the law." [59] Crane's formulation implies that the metaphorical "beast of impunity" has been instantiated in the bodies of the accused individuals before him, and that the transition to a "new day" requires caging these "jackals" before him. But at what ethical and material cost does this transition take place?

Critics of transitional justice mechanisms have noted the risk of effacing the difference between victims and beneficiaries of past violence by isolating a few perpetrators and recasting the remainder – both victims and beneficiaries – as a unified social whole.[60] In the work of the Special Court, the problem of the beneficiary is most starkly presented by the figure of the insider witness, who receives material benefits from his participation in the trial process. According to Crane, securing convictions of the handful of individuals actually indicted required what he termed "dancing with the devil": employing high-ranking insider witnesses to testify regarding the command responsibility of the accused. Although there may have been a fine line between indictee and insider witness, as the case of Issa Sesay shows, the Court entrenches these identities through its work: it isolates representatives from combatant groups and assigns them the category of "those bearing the greatest responsibility," and in its efforts to secure their convictions, it transforms perpetrators into insider witnesses who continue to benefit from their roles in the conflict. Some of these individuals had been incarcerated for years in the Sierra Leonean prison system – accused of treason without being brought to trial – before they were released into the care of the Special Court. Many of their fellow combatants remained in prison much longer until foreign lawyers took up their cause and brought writs of *habeas corpus* on their behalf. The injustice of individuals profiting off the atrocities they committed and witnessed is implicitly recognized by Court proponents (and explicitly, in the case of the Court's first prosecutor) as a necessary condition for catching the few individuals that the Court will ultimately convict, effectively permitting impunity in the interests of a greater social whole that will be produced through the trial process. This form of transitional justice manifested through the prosecutor's interpretation of the Court mandate explicitly accepts that it must absorb a number of perpetrators back into the Sierra Leonean polity. Read from a legal perspective, which emphasizes the need to demonstrate the elements of the alleged crimes, this appears as

[58] Judge Benjamin Mutanga Itoe, *The Prosecutor of the Special Court vs. Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa*, 3 June 2004 Transcript of Proceedings, p. 3-4.
[59] *The Prosecutor of the Special Court vs. Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa,* 3 June 2004 Transcript of Proceedings, p. 6, lines 28-32.
[60] Robert Meister, "Human Rights and the Politics of Victimhood," *Ethics and International Affairs* 16 (2) (2002).

simply the cost of doing business. From the perspective of the affected population, however, it is difficult to fathom why some high-level combatants effectively profited off their roles in the conflict. This suggests that the trial process itself – extensive public relations material to the contrary notwithstanding – is directed outward to a donor community that regards international criminal justice as an investment in global security rather than toward an internal population that is attempting to recover from a decade of conflict.

The internal transition in Sierra Leone is simultaneously addressed toward an international audience of addressees - donor states who invest resources in the work of the Court. The Court is funded entirely through donations, primarily by UN member states. As mentioned above, the United States has been the Court's strongest financial supporter, followed by the United Kingdom and the Netherlands. The Court's neoliberal-sounding "Management Committee," comprised of representatives of donor states, was mandated to advise the Court on non-judicial matters. Significantly, the composition of the committee underwent a shift from previous Management Committees at the *ad hoc* tribunals, which were composed of the tribunal President, Vice-President, one of the judges, the Registrar, the Deputy Registrar and the Chief of Administration. Rather than using internal actors, as was the case at the ICTY and ICTR, the Special Court Management Committee includes representatives from donor states. The Committee includes two African state members: Sierra Leone itself as well as Nigeria, the West African regional power and a contributor to the budget. The remaining four members of the committee are all Western democracies: Canada, the Netherlands, the United Kingdom and the United States.

Securing international support for the Court hinged on political shifts and the degree of attention that the conflict received as a policy concern of wealthy states from the global North. The Court is not simply an external imposition; there has also been a strategic appropriation of "peace and security" discourse by the Sierra Leonean state and civil society as a way of appealing for material and political assistance from the international community, which has waxed and waned in response to the domestic priorities of the states that voluntarily back the Court. Commentary on the conflict noted a dearth of international interest in addressing the atrocities in Sierra Leone before the RUF's hostage-taking action in the spring of 2000, though images of brutalities such as amputations and mass killings had been circulating in the Western media throughout the 1990s. Some scholars have attributed previous international apathy in part to American journalist Robert Kaplan's widely circulated 1994 article in *The Atlantic Monthly* entitled "The Coming Anarchy," which portrayed African conflicts as essentially tribal in character, compounded by failed states and environmental degradation.[61] Following the 1999 Lomé agreement, a journalist noted that "instead of convening a war crimes tribunal for the leaders of this brutal campaign, the United States is backing a peace accord that would put eight of them in the cabinet of the democratically elected government."[62] U.S. policy at the time emphasized negotiation and power-sharing arrangements between former enemy factions rather than judicial accountability. After the UN troop abduction, Susan Rice, then Assistant Secretary

[61] Richards devotes much of his *Fighting for the Rain Forest* to refuting this "new barbarism" thesis. He also notes that Kaplan's article was "faxed to every American embassy in Africa, and has undoubtedly influenced U.S. policy" (xv). The Sierra Leone Truth and Reconciliation Commission also highlighted the significance of Kaplan's article in their Executive Summary.

[62] Steven Mufson, "U.S. Backs Amnesty in Sierra Leone," *The Washington Post*, October 8, 1999, A 13.

of State for African Affairs (and now U.S. Ambassador to the UN) argued before a Senate panel that "only when the rule of law is extended to all of Sierra Leone's territory and those most responsible for the horrendous atrocities are held fully accountable before a court of law will the population experience the freedom and the confidence necessary to rebuild their war-ravaged country."[63] 'Rule of law' and 'accountability' discourse replaced pragmatism and political compromise. This push toward judicial intervention in Sierra Leone eventually succeeded, fostered in part by increasing allegations that Liberian president Charles Taylor was involved in destabilizing the region. Paul Richards describes a "change of mood in the last days of the Clinton administration from tolerance of Charles Taylor, the Liberian president, and former Libyan-backed rebel ally of the RUF, to outright hostility," adding "This change of perspective in the Clinton camp helped unite the international community against Taylor".[64]

As the discourse of judicial intervention reveals, there has been a growing interest in promoting security and governance through liberal institutional forms. Mark Findlay argues that we have entered a period in which risk and security structure concerns with international justice.[65] As mentioned, the United States is a major investor in the Court's work. Speaking before the Court's establishment, Susan Rice noted that the U.S. had "many important interests in achieving peace in Sierra Leone. Continued instability in Sierra Leone will have long-term effects on political and economic development throughout the sub-region."[66] Legal accountability is figured as a tactic deployed to generate the conditions of possibility for economic health and development.

As global security concerns were foregrounded following the events of September 11, 2001, possible links between the economic dimensions of the conflict and terrorist activity in the region provided states with another motivation for supporting the work of the Court. As chapter five explains in greater detail, the Chief of Investigations and the first Prosecutor appointed by the Court had prior experience in U.S. intelligence organizations, and some critics wondered whether the Office of the Prosecutor may have been using the platform afforded by the Special Court to pursue regional *Qaeda* links for the CIA.[67] In the midst of Taylor's trial in The Hague, the then-current Prosecutor argued a relationship between the crimes the Court was set up to address and the global problem of terrorism. Prosecutor Rapp described terrorism broadly as "intentional attacks on the innocent to accomplish a military or political objective," which he

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[63] Senate Committee on Foreign Relations, *United States Policy in Sierra Leone: Hearing and public meeting before the Subcommittee on African Affairs of the Committee on Foreign Relations*, 106th Cong., 2d sess., 2000, 4.
[64] Paul Richards, "War and Peace in Sierra Leone," *Fletcher Forum of World Affairs* 25(2) (2001), p. 47.
[65] Mark Findlay, *Governing through Globalized Crime*. On the networked character of global governance, combining international governmental organizations, non-governmental organizations, states, and private companies to accomplish regulatory tasks, see Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (London: Zed Books, 2001).
[66] Senate Committee on Foreign Relations, "United States Policy in Sierra Leone: Hearing and public meeting before the Subcommittee on African Affairs of the Committee on Foreign Relations," 106th Cong., 2d sess., 4. This policy objective is reiterated some years later: "The primary U.S. interest in Sierra Leone is the consolidation of peace, stability and security in the country, and by extension, across West Africa." United States Agency of International Development (USAID) *Sierra Leone Strategy Statement FY 2006-2008*, 1.
[67] There was a supposedly 'confidential' report from the SCSL Office of the Prosecutor posted on journalist Douglas Farah's website detailing links between *Qaeda* operatives and Charles Taylor. See http://www.douglasfarah.com/materials.shtml.

claimed constituted a continuous purpose linking the ethnic cleansing in Yugoslavia to al-Qaeda actions to the events of the conflict in Sierra Leone:

> the indictments at the Special Court have included charges for the war crime of "acts of terrorism." At a time when world leaders speak of a "war on terror," this is a historic development. In the past, many infamous crimes have constituted acts of terrorism. In the former Yugoslavia, ethnic cleansing – attacks on members of an ethnic or religious group to cause them to leave their town, abandon their property, or surrender their land to members of another group – was accomplished through a campaign of terror involving the murder and rape of a relative few as a means of driving out the many. There has also been the kind of terrorism practiced by al-Qaeda – the mass killings of civilians intended to force America and its allies to withdraw their presence from Muslim lands, particularly Saudi Arabia, the site of their holy places. Finally, there has been the kind of terrorism practiced by some liberation movements – the launching of widespread attacks on civilian targets in order to bring forth an oppressive overreaction by government authorities in the hope of building support for the insurrection. In each of its forms, terrorism involves intentional attacks on the innocent to accomplish a military or political objective. It was the hallmark of the conflict in Sierra Leone, it was the cause of unimaginable suffering, and its prohibition in international law has been given force by the Special Court.[68]

There is no internationally agreed legal definition of terrorism to date – negotiations on a comprehensive terrorism convention at the UN have been ongoing since 2000 – though it has appeared in treaty language and in some tribunal proceedings. Terrorism was invoked at Nuremberg in the Prosecution's opening statement, for example, where it was regarded as a technique for securing the German people's compliance with the aims of the Nazi party, as well as at the ICTY, which handed down a conviction for acts of violence that carried the purpose of spreading terror among the civilian population.[69] The "acts of terrorism" charge noted by Prosecutor Rapp falls under violations of Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II, and under this authority the Special Court produced the first conviction for acts of terror in a civil war.[70] How the charges in the Sierra Leonean context relate to other forms of terrorism remains unclear, however, despite Rapp's assertion of continuity between ethnic cleansing in Yugoslavia, al-Qaeda attacks on U.S. citizens, and civilian casualties arising from liberation movements. Rapp's claim regarding the links between these different forms of crime elides their different social and political contexts, creating an overarching legal category with significant contemporary purchase, as he notes himself by invoking the contextual importance of the "war on terror." Although Rapp does not elaborate on the connection between the "war on terror" and the work of the Special Court, the fact that he invokes the former in a discussion of the latter suggests that they are connected, though the

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[68] Stephen Rapp, "The Compact Model in International Criminal Justice: The Special Court for Sierra Leone," in *Drake Law Review* 57 (2008): 15.

[69] *Prosecutor v. Stanislav Galic*, IT-98-29-T, Judgment of 5 December 2003. The judgment did not find that the crime of terror has a foundation in international law, but that the crime was based in a 1992 agreement between the parties to the conflict.

[70] Rapp, 31.

nature of this connection remains unclear. Is the Court to be regarded as another front of the "war on terror"? As the largest donor to Special Court operations, the United States appears to be investing in post-conflict justice in Sierra Leone as part of a broader investment in regional security. How might this reorient the character of post-conflict transitional justice? Is the purpose of transition a move from a violent past to a peaceful future, or is it rather a move from an insecure investment climate to a secure partner in trade and development? The final chapter of my dissertation returns to the prospective objectives of the Court in greater detail, where I consider how the Special Court for Sierra Leone is regarded as a form of juridical "investment" and its implications for how we have come to view transitional justice.

Conclusion

As with all institutional mechanisms of transitional justice, the work of the Special Court for Sierra Leone looks back in order to look forward: it reflects on past criminal acts in the professed interest of securing a peaceful future. The Court's mandate to bring "those bearing the greatest responsibility" for the atrocities of the Sierra Leonean conflict is by no means exhausted by the prosecutor's decisions about whom to indict. The role of insider witnesses serves as a reminder of the subjective, interpretive limits to "bringing justice" to the people of Sierra Leone through this constrained legal form. For example, a recent report assessing perceptions of the Special Court's legacy noted that

> people see those they consider to also be responsible, many of whom for the crimes against themselves, still living in their communities, or appearing as witnesses at the Court and the perception that they were given financial remuneration and otherwise 'looked after' by the Court abounded. The concept of insider witnesses was an anomaly for many interviewees (across the regions) and one that perhaps has not been fully explained, or that simply does not translate into many Sierra Leoneans' perception of justice.[71]

Accountability at the Court is limited to the select few who are meant to represent or stand for something much larger – perhaps even for the criminality of the conflict itself. Holding these few figures responsible is considered important enough to justify the use of insider witnesses who arguably breached international criminal law themselves and who may have been indicted under a different interpretation of the Court's mandate. Accountability for the crimes of the Sierra Leonean conflict appears less important at the Special Court for Sierra Leone than the prospective work of transition. I argue that the form of justice modeled through the Court has more to do with teaching the 'rule of law,' a phrase with a vague and shifting referent, than it has to do with judging the accused individuals brought before the Court.

The audience of this extended institutional lesson on the 'rule of law' is at least double. On the one hand the Court addresses itself to the people of Sierra Leone: the Court was deliberately located in-country, it has an outreach office designed to inform Sierra Leoneans about its work through publications that translate technical legal terms into local languages, and it concerns itself with what it calls 'capacity building' in the national courts and in Sierra

[71] Rachel Kerr and Jessica Lincoln, "The Special Court for Sierra Leone: Outreach, Legacy and Impact," published through the War Crimes Research Group at King's College London (February 2008).

Leonean civil society groups. On the other hand, the Court appears to tailor even these domestic objectives outward to its second audience, the international donor community, which seeks signs that its 'investment' in post-conflict justice is yielding positive returns.

From a realist perspective it seems unsurprising that the Court would serve the concerns of its donors, whether these concerns are part of a broader desire to promote security and combat terrorism or whether they signal states' interests in democratization and development in sub-Saharan Africa. All of these objectives are notably prospective, future-oriented tasks – punishing war criminals is little more than the occasion for a larger project of reform that also serves the foreign policy objectives of the Court's donor states. In the view of legal cosmopolitans, or "utopians" in Koskenniemi's terms, the Court forms part of a growing transnational interest in challenging impunity and expanding the field of international criminal law. According to this view, the Special Court is another instantiation of a broader imperative to 'globalize' justice – one further move in a series of related and building developments.

Bracketing these two views and their normative investments, this dissertation considers the way in which this unprecedented legal form understands and claims its jurisdiction. The Court's 'hybrid' legal structure distinguishes it from the international criminal tribunals that preceded it, and as the next chapter shows, the Court's establishment through a treaty between the government of Sierra Leone and the United Nations presents unique challenges to its legal authority. The Special Court for Sierra Leone's voluntary funding structure served as the basis of a challenge to its jurisdiction on the grounds that this patron-client relationship between contributing states and the Court might compromise its judicial independence. The appellate chamber's response to this challenge also asserts the moral authority of the Court and its donors:

> Undoubtedly, states which have contributed to the funds of the Court must have done so because they believe in due process of law and the rule of law. It is far-fetched, preposterous, and, almost, bad taste to suggest that donor states, which in their national practice promote and respect human rights and the rule of law and promote such values internationally, would be committed to funding and sustaining a court in the expectation that it will operate contrary to those same values.[72]

The appeals chamber appears to miss the irony of its claim about respecting "due process of law and the rule of law" given that the Court's main donor, the United States, was actively flouting human rights protections and international humanitarian law in its own 'war on terror' when this opinion was issued. Yet the truth of donor states' virtuous intentions is not substantively at stake here. The need to establish the truth of what happened during the Sierra Leonean conflict is also not a primary concern of the Court. Even the call to bring all of those who truly bear the greatest responsibility to justice is less important than the Court's *transitional* imperative. The Special Court for Sierra Leone, like many transitional justice mechanisms, is primarily about projecting aspirational futures – it is concerned with rhetorical productions of legitimacy and 'the rule of law' even as the Court's authority is perpetually contested and the 'rule of law' remains an inscrutable social good.

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[72] *Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence),* Prosecutor v. Sam Hinga Norman, SCSL-2004-14-AR72(E), 13 March 2004, para. 41.

Chapter 2
Court Foundations and Jurisdiction

> [L]aw is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable. -Jacques Derrida, "The Force of Law"[73]

> The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success. -H.L.A. Hart, *The Concept of Law*[74]

The previous chapter described the establishment of the Special Court for Sierra Leone and introduced some of the issues arising from its work as an institution of transitional justice. This chapter considers how the Court attempts to secure its authority in the international legal order by relating its jurisdictional assertions to those of previous tribunals. Before the Court's founding in 2002, no international criminal tribunal had been established by a treaty between a sovereign state and the United Nations. The Special Court for Sierra Leone was thus an unprecedented legal form, and it confronted jurisdictional challenges as it attempted to assert its right to speak international law from within the territory of Sierra Leone. By calling itself 'hybrid,' as I discuss further in chapter three, the Court attempted to distinguish itself from previous tribunals. Yet it also built upon the authority of precedent by claiming a place within a lineage of post-conflict institutional responses to violations of international law. The Court's self-representation as a legal form thus harbors a tension between novelty and continuity: on the one hand it claims it is an unprecedented institution, and on the other it claims it is continuing a project of post-conflict justice that began at Nuremberg in the middle of the twentieth century.

This chapter considers how the Special Court for Sierra Leone attempts to claim its authority by both building upon and diverging from the jurisdictional claims made by previous tribunals. Here I argue two things: first, challenges to tribunal jurisdictions reveal the political dimensions of their origins. Although the language of jurisdiction generally recasts political problems of power and legitimacy as matters of place and right within an already established legal framework, challenges to a tribunal's jurisdiction readdress the political origins of post-conflict tribunals. If law is always an authorized force, as this chapter's first epigraph suggests, it only appears to be authorized when viewed from within; meanwhile, jurisdictional challenges contest a tribunal's legitimacy by raising matters of power and authority that legal frameworks attempt to conceal or exclude. Second, I argue that tribunals have become increasingly sophisticated in their responses to these challenges. Because they are *sui generis* institutions, tribunals such as the Special Court for Sierra Leone are uniquely empowered to consider their own jurisdiction. They alone can determine whether they have the right to assess the basis of their legal authority, or put differently, whether they have the competence to declare their own competence. It is thus unsurprising that tribunals consistently rule to uphold their own

[73] Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" *Cardozo Law Review* 11 (1990): 925.
[74] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997), 153.

jurisdiction when they consider jurisdictional challenges.

This chapter examines the Special Court's response to challenges to its authority in relation to jurisdictional challenges in preceding tribunals. Legal scholars have claimed that jurisdictional assertions reveal definitions of community, sovereignty, and legitimacy.[75] Building upon these insights, this chapter shows how jurisdictional assertions offer a view into the political dimensions of a legal body. Tribunal responses to jurisdictional challenges thus form part of a legitimating narrative about their authority in the international legal sphere.

Court Foundations and Jurisdictional Challenges

How does the Special Court for Sierra Leone relate to the tribunals that preceded it? Transitional justice scholarship tends to periodize post-war international courts in three phases: the post-war Nuremberg and Tokyo tribunals, the "second wave" UN-backed courts in the former Yugoslavia and Rwanda, and the more nebulous third period of courts that are variously characterized as "mixed," "hybrid," or perhaps most confusingly, as "internationalized" courts.[76] In the common scholarly narrative, the dormant period between the post-World War II tribunals and the second generation of courts is generally explained with reference to the Cold War.[77] International criminal justice projects were largely abandoned during the Cold War period and then taken up again in the wake of the conflicts in Rwanda and the former Yugoslavia in the last decade of the twentieth century, in what former ICTY judge and current president of the Special Tribunal for Lebanon Antonio Cassese characterizes as "a new ethos in the world community and a strong request for international criminal justice."[78]

Scholarship on the relationship between these courts is often unclear about whether they can be treated as the same type of legal creature. On the one hand, there is a strong impulse to generate a progressive historical account linking the work of the "first generation" postwar courts to the projects of subsequent tribunals. On the other hand, this "new ethos" championed by Cassese is to be distinguished from the "victor's justice" of the post-World War II trials: these new courts *are* considered different insofar as they seriously entertain the human rights and fair trial developments from the second half of the twentieth century. Writing nearly twenty years after Nuremberg and well before the second-generation tribunals for Rwanda and the former Yugoslavia, Judith Shklar remarked:

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[75] Paul Schiff Berman, "The Globalization of Jurisdiction," *University of Pennsylvania Law Review* 151 (2002). See also Richard Ford, "Law's Territory (A History of Jurisdiction)" in *The Legal Geographies Reader: law, power and space* (2001).

[76] See Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003) for an account of these shifts, and William Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) for an alternate account that places Sierra Leone with the UN *ad hoc* tribunals as "international criminal tribunals."

[77] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000); Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2002); Geoffrey Robertson, *Crimes Against Humanity: the Struggle for Global Justice* (New York: The New Press, 1999). Antonio Cassese argues that "the demand for international justice blew up, as it were, in the 1990s": see *International Law* (Oxford: Oxford University Press, 2005), 453.

[78] Cassese, 454.

> If the [Nuremberg] Trial had been part of an established legal order, it might have been a legal precedent, for better or worse. Since it was nothing of the sort, both the hopes and fears for the distant future of international law were groundless. The Trial was not, and could not be, a precedent, except by way of vague analogy, for the future.[79]

Shklar points out what continues to be true: each tribunal is, strictly speaking, without precedent. Each emerges *sui generis*, yet each attempts to ground itself within a pre-existing international legal field. Previous decisions in other tribunals provide guidelines for matters of legal interpretation and evidence, but these legal decisions are not binding upon other tribunals as true precedent would be. Each tribunal is its own more or less self-contained entity governed by its own constitutive documents and procedures. What they hold in common is a shared body of law that their statutes draw from, though in different configurations and under different historical circumstances. This means they cannot rely upon the developments in previous tribunals to guarantee their own legitimacy, but as this chapter shows, these tribunals draw upon each other as rhetorical gestures of kinship and shared purpose by forming a historically progressive account of the rise of internationalized criminal courts. More problematically, tribunals may also use the fact that an issue was previously decided in the forum of another tribunal, even if this decision was unreasoned or disanalogous, to reinforce their authority.

After the Special Court for Sierra Leone was established and before its first trials began, the court's authority was contested through a number of jurisdictional challenges brought by defense teams for indicted individuals. Several of these challenges focused on the legitimacy of the tribunal, including whether it violated the Sierra Leonean constitution, whether the United Nations had exceeded its powers in establishing the court, and whether the government of Sierra Leone had violated provisions of a prior agreement granting amnesty to combatants by helping to establish a court that would later try them.[80] One motion contended that the structure of the Court, which relied upon voluntary financial contributions from state parties, could ultimately compromise the independence of the Court's judges.[81] Other motions challenged the law of the court, including the novel charge of conscripting child soldiers, the characterization of the conflict as national or international and its implications for applicable law, and the use of command responsibility as a mode of liability in internal conflicts.[82] Defense counsel for the

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[79] Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964), 160.

[80] *Prosecutor v. Kallon, Norman, Kamara, Decision on Constitutionality and Lack of Jurisdiction* Case No. SCSL-2004-15-AR72(E), Case No. SCSL-2004-14-AR72(E), Case No. SCSL-2004-16-AR72(E), 13 March 2004; *Prosecutor v. Fofana, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the United Nations* Case No. SCSL-2004-14-AR72(E), 25 May 2004; *Prosecutor v. Kallon, Kamara, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* Case No. SCSL-2004-15-AR72(E), Case No. SCSL-2004-16-AR72(E), 13 March 2004.

[81] *Prosecutor v. Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)* Case No. SCSL-2004-14-AR72(E), 16 March 2004.

[82] *Prosecutor v. Norman (Fofana intervening), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)* Case No. SCSL-2004-14-AR72(E), 31 May 2004; *Prosecutor v. Fofana, Decision on Preliminary Motion Based on Lack of Jurisdiction Materiae: Nature of the Armed Conflict* Case No. SCSL-2004-14-AR72(E), 25 May 2004; *Prosecutor v. Norman, Decision on the Defence Preliminary Motion on Lack of Jurisdiction: Command Responsibility* Case No. SCSL-2003-08-PT, 15 October 2003. Unlike the other motions, this was decided before the Trial Chamber on the grounds that it was not in fact an objection to the jurisdiction of the court.

former president of Liberia, Charles Taylor, claimed that Taylor was immune from jurisdiction because he had been acting as head of state at the time of his indictment, which I address further in chapter four.[83] The Appellate Chamber dismissed these challenges to the court's jurisdiction unanimously in all but one ruling.

It seems unsurprising that a court would rule to uphold its own jurisdiction in these instances rather than to decide that it did not have standing to adjudicate a case before it. The Appellate Chamber's rulings appear as an act of power that takes place in language. The Court's act of justifying and making law relies upon a pre-existing framework in which the act appears to be legally sanctioned. This self-legitimation is enabled by the very law of the tribunal, which provides for rulings on jurisdictional challenges in the pre-trial stage of the proceedings. The court is granted the authority to affirm its own jurisdiction through legal means by its own constitutive instruments. This marks a certain triumph of legalism: creating a structure in which an act of extrajuridical power is made to appear fully lawful.

How have we arrived at the present state, where a temporary internationalized court sanctions challenges to its authority on multiple fronts, yet predictably affirms its own right to declare law? How has this dynamic of contestation and assertion come to be institutionalized in the work of international criminal justice, and what legitimating role does it serve? The post-war tribunal at Nuremberg did not provide a means for challenging its jurisdiction. Its failure to permit such challenges supported the claims of "victor's justice" that have been leveled against the Nuremberg tribunal, which architects of subsequent tribunals have sought to avoid in part by instituting means for challenging their jurisdiction in their own governing instruments. The language of "international fair trial standards" now circulates in civil society discourse and within these courts themselves, and jurisdictional challenges in internationalized criminal courts are taken to be a matter of right - the right of the indicted individual to contest the right of the court to call subjects before it. In the contemporary framework of liberal legalism, fair trial rights are regarded as a subset of human rights, and legal institutions incur losses to their perceived legitimacy by failing to uphold them. In this way, jurisdictional challenges provide part of the legitimating discourse of these temporary courts while simultaneously consolidating their power.

The following sections turn to the way in which earlier tribunals have dealt with challenges to their authority and legitimacy in order to contextualize the jurisdictional challenges that took place at the Special Court for Sierra Leone. Jurisdictional challenges are governed by the constitutive documents of these tribunals, as well as by the body of rules and procedures that are intended to govern their proceedings. The Special Court for Sierra Leone largely models its rules and procedures after those used in the *ad hoc* tribunal for Rwanda, which permitted challenges to the jurisdiction of the court together with the tribunal for the former Yugoslavia. In each instance the outcome is substantially the same: all accused individuals are ultimately brought before the courts that have indicted them. The differences lie in how each court addresses the rhetorical project of its self-legitimation: that is, whether it is willing to confront challenges to its authority and to attempt to guarantee its own authoritative status through examining the political phenomenon of its own foundation. These courts take their own legitimacy for granted, either by shutting down attempts to question it, by rationalizing it as a

[83] *Prosecutor v. Taylor, Decision on Immunity from Jurisdiction,* Case No. SCSL-2003-01-I, 31 May 2004.

natural outgrowth from the founding, or by claiming that the question of whether or not it has jurisdiction is in fact *outside* the court's own jurisdiction. The following sections thus offer a series of readings of these moments, which, when taken together, form a kind of genealogy of jurisdictional challenges in temporary internationalized criminal courts. What I hope to show is their growing sophistication in naturalizing their own power, which they attempt through constructing increasingly elaborate legal frameworks.

Nuremberg

Although it was not the first instance of a court set up to adjudicate crimes of war, and although its status as an international court is disputed, the temporary International Military Tribunal at Nuremberg (1945-1946) is widely regarded by scholars in the fields of transitional justice and international law as a "paradigm shift" for the project of international justice.[84] Despite Shklar's claim that Nuremberg cannot be taken as precedent for future tribunals, it continues to be invoked as their authoritative precursor. In the legal register, Nuremberg is most often credited with inaugurating the legal category of crimes against humanity as well as the principle of individual responsibility for crimes that might have otherwise been characterized as acts of state. It is also presented as an ideal of post-conflict legal accountability: for instance, Samantha Power writes, "If the memory of Nuremberg helped sweeten allied and UN officials on the idea of a court in 1992 and 1993, Nuremberg would also provide the foundation for the Hague court's jurisprudence."[85] It is also regarded as marking a high point of interest in notions of post-conflict legal accountability, as when Gary Jonathan Bass laments, "[u]nlike today's tribunals in The Hague and Arusha, there was no lack of interest from the great powers at the end of World War II."[86] Following an extended reflection on impunity in the latter part of the twentieth century, legal scholar and former Special Court for Sierra Leone Appellate Justice Geoffrey Robertson writes: "This was all the doing of international diplomacy, which until the Bosnian crisis simply pretended that Nuremberg had never happened."[87] Many of these scholars working in the areas of transitional justice and international criminal law presume that Nuremberg, though flawed, marked the inauguration of a new era of international justice and an exemplary demonstration of the political will to combat impunity. In this way Nuremberg has become as much a regulative ideal of post-conflict justice as it is regarded as "victor's justice."

Much has been written on the arguments surrounding what to do with Nazi war criminals and collaborators following the end of World War II, as well as on the contentious origins and subsequent process of the Nuremberg tribunal (IMT). However, very little scholarly attention has been given to the fact that the court did not provide a forum for contesting its jurisdiction, which may well be subsumed within the broader critique of "victor's justice." In circling back to Nuremberg, my intention is not to assess its institutional status or to evaluate its worth as

[84] See for instance Ruti Teitel's account in "Transitional Jurisprudence: the Role of Law in Political Transformation," *Yale Law Journal* 106 (1997), and again in "Transitional Justice: Postwar Legacies," *Cardozo Law Review* 27:4 (2006).
[85] Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2002), 484.
[86] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 204.
[87] Geoffrey Robertson, *Crimes Against Humanity: the Struggle for Global Justice* (New York: The New Press, 1999), 205.

precedent for future tribunals such as the Special Court for Sierra Leone, but rather to show how it reflects upon its own founding and forecloses efforts to contest its authority. The force required for legitimating an unprecedented legal institution appears most starkly in these moments.

The Nuremberg tribunal emerged from out of a series of agreements between the victorious allied powers following the end of World War II. The 1943 Moscow Declaration provided that individuals who had committed atrocities in particular locations should be sent back and tried where the acts took place; it also stated that those who had committed geographically broader atrocities would be punished by joint decision of the government of the victorious Allies. The 1945 London Agreement establishing the IMT invokes the authority of the Moscow Declaration to assert its jurisdiction over this second group. The International Tribunal at Nuremberg was created from out of this agreement, a treaty between the four allied powers that declared their "supreme authority" in Germany.[88] The tribunal was established through the allies acting in concert as the sovereign authority within the defeated Nazi state. Retrospectively reflecting on its origin, the tribunal's final judgment determines that the Nuremberg Charter – its constitutive document – had been produced through "the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered."[89] In the process of surrendering, the German state had transferred its sovereignty to the victorious powers, including its capacity to legislate. The Nuremberg judgment further asserts that the "undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."[90] This conception of the "civilized world" as an agent that is capable of bestowing recognition, and in particular in recognizing the legitimacy of Nuremberg's founding, seems to prefigure the "international community" that is later invoked by the so-called second and third generation courts as the moral guarantors of their work. Nuremberg was inaugurated shortly before the signing of the UN Charter, before the will of the "international community" could be consolidated in the resolutions of a single body.

Like the Special Court for Sierra Leone, the Nuremberg tribunal was established through a treaty. Yet unlike Sierra Leone's founding agreement, which joins the signatory power of the sovereign state of Sierra Leone with the United Nations, Nuremberg's treaty structure was created through the allies legislating as the sovereign authority from *within* the defeated German state. For this reason, international law scholars have pointed out that it could be construed as an internal exercise of power rather than as an international treaty.[91] The court itself invokes the force of law enjoyed by the four states that signed it into being:

> The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be

[88] In the declaration referred to as the Potsdam agreement, the four governments declared that they "hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority." Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers, June 5, 1945.
[89] *International Military Tribunal Judgment*, p. 216.
[90] *Ibid.*
[91] Chittharanjan Amerasinghe, *Jurisdiction of International Tribunals* (The Hague: Kluwer Law International, 2003), 92.

> doubted that any nation has the right thus to set up special courts to administer law.[92]

This passage is remarkable both for its linguistic force and for its retreat into the familiar authority of the nation-state and its structure of state sovereignty. Here the signatory powers are invoked as the underlying political source of the tribunal's law and institutional framework, but their power is then compared to the power of a unified sovereign acting within its domestic territory. Indeed, their right to legislate the tribunal into existence was grounded in Germany's unconditional surrender, and thus the power was technically a replication of internal sovereignty; that is, the right of a sovereign state to maintain public order within its own borders.[93] Even so, the tribunal invokes a kind of supplemental grant of authority, the recognition of the "civilized world" in whose name it presumably speaks when it pronounces law.

The Nuremberg Charter explicitly prohibited legal challenges to the tribunal's jurisdiction in an article that declared "Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel."[94] This article circumscribes what the defense can plead. It was interpreted even more broadly to cover speech acts by defense counsel that attempted to work around the prohibition by bringing in other parties who were not explicitly prohibited from challenging the court's jurisdiction. Shortly before the opening of the Nuremberg trial, all counsel for the defendants brought a joint motion that the tribunal interpreted as a jurisdictional challenge violating the Charter. The defense requested an authority on international law to issue an opinion on the legality of the trial according to the tribunal's own charter. Among other things, its motion contended that "Crimes against Peace" – the basis for the first three indictment counts – violated the principle of legality:

> The present Trial, can, therefore, as far as Crimes against Peace shall be avenged, not invoke existing international law, it is rather a proceeding pursuant to a new penal law, a penal law enacted only after the crime. This is repugnant to a principle of jurisprudence sacred to the civilized world…only he can be punished who offended against a law in existence at the time of the commission of the act and imposing a penalty.[95]

On the second day of the trial the Chamber dispensed with the concerns of the defense in a remarkable ruling. Its speech act operated as a blanket dismissal of this defense effort to challenge the tribunal's authority:

> THE PRESIDENT: A motion has been filed with the Tribunal and the Tribunal has given it consideration, and insofar as it may be a plea to the jurisdiction of the Tribunal, it conflicts with Article 3 of the Charter and will not be entertained. Insofar as it may contain other arguments which may be open to the defendants, they may be heard at a later stage.
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> DR. DIX: May I speak to Your Lordship for just a moment?

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[92] *International Military Tribunal Judgment*, p. 48.
[93] Hans Leonhardt, "The Nuremberg Trial: A Legal Analysis," 11 *The Review of Politics* (1949): 450.
[94] Nuremberg Charter, Article 3.
[95] *Motion Adopted by All Defense Counsel*, 19 November 1945, International Military Tribunal at Nuremberg.

> THE PRESIDENT: You may not speak to me in support of the motion with which I have just dealt on behalf of the Tribunal. I have told you that so far as that motion is a plea to the jurisdiction of the Tribunal, it conflicts with Article 3 of the Charter and will not be entertained.[96]

The defense request was not formally in violation of the Charter, as it had specifically asked for an outside party to review the jurisdiction of the tribunal, yet this request was conflated with a defense challenge to its jurisdiction. The Chamber thus presents an impossible situation: the only forum where the law of the tribunal could be critiqued with any effect is in the tribunal itself, and the only speaking subjects within that forum are the prosecution, the defense, and members of the tribunal. If the prosecution and the defense are prevented from challenging the tribunal's jurisdiction, and if this prohibition is extended to any request by the defense for an external opinion, there is no possible standpoint from which to advance a critique of the tribunal's jurisdiction. Through this display of linguistic power authorized by its own Charter, and sanctioned in turn by the legislative power of the Allies, the tribunal successfully foreclosed efforts to contest its authority. The IMT's ruling against jurisdictional challenges appears as an act of power that takes place in language.

International Military Tribunal for the Far East

The Nuremberg tribunal was founded through the consent of four sovereign states captured in the form of a treaty; in contrast, the International Military Tribunal for the Far East (1946-1948, known as the "Tokyo tribunal") was inaugurated through an executive order of General Douglas MacArthur, commander of the allied powers in Japan.[97] Unlike the IMT, the Tokyo tribunal does not refer to any prior agreement or founding authority. The Tokyo tribunal Charter itself acts as a performative, and the tribunal "hereby established" with the signature bearing the inscription "By command of General MacArthur." The Charter was drafted exclusively by the United States, and the other allied powers were consulted only after it had been issued.[98] While nominally international, then, the IMFTE was described by one of its own judges from the Netherlands as "an American performance."[99]

Unlike Nuremberg, which strictly forbade them, the Tokyo charter is silent on the matter of jurisdictional challenges. This silence opened a space for defense counsel to contest the tribunal's authority to decide the charges in the indictment. The defense asserted its ability to challenge the court as a matter of right: "It is the understanding of all counsel for all accused that

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[96] IMT trial transcript, 21 November 1945.

[97] See Jackson Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (Ardsley: Transnational Publishers, 2003). According to Maogoto, after the surrender of Japan, control over the occupation rested with MacArthur, who established the IMTFE on behalf of the Far Eastern Commission. There was no founding treaty. For a thorough description of MacArthur's role in the process of establishing the Tokyo tribunal, see Yuma Totani, *The Tokyo War Crimes Trial: the Pursuit of Justice in the Wake of World War II* (Cambridge: Harvard University Press, 2008). Totani notes that "various powers and responsibilities were concentrated in MacArthur whereas no comparable power existed at Nuremberg" (29).

[98] B.V.A. Röling and Antonio Cassese, *The Tokyo Tribunal and Beyond* (Cambridge: Polity Press, 1993). See especially pages 2-6 for introductory material. Yuma Totani suggests otherwise, claiming that "the Australian participants profoundly shaped the course of the trial and left their deep imprint on its outcome" (42).

[99] *Ibid.* at 31.

they may always question the fundamental jurisdiction of this Court."[100] In his opening statement, however, the chief prosecutor responded by characterizing these challenges as an affront to civilized nations, and even to civilization itself:

> [A]lready in these proceedings, each and every accused has lodged an objection to the validity of this trial, which we contend constitutes a clear challenge to the capacity of civilized nations to take effective steps to prevent the destruction of all civilization. For in effect and in essence, the accused have contended that there is no power presently on earth duly authorized to try them, and no just or legal right to mete out justice....[101]

The tribunal judges summarized the substance of the defense's jurisdictional challenges in their judgment. The seven points of contestation focused mainly on the problem of *ex post facto* legislation, including the novel charge of Crimes against Peace and the criminalization of aggressive war.[102] After oral argument at trial, the Chamber dismissed all of the motions "for reasons to be given later."[103] These reasons were not provided until the IMTFE judgment was issued, which held that

> Since the law of the Charter is decisive and binding upon it this Tribunal is formally bound to reject the first four of the above seven contentions advanced for the Defence but in view of the great importance of the questions of law involved the Tribunal will record its opinion on these questions.[104]

The first four jurisdictional challenges related to the lawfulness of the Charter: (1) the Allied powers acting through the Supreme Commander have no authority to include "Crimes Against Peace" in the Charter of the Tribunal; (2) aggressive war is not *per se* illegal, and the pact of Paris of 1928 renouncing war as an instrument of national policy does not enlarge the meaning of war crimes nor constitute war a crime; (3) war is the act of a nation for which there is no individual responsibility under international law; and (4) the provisions of the Charter are "ex post facto" legislation and therefore illegal. The tribunal dispenses with the first four challenges by recourse to the authority of its own Charter. While it offers to "record its opinions" on the remaining questions of law, it turns instead to the reasoning offered by the Nuremberg tribunal. The IMTFE judgment thus adopts the (unspecified) "relevant sections of the decision issued at Nuremberg" and adds:

> With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord. They embody complete answers to the first four of the grounds urged by the defence as set forth above. In view of the fact that *in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical,* this Tribunal prefers to

[100] Tokyo trial transcript, p. 344.
[101] *Ibid*, p. 392.
[102] *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.)*, 29 April 1946 – 12 November 1948, (Amsterdam: University Press Amsterdam, 1977), Volume I, page 27.
[103] *Ibid*, at 22.
[104] *Ibid*, at 27.

> express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.[105]

Although the founding of the Tokyo tribunal was structurally distinct from Nuremberg and their charters were not identical, perhaps most notably in relation to jurisdictional challenges, the Tokyo tribunal nonetheless draws from the authority of Nuremberg as precedent for its own reasoning on questions of law. After dispensing with the three remaining grounds for challenging the tribunal's jurisdiction by recourse to Nuremberg, the IMTFE chamber announces: "The challenge to the jurisdiction of the Tribunal wholly fails."[106]

Despite this forceful assertion of closure, an additional challenge to the jurisdiction of the tribunal remained unresolved. One defense counsel had raised the problem of "victor's justice" before the Chamber, arguing that "the members of this tribunal being representatives of the nations which defeated Japan and which are the accusers in this action, a legal, fair, and impartial trial is denied to these accused by arraignment before this tribunal…The question of jurisdiction is a question of moral judgment."[107] Although the final judgment ruled on the seven challenges noted above, the judges did not address this further challenge.[108] The lone exception was Judge Pal of India, whose lengthy dissenting opinion challenged the tribunal's legal and political foundations.[109]

What grants the Chamber its power to dispense with challenges in the way it did – by appealing to Nuremberg as precedent? As with Nuremberg, the IMTFE turns to the authority of its own Charter as the basis for its legal power, which relies in turn upon a prior authorizing power:

> In our opinion the law of the Charter is decisive and binding on the Tribunal. This is a special tribunal set up by the Supreme Commander under the authority conferred on him by the Allied Powers. It derives its jurisdiction from the Charter.[110]

Noteworthy about this passage is the invocation of General MacArthur's speech act as the tribunal's constitutive power, and yet its *jurisdiction* is grounded elsewhere – in the presumably apolitical and already constituted "law of the Charter." In this dual assertion, the tribunal downplays the political act of founding by positing an already established "legal" form that stands in its place. The "law of the Charter" thus opens a discursive space for the tribunal to authoritatively claim its own jurisdiction, which it accomplishes by supplementing the constituting power of MacArthur's speech act with an already constituted (and already *legal*) authorizing structure.

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[105] *Ibid* at 28, emphasis mine.
[106] *Ibid.* at 29.
[107] Tokyo trial transcript, 196-197.
[108] Richard Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), 77.
[109] See Yuma Totani, *The Tokyo War Crimes Trial: the Pursuit of Justice in the Wake of World War II*, chapter 9.
[110] The Tokyo Judgment, p. 27.

The two post-World War II tribunals at Nuremberg and Tokyo offer the most direct examples of the requisite *coup de force* that accompanies jurisdictional assertions and backs a tribunal's own self-legitimating practices. With Nuremberg the very possibility of contesting the tribunal's jurisdiction was foreclosed; meanwhile, the Tokyo tribunal relied upon the disanalogous (and ultimately unreasoned) authority of the Nuremberg tribunal to dispense with its own jurisdictional challenges. This changed as the body of law expanded and as additional *ad hoc* internationalized tribunals emerged in the international legal field. These changes were accompanied by the idea that an "international community" could serve as the moral guarantor of such a court, and from a presumably neutral standpoint rather than from the interested position of a sovereign state. For instance, nearly fifty years after Nuremberg, in the course of ruling that its own founding was legitimate, the Appellate Chamber of the ICTY stated that political questions no longer pose problems for the contemporary field of international law: "The doctrines of 'political questions' and 'non-justiciable disputes' are remnants of the reservations of 'sovereignty', 'national honour', etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law."[111] The moment of founding is nearly effaced as it is translated from a "political question" into the legal language of jurisdiction. The Chamber thus attempts to consolidate its own authority by claiming that "political questions" such as the legitimacy of a court's establishment are in fact legal anachronisms that mark a time before a coherent and developed body of international law. In this vision of a new and increasingly cosmopolitan legal order, the tribunal claims to speak on behalf of a broader interest, with its UN-based constituting power standing in for the unified "general will" of the international community. The following section considers this shift to a conception of "derivative consent" that seeks to move beyond the traditional sovereign guarantors of the Nuremberg and Tokyo tribunals.

Legitimating the Second Generation

In the period between the post-war tribunals for Nuremberg and Tokyo and the emergence of the so-called "second generation" tribunals for Rwanda and the former Yugoslavia, the United Nations emerged as a possible location of the "will" of the international community. In this logic, the international community is produced through an originary moment of consent when aspiring UN member states sign on to the organization's Charter. This original moment of signature or consent opens the possibility of claiming "derivative consent" for resolutions of the United Nations Security Council. By this logic, the very act of signaling consent to the Charter binds a state to subsequent decisions taken by the Security Council, providing a potentially boundless field of consensual activity undertaken in the name of the international community.

The *ad hoc* tribunals for the former Yugoslavia and Rwanda, established in 1993 and 1994 respectively, were grounded in UN Security Council resolutions that draw from Chapter VII powers under the UN Charter. These powers permit the Security Council to act in the interest of "maintaining international peace and security." For a tribunal to be considered an appropriate creation under Chapter VII, its objectives must be crafted in such a way to serve this

[111] *Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 24.

interest. Before the ICTY and ICTR the Security Council had never set up a tribunal. The *ad hoc* tribunals were thus unprecedented creations, and they were challenged on grounds that the Security Council had exceeded its authority by establishing a judicial institution.

Unlike the Nuremberg tribunal, the rules of the *ad hoc* tribunals provide that preliminary motions by the accused can include "objections based on lack of jurisdiction." As the ICTY was the first to consider a case before it, and because the two tribunals share an Appeals Chamber, the authoritative case on jurisdictional issues is the famous *Tadic* decision, which was issued in 1995.[112] There the Appeals Chamber departs from its lower Trial Chamber in determining that it would be able to consider the legitimacy of its own founding, or what I previously referred to as a tribunal's constituting power. This is a remarkable ruling both legally and rhetorically, as the tribunal asserts its own right to adjudicate whether or not it was properly founded. While the Trial Chamber had held that it lacked the authority to review what it regarded as a political rather than a justiciable matter,[113] the Appeals Chamber counters that it is within the ability of a judicial or arbitral tribunal to determine its own competence.[114]

The exclusion of the foundational issue at the Nuremberg tribunal is thus replaced here by the phenomenon of inherent jurisdiction, or the capacity of a tribunal to declare its own competence. The Appeals Chamber finds that it has this power even though it has not been expressly asserted in the ICTY's constitutive documents:

> This power, known as the principle of '*Kompetenz-Kompetenz*' in German or '*la compétence de la compétence*' in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction.' It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals"[115]

The Appeals Chamber thus declared that it was vested with the authority to examine the legitimacy of its own founding.

The appellant Tadic had raised the argument that the tribunal had not been lawfully established and that it therefore lacked the jurisdiction to try him. His challenge to the ICTY strikes directly at the question of legal foundations: Tadic contended that the tribunal should have been created by treaty, a consensual act of nations, or by an amendment of the UN Charter, but not by a Security Council resolution. In the course of this argument, Tadic contended that as a *political* body, the Security Council does not have the authority to establish an independent judicial body with jurisdiction in criminal matters. One of the main questions taken up by the Appeals Chamber was thus whether the creation of the tribunal by the Security Council fell within the powers granted to it by the UN Charter.

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[112] For an analysis of the legal arguments of the decision at both the trial and appellate levels, see George Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia," *The American Journal of International Law*, Vol. 90(1) (1996).
[113] *Prosecutor v. Tadic, Decision on Jurisdiction*, Case IT-94-1-T, 10 August 1995, paragraphs 8 and 12.
[114] *Prosecutor v. Tadic, Appeal on Jurisdiction*, IT-94-1-AR72, 2 October 1995, paragraphs 18-19, 24-25.
[115] *Ibid*., para. 18.

Both the prosecutor and the Trial Chamber had argued that the tribunal did not have the competence to determine the legality of its own founding. The prosecutor maintained that this was a political, non-justiciable question. Overriding this claim, the Appeals Chamber asserted an almost imperial right to all legal matters regardless of their possible political dimensions: "As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue."[116] The Chamber went on to argue further for an expansive understanding of jurisdiction:

> A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour.[117]

As with the Tokyo tribunal, the Appeals Chamber of the ICTY dismissed the appellant's challenges to its jurisdiction, yet in doing so, the Chamber ventured beyond affirming that it had the right to hear the case before it. More significantly, it claimed that it had the authority to determine the legality of its own constitution, and by extension to guarantee the legitimacy of its own constituting power.[118] The tribunal accomplishes this in part by emphasizing a moment of translation from the political to the legal: anything before it that appears to be a "legal question capable of a legal answer" can be assessed by the Chamber, which has granted itself a broad jurisdictional field in which to assess the nature and extent of its own power. Indeed, the very fact of the tribunal's "self-contained," *sui generis* structure is what backs its claim to exercise such wide jurisdictional discretion.

If Nuremberg and Tokyo provide striking instances of law as a discursive force, the landmark *Tadic* decision of the ICTY reveals a broadening of a tribunal's own political authority through seemingly legal means. Not only did the Appeals Chamber affirm the tribunal's own constituted power, it also assumed the authority to evaluate its own foundational act by claiming that the United Nations Security Council acted "in accordance with the rule of law" and followed the provisions of its own Charter.[119] The tribunal describes this inherently political evaluation as a lawful assertion made under the authority of its own constitutive instruments. As some commentators have noted, however, this moment of political power cast in legal language may actually be a development in safeguarding the rights of the accused. The Appeals Chamber's willingness to evaluate the basis of the ICTY's jurisdiction – although seemingly inevitable in its

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[116] *Ibid*, para. 24.
[117] *Ibid*, para. 11.
[118] This decision was met with resistance in the Chamber itself; Judge Li dissented on this point, claiming that the tribunal's examination of the legitimacy of its establishment was "*ultra vires* and unlawful." IT-94-1-AR72, *Separate Opinion of Judge Li*, at 1, para. 2.
[119] *Prosecutor v. Tadic*, Case IT-94-1-AR72, *Appeal on Jurisdiction* (Oct. 2, 1995), at 22, para. 45.

outcome – enables an accused person to compel the tribunal to examine its own legality and to confirm the validity of its founding.[120] The Special Court for Sierra Leone produced conflicting decisions regarding whether it had the jurisdiction to examine its own jurisdiction. The following section describes the tension in the Court's presentation of itself as both a continuation of and a break from the tribunals preceding it, a tension that is due at least in part to its 'hybrid' structure.

The Special Court for Sierra Leone

At the opening of the first trial at the Special Court for Sierra Leone in 2004, the lead prosecutor began his case by asserting a shared project between tribunals that unfolds historically: "On this solemn occasion, mankind is once again assembled before an international tribunal to begin the sober and steady climb upwards toward the towering summit of justice."[121] Through his claim of "once again," the prosecutor invokes a common purpose – this court in Sierra Leone, while unprecedented in structure, shares a set of objectives that links its work to the work of previous post-conflict tribunals. One international law text notes that with the founding of the Special Court, the Secretary-General "was now in a position to trace a line of pedigree between the jurisprudence of Nuremberg and that of Yugoslavia and Rwanda….By this time the Rome Statute of the ICC had been agreed, providing the Secretary-General with an additional rhetorical platform when setting up the SCSL."[122]

Whenever an *ad hoc* legal institution such as the Special Court for Sierra Leone appears, a new 'subject' is inaugurated within the international legal order. Insofar as it successfully claims jurisdiction, it is literally able to 'speak law,' as the etymology of jurisdiction suggests. As the previous sections have shown, novelty generally appears as an unsettling force that is quickly marginalized or absorbed into an existing (legal) structure. Law responds to novelty by retreating into what has already been authoritatively established as "lawful," as when lawyers and judges tether novel interpretations to precedent or to statutory authority. The task is to make the new appear as a re-articulation of the familiar: legal rulings are routinely presented as a statement of what the law has always been rather than as a moment of judicial invention.

Precisely because of law's discomfort with the new, the Special Court attempts to legitimate its work through claiming that it forms part of this historical chain of judicial projects beginning with Nuremberg. Its rulings on jurisdictional challenges draw directly from the (legally non-binding) precedent of prior developments in international humanitarian law. For instance, in dismissing former Liberian president Charles Taylor's challenge to the Court's jurisdiction on the basis of head of state immunity, the Court's Appeals Chamber invoked the authority of the Nuremberg Charter to claim that the immunity matter has been long settled in

[120] Simon Meisenberg claims that "[a]lthough the *Tadic* decision was highly controversial at the time, most authors acknowledged the fact that the ICTY was honestly willing to examine its own legality and the legality of provisions of its Statute" (843). Meisenberg notes that following *Tadic* in the *Kanyabashi* case, the tribunal explicitly interpreted a provision of its Statute as containing a defendant's right to challenge the legality of its creation. See "Legality of amnesties in international humanitarian law: The Lomé Amnesty Decision of the Special Court for Sierra Leone," *International Review of the Red Cross* vol. 86 (2004).

[121] The Opening Statement of David M. Crane, Special Court for Sierra Leone, 3 June 2004. Transcript page 6.

[122] Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008), 87.

international law.[123] It also relied upon an ICTY Appeals Chamber ruling to claim that if the UN Security Council had the power to establish a tribunal through a resolution, it would also have the power to enter into a treaty establishing a tribunal. In asserting its status as an international court, the Special Court for Sierra Leone's Appeals Chamber argued that the Court's founding treaty served as an expression of the will of the international community:

> The Agreement between the United Nations and Sierra Leone is thus an agreement between *all* members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community.[124]

Here the Court relies on the logic of derivative consent, claimed previously by the ICTY, as a basis for asserting widespread recognition of its authority. The Court thus asserts its jurisdiction on the ground that its founding was sanctioned by the international community as a whole.

Yet the Court's ostensibly 'hybrid' identity and the fact that it was established by treaty complicates its relationship to previous tribunals. The opinions issued by the Special Court's Appeals Chamber in response to a number of separate jurisdictional challenges reveal competing claims about the Court's status and identity, not only between the prosecution and the defense but also within the Appeals Chamber itself. For example, in response to jurisdictional challenges based on the Lomé amnesty agreement, which required determining whether the agreement between the RUF and the Sierra Leonean government granting amnesty for crimes committed during the conflict would apply at the Special Court, the Court's Appeals Chamber was reluctant to assess the legitimacy of its own founding. The Chamber claimed that unlike the ICTY, the Court had been created through a treaty rather than through a Security Council resolution. The Appeals Chamber argued:

> The ICTY is not a treaty-based Tribunal, nor did the *Tadic* case involve the validity of the provisions of a treaty but rather the extent of the powers of the Security Council, an authority established by the UN Charter. Besides, the question may need to be revisited when the occasion arises as to the legal basis of the power of a body purportedly established as a court to make a *binding* declaration that it is not a court, when only a court legally established has jurisdiction to make such declaration [sic] that would have a binding force![125]

After emphasizing the structural differences in the Court's composition that distanced it from the ICTY jurisprudence, namely the Court's treaty-based composition, the Chamber makes a broader argument about the circularity of this very question: how can a court authoritatively determine that it is not a court, especially without a clear legal basis for its own authority to make that kind of decision? In this response to a jurisdictional challenge, the Appeals Chamber determined that

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[123] *Prosecutor v. Taylor, Decision on Immunity from Jurisdiction*, Case No. SCSL-2003-01-I, 31 May 2004, p. 22, para. 46.
[124] *Prosecutor v. Taylor, Decision on Immunity from Jurisdiction*, Case No. SCSL-2003-01-I, 31 May 2004, para. 38.
[125] *Prosecutor v. Kallon and Kamara, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, Case Nos. SCSL-2004-15 and SCSL-2004-16, 13 March 2004, para. 62.

it did not have the jurisdiction to evaluate the basis of its own jurisdiction, or what the ICTY referred to as "inherent jurisdiction." It argued that because it was established by treaty, it could only question the validity of the Court founding on the basis of the international law governing treaties - not based on its own inherent jurisdiction, as was the case with the ICTY.

Responding to another challenge that the Court's establishment violated the Constitution of Sierra Leone, however, the Appeals Chamber did assert its own power to determine whether it could rule on its own founding:

> It is beyond argument, therefore, that the Appeals Chamber of the Special Court has the competence to determine whether or not the Special Court has jurisdiction to decide on the lawfulness and validity of its own creation.[126]

The Chamber went on to find that the Court *had* been lawfully established according to the Sierra Leonean Constitution because its founding document "fulfils the relevant constitutional requirements and the appropriate procedures were certainly followed."[127] There are thus two different conceptions of "lawfulness" at stake in the Court's analysis of its own jurisdiction: the constitutionality of the Court in relation to Sierra Leonean law (which the Court affirmatively claims) and the "lawfulness" of the Court as an international body (which it claims it does not have the power to determine). Put differently, the Court claims that it can guarantee its own authority to operate in the territory of Sierra Leone without violating the Sierra Leonean Constitution, but it also claims that it cannot determine the lawfulness of its creation through an international treaty. This doubling of the jurisdictional problem is largely a product of the Court's unprecedented "hybrid" form: it sits within the territory of Sierra Leone and is a product of the state of Sierra Leone's consent, yet it is also a treaty-based institution "not anchored in any existing system."[128] The filings challenging the Court's jurisdiction, responding to those challenges, and deciding legal matters offer different interpretations of the Court's identity. Contested meanings of the Court's hybridity represented throughout the challenges to its jurisdiction are authoritatively settled by the Appeals Chamber:

> The Chamber finds that the establishment of the court did not involve a transfer of jurisdiction or sovereignty by Sierra Leone. The Special Court is a completely new organisation established by an international treaty between Sierra Leone and the United Nations and functioning under its own Statute with an independent Prosecutor. It does not operate on the basis of transferred jurisdiction but is a new jurisdiction operating in the sphere of international law.[129]

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[126] *Decision on Constitutionality and Lack of Jurisdiction*, 13 March 2004, para. 34.

[127] *Prosecutor vs. Kallon, Norman and Kamara*, *Decision on Constitutionality and Lack of Jurisdiction*, Case Nos. SCSL-2004-15, SCSL-2004-14, and SCSL-2004-15, 13 March 2004, para 53.

[128] "Report of the Secretary-General on the establishment of a Special Court for Sierra Leone," UN Doc. S/2000/915, 4 October 2000, para. 9, as cited in *Prosecutor vs. Kallon, Norman and Kamara*, *Decision on Constitutionality and Lack of Jurisdiction*, Case Nos. SCSL-2004-15, SCSL-2004-14, and SCSL-2004-15, 13 March 2004, para. 51.

[129] *Prosecutor against Augustine Gbao* (SCSL-2004-15), *Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court*, 25 May 2004, para. 6.

The Court attempts to build its own legitimacy through appealing to institutional precedent, claiming that it is structurally and functionally similar to previous tribunals. At the same time, it asserts its hybrid difference as a basis for arguing that it cannot review the legitimacy of its own founding. The following chapter examines this professed hybrid identity in greater detail.

Conclusion

Chapter one described how the Special Court was established in response to the conflict in Sierra Leone. This chapter showed how the Court and preceding tribunals were confronted by their own extralegal origins through challenges to their jurisdiction. In responding to jurisdictional challenges, international criminal tribunals vigorously attempt to cover over the political dimensions of their establishment with a seamlessly legal response. What this elides, and what this chapter has shown, is the linguistic force required by tribunals to settle these foundational questions – a force that cannot be authorized by a prior grant of authority but is instead produced in the moment of the jurisdictional decision. Jurisdictional challenges and responses are sites of contestation where tribunals are prompted to articulate the basis of their authority.

Through the phenomenon of the jurisdictional challenge, this chapter investigated the tension between novelty and continuity that is apparent in the work of *sui generis* tribunals. All of these tribunals are an unusual species of political institution: they must claim their own right to speak law independent of other existing or preexisting institutions. At the same time, they back their claims to authority by appealing to a common set of aspirations that they supposedly share with other tribunals, and they regularly invoke connections with past criminal justice projects to augment their legitimacy.

The problem of grounding judicial bodies is more pronounced in the unsettled international arena, where tribunals draw from notions of consent that parallel the founding of a polity just as they draw from conceptions of sovereign agency. These efforts by tribunals to strengthen their perceived legitimacy through political analogies leaves an irresolvable gap: the founding of an international tribunal is not directly analogous to the founding of a polity, and a tribunal such as the Special Court for Sierra Leone must rely on signs of consent from existing sovereign states – even when taken together as the imagined will of an international community – rather than upon its own sovereign agency.

In the decisions of the Special Court for Sierra Leone, rhetorics of both the global and the local are invoked to legitimate what it does in practice. Combining elements of the global and the local brings in the authority of the international community as a guarantor of the Court's work, which presumably helps it to transcend the domestic political situation without seeming to violate the sovereignty of Sierra Leone. The 'hybrid' form – brought into being through a treaty between the state of Sierra Leone and the United Nations – complicates the Court's identity as a technique of judicial intervention. Much is made of this original sign of state consent in Court literature. I contend that the rhetoric of 'hybridity' is a new form of legitimating discourse in the work of international criminal justice that seeks to draw from both global and local modes of authority, as I discuss in greater detail in the two chapters that follow.

Chapter 3
'Hybrid' Law and the Place of Jurisdiction

> Upon its establishment the Special Court assumed an independent existence and is not an agency of either of the parties which executed the Agreement establishing the Court. It is described as 'hybrid' or of 'mixed jurisdiction' because of the nature of the laws it is empowered to apply.[130]

Chapter two addressed the ways in which international criminal tribunals such as the Special Court for Sierra Leone assert their jurisdiction. I argued that the Special Court's hybridity distinguished it from its institutional predecessors and presented unique problems for the Court when it confronted challenges to its legal authority. As I pointed out in the introduction, jurisdiction has multiple meanings. In the first sense, which is closer to the etymology of the term itself, it is the authority to state law. Chapter two addressed jurisdiction according to this definition: as a form of assertion, or put differently, as a court's claims regarding its right to exercise authority. A second definition addresses the already existing power held by a court, whether over laws, subjects, or territories. Jurisdiction in this second sense concerns the space or domain where authority is exercised. At the Special Court for Sierra Leone this supposedly hybrid domain contains elements of both domestic and international law. In the words of the Court's own appellate chamber above, the Court's hybridity is related to its legal jurisdiction.

This chapter builds on the previous chapter's concerns with foundation and legitimation by demonstrating how the discourse of the Special Court's self-proclaimed 'hybridity' is used to legitimate its exercise of authority. Through blending the procedural legitimacy of international tribunals with domestic elements to bring it closer to the affected population, the Special Court for Sierra Leone was thought to offer a kind of political and legal compromise: a "new model" for post-conflict justice, as one of its lead prosecutors claimed.[131] Despite these visions for a more inclusive juridical form, this chapter shows that the Special Court's hybrid aspirations are shadowed by an unexamined colonial legal heritage. Including elements of Sierra Leonean law in the Court statute – the basis for the Court's *de jure* hybridity – is a strategic move that offers a counter-argument to claims that the Special Court was an unwelcome imposition by the international community. Yet incorporating a dimension of 'the local' also reveals the limits of a meaningfully hybrid legal body in this post-conflict context, as the available domestic laws were considered too legally inadequate and politically inexpedient to be included in court practice. Through tracing the unacknowledged colonial history of the fragments of Sierra Leonean law in the Special Court's statute, I show how the Court's legal topology resembles a colonial-era legal structure of formal inclusion and substantive exclusion. The presence of Sierra Leonean law in the Court statute is more a matter of signaling political legitimacy than of modeling a meaningfully hybrid legal form.

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[130] *Prosecutor vs. Kallon and Kamara, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, Case. Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), 13 March 2004, para. 85.

[131] Stephen Rapp, "The Compact Model in International Criminal Justice: the Special Court for Sierra Leone," *Drake Law Review* 57 (2008): 21.

This chapter focuses on how the Court was envisioned as a novel response to post-conflict justice and on the legal limits of that vision. Legal scholars have suggested that the Court is hybrid because "it incorporates various national elements in its Statute" [132] or "because both the institutional apparatus and the applicable law consist of a blend of the international and the domestic."[133] Much commentary on the Court's work applauds its hybridity without adequately describing the legal and material forms it takes, and some recent scholarship has mistakenly suggested that the Court has applied Sierra Leonean law in practice.[134]

The first section of this chapter sets out the original hybrid conception of the Court as imagined by the then-Sierra Leonean president Ahmed Tejan Kabbah, who viewed the Court as an opportunity to draw upon both international criminal law and Sierra Leonean law. The second section traces the Court's shifting interpretation of its own legal hybridity – that is, from an initially broad to a subsequently narrower role for domestic law. Drawing upon historical material, the third section places the domestic law included in the statute in the context of Sierra Leone's colonial past. The fourth section shows that while domestic law is included in the Court statute, the Court does not employ it in practice. The structure of the simultaneous inclusion and domination of the local that characterized British colonial rule thus also describes the relation of Sierra Leonean to international law in the Special Court. Without excluding domestic law (but without fully including it), the Court is able to claim that it engages with the local legal context even if this engagement only takes place at a symbolic or rhetorical level. Returning to the problematic of jurisdiction, I then consider the way in which the colonial remainder included in the Court's structure haunts and constrains its hybrid potential.

Envisioning 'Hybrid' Justice

> This will be a special court for Sierra Leone created by the United Nations Security Council that will take into account the special needs and requirements of the Sierra Leone situation. It should be a court that is flexible in law and venue.
>
> -Letter from Sierra Leonean President to the United Nations Security Council

The Sierra Leonean president's request to the United Nations, excerpted above, introduces the first vision of the Court that was to be established in the country's capital. Here President Kabbah imagines a court that would be "flexible in law and venue," attuned to the particularities of Sierra Leone while drawing from the financial support and legal resources of the international community. This combination of the national and the international has led

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[132] Simon Meisenberg, "Legality of amnesties in international humanitarian law: The Lomé Amnesty Decision of the Special Court for Sierra Leone," *International Committee of the Red Cross Current Issues and Comments*, 86 (2004): 837.

[133] Laura Dickinson, "The Promise of Hybrid Courts," *American Journal of International Law* 97(2) (2003): 295.

[134] For example, Pádraig McAuliffe claims the Court "was a typically hybrid tribunal in terms of law applied and the personnel employed" and adds, "[t]he law applied was a combination of international and domestic"; see "Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone Trial to The Hague Defeats the Purposes of Hybrid Tribunals," *Netherlands International Law Review*, 55 (2008). Matthias Goldmann also writes that "the Special Court relies heavily on Sierra Leonian law and lawyers" in "Sierra Leone: African Solutions to African Problems?", *Max Planck Yearbook of United Nations Law*, 9 (2005): 459.

some commentators to refer to the Court as a 'hybrid' legal body – much lauded as an innovative form of post-conflict justice in public discourse surrounding the Court and in international legal scholarship.[135] The President himself referred to the Court as a "'hybrid' institution" at the ceremonial opening of the courthouse facilities, and the Special Court appellate chamber claimed that the Court was "described as 'hybrid' or of 'mixed jurisdiction' because of the nature of the laws it is empowered to apply."[136]

When law and legal institutions claim to be in a flexible relationship to the places where they are exercised, as imagined here by the Sierra Leonean president, this claim raises a number of questions. What does it mean for law to be responsive to its context, whether this context is envisioned as a cultural, social, or political category? How do international legal institutions claim to accommodate local concerns, and how do these concerns come to be known and articulated? Such attention to context takes on even more political urgency when viewed against the backdrop of Sierra Leone's colonial history. If the Court were to neglect the local context, or what the country's president calls "the special needs and requirements of the Sierra Leone situation," it would risk dispensing forms of judgment and governance objectives that could be construed as foreign impositions even though the United Nations had established the Court at the president's behest. More pointedly, this project of judicial accountability might appear neocolonial in its ambitions or outcomes, as the expression "white man's justice" in popular discourse about the Court's work seems to suggest. For example, one journalist noticed that "[n]egative perceptions of the court persist for several reasons, not the least of which is a local press corps that brand it an agent of 'white man's justice.'"[137] Such accounts were apparently pervasive enough in Sierra Leone to receive recognition from the Court's first prosecutor, who directly addressed them in a journal article entitled "White Man's Justice."[138] Two years into the Court's work, an NGO report noted that local perceptions of the Court's legitimacy had been tarnished by the impression that it was an international court, "a perception that the Court has cultivated through its jurisprudence and presentation."[139] The Court had apparently neglected the domestic jurisdiction that it was designed to address. The move of former Liberian president Charles Taylor's trial from Freetown to The Hague, ostensibly for security reasons, seemed to further this perception, as I describe in chapter four.

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[135] See Dickinson, McAuliffe, and Rapp, in addition to Beth Dougherty, "Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone," *International Affairs* 80 (2), (2004) and Jelke Mayr-Singer, "Hybridgerichte –eine neue Generation international Strafterichte (I). Der Sondergerichtshof für Sierra Leone," *Vereinte Nationen* 56 (2), (2008).

[136] Kabbah, A.T. (2004, March 10). Statement by His Excellency Alhaji Dr. Ahmad Tejan Kabbah, President of Sierra Leone at the Formal Opening of the Courthouse for the Special Court for Sierra Leone. Retrieved September 18, 2008, from www.statehouse-sl.org/speeches/spe-court-mar10.html; *Prosecutor v. Kallon and Kamara*, "Decision on Challenge to Jurisdiction: Lome Accord Amnesty," 13 March 2004, para. 85.

[137] Hans Nichols, 5 January 2005, "Truth Challenges Justice in Freetown," *Washington Times*. Retrieved June 14, 2009, from http://www.globalpolicy.org/component/content/article/163/29151.html.

[138] David Crane, "White Man's Justice: Applying International Justice After Regional Third World Conflicts," *Cardozo Law Review* 27 (2006).

[139] Tom Perriello and Marieke Wierde, "The Special Court for Sierra Leone Under Scrutiny." New York: International Center for Transitional Justice, 2006. Retrieved June 14, 2009, from http://74.125.47.132/search?q=cache:rQf7XdOZSuQJ:www.ictj.org/static/Prosecutions/Sierra.study.pdf+the+local+court+system+in+sierra+leone+sierra+leone+studies&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a.

In the context of these criticisms, I argue that descriptions of the Special Court of Sierra Leone as a legally 'hybrid' institution should be read rhetorically; that is, as attempting to signal the Court's responsiveness towards the national context in which it operates. This gesture can be read as a necessary attentiveness to the place of the local or national within an otherwise international project – as an effort to incorporate the particular within an institutional framework that could be critiqued as overly universalizing in theory and culturally Western in practice. This was arguably the vision of then-President Kabbah in crafting a court that would account for the "special needs" of this former British colony.

The Court was originally designed to draw from two bodies of law: Sierra Leonean law and international criminal law. Sierra Leonean legal scholars have demonstrated that British legal structures, and indeed British law, permeate the post-independence legal system of this West African state.[140] Making the Special Court "flexible" in the national context, as the Sierra Leonean president envisioned, would mean incorporating aspects of this system into the workings of a new court that would be located in the territory, if not the legal jurisdiction, of the Sierra Leonean state. Including or responding to the domestic legal context then does not mean drawing from the pre-colonial legal norms of the territory now known as Sierra Leone, but rather from the largely unreformed system of laws and procedures of the state's colonial period. Scholars such as Mahmood Mamdani and Sally Falk Moore have shown that British colonial oversight shifted structures of customary governance while theoretically preserving some of these 'indigenous' norms and practices through the system of indirect rule. This dynamic of formally creating space for existing law while distorting or excluding it in practice will be explored in greater detail in relation to Sierra Leone.

In addition to employing Sierra Leonean law, the Court draws from a growing body of international law and judicial institutions. In its structure and composition the Special Court for Sierra Leone falls somewhere between the *ad hoc* international courts set up by the United Nations for Rwanda and the former Yugoslavia and the domestic courts that try crimes under international law in Kosovo, East Timor, and Cambodia. Kosovo and East Timor had been operating under UN transitional administrations, and their respective post-conflict courts were set up as domestic legal bodies. Although Cambodia had entered into an agreement with the UN Security Council much like Sierra Leone, its Extraordinary Chambers were also established within the domestic court system. There is some disagreement in international legal scholarship about how to classify these courts, whether 'international' or 'hybrid.' One commentator has categorized the Special Court for Sierra Leone as 'hybrid' along with Kosovo, East Timor and Cambodia insofar as they all apply "both national and international law."[141] Another has separated Sierra Leone from these three, placing it in a group of "international criminal tribunals" that includes the UN *ad hoc* tribunals for Rwanda and the former Yugoslavia.[142] The Special Court is often described as combining both domestic and international law, though its

[140] See for example Gershon Collier, *Sierra Leone: Experiment in Democracy in an African Nation* (New York: New York University Press, 1970) and Bankole Thompson, *The Criminal Law of Sierra Leone* (Lanham: University Press of America, 1999).
[141] Kai Ambose and Mohamed Othman, *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Freiburg: Max Planck Institut, 2003), 2.
[142] William Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006).

legal hybridity is a *de jure* rather than a *de facto* phenomenon. The Sierra Leonean law present in the statute that authorizes the Special Court is never used in an indictment, and none of the indicted individuals are accused of crimes under Sierra Leonean law. This chapter thus traces a legal silence – a local law bound up with a colonial past that is given rhetorical rather than legal force. Regarding the role of this court as a hybrid structure requires understanding the implications and continued traces of colonial logics for Sierra Leone's legal history and legal present.

The Special Court's claim to a hybrid identity raise a number of questions. To what extent does the Court actually draw from domestic law to supplement international law? What law is incorporated into the law of the Special Court, and what relationship does the Court's law bear to the legal traditions of the country? In response to the first question, this chapter shows that the presence of Sierra Leonean law in the Statute of the Special Court serves little more than a symbolic purpose, which opens further questions about the nature and extent of the Court's 'hybridity.' The second question is more complex, and arguably unanswerable because it raises problems of cultural knowledge and history. What could the distinctly Sierra Leonean attributes of the Special Court's law possibly be? The legacy of colonialism poses epistemological problems for identifying 'traditional' culture, and a hybrid court that engages with the law of the post-colonial Sierra Leonean state would not draw from pre-colonial legal practices. These problems are not unique to Sierra Leone, yet the case of the Special Court for Sierra Leone reveals a colonial remainder that occupies the place of domestic law in its vision of an admixture of international and national forms of justice. The Court's attempt to incorporate domestic law in its statute and the subsequent disappearance of domestic law from the Court's practice reveals the extent to which domestic law is bound up with Sierra Leone's colonial past, and suggests that the Court is insufficiently attuned to the "special needs and requirements of the Sierra Leone situation" in its socio-political present. The spectral colonial presence in Sierra Leonean law reveals the limits of the hybrid vision of the Sierra Leone tribunal, a vision that arguably serves a political purpose of reinforcing the need for external intervention in the name of the international community. The following section recounts the narrative of this animating vision of the Court before turning to its limits.

"Flexible in Law and Venue": the Genealogy of a Jurisdiction

Viewed from a legal perspective, the Special Court of Sierra Leone's establishment is typically traced back to its founding agreement and statute signed in 2002.[143] The agreement works as a treaty, with the signatures of the President of Sierra Leone and the UN Security Council conferring power to the Court in a similar way as the implied consent of a nascent citizenry is thought to authorize the liberal state (and bearing similar limitations). As the previous chapter showed, the Court is thought to have both the consent of the people of Sierra Leone, represented through the sovereign signature of the president, and the consent of the international community, signaled by a representative for the United Nations. This synechdochal figuring of consent housed in the president's signature seemingly insulates the Court from the

[143] Hassan Jallow, "The Legal Framework for the Special Court for Sierra Leone," in Ambose and Othman, *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Freiburg: Max Planck Institut, 2003).

charge that it imposes itself on the people of Sierra Leone from outside, a contestation manifested in popular allegations of 'white man's justice.'

Other accounts of the Court's establishment begin with a different sort of document: a formal letter, signed by the Sierra Leonean president and addressed to the UN Secretary General. The letter was dispatched in the summer of 2000 in the wake of another period of instability in Sierra Leone. The country had experienced the breakdown of the 1999 peace accords between the Revolutionary United Front (RUF) and Kabbah's government and UN troops were abducted from the interior of the country in the months before the letter was sent. Framed as a formal request, President Kabbah's letter asks for UN assistance in setting up a court to try members of the RUF, the rebel group that had displaced him from office and which was widely considered responsible for many of the more violent atrocities committed during the course of the conflict.

In his letter to the Secretary-General, the President called for "a court that will meet international standards for the trial of criminal cases while at the same time having a mandate to administer a blend of international and domestic Sierra Leonean law on Sierra Leonean soil."[144] This vision of a "blend" of law – both international and domestic – was repeated in the president's suggested framework for the Court enclosed in his letter:

> The court could be designed to use a blend of both international law and Sierra Leonean criminal law and procedure. Such use of law will allow for flexibility in the charging of offences that were committed during the relevant period. It will also cast a wider web to catch the leaders of the violence and atrocities committed. Some of the international crimes are certainly crimes against humanity and humanitarian law and the war crimes of attacking personnel or objects involved in humanitarian assistance or peacekeeping missions. Other crimes to be taken into account are grave criminal offences and for them the domestic law of Sierra Leone will be used in the court.[145]

In this initial vision of the Court, international law and Sierra Leonean law would work to complement each other. Is this "blend" of law a synthesis, a new legal topology, or two separate bodies of law taken together? It is unclear from the letter whether the president regards this "blend" as a new jurisdiction amalgamating international and domestic legal domains, or rather as two distinct legal jurisdictions that supplement each other within the institutional context of this proposed court. The president disarticulates the two bodies of law later in the passage, where some crimes are cast as international – crimes against humanity, violations of humanitarian law, war crimes – while others, "grave criminal offenses," are regarded as violations of the domestic law of Sierra Leone. Where is the place of this court's law? If it is not a blended jurisdiction, which legal order has priority, or do they appear in an equal and complementary relationship? Kabbah seems to offer an answer to this question when he summarizes his suggestions by adding, "This approach roots the process in Sierra Leone and makes it uniquely Sierra Leonean."[146]

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[144] Letter from Ahmad Tejan Kabbah to the Secretary-General of the United Nations (UN Document S/2000/786), 12 June 2000.
[145] *Ibid.*
[146] *Ibid.*

In the president's vision, then, the Court grows from within the state of Sierra Leone. The president claims that his suggested combination of international and Sierra Leonean law "roots" the process in the state, though it is not clear what this organic vision entails: does the Court grow from out of the geographical territory of Sierra Leone or from within its domestic criminal jurisdiction? From out of the physical territory of a state or from out of the legal system that inhabits it? These early ambiguities regarding law's place of origin continue to be contested through jurisdictional challenges well into the Court's operations.

Although the legal power of the Court lies in the agreement between the Sierra Leonean government and the United Nations, it draws a kind of *moral* authority from the president's letter that precedes it and calls it into being. As a linguistic act or performative, Kabbah's letter invites the United Nations into the jurisdiction of the sovereign state of Sierra Leone, requesting the UN to intervene by producing a judicial structure that the state itself is unable to support on its own. With sufficient political will the UN could have intervened to establish a court in any case, as the jurisprudence of the *ad hoc* tribunals has claimed. Yet the authority of the president's signature, appended to an invitation to the UN, sets this origin narrative apart from those of other international or 'hybrid' judicial bodies. The president's written request for a court serves the rhetorical purpose of legitimating later claims: that the Court was established not only with the explicit consent of the state located in the founding agreement, but also in response to his direct appeal for help from the international community. As the UN representative present at the signing of the Court agreement commented, "The Special Court for Sierra Leone is different from earlier ad hoc courts in the sense that it is not being imposed upon a State. It is being established on the basis of an agreement between the United States and Sierra Leone – at the request of Government of Sierra Leone."[147]

Yet the court first envisioned by the president, with its "blend" of law rooted in Sierra Leone, is not the court that eventually emerges from out of the series of decisions that follow his request. Early UN responses reserved a place for Sierra Leonean law in the Court's jurisdiction, as does the Court statute. The eventual disappearance of domestic law from Court practice may have been foreshadowed in these documents, but at least in the early stages of negotiation, Sierra Leonean law continued to have a place in the Court. This section details the shifts in how the emerging court was envisioned legally, focusing on the place of Sierra Leonean law as it slips from out of the Court's *de facto* jurisdiction and becomes a purely symbolic gesture of legal hybridity.

The UN response to the president's invitation in June of 2000 unfolds in a series of reports and a Security Council resolution. As previously noted, the legal moment of the Court's origin is located in 2002, in the pair of signatures to the agreement establishing the Court. Yet the decisive framing of the law of the Court, cemented by its agreement and statute, masks the uncertain status of the relationship between international and domestic law that had preceded it. A UN report on the security situation, released in the weeks following the President's letter, continues to hold open the possibility of a court grounded in the existing legal jurisdiction of

[147] Hans Corell, "Ceremony for the Signing of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone," 16 January 2002. Retrieved 14 June 2009 from untreaty.un.org/OLA/media/info_from_lc/SierraLeone_ceremony.pdf.

Sierra Leone. In particular, the report notes that during a UN legal officer's information-gathering visit to the country, "a clear preference was expressed for a national court with a strong international component in all its organs."[148] This UN report begins from the premise that a court established in response to the President's request would emerge from out of the domestic legal context:

> In establishing a special court under Sierra Leone law with United Nations and international assistance, the following issues will need to be addressed. The subject-matter jurisdiction should include international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law, consistent with the reservation entered by the United Nations at the signature of the Lomé Agreement. At the same time, crimes under national law would not be excluded.[149]

As with the president's letter, the details of the relationship between the criminal law of Sierra Leone and international law are not specified, but both bodies of law are to be included in the Court. At the beginning of the passage the Court seems to emerge from the domestic legal sphere, and it is supplemented "with United Nations and international assistance." The position of Sierra Leonean law undergoes a shift in the course of the passage, however: from being the primary site of jurisdiction – the authority *under* which the Court is established – it becomes the body of law that "would not be excluded," while international crimes appear to take precedence in the Court's anticipated jurisdiction.

Roughly one month after the president's letter the United Nations Security Council passed a resolution calling for the Secretary-General to issue a report on the Court's establishment. The resolution envisions a court that would include both international crimes as well as "crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone."[150] The Secretary-General's subsequent report explains the relationship between the two bodies of law:

> While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law.[151]

This is the decisive framing of the relationship between international and domestic law in the Court that structures later formulations. Here Sierra Leonean law appears as a *supplement* to international law, the latter of which becomes the primary legal body that the Court draws from. Yet buried at the end of the report, immediately before the conclusion, is an alternative vision of

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[148] Kofi Annan, "Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone," UN Document S/2000/751, paragraph 9.

[149] *Ibid.*, paragraph 10.

[150] United Nations Security Council Resolution 1315 (2000), Adopted by the Security Council at its 4186th meeting, 14 August 2000.

[151] Kofi Annan, "Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN document S/2000/915 (2000), paragraph 19.

how the Court could have navigated the relationship between two bodies of law. In the path not taken, the Court would have been based in the national jurisdiction of Sierra Leone with "international assistance;" a solution that tracks the language of the earlier report, considered above, where the body of international law supplements the domestic legal order. According to the Secretary-General, this alternative "would rely on the existing – however inadequate – Sierra Leonean court system,"[152] but would root the Court in Sierra Leone in keeping with the president's original vision. Had this structure been adopted, it would have effectively reversed the relationship of primacy between the two bodies of law. Instead, domestic criminal law appears as an afterthought, to be deployed primarily as a means of closing gaps in the privileged body of international law.

President Kabbah's vision of a process "rooted in Sierra Leone" appears in the Secretary-General's report as an alternative that is not pursued because it is considered to be inconsistent with the Security Council resolution.[153] Instead, the founding agreement institutes a *formally* hybrid court – 'hybrid' insofar as it includes elements of both domestic and international criminal law – grounded outside the domestic jurisdiction of Sierra Leone. This legal order in effect opens a new jurisdictional domain: the Court is thought to reside completely outside the domestic legal sphere as a *sui generis* institution. Despite inhabiting a jurisdiction completely separate from the domestic courts of Sierra Leone, the Court borrows from two pieces of Sierra Leonean criminal law in its statute. Though this legal 'hybridity' is cemented in the founding documents of the Court, it does not appear in practice: no crimes have been charged under Article 5 of the statute, which grants the authority to prosecute individuals under Sierra Leonean law.

There are various explanations of why domestic charges were excluded from all thirteen indictments issued by the Special Court. Some explanations refer to formal legal necessity: using only international law, the Court would not appear to violate the provisions of the peace treaty between the Revolutionary United Front and the Sierra Leonean government signed at Lomé, Togo in 1999 (while granting broad amnesty to all combatants, the treaty also included a handwritten exception for crimes under international law that was added by the UN representative). Some explanations argue from political expediency – the whole machinery of international justice could not be as easily brought to bear if it needed to operate within the confines of a law that most international practitioners do not know. There are claims that the crimes under Sierra Leonean law can be more effectively adjudicated through their analogues in international law: for instance, the crime of destroying property appears in both fields of law, but is charged as an international crime. There are also normative arguments in favor of international law, as some commentators argue that the crimes under Sierra Leonean law that appear in the court statute are "inappropriate in a modern, international criminal court."[154] This report's author was particularly concerned about the possible use of a 1926 law concerning the abduction of girls, discussed below, claiming that the statute discriminates against boys and employs gradations of seriousness according to age. These all form compelling explanations for charging international crimes rather than their domestic counterparts, and I do not contest their

[152] *Ibid.*

[153] *Ibid.* at paragraph 13.

[154] Amnesty International, "Sierra Leone: Recommendations on the Draft Statute of the Special Court," AI Index AFR 51/083/2000 (2000).

merit. I am instead concerned with what the vestigial domestic law does for the Court as an institution. What kinds of claims does it enable about the Court's identity even if domestic law is not used in the indictments? What does the role of domestic law in the Special Court reveal more broadly about the state of the Sierra Leonean legal system? Finally, how does its presence help to shore up the Court's authority?

Although Sierra Leonean law is not used in any of the indictments, the Court relies upon this law's silent statutory presence to assert its own hybrid identity. In his opening statement at the start of the first trial, the Court's original prosecutor describes the Special Court for Sierra Leone as a "hybrid international war crimes tribunal."[155] In arguing that the Court is structurally distinct from the tribunals in The Hague and Arusha, and thus not bound to follow their precedents on related points of law, an appellate decision asserts, "it must be emphasised that the Special Court is a hybrid court." The nature and extent of this hybridity shifts in the Court's official decisions and in the commentary surrounding its work. In this way, 'hybrid' is a rhetorical rather than an ontological category: rather than designating what the court *is*, the term serves as a symptom for what its speaker would like it to be in a specific context. For the first prosecutor, the Court's hybridity serves as an empty qualifier that does not alter its status as an international tribunal. This speaker thus emphasizes that the Court is in fact international, insofar as it transcends the domestic legal domain and resides outside of it – a critical point to make in anticipating the defense's jurisdictional challenges to the Court. Whether the Court is seen to function within the boundaries of Sierra Leone depends on which boundaries are at stake, whether political or legal, and on who is drawing them. This discourse of hybridity serves particular political ends: legitimating the Court's presence in Sierra Leone; distinguishing it from prior judicial institutions and jurisdictions; conjuring a sense of its innovation and legal novelty; signaling its attunement to the local juridical context.

This hybrid claim thus carries a substantial political investment, serving as a legitimating discourse for the Court and the projects of legal reform that it seeks to implement in the region – bringing 'the rule of law' to combat the 'rule of the gun,' in the words of its original prosecutor.[156] In the relatively recent history of adjudicating mass atrocity in the last century, nominally 'international' courts (such as the International Military Tribunal at Nuremberg) have been criticized as forms of partisan justice masquerading as neutral legalism, and trials in national courts for international crimes have been considered insufficiently removed from domestic political concerns (as with the trial of Adolf Eichmann in Israel, criticized by Hannah Arendt for over-emphasizing theatricality and historical pedagogy). By including Sierra Leonean law in the statute of the Special Court, its architects and proponents can claim that it offers a different sort of justice and judicial institution – a form that is responsive and attendant to the local setting while maintaining the neutrality of the 'international.' This inclusion serves a rhetorical purpose: it lends the appearance of a dialectical relationship between municipal (domestic) and international forms of justice, resulting in a seamless marriage of the global and

[155] David Crane, "The Opening Statement of David M. Crane, the Prosecutor of the Special Court for Sierra Leone," 3 June 2004, Retrieved 14 June 2009 from http://www.sc-sl.org/PRESSROOM/OTPPressReleases/tabid/196/Default.aspx.

[156] David Crane, "Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts," *Case Western Reserve Journal of International Law* 37 (2005): 8.

the local that can then presume a universal or totalizing consent to its authority. In this logic there is no outside to hybrid justice, as it seemingly fills in the gap between the universal and the particular. It combines an attunement or responsiveness to the local context with the authority of transnational principles located in conventions and international customary law.

Yet the 'local' in this context is in fact national, and the boundaries of the modern nation-state of Sierra Leone exhibit the geographical arbitrariness that characterizes the colonial legacy. The conflict itself spilled over these national boundaries, as the indictment of former Liberian president Charles Taylor indicates. The criminal law of Sierra Leone is largely unreformed from the colonial period, and it reflects the British legal norms of the nineteenth and early half of the twentieth century at least as much as it represents a domestic legal culture particular to Sierra Leone. The president's vision of a flexible law and venue that attends to the domestic situation thus harbors a tension: in order to "take into account the special needs and requirements of the Sierra Leone situation" through a hybridized or "blended" law, the court has to draw upon a colonial legal history in its now-internationalized legal present. The limits of Sierra Leone's domestic law and legal culture is actually presupposed by another of the Special Court's missions; namely, the Court as a vehicle for local reform. The Special Court's first prosecutor hints at this role, and perhaps unwittingly reproduces the discursive form of a civilizing mission, when he characterizes the Court's work as addressing a region that "has never really known the rule of law."[157] The prosecutor's account downplays both the presence of legal order before the Court and the possibilities of disorder produced by his own work in Sierra Leone (as his decision to indict pro-government militia leaders who had supported President Kabbah had revealed). Furthermore, in his curious depiction of law's absence from the Sierra Leonean context – that is, in focusing on Sierra Leone's historical "lawlessness" – Crane precludes the possibility of a hybrid juridical structure in Sierra Leone. His language presumes an anomic void instead of the tangible history of 'lawful' colonial oppression that the contemporary Sierra Leonean legal system has not fully excised.

The History of a Legal Present

Article 5 of the Statute of the Special Court for Sierra Leone draws from two pieces of domestic statutory law: the Prevention of Cruelty to Children Act of 1926, and the Malicious Damage Act of 1861. Both of these laws pre-date Sierra Leone's independence from Britain. Article 5 states:

> The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:
> a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31)
> i. Abusing a girl under 13 years of age, contrary to section 6;
> ii. Abusing a girl between 13 and 14 years of age, contrary to section 7;
> iii. Abduction of a girl for immoral purposes, contrary to section 12.

[157] David Crane, "Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts," *Case Western Reserve Journal of International Law* 37 (2005): 8

b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:
    i. Setting fire to dwelling – houses, any person being therein, contrary to section 2;
    ii. Setting fire to public buildings, contrary to sections 5 and 6;
    iii. Setting fire to other buildings, contrary to section 6.

The extent of Sierra Leonean law included in the Court statute is a British parliamentary act governing property crimes, now largely repealed in Britain, and a colonial-era ordinance drawn primarily from a British Imperial statute. This section traces the contours of an absence: it tracks the colonial history of the law that was *not* used, arguing that what figures prominently as Sierra Leonean law is merely a residual presence or remainder in the workings of the Court. This law has purchase only as far as it continues to provide grounds for a claim to hybrid justice. Historical material and commentary on the colonial period of Sierra Leone reveals the limits of this particular hybrid vision. Most commentary on the Special Court does not discuss the nature of the Sierra Leonean law that was to be used: the fact of its presence in the statute is the only attention it receives.[158] This section places these laws in the broader context of the history of Sierra Leonean law, first by examining their statutory sources and then by locating them historically, in relation to the legal structures in place at the time of their inclusion in the law of the colony. The section situates the work of the Court in relation to some of the key factors within that history: namely, the division between the colony and protectorate that were later combined into what is now the state of Sierra Leone; the bifurcated legal system that this division relied upon; and the vision of indirect rule that informed the British colonial imaginary prior to Sierra Leonean independence in 1961.

In the limited post-independence legal scholarship available on Sierra Leone, narratives of the rise of the modern state customarily begin with the 1787 establishment of Freetown, a settlement of freed slaves credited to the philanthropic ambition of British settler Granville Sharp.[159] The nascent colony was to be governed by "a constitution, bound by a social contract, rooted in history, in the institutions of the Anglo-Saxon monarchy."[160] Like many other colonial entities that had their origins in a kind of public-private partnership, it was transformed into the Sierra Leone Company, incorporated in London in 1791, and subsequently became a chartered colony in 1800. By 1808, administrative authority had passed from the Company to the British Secretary of State and Sierra Leone held the status of a Crown colony. Legislative power first rested with the Governor of the colony and eventually with the Legislative Council: a body comprised primarily of the Governor's appointees, of varied composition and size throughout the

[158] Examples include Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (New York: Cambridge University Press, 2005), 63; Pádraig McAuliffe, "Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone Trial to The Hague Defeats the Purposes of Hybrid Tribunals," *Netherlands International Law Review*, 55 (2008): 366; William Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda, and Sierra Leone* (Cambridge: Cambridge University Press, 2006), 37.

[159] Gershon Collier, *Sierra Leone: Experiment in Democracy in an African Nation* (New York: New York University Press, 1970); Bankole Thompson, *The Criminal Law of Sierra Leone* (Lanham: University Press of America, 1999).

[160] Christopher Fyfe, *A History of Sierra Leone* (Oxford: Oxford University Press, 1962), 16.

colonial period.[161] Governance was thus tied directly to the British Crown, as was the governing law of the colony. The common law of the English courts was officially adopted by Sierra Leone at the end of the nineteenth century, with a 'reception date' around the beginning of 1880.[162] After this initial reception, English law continued to be incorporated into the law of the colony through Imperial statutes.

The Malicious Damage Act of 1861, excerpted in the Special Court statute, was one instance of the adoption of English law into the domestic jurisdiction of Sierra Leone. It was first enacted by the British Parliament as a means of consolidating various crimes against property under one piece of legislation. The law that the Special Court draws from thus did not originate in Sierra Leone, nor did it issue from the colony's Legislative Council, but rather from a British law adopted *en masse* by Sierra Leone with other legislation in the late nineteenth century. Despite having been largely repealed in England during the second half of the twentieth century, the law is still in force in Sierra Leone.[163]

The law of the Special Court also draws from a 1926 Ordinance, which is described by the Court statute as "offences relating to the abuse of girls." The annual Colonial Reports volume notes that among the most important legislative enactments of 1926 was this so-called "*Children's Ordinance*, which deals with the prevention of cruelty to children and is to a large extent based on the Imperial Statute."[164] Although colonial ordinances during this period were enacted by the Sierra Leone Legislative Council and presided over by the Governor in Sierra Leone, all parties were ultimately answerable to the British Crown. The fact that an Imperial statute formed the basis of the ordinance shows that this law did not originate in Sierra Leone, but rather in the British parliament.

The limited literature on post-independence criminal law in Sierra Leone has noted its continued reliance on the law of its former colonial power. Writing in 1960, just before independence, one international legal scholar described Sierra Leone as "a most backward colony" compared to other British African territories, noting "All these territories with the exception of Sierra Leone have codified their substantive criminal law."[165] Five years after independence, a Nigerian law professor commented that Sierra Leonean criminal law was "unique among its neighbors" because it was uncodified, and noted that it "draws freely from English law as if enjoying the same legislature and the same hierarchy of courts."[166] This dependence persisted well into the period of the conflict that the Special Court was set up to

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[161] Bankole Thompson, *The Constitutional History and Law of Sierra Leone (1961-1995),* (Lanham: University Press of America, 1996), 2.

[162] J.H. Jearey, "The Structure, Composition, and Jurisdiction of Courts and Authorities Enforcing the Criminal Law in British African Territories," in *The International and Comparative Law Quarterly* 9 (3) (1960): 399. A.G. Karibi-White, "The Reception of English Law in Sierra Leone: A Historical Treatment," in *Sierra Leone Studies* 19 (1966): 117.

[163] Bankole Thompson, *The Constitutional History and Law of Sierra Leone (1961-1995),* (Lanham: University Press of America, 1996), 149.

[164] Sierra Leone Colonial Reports – Annual No. 1359, Report for 1926 (London: Her Majesty's Stationary Office, 1927).

[165] Jearey, 396.

[166] Karibi-Whyte, 117.

adjudicate. In the preface to one of the more recent textbooks of Sierra Leonean criminal law, published in 1999, a law professor at the University of Sierra Leone remarked, "The criminal law of the country continues to be scattered in a wilderness of legislation substantially imported from England… supplemented with sparse local legislation. In short, the bulk of the country's criminal law is found in Acts of the United Kingdom Parliament of years gone by, most of which have now been repealed in that country."[167]

These characterizations of Sierra Leone presume that its development is to be measured through its *positive* law: Sierra Leone is "backward" because its laws are insufficiently codified, because they draw from outdated British legislation, and because they have not been reformed by the post-independence Sierra Leonean legislature. Yet the modern legal system in Sierra Leone is pluralistic: as a product of its colonial history, Sierra Leone's contemporary court system is split into "general law" courts drawn from the British common law tradition, and "local" courts that are believed to be drawn from indigenous forms of judicial administration.[168] The customary law used in these courts is largely unwritten and is described in the 1991 Constitution as "the rules of law which by custom are applicable to particular communities in Sierra Leone." For those seeking to reform the domestic legal system of Sierra Leone, its pluralism is a complicating factor: as one legal scholar writes, "There is a substantial group of wrongs proscribed under the Sierra Leone legal system known as 'customary law offenses,' which due to the unwritten nature of customary law, are difficult to ascertain with any degree of specificity."[169] The Special Court omits this second body of law in its statute, which is unsurprising given the epistemological problems it would pose to any efforts to capture it in a positivist legal framework. My point in turning to Sierra Leone's legal pluralism is not to lament the lack of representation (or unrepresentability) of its customary law in the work of the Special Court, but rather to show that the rhetoric of hybridity and its related discourse of legal pluralism have a prior history in Sierra Leone's colonial period.

Paradigms of Rule in British Colonial Sierra Leone

> The African protectorates were for the most part declared over uncivilized territories, in which (since the native Governments were incapable of maintaining law and order) there were instituted courts of law and police for the benefit of both Europeans and natives.[170]

Categories from Sierra Leone's colonial past continue to structure its legal present, as this section shows in its discussion of the British administrative division between the colony and the protectorate. The system of legal administration that was deployed throughout much of British Africa in the late nineteenth and early twentieth centuries blended different types of law. A hybrid form of law was thus not new to Sierra Leone, if hybridity is understood as signaling a relationship between two distinct types of law in a shared territorial jurisdiction. I am not claiming that the hybrid structure of the court directly replicates a colonial legal logic, nor do I

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[167] Thompson, *The Criminal Law of Sierra Leone*, xvi.

[168] Thompson, *The Criminal Law of Sierra Leone.*

[169] *Ibid.*, 299.

[170] F.D. Lugard, *The Dual Mandate in British Tropical Africa* (Edinburgh: William Blackwell & Sons Ltd., 1926), 33.

think it can be reduced to merely a form of neocolonial power. Such claims disavow the very different historical circumstances and political teleologies that accompany the work of a British colonial administration, on the one hand, and an 'international community' that claims to work in the interest of developing the rule of law in a post-conflict country. This comparison draws attention to what is enabled through asserting a hybrid judicial form: in both British colonial administration and in international judicial intervention, the institution or political authority can claim to include local legal culture within its broader structure of governance. This move is politically significant in that it shores up the authority of institutions by attempting to incorporate what might otherwise become a site of resistance, whether local resistance to colonial rule or the sovereign state's resistance to international intervention. The rhetorical move of claiming hybridity enables an institution or power to claim that it acknowledges that a (circumscribed) degree of authority or autonomy is retained at the local level. While President Kabbah had envisioned a court that would employ both domestic and international law, the Court's first prosecutor – from the United States, the Court's largest financial backer – decided to exclude Sierra Leonean law from the indictment charges. Excluding Sierra Leonean law from the indictments was expedient, both politically and legally, in light of the amnesty that had been granted to former combatants in Lomé and due to the sovereignty issues stemming from the indictment of a head of state.

The colonial project of incorporating the local into techniques of governance shares a particular *discursive* (as opposed to material) logic with the work of the Special Court. Among other things, the British colonial administration used its policy of indirect rule to assert that it retained a space for local cultural practices of dispute resolution. Including domestic criminal law in its statute enables the Special Court to claim that it preserves context-specific legal norms and practices in the work of an otherwise internationalized institution, and is thus "flexible in law and venue," at least in theory, as per the president's vision. Preserving a national dimension in the Court statute dignifies the law of Sierra Leone as something that *could* be used in tandem with the body of international humanitarian law that has developed throughout the second half of the twentieth century. Insofar as it is *not* used, however, its impotence testifies to the need for international intervention in the domestic legal order. The 1861 Malicious Damages Act and the 1926 Children's Ordinance appear as legal curiosities; relics of another time that are essentially useless in the prosecution of alleged war criminals. The international court does not need to rely upon colonial-era legal remnants when it has a field of relevant international jurisprudence at its disposal.

The pieces of domestic law in the statute are thus something other than legal instruments to be deployed in the courtroom. Instead they work at the level of political signification: they help legitimate the work of the Court by signaling that its work is welcomed and indeed necessary. As with Kabbah's signature on the Court agreement, the laws in the statute seem to convey the consent of the sovereign state of Sierra Leone to the Special Court's authority. They also highlight the ostensible anachronisms in the Sierra Leonean legal system as a whole. As the primary addressee of the Court's work, the international community bears witness to the impotence of the domestic legal order. As many Court proponents have noted, the Court was established largely because the Sierra Leonean court system was perceived to be incapable of handling such large and complex trials in its weakened post-conflict state.

The logic of inclusion also characterizes the relation of British colonial rule to the customary laws of the territory known as the Sierra Leonean protectorate. There too, a form of subaltern law is retained within the dominant legal order in part to demonstrate its backwardness, and thus to justify the need for reform – in this case, through British oversight of 'native' courts.

During most of the nineteenth century, only the colony located in the Freetown peninsula area came under British administration; the remainder of the territory forming the modern state of Sierra Leone had not yet been formally appropriated, though there are varying accounts as to the extent of British influence in that period. Fenton claimed that the territory was still under the "sphere of British influence" before it was annexed as the protectorate; in contrast, Joko Smart argued that before the proclamation of the protectorate, "the policy of the British administration towards the hinterland was that of deliberate non-interference so long as an act perpetrated in the hinterland did not affect the peace and tranquility of the Colony."[171] This changed with the application of the Foreign Jurisdiction Act establishing a British protectorate over areas adjoining the colony, which took effect in 1895 and was formally proclaimed the following year.[172] The Sierra Leone Legislative Council was then able to take the position as legislative authority for both the colony and the new protectorate. While the colony was primarily ruled through English common law and legal procedures, protectorate administration attempted to incorporate local juridical practices. A former chief justice of the Sierra Leone Supreme Court writes:

> Although an Order in Council passed in 1895 authorized the Sierra Leone Legislative Council to legislate for the Protectorate in the same way as for the Colony, the British administrators, from the inception of the Protectorate, displayed an awareness of the authority of chieftancy and other indigenous institutions in tribal life. Accordingly, they introduced a system of government and administration that was calculated to preserve tribal institutions within a larger framework rather than to be in conflict with them.[173]

The Protectorate was divided into districts headed by District Commissioners who shared power with the district's Paramount Chief. While this structure may have had preservationist impulses, it simultaneously stripped juridical powers from local leaders and relocated them within the jurisdiction of the British authorities through mechanisms such as the Protectorate Ordinance of 1896. Native courts had their power to hear significant criminal cases removed to courts of District Commissioners, who exercised authority over the chiefs: "While the Paramount Chiefs continued to preside over minor cases in which citizens of the Protectorate were involved, matters relating to serious crimes came before the District Commissioner," who enjoyed a substantial amount of judicial discretion insofar as he "was guided by English legal procedures but not bound by them."[174] According to a former Chief Commissioner of the Protectorate, the District Commissioner's "first duty is supervision, to see that the native courts decide promptly and justly according to customary law"; furthermore, "Supervision by District Commissioners

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[171] J.S. Fenton, *Outline of Native Law in Sierra Leone* (Freetown: The Government Printer, 1948); H.M. Joko Smart, "The Local Court System in Sierra Leone," *Sierra Leone Studies* 22 (1968): 32.
[172] Collier, 7.
[173] *Ibid.*, 9.
[174] Smart, 9.

has further increased the influence of English ideas on native law."[175] Colonial officers were granted a great deal of authority over local dispute resolution.

With the 1905 Ordinance "to Promote a System of Administration by Tribal Authority Among the Tribes Settled in Freetown," for instance, tribal authorities were granted the power to make rules and determine fines for their violation, but they had to be granted approval by the Governor before they could be enforced. One pre-independence commentator noted: "Legally, everything depended upon the Tribal Rulers making good sets of rules. In practice, everything depended upon the officers of the Administration and their bridging, by personal contact, the gap between the machinery of European-type government and the limited understanding of most of the tribal heads."[176]

By 1918, the Protectorate Amendment Ordinance empowered the Governor of the colony to depose and replace Paramount Chiefs.[177] The institution of the Paramount Chieftancy itself regularized forms of tribal governance and operated as a technique of colonial control.[178] Writing in 1947, the former Chief Commissioner of the Protectorate of Sierra Leone commented on what remained in the Native courts: "If the body of principles seems meager it is to be remembered that much, especially in criminal matters, has been removed from the native courts," and added, "Native courts have gradually been limited and regulated by Ordinances which owe very much to English law. Supervision by District Commissioners has further increased the influence of English ideas on native law."[179]

Mahmood Mamdani has described such techniques of colonial control, traveling under the banner of indirect rule, as a form of "decentralized despotism" in his treatment of British governance of Africa during the late colonial period: "It was about incorporating natives into a state-enforced customary order."[180] This form of governance both seeks to reveal the inadequacies of indigenous juridical practices against the standards of British law and simultaneously seeks to preserve them as 'native.' What at first appears as preservation actually operates as a tactic of reform, however, as more disputes are removed from the sphere of native authority and the remaining disputes are subject to colonial oversight, as Fenton noted in the context of the Sierra Leonean protectorate. Mamdani writes, "Lest one think that the tag 'customary' was a shorthand for letting things be as they always had been, that this was a permissive gesture of powers tired and reluctant to execute a mission, we need to bear in mind that there was nothing voluntary about custom in the colonial period." He continues, "More than being reproduced through social sanction, colonial custom was enforced with a whip, by a constellation of customary authorities."[181]

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[175] Fenton; Smart, 10.

[176] M. Banton, "The Origins of Tribal Administration in Freetown," *Sierra Leone Studies: The Journal of the Sierra Leone Society* New Series 2 (1954): 113.

[177] Sierra Leone Protectorate Ordinance No. 12 Section 80 (1918).

[178] See Banton and J.D. Hargreaves, "The Evolution of the Native Affairs Department," *Sierra Leone Studies: The Journal of the Sierra Leone Society* New Series 3 (1954).

[179] Fenton, 2.

[180] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996), 18.

[181] Mamdani, 50.

To be sure, the colonial violence captured in Mamdani's description highlights where any simple comparison to the work of the Special Court runs aground. Indeed, the Court casts itself (and is cast by its architects) as a *response* to violence, a response that aspires to a regional peace through legal accountability and pedagogies of justice. As the UN representative stated at the opening of the Court buildings in Freetown, the work of the Court "is part of a process to establish justice and the rule of law in Sierra Leone, with roles to be played by both the international community and the people of Sierra Leone."[182] The work of the Special Court for Sierra Leone is more attuned to context than the British colonial project, yet the Court's institutional discourse and hybrid character frequently lends itself to representing the people of Sierra Leone as passive subjects in an anomic region awaiting empowerment and modern political subjectivity through liberal legal forms. The Court is figured as a teaching device that will 'enlighten' the people of Sierra Leone through modeling rigorous procedural standards and a form of law designed to prosecute those who had violated their rights as civilians. At the elite or professional level, according to one commentator, "the hybrid court in Sierra Leone may well develop and apply [international humanitarian law and human rights norms] in an African context and perhaps contribute to a regional mass atrocity jurisprudence."[183] The privileged form of law in this relationship is clearly international, which is meant to supply a paradigm for domestic reform and legal 'capacity-building.'

Instead of focusing on whether the Court is a proxy for power politics – reflecting the interests of its main financial supporters, for instance – I have attempted to address the rhetorical dimension of its work and its parallels with other historical discourses of legal hybridity in the Sierra Leonean experience. I sought to highlight the similar ways in which the target of reform here – whether native law or domestic institutions – is framed in order to authorize an external intervention based on particular ideals of governance. In the first instance, native authorities participate in the civilizing mission of the British through a combined move of inclusion and subjugation. In the second, the domestic legal order of Sierra Leone is both formally represented and substantively neglected in the structure of the Special Court. As a legal *topos*, the claim to a hybrid or plural jurisdiction carries a prior history in the Sierra Leonean context. It also invariably carries a political project: by demonstrating the anachronistic character of domestic law, the Court is able to justify international intervention as a necessary supplement.

Native authorities produced rules under the shadow of the colonial administration, which regulated their work in order to ensure, in the words of a colonial official, that it "was not repugnant to natural justice, equity, and good conscience." He adds: "Serious crimes, however, and cases in which non-natives are parties, and matters new to native law, were removed to the English courts."[184] In the Special Court, the more serious crimes of the conflict are reserved for international law: there is no authority for charging murder under domestic law in the statute, but rather abduction and destruction of property. In both instances, this two-tiered dynamic

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[182] Hans Corell, "Ceremony for the Signing of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone," 16 January 2002. Retrieved 14 June 2009 from untreaty.un.org/OLA/media/info_from_lc/SierraLeone_ceremony.pdf.
[183] Dickinson, 308.
[184] Fenton, 2.

presents the secondary order in a way that highlights its need for tutelage and reform: a reform that is made more justifiable on the basis of the inclusion and cooperation of its subject.

Conclusion

The original vision of a blended system of law has more or less disappeared from the practice of the Special Court for Sierra Leone. The Court's hybridity is now seen as a matter of the composition of its personnel rather than the composition of the law it draws from. Although the Secretary-General's report originally asserted that the Special Court "has concurrent jurisdiction with and primacy over Sierra Leonean courts,"[185] in practice the Court has effectively removed itself from the jurisdiction of the domestic legal sphere and asserted that it is fully international. For example, the Appeals Chamber determined that "Special Court is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone," and added, "there is no reason to conclude that the Special Court should be treated as anything other than an international tribunal or court."[186]

The Court has created its own legal *topos* carved out jointly through active jurisdictional claims and deliberate omissions. The resulting juridical body looks remarkably similar to its *ad hoc* predecessors for Rwanda and the former Yugoslavia, as it has been fully internationalized as a matter of law. This critique of the Court's legal ontology would not substantially shift, however, if charges under Sierra Leonean legal provisions in the Court statute had been included in the indictments. The omission of Sierra Leonean law was both a pragmatic jurisdictional move as well as the only feasible path for a diligent prosecutor to take; including charges under domestic law would effectively replicate the very problem I have outlined above by ascribing domestic charges with a purely symbolic weight.

To be sure, the Court employs other 'hybrid' elements in its administration: judicial appointments by the United Nations and the government (though here the UN retained ultimate authority to appoint judges, whereas the government could merely nominate candidates), and a mix of personnel (though international employees are paid on a different scale than national staff).[187] This is a marked departure, however, from the president's initial vision of a form of justice "rooted" in Sierra Leone, and it reinforces the authority of the international order in this nominally hybrid structure. Both the presence of vestigial law from the colonial era in the Court statute and its absence from Court practice work rhetorically to reveal the weaknesses of the domestic legal order, and to sanction its reform through the intervention of a discursively constituted international community.

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[185] Kofi Annan, "Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone," UN Document S/2000/915.

[186] *Prosecutor Against Charles Ghankay Taylor*, "Decision on Immunity from Jurisdiction," 31 May 2004, paragraph 40.

[187] Special Court prosecutor Stephen Rapp describes the Court's "hybrid constitution" as follows: "Under the statute, the U.N. Secretary-General was to appoint the prosecutor and a simple majority of the judges of the trials chambers and appeals chamber. The President of Sierra Leone was to appoint the deputy prosecutor and the remaining judges" (Rapp 2008: 23). This recent description of the Court's 'hybridity' notably excludes its law. Rapp's predecessor David Crane also attributes the Court's "hybrid nature" to the composition of its judicial and administrative personnel (Crane 2005: 3).

Chapter 4
Sovereign Figures, Sovereign Claims

> From birth to mourning after death, law "takes hold of" bodies in order to make them its text. -Michel de Certeau[188]

The previous chapter explained how the Special Court for Sierra Leone suggested that it was a unique legal entity detached from domestic influence and constituted for itself a "new jurisdiction"[189] completely outside of the domestic Sierra Leonean legal system. The Court nevertheless asserted its 'hybrid' identity to distinguish itself from the work of UN international tribunals and to note its proximity to the target population of Sierra Leone. As I argued in chapter three, 'hybridity' is a rhetorical strategy rather than an accurate description of the Court as a legal body. This chapter considers how the Court's ambiguous 'hybrid' jurisdiction affects its work in practice by considering how it confronts two former West African heads of state – one, the former president of Sierra Leone, a founder of the Court; the other, the former Liberian president, as an indictee. I argue that these two figures present dilemmas for the Court's assertion of its own power as it seeks to establish its place within the international legal order. Examining how the two are brought within the Special Court's jurisdiction reveals the novel challenges posed by the Court's hybrid constitution: the deference it exhibits toward the former Sierra Leonean president suggests a reluctance to infringe upon the sovereignty of Sierra Leone, and the Court's struggle to establish its own legitimacy in the international legal order is revealed through its need to include the former Liberian president within its authoritative domain.

As with any court, the Special Court's work entails bringing individuals before it - individuals who are charged with broader meanings in the dramaturgical space of the courtroom. The Court defines its relationship to individuals through the language of personal jurisdiction. Its founding documents determine who it can indict: persons who allegedly bear "the greatest responsibility" for the crimes named in its Statute, which specifically includes "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[190] Of course the individuals brought before the Court are not restricted to the handful of indictees selected by the prosecution: they also include victims' bodies inscribed with physical evidence of the conflict; perpetrators re-cast as insider witnesses; and aid workers, military commanders, scholars, and others who are called to give voice to forms of "expertise" as part of the Court's production of knowledge. In the jurisdiction opened by the Court's constitutive documents, these figures become interpretive sites to be read for what they reveal about the Special Court for Sierra Leone's broader social and political context.

Trial processes charge the bodies brought before them with supplemental meanings. The former Sierra Leonean president and Court founder, Ahmad Tejan Kabbah, is cast alternately as the good liberal leader who governs through established democratic institutions and turns to the

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[188] Michel de Certeau, *The Practice of Everyday Life* (trans. Steven Rendall, Berkeley: University of California Press, 1984), 139.

[189] *Prosecutor against Augustine Gbao* (SCSL-2004-15), *Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court*, 25 May 2004, para. 6.

[190] Statute of the Special Court for Sierra Leone, Article I(1).

international community for assistance or as a political opportunist who deploys legal mechanisms to dispense with political enemies. Former Liberian president Charles Taylor is figured as a warlord who governed through greed and brutality or as the misunderstood broker of regional peace. The dramatic nature of these charged identities, which are constantly contested and negotiated by prosecution and defense, sharply contrasts with the somber, procedure-driven legalism of the trials themselves. Horrific witness accounts, political outbursts, and legal antagonisms are recorded with a sobriety that is at times comical, at times grotesque. As some legal scholars have noted, the war crimes trial may well be the "paradigm of the legal proceeding in which the symbolic and expressive elements predominate over instrumental concerns."[191]

Some commentary on international criminal trials notes the overdetermined roles of certain individuals within the trial process, either as a problematic extension of a court's mandate or as a necessary aspect of transitional justice. Hannah Arendt famously critiqued the various extra-legal, pedagogical purposes of the trial of Adolf Eichmann, suggesting that the spectacular figure of Eichmann as an instantiation of Nazi evil that was advanced through the trial did not match the bureaucratically minded murderer himself.[192] In contrast, some proponents of transitional justice have celebrated the notion of using post-conflict trials for purposes other than individual accountability – a consequentialist view in which scapegoating might be directed toward productive social ends.[193] For example, Mark Osiel writes "[t]o maximize their pedagogic impact, such trials should be unabashedly designed as monumental spectacles."[194] In Osiel's view, a trial of this kind should be directed outward at an audience to prompt collective reform rather than remaining confined to "conventional concerns with deterrence and retribution."[195] In other words, the primary addressee is not the individual – as a lawbreaker or as a potential lawbreaker – but the polity more broadly. Here the body of the accused might provide an occasion for what Lawrence Douglas terms "didactic legality"[196] by prompting its audience to reflect on problems of representation and judgment. At the Special Court for Sierra Leone, as this chapter will show, the didactic message produced through the Court's engagement with these two leaders appears to concern legitimate and illegitimate rule. Precisely because the Court is designed with the pedagogical purpose of demonstrating that nobody is above the law, its deference to the former Sierra Leonean president is not fully analogous to domestic sovereign immunity. Kabbah was not accused of any crime, yet the texts produced from out of the debate over his potential subpoena suggests a lingering concern that he might be made to appear culpable for the crimes allegedly committed by the pro-government CDF militia. Concerns about perceptions of Kabbah's role among the Sierra Leonean populace were not unfounded; researchers who interviewed people throughout Sierra Leone in 2007 found that

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[191] Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton: Princeton University Press, 2000), 483.
[192] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1963).
[193] See Rene Girard, *I See Satan Fall Like Lightning* (Maryknoll: Orbis Books, 2001), especially chapters 12-14 and the conclusion, regarding scapegoating as a ceremony of atonement and transference.
[194] Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers, 1997), 3.
[195] Osiel, 2.
[196] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001), 5. Guyora Binder notes how the French government regarded the trial of Klaus Barbie as a similarly pedagogical undertaking in "Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie," *Yale Law Journal* 98(7) (1989).

> [a]lthough the indictment of Charles Taylor is a significant development for the SCSL the issue of Charles Taylor is not as central for many as is the issue surrounding the absence of an indictment against either the former President Kabbah or former Vice President Berewa. This issue was referred to frequently and by nearly all interviewees: 'What about Pa Kabbah?'; 'Why is he not at the Court?'; 'Will he be arrested when he leaves office?'[197]

The following sections focus on how the Court addresses the former presidents of Sierra Leone and Liberia. First I consider the Court's refusal to subpoena President Kabbah in a combined case against members of the Civil Defence Forces (CDF), a militia group that had supported his government in opposing the rebel forces that were allegedly responsible for the bulk of the atrocities.[198] What appears to be a routine procedural matter about compelling evidence reveals a deeper ambiguity regarding the President's relationship to the Court. The Court's reluctance to call Kabbah before it while he was president reveals a residual deference toward one of its founders that marks one of the tensions of its hybrid identity.

In the second part of the chapter I contrast the Court's deference toward Kabbah with its relationship to the former Liberian president Charles Taylor. I consider how the Court asserts its authority by bringing the former head of the Liberian state before it. The Court hangs much of its institutional legitimacy on bringing Taylor within its jurisdiction. Taylor's 'capture' is thus represented and replicated in various ways through Court practice, presumably setting a broader example for what awaits illiberal leaders in a global legal order that aspires to contain everything under the banner of the rule of law.

Deference and Deferral: the Presidential Subpoena

Although not legally hybrid in practice, as shown in chapter three, the Special Court for Sierra Leone can be distinguished from the other tribunals through the uniqueness of its founding: it was established by a joint agreement between the government of Sierra Leone and the United Nations following a request from the Sierra Leonean president. This instills an authorizing power in the figure of President Kabbah, a power that appears to produce an institutional reluctance to call him before the Court. These political residues are precisely what the Court attempts to push beyond the borders of its own work, focusing instead on forensic matters of fact-finding and rule application. Yet political considerations transgress legal boundaries, revealing a space of contestation where the Court's relationship to its guarantor remains unsettled.

In one of the Court's annual reports issued shortly before the opening of the trial against Charles Taylor in the summer of 2007, the Special Court President describes a recent visit by former UN Secretary-General Kofi Annan as the "crowning glory" of that period of the court's work. The Court President, a judge in the Appellate Chamber, continues:

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[197] Rachel Kerr and Jessica Lincoln, *The Special Court for Sierra Leone: Outreach, Legacy and Impact*, published through the War Crimes Research Group at King's College London (February 2008), 23.
[198] Sierra Leone Truth and Reconciliation Report.

> It was fitting that [Kofi Annan] should pay us a visit before his retirement as he was very instrumental in the setting up of the Special Court for Sierra Leone and with the President of Sierra Leone, H.E. Tejan Kabbah, played a pivotal role in its establishment.[199]

Turning the page reveals a photo of Kofi Annan, flanked by the Court President and its Registrar, the respective heads of its judicial and administrative sections. The image conveys the Court's recognition by the most prominent UN figurehead and, by extension, the implied recognition of the Court by the international community. In the preceding quotation, the Court President notes the "pivotal" roles of the Secretary General and Sierra Leonean president Ahmad Tejan Kabbah in establishing the Court. As one commentator noted, "the UN is the key actor legitimizing judicial intervention."[200]

As a signatory to the letter requesting the establishment of a tribunal, the former Sierra Leonean president inhabits a complicated relationship to the Court's work. His request for the Court's establishment is freighted with the symbolic consent of the Sierra Leonean state to the Court's presence in its sovereign territory. Kabbah's consent, which stands in for the consent of Sierra Leone, figures heavily in the Court's own claims to legitimacy, as discussed in Chapter two.

While Kabbah was still acting as president of Sierra Leone in 2006, the Court refused a defense request to subpoena him in a case against former members of the CDF. As we shall see, President Kabbah's foundational position appeared to present a problem for the Court when it needed to decide whether to compel him to appear before it. This section undertakes a close reading of the arguments surrounding the Court's refusal to subpoena the president in the CDF case. I argue that Kabbah's position as a foundational figure produces a kind of judicial deference when the Court is confronted with a body that stands metonymically for the sovereign state of Sierra Leone. This deference appears to be in tension with the Court's broader pedagogical objective of demonstrating that no figure, no matter how politically powerful, is beyond the reach of the 'rule of law."

During the course of the consolidated trial against three alleged members of the Civilian Defence Forces (CDF), the pro-government militia that had fought RUF rebel forces on behalf of Kabbah's government, two defense teams filed a request to subpoena the president. The defense sought the president's testimony about the command structure of the CDF, a group that was allegedly answerable to him in his capacity as Commander in Chief of the armed forces and Defense Minister of Sierra Leone. The CDF had been fighting on behalf of Kabbah's government, and one of the defense teams not only suggested that Kabbah might have relevant information about the CDF command structure, but also implied that he might bear some command responsibility for atrocities committed by the CDF. The president's original vision of the Court's mandate had not included prosecuting members of the forces that had fought on his behalf and the CDF indictments presented a political conundrum for Kabbah, whose own deputy defense minister, considered a war hero by many Sierra Leoneans, was indicted and removed from office during his presidency. As president, Kabbah had previously refused requests by

[199] Special Court for Sierra Leone, Fourth Annual Report, 5.
[200] David Scheffer, "International Judicial Intervention," 38.

CDF defense team members to willingly come before the Court, as he claimed that he had an informal agreement with the UN Secretary-General to refrain from involving himself in Special Court affairs. According to defense submissions, he "expressed sympathy with the CDF defendants and hoped they would be acquitted."[201] Appearing in court on the president's behalf, the Sierra Leonean attorney general argued that the application for him to appear was a bad faith effort by the defense to embarrass the President. More notably, the attorney general also contended that the president was immune from legal process as the head of state of Sierra Leone - a position that is not supported in contemporary international criminal jurisprudence and which counters the Court's indictment of Charles Taylor while he was acting as head of state of Liberia. In his written submissions, the attorney general stated that "the President is the embodiment of the State of Sierra Leone and *ex hypothesi*, a subpoena cannot issue against him and a penalty cannot be ordered and enforced against him were he, as Head of State, to disobey it."[202]

The Special Court's trial chamber ruled against issuing a subpoena on the grounds that a threshold test for the potential evidence had not been met. The relevant rule governing subpoenas states: "At the request of either party or of its own motion, a judge or a trial chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."[203] No party had requested the Chamber to use its subpoena power before this point, and thus the subpoena request for Kabbah presented the Chamber with its first opportunity to articulate a standard for issuing subpoenas. The majority of the Trial Chamber set out a two-pronged standard, requiring the requesting party to demonstrate that the evidence was both necessary *and* could not be obtained by other means. The Chamber thus based its ruling on a narrow and novel interpretation of the Court Rules of Procedure that retrospectively produced a test for the potential evidence that could not have been anticipated by the defense in originally making the request. In a separate concurring opinion to the Trial Chamber's decision, Judge Itoe gave a remarkable account of the president's status that expanded upon the attorney general's immunity argument:

> Commonly referred to as "The Princes who govern us," Heads of State are granted these immunities, not for their personal aggrandizement, comfort, needs or aspirations, but because the seat and position they occupy as the highest ranking Officials and Citizens of their countries. This emphasizes the necessity for the dignity, respect and honour that go with it to be conserved and to remain inviolable in order to preserve the integrity and honour that, in this regard, is due primarily and firstly to the Sovereign Nations concerned and subsidiarily, to their Heads of State who are their sovereign representatives. In this process and within this context, Heads of State need to be guaranteed an environment, an atmosphere, and an institutional framework for them to perform their duties in all

[201] As noted in the "Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006, paragraph 15.
[202] *Prosecutor against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, "The Response of the Attorney-General and Minister of Justice to the Applications made by Moinina Fofana and Samuel Hinga Norman for the Issuance of a Subpoena ad Testificandum to President Alhaji Dr. Ahmad Tejan Kabbah," 23 January 2006, page 6.
[203] Rule 54 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

> tranquility and without any unnecessary interferences which could result from the issuance of a Subpoena.[204]

An Appeals Chamber judge later described this characterization of Kabbah's power as akin to "the mind-set that prevailed in Europe in 1648, at the time of the Treaty of Westphalia."[205]

The defense appealed, claiming that the test established by the Trial Chamber for issuing subpoenas was too restrictive. It also contested the factual errors made in Judge Itoe's concurring opinion about sovereign immunity excerpted above, which it claimed should be corrected in the tribunal's jurisprudence. The defense was confronting a paradox: it had reason to believe that the President had evidence of the command structure and activities of the CDF, but it could not actually demonstrate this without hearing his evidence. The Appeals Chamber majority upheld the decision of the lower chamber. The Chamber refused to address the question of the President's immunity on the basis that it was raised in a minority opinion and therefore was not a relevant ground for appeal.

The legal question at stake in this series of decisions is an interpretation of a rule of evidence: under what circumstances can the Court issue a subpoena? Yet because it is the first opportunity the Court had to make this kind of ruling, and because the Court is technically not bound to the jurisprudence of the *ad hoc* tribunals, its decision takes on much greater weight. The decision is not merely a matter of applying an already settled rule; as the rule appears in the Court Rules of Evidence and Procedure, it leaves room for a more permissive interpretation than the two-pronged standard set forth by the Chamber. Through what it does and what it does not say, the Court shows its own unwillingness to bring certain individuals before it. Furthermore, by remaining silent regarding the legal errors of the concurring opinion, the Court allows them to remain in its official record.

In a dissenting opinion, one of the appellate judges begins with a statement made by Jeremy Bentham in the 19th century:

> Are men of the first rank and consideration – are men in high office – men whose time is not less valuable to the public than to themselves – are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody…[206]

The dissenting judge thus re-frames the issue before him as a matter of jurisdiction: he writes,

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[204] *Prosecutor against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa,* "Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone," 13 June 2006, paragraph 132.

[205] *Prosecutor against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa,* "Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006, para. 40.

[206] *Prosecutor against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa,* "Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006.

the Special Court "is, after all, a court set up with plenary power to indict anyone, including President Kabbah himself, and that power to indict must, *a fortiori*, include a power to direct that he should testify."[207]

What I want to point out here are two different conceptions of the Court's jurisdiction: one explicitly stated in the minority dissent, and the other implicit and unsettled in the majority decision of the Appeals Chamber. The dissenting appellate judge reasserts the view taken elsewhere by the Appeals Chamber that the Court is a creature of international law, and as such it does not fall within the jurisdiction of the domestic legal sphere, where Kabbah would have had immunity from process as the head of state of Sierra Leone.[208] On the other side, the majority's refusal to correct the separate opinion from the lower chamber on sovereign immunity could mean many things. It could be a desire to respect the trial chamber's discretion. It could be that the view on sovereign immunity amounts to such a ridiculous misreading of the Court's jurisdiction that it is not worth the Appellate Chamber's attention. Even so, the Court's official silence leaves the question open: was Kabbah– while in his role as president of Sierra Leone, connected to his role as founder of the Special Court – *de facto* above the law?

My point is not that the Appellate Chamber was actively shielding the President, nor am I saying that he is officially above the law in the court's formal jurisdiction. Kabbah did eventually appear before the Court, albeit once he was out of office and in the case against the RUF rebels that he had established the Court to try. Whether it does so deliberately or not, the Appellate Chamber decision leaves a field of ambiguity surrounding the figure of the president and his relationship to the Court, an ambiguity that could have been clarified through the subpoena question. As dissenting justice Robertson pointed out, "it is understandable that President Kabbah would be concerned about appearing as a witness. The court was established at his request, by an agreement between his government and the UN."[209] Roberts attributes Kabbah's reluctance to appear before the Special Court to his foundational role in establishing it, claiming that Kabbah's 'concern' may have stemmed from the actions he took to bring the Court into being. Compelling him to testify would bring Kabbah within the Court's legal process, which may have posed a problem for Kabbah (and some members of the Court) if that meant that his sovereign position – as both the head of the Sierra Leonean state, one prong of the Court's originating authority, and as the self-proclaimed author of the *idea* of a court – was somehow compromised.

Why would the majority of the Appellate Chamber adopt such a deferential approach in refusing to settle the matter of the President's immunity, as dissenting justice Robertson attempted to do? The Chamber's silence on the issue of the President's subpoena in its majority decision opens the possibility of a kind of *de facto* immunity – a spectral privilege outside the authority of the Court. Such extra-legal authority has been noted by political theorists such as Jean-Jacques Rousseau and Hannah Arendt, who note the seeming paradox of the foundational moment, whether the foundation of a body of law or the founding of a polity. There is an inaugural force in every field of power that cannot be accounted for within the field's own terms, as was discussed in chapter two. In the work of Carl Schmitt, this force is the figure of the

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[207] *Id.*, paragraph 16.
[208] *Prosecutor v. Taylor, Decision on Immunity from Jurisdiction*, Case No. SCSL-2003-01-I, 31 May 2004.
[209] *Ibid.*

sovereign, which enables the existence of a political order while dwelling at its margins, not subject to the laws of the order that it authorizes or guarantees. What happens at the concrete site of the sovereign's body here is replicated in international law as well: in its most utopian form, international law wants to unmoor itself from the constraints of state sovereignty even though it relies upon the sovereign state to anchor and legitimate it. Reliance upon the state is even more pronounced in this instance, as the Special Court for Sierra Leone was inaugurated through the direct consent of the head of the Sierra Leonean state. As a tribunal that describes itself as international, applying international criminal law, the Special Court exhibits an ambivalent relationship to its sovereign guarantor. The consent granted by the sovereign state of Sierra Leone, conveyed through the consent of the President, enables the Court to come into being. Even so, both the laws of the state of Sierra Leone and the figure of the President are contained within the jurisdiction of the court. The state is bound to cooperate with the decisions of the Court, and the President is bound to appear if he is subpoenaed to testify before it. Yet the President's role in the formation of the Court lends him a kind of residual authority: his signature is partly what grants the court's jurisdiction, as I explained previously in chapter two.

Kabbah eventually appeared before the Trial Chamber in response to a subpoena in the case against members of the Revolutionary United Front (RUF) after he had left office. The conditions under which he testified were substantially different than they would have been in the CDF case: for one, Kabbah was no longer president and was thus detached from his role as the "embodiment of the State of Sierra Leone," in the words of the attorney general. Furthermore, the RUF was the precise target of his efforts to set up the Court in the first place, as he clarified in his original letter to the United Nations, and thus the testimony he gave would not appear to implicate him in relation to his subordinates, as was possible in the CDF case. During the course of his testimony before the Trial Chamber in the RUF case, Kabbah explicitly claimed ownership over the institution, stating "I regard this as my brain child, this court."[210] When prompted by a defense counsel's statement – "I wanted to give you an opportunity to deal with your subpoena" – Kabbah responded:

> it gives me an opportunity to say something about the Court itself. This court is something that I believe in strongly…the vision is that I had at that time [sic] for this court is that Sierra Leone should be a legacy after the war which we shall share with other countries in the subregion, and so I still believe that and that's perhaps the reason why I deliberately kept away from the Court.[211]

The former president did not actually provide a reason for why he "deliberately kept away" from the Special Court. Instead, Kabbah went on to express concern about rumors that he was willing to give evidence on behalf of the rebels but had refused to support his own militia, and he availed himself of the opportunity to use the Court as a vehicle to address his critics: "I'm very proud of this Special Court and it will be just my pleasure at any time to come and [give evidence]," to which the Presiding Judge added rhetorically, "But haven't you proven them wrong, Mr. Witness."[212] This deference to Kabbah was threaded throughout the Chamber's responses to his

[210] *Prosecutor against Issa Sesay, Morris Kallon, Augustine Gbao* (Case No. SCSL-2004-15-T), 16 May 2008 Trial Transcript, page 11, lines 5-6.
[211] *Ibid.*, 40.
[212] *Ibid.*, 42, lines 16-19.

testimony, with one member of the three-judge panel referring to Kabbah as "one of the leading architects" of the Court Statute,[213] and with the Presiding Judge later suggesting that Kabbah had created the Court.[214] In response to a defense question – "Can I ask you if your commitment to this institution is, as you say it is, why it was that when you were requested to attend the CDF trial you sent the attorney-general here to resist the subpoena that was laid against you?" – the Presiding Judge interjected, "No, we would not ask the witness to answer this question."[215]

Even when he was no longer the "embodiment" of the State, the Trial Chamber displayed a deferential attitude toward the former president of Sierra Leone. This deference – arguably common in legal confrontations with politically powerful figures – is particularly pronounced in the context of the Court's hybrid structure. The perceived legitimacy of the Special Court is tied to the legitimacy of its foundation, and by extension to its founder. The figure of Kabbah provides a kind of embodied guarantor for the Court – of the consent of the Sierra Leonean state, of democratic governance, and of West African complicity in international criminal justice projects.

Bringing the "'Great' Criminal" Before the Law

> [V]iolence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law. The same may be more drastically suggested if one reflects how often the figure of the 'great' criminal, however repellant his ends may have been, has aroused the secret admiration of the public. This cannot result from his deed, but only from the violence to which it bears witness.[216]

If President Kabbah appears in the context of the Special Court for Sierra Leone as a West African leader who resolves conflicts through properly liberal, democratic channels, then Charles Taylor appears as Kabbah's illiberal foil. In journalistic, academic, and advocacy literature, Taylor was regularly invoked as one of the major causes of the ongoing conflict in Sierra Leone. He was popularly depicted as a warlord-turned-president who took advantage of his extensive regional networks and his control over Liberian state resources to engage in a cross-border trade of diamonds for arms with combatants in Sierra Leone. If it did not hold Taylor to account for these allegations, the Special Court for Sierra Leone would arguably have failed to meet its mandate of trying those allegedly bearing the "greatest responsibility" for the conflict. As one independent observer put it, Taylor's eventual trial was "the jewel in the crown" of the Special Court for Sierra Leone.[217] This section illustrates the various ways in which the Court's work presents Taylor as the instantiation of lawlessness that it seeks to conquer in the West African region.

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[213] *Ibid.*, 44, line 21.
[214] *Ibid.*, 70, lines 25-26.
[215] *Ibid.*, 72, lines 6-10, 14-15.
[216] Walter Benjamin, "Critique of Violence" in *Reflections: Essays, Aphorisms, Autobiographical Writings* (trans. Jephcott, New York: Schocken Books, 1978), 281.
[217] See Thierry Cruvellier, "From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test" (International Center for Transitional Justice and Sierra Leone Special Court Monitoring Program, 2009), 5.

The Special Court was jurisdictionally designed to allow for Taylor's trial: its statute provides it with "the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, *including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone*."[218] The Court's first trial chamber issued a sealed warrant for Charles Taylor's arrest based on charges of war crimes and crimes against humanity, which was subsequently unveiled at a Liberian peace conference the president was attending in Accra, Ghana in the summer of 2003.[219] Ghanaian authorities refused to arrest Taylor, and he stepped down from the presidency shortly after and was granted asylum in Nigeria. Appearing before Sierra Leone's Truth and Reconciliation Commission weeks after the unveiling of Taylor's arrest warrant, then-president Kabbah accused Taylor of contributing to the conflict in Sierra Leone: "He is known to have organized and sponsored the initial invasion into Sierra Leone by arming and directing the invaders and his support for them remained active all throughout the rebel war."[220] The allegations against Taylor included, among other things, developing a plan "to take political and physical control over Sierra Leone in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to facilitate that exploitation."[221]

Taylor attempted to challenge the jurisdiction of the Special Court remotely, and he hired a Sierra Leonean barrister to argue before the Court that he was immune from prosecution as an acting head of state. This challenge to the Court's jurisdiction based on a claim of sovereign immunity enabled the Court to argue that it had already captured Taylor within its jurisdiction, as Taylor had implicitly recognized its authority by virtue of having an attorney appear for him in Freetown. The Court's press office claims – among a number of other "firsts" – that the Special Court for Sierra Leone was the "first court to adjudicate the limitation of immunity of a head of state before an international criminal court."[222] Yet this development was more a product of the Court clarifying the nature and extent of its hybrid identity, as a clearly international criminal court would not have needed to adjudicate this already settled point of law. Indeed, the immunity decision recognizes that "the issues in this motion turn to a large extent on the legal status of the Special Court." [223]

Taylor contested the lawfulness of indicting a sitting head of state, suggesting among other things that it is a violation of sovereign equality for a state to exercise its authority on the territory of another state. The jurisprudence on this point was already clear under international

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[218] Statute of the Special Court for Sierra Leone, Article 1, section 1, emphasis added.

[219] Taylor was ultimately charged with eleven counts of war crimes and crimes against humanity, including terrorizing the civilian population, unlawful killings, sexual violence, physical violence, the use of child soldiers, abductions and forced labor, and looting. See *Prosecutor against Charles Taylor*, SCSL-03-01-PT, Prosecution's Second Amended Indictment, 29 May 2007.

[220] Statement by His Excellency the President Alhaji Dr. Ahmad Tejan Kabbah made before the Truth and Reconciliation Commission on Tuesday 5th August, 2003, paragraph 7.

[221] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Trial transcript of 4 June 2007, p. 30 lines 12-15.

[222] Press release, 16 July 2009. For an analysis of the decision, see M. Frulli, "The Question of Charles Taylor's Immunity," *Journal of International Criminal Justice* 2 (2004) and Z. Deen-Racsmány, "Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity", *Leiden Journal of International Law* 18 (2005).

[223] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Decision on Immunity from Jurisdiction, 31 May 2004, paragraph 34

law, where heads of state do not have immunity for international crimes, so the decision would hinge on how the Court interpreted its own jurisdiction: that is, whether its 'hybrid' identity meant that it shared the domestic jurisdiction of Sierra Leone in some way. The Appeals Chamber ultimately ruled that the Court was not a national court but rather an international criminal tribunal, and thus head of state immunity does not apply. Furthermore, the Appeals Chamber appears to call the legal status of Taylor's presidency into question through a footnote in its decision. Taylor had taken his oath of office as president of Liberia on August 2, 1997 after elections that same year. The footnote states:

> The date of the oath is curious, given the provisions of Article 50 of the Liberian constitution of 3 July 1984: 'The President… shall hold office for a term of six years commencing at noon on the third working Monday in January of the year immediately following the election.[224]

The Appeals Chamber suggests that Taylor's accession to office did not comply with the Liberian constitution, calling into question his own legitimacy as sovereign.

After evading arrest for three years in Nigeria, Taylor was turned over to face charges at the Special Court following sustained diplomatic pressure by members of the Court and its supporting states. His transfer to the Freetown facilities in March of 2006 generated increased international attention and renewed interest in the Court's work, and the eventual relocation of proceedings to The Hague, the self-described "international city of peace and justice," raised the profile of the Court even further. In the words of one of the Court's lead prosecutors, "Fortunately, with the Taylor trial occurring in The Hague and this case being viewed as a test of international justice, there has been support from some countries at greater levels than would have been offered for proceedings in Freetown."[225]

Although the trial of Charles Taylor significantly increased the publicity of the Special Court for Sierra Leone, it also diverted attention from the Court's base in Freetown while the defense phase of the case against members of the RUF was continuing. The Court President, a judge of the appellate chamber, had issued an order changing the venue of the proceedings from Freetown to a courtroom rented from the International Criminal Court in The Hague. He cited the security situation in Freetown as a basis for moving the trial outside of the West African region. The Court prosecutor claimed that the trial had been moved following a request from the current Liberian president, Ellen Johnson Sirleaf, who had expressed concern about regional stability.[226] Not all parties supported moving the trial from the Court's original seat in Freetown to the Netherlands, however, and Taylor's first defense team challenged the Court President's decision to relocate the trial. The defense requested to be heard on the issue of venue after hearing of the attempted arrangements to move the trial and the Trial Chamber referred the request to the Court's appellate body. The Appeals Chamber ultimately determined that matters

[224] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Decision on Immunity from Jurisdiction, 31 May 2004.
[225] Rapp, Steven. "The Compact Model in International Criminal Justice: The Special Court for Sierra Leone," 57 Drake Law Review, 11-49, 31.
[226] Rapp, 28.

relating to the trial's venue "are exclusively within the Court President's 'administrative and diplomatic functions'"[227] and are thus immune from review due to their administrative nature.

Representatives from Sierra Leonean civil society groups also contested the move in an amicus brief filed with the court. Among other things, the group claimed that relocating the proceedings would remove the Court too far from the communities that had been affected by the conflict. A section of the brief, entitled "Hybrid Nature of Special Court Suggests that Civil Society Should Be Heard," asserted that:

> The Special Court is unique among international tribunals because it is situated in the country where the atrocities occurred. For Charles Taylor to be taken away and tried in The Hague to a large extent dissipates the hybrid nature of the Court and would likely reduce the impact of the legacy of the Court to the people in West Africa in particular. Since the Court was established not only to address impunity but also to benefit the people of Sierra Leone and the sub region, it is only fair that their concerns are treated with the seriousness they deserve. Thus, to relegate them to the margins of the trial process so crucial as that of the former President of Liberia will be tantamount to denying the people of Sierra Leone and the sub region the right to see, first hand, justice being administered.[228]

The civil society consortium asserted an understanding of the Court's hybridity that was grounded in its geographical presence in Sierra Leone. This "hybrid nature" was thus at risk when the Court's president decided to move the trial to The Netherlands based on supposed security threats. As one independent commentator pointed out, Taylor had been detained in Sierra Leone for three months following his apprehension without any signs of destabilizing the country; the decision seemed to be more a product of long-term political conceptions of stability than short-term security concerns.[229]

The Court did not formally respond to the civil society brief. The issue appeared again, however, in the defense's opening statement. Taylor's attorney characterized the move to The Hague in dramatic terms, likening Taylor's displacement through the change of venue to the history of forced displacement by Africans through the Atlantic slave trade:

> like an illegal immigrant, refugee or worse, and for those of an historical mind, in reverse, he was taken in chains from the shores of Africa and taken to Holland, thousands of miles away. The country of one of the colonisers of the black race for centuries. A historically familiar journey for some.[230]

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[227] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Decision of the President on Defence Motion for Reconsideration of Order Changing Venue of Proceedings, 12 March 2007, p. 3, referencing 29 May 2006 decision by Appeals Chamber.
[228] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Civil Society *Amicus Curiae* Brief Regarding Change of Venue of Taylor Trial Back to Freetown, 9 March 2007, para. 5.
[229] Thierry Cruvellier, 13.
[230] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Defense Opening Statement, 13 July 2009, page 10, lines 8-13.

In the defense attorney's account, Taylor's transfer stands metonymically for the broader history of colonial intervention in Africa. Playing upon tropes of capture and forced submission, this defense account offers a more extreme version of the civil society brief's claim that the Court had reoriented itself toward the international legal community in Europe at the expense of its Sierra Leonean constituents. The defense counsel's statement offers a version, albeit an extreme one, of the argument for "African solutions to African problems" – letting regional organizations such as ECOWAS (the Economic Community of West African States) or the African Union address conflicts and their aftermath through more localized mechanisms rather than involving the international community more broadly, with its attendant risk of neocolonial influence.

Before Taylor's apprehension in Nigeria, it had appeared as though the Court would be unable to fulfill its mandate to prosecute those bearing the greatest responsibility for the atrocities committed during the conflict. High-ranking commanders of the various factions of the conflict had either been killed, had passed away or could not be located, and a number of other commanders who were believed to be farther down command chains had been absorbed into the Court's work as insider witnesses. Taylor's capture revivified international interest in and support for the Special Court for Sierra Leone. The Court's acquisition and transfer of Taylor's body seemed to validate its work - his appearance before the Court appeared to strengthen its legitimacy just as his absence had threatened it with obscurity.

Images of a handcuffed and subdued Taylor at various stages of his transfer from Monrovia to Freetown were circulated among Court staff and disseminated more broadly.[231] For a period of time the Court website had posted an image of Taylor with his hands tented, appearing calculative. Visitors to the site would link to more information about the trial by clicking directly on this photo, 'capturing' his image, as it were, and 'submitting' it as a request for additional knowledge about the proceedings against him. After the site had been updated, a link to the streaming video of the trial could be accessed by clicking on Taylor's head framed in a television screen, with the word "LIVE" emblazoned in red in the upper left corner. After years of evading the Court's jurisdiction, Taylor would be put on display in an ongoing staging of his submission to the Court's power.

Taylor actively fought the prosecution's efforts to interpellate him as the 'great criminal' of the conflict. In his opening statement, the lead prosecutor claimed that Taylor bore responsibility for "the development and execution of a plan that caused the death and destruction in Sierra Leone,"[232] and argued in effect that the former Liberian president had masterminded the effort to gain physical and political control over the territory of Sierra Leone. Taylor was not present at the opening statement of the trial against him, however, and the Court adjourned for another seven months after the Prosecution's opening statement to give Taylor additional time to prepare his case. His original lawyer noted that while Taylor recognized the jurisdiction of the Court,[233] he had expressed concern that he did not have the financial resources necessary for conducting an effective defense. Rather than appearing in the courtroom for the opening

[231] Email correspondence dated 30 March 2006, on file with the author.
[232] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Prosecution Opening Statement, 4 June 2007, page 30, lines 9-11.
[233] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Prosecution Opening Statement, 4 June 2007, page 2, lines 25-26.

statement, Taylor had submitted a letter to his attorney to be read before the judges. He claimed that he did not believe he would receive a fair trial due to inadequate resources, and his letter stated:

> I cannot participate in a charade that does injustice to the people of Sierra Leone and Liberia and the people of Africa and to the international community in whose name this Court claims to speak. I cannot, I choose not to, be a fig leaf of legitimacy for this process. I hope and pray for a fair trial that will perhaps bring to an end the cycles of injustice. I stand ready to participate in such a trial and let justice be done for myself and for those who have suffered far more than me in Liberia and Sierra Leone.[234]

Delivered through his attorney with his absence looming over the proceedings, Taylor's public refusal to participate under the terms he had been granted by the Court carried substantial rhetorical force. Describing himself as the "fig leaf of legitimacy" for the Court's work (and thus implying that the Court was obscene or shameful), Taylor made an explicit argument about the legitimating role played by his own body in the Court process. In his characterization, his body also becomes the site of potential injustice that would be inscribed not only on him but also on the people of the region and the international community, whose voice has been unjustly appropriated, Taylor suggests, through the work of the Court. He further ordered his legal team to cease representing him, leaving the Court with a tangible absence of both the accused and his legal analog that threatened to undermine the legitimacy of the proceedings. The prosecution objected: "having thumbed his nose at this Court and refused to come, his unsworn statement, his political arguments, are being read out in this letter by Mr. Taylor"[235] – that is, his counsel was able to subvert previous agreements between the parties and to instead ventriloquize Taylor's political objections to the Court through the vehicle of the letter.

Taylor received the additional resources he had requested, including a new lead counsel, and his trial reconvened seven months after the prosecution's opening statement. The proceedings against Taylor brought further disputes about how to interpret the 'text' instantiated through Taylor's body. The case against Taylor was initially staged around the issue of diamonds: as a member of the prosecution noted in the opening statement, "Geographical boundaries had no meaning. What had meaning in this conflict were diamonds."[236] Taylor was specifically accused of participating in a plan to "take political and physical control of Sierra Leone in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to facilitate that exploitation."[237] The first witness called by the prosecution – and inhabiting a particularly charged position in the unfolding case as its inaugural witness – was identified as an expert on the diamond trade in West Africa. He had contributed to a UN expert report on conflict diamonds in the region and authored a report for the Office of the Prosecutor

[234] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Prosecution Opening Statement, 4 June 2007, p. 9 line 25 to page 10 line 4.
[235] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Prosecution Opening Statement, 4 June 2007, p. 6 lines 12-18.
[236] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Prosecution Opening Statement, 4 June 2007, p. 59 lines 5-11.
[237] *Id.*, p. 30, lines 9-12.

entitled "Diamonds, the RUF, and the Liberia Connection," and through his testimony the prosecution sought to link Taylor to the "campaign of terror" directed at civilians in the effort to gain control of the regional diamond trade. The expert's testimony focused primarily on much broader issues such as the geological formation of diamonds, mining techniques, and the licit and illicit trade in diamonds centered in the West African region and their export to Antwerp, Belgium. The prosecution's case thus unfolded as a narrative of the political economy of war, often reaching beyond its specific subject – Charles Taylor's alleged crimes – to establish a historical account of the diamond trade in West Africa during this period.

Taylor's defense team contested this representation of their client: "a couple of months before the trial was due to start, and after several years of preparation, when the Prosecution filed its pre-trial brief in this case we began to see the emergence of diamonds as an expressly stated reason for Mr. Taylor's alleged participation in the common plan of the [joint criminal enterprise]."[238] This representation of Taylor's involvement shifts, the defense contends, throughout the trial process: a month after the prosecution's opening statement, the Office of the Prosecutor filed an amended case summary

> alleging there that the common plan that was shared by Mr. Taylor and other participants in the JCE was to inflict a campaign of terror on the citizens of Sierra Leone in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone. Yes, it had become terrorism. Now, I wonder where that term "terrorism" came from, at a time when the so-called war on terror is still ongoing, a war which has dominated our lives for over a decade. So we say now, now that we've reached June/July 2009, which is it? Diamonds? Or is it political control? Or is it overthrowing the Government of Sierra Leone? Or is it terrorising the citizens of Sierra Leone? Which is it?[239]

Taylor's defense sought to establish that the prosecution was using the figure of Taylor as a metonymic substitution of the myriad evils of the conflict, whether economic greed, political control sought through illiberal means, or terrorism. In contrast, Taylor claimed during his own testimony that his revolution in Liberia was intended "to bring about democracy, multi-party democracy, may I say, and a rule of law which we no longer knew,"[240] adding that it was ideologically "informed by one thing; a desire for democracy and the rule of law."[241] Appropriating the rhetorical currency of the Court itself, Taylor sought to represent himself as a champion of domestic political reform in Liberia and as a broker of peace in the region during the Sierra Leonean conflict.

What precisely is happening here through these contested claims about the figure of

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[238] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Defense Opening Statement, 13 July 2009, page 24299, lines 5-10. I discuss joint criminal enterprise previously in chapter one.
[239] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Defense Opening Statement, 13 July 2009, page 24300, lines 2-14.
[240] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, 14 July 2009 Trial Transcript, page 24327, lines 17-19.
[241] *Ibid.* at 24-25.

Charles Taylor? Writing on representations of criminality in South Africa, Jean and John Comaroff pose the following questions:

> To the extent that discourses of crime and enforcement, as *popular* national fantasy, are endemic to the imaginary of modern state power, how might current changes in the nature and sovereignty of states – especially postcolonial states – be tied to the criminal obsessions sweeping so many parts of the world? Why do outlaws, as mythic figures, evoke fascination in proportion to their penchant for ever more graphic, excessive, and unpredictable violence?[242]

Returning to Benjamin's observation on the perceived threat of the 'great' criminal that heads this section, it is apparent that Taylor's cathected body appears as a threat to the established order of democratic governance. For Benjamin, the figure of the 'great' criminal poses a threat to law's monopoly of violence, which also serves to explain how the criminal becomes an object of illicit admiration. Taylor's alleged violent acts – outside the margins of the legal order – constitute an instantiated threat to that order, which is why his appearance within the domain of the Court is so freighted with social and political meaning. Taylor's capture and submission to the Court's jurisdiction form part of a broader display of power, but whose power, and on whose behalf is it exercised? Who is the ultimate addressee of the Court's work: the population of Sierra Leone? The discursively constructed 'international community?' External economic stakeholders? The questions posed by the Comaroffs add the complex element of postcolonial sovereignty to this dynamic of criminality and punishment: a more fragile sovereignty that may require an overt production of its authority to shore up its containment of violence by law. The Court's representation of Taylor as an instantiation of criminality is also a statement about the inadequacies of weak postcolonial states, calling for the sovereign assertion of another entity – the Court itself – to supplement state power. Yet sovereignty as a political concept is by definition unified and supreme; it cannot be supplemented or shared in a hybrid form.[243] It would seem that this *un*-sovereign dependence in both directions – of the Sierra Leonean state upon the Court to do the work of accountability that it is unable to do, and of the Court on the Sierra Leonean state for its inaugural force – is precisely what produces these ambivalent encounters with sovereign figures, whether the Court's deferential approach to Kabbah or its over-determined need to contain Taylor within its jurisdiction.

Conclusion

In the words of the Comaroffs, law enforcement – in this case through court process – "may provide a privileged site for staging efforts…to summon the active presence of the state into being to render it perceptible to the public eye, to produce both rulers and subjects who recognize its legitimacy."[244] The complicating factor in this instance is the relationship between the Court and the state: that is, how the Court navigates its hybrid identity, which depends on the

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[242] Jean and John Comaroff, *Law and Disorder in the Postcolony* (Chicago: University of Chicago Press, 2006), 279.

[243] For an account of sovereignty in political theory, see Wendy Brown, "Sovereignty and the Return of the Repressed," in *The New Pluralism: William Connolly and the Contemporary Global Condition* (ed. David Campbell and Morton Schoolman, Durham: Duke University Press, 2008), 250-272.

[244] *Ibid.*, 280.

Sierra Leonean state as its guarantor. Throughout its work the Court must mediate between honoring the sovereignty of the Sierra Leonean state (and its 'embodied' analogs) and its own self-assertion as a sovereign form. In its various appellate decisions concerning the Court's jurisdiction and Charles Taylor's claims to sovereign immunity, the Court asserts its own separation from the jurisdiction of the Sierra Leonean state in order to count itself as a creature of international law that dispenses international criminal justice. The Court claims that its own power is distinct from the power of the Sierra Leonean state, and it argues that its founding agreement is "an expression of the will of the international community."[245] As I noted in Chapter Three, the Special Court for Sierra Leone defined itself as an international tribunal located outside the domestic jurisdiction of Sierra Leone. In the words of its Appellate Chamber, "the judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself reflecting the interests of the international community."[246] The Court is careful to claim its own power as distinct from the power of the Sierra Leonean state and its jurisdiction. It does this in part to avoid the specter of state sovereignty: if it were to yoke itself to the authority of the Sierra Leonean state and its judicial powers, it would appear less *international* – less able to speak "the interests of the international community" – and incapable of indicting an acting head of state from a neighboring country. In effect, the Court claims its own power in order to expand its jurisdictional hold over bodies that might otherwise be granted sovereign immunity.

The Court tries to assert its sovereignty by establishing itself as the highest authority in the domain where it exercises jurisdiction. Yet this authority is troubled when it runs up against the figure of one of its founders, as this chapter has shown. Although the Court technically exercises jurisdiction over the president of Sierra Leone, Kabbah's foundational status produced a kind of judicial deference in court practice. This deference toward the former president of Sierra Leone contrasts sharply with the Court's need to visibly capture the figure of the former Liberian president within its jurisdiction, a key element of the Court's perceived legitimacy and viability as an international legal body.

[245] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Decision on Immunity from Jurisdiction, 31 May 2004, paragraph 38.
[246] *Prosecutor against Augustine Gbao* (SCSL-2004-15), "Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court," 25 May 2004, paragraph 6.

Chapter 5
Governance and the Reach of Jurisdiction

International criminal courts often move beyond a strictly retributive understanding of a court's jurisdiction – that is, determining the guilt or innocence of individuals in relation to specific crimes – and into a supplemental set of objectives. For the Special Court for Sierra Leone, these objectives include securing regional peace and cultivating the rule of law. In addition to enacting a spectacle of judgment and punishment, then, this Court also presents a pedagogical display of lawfulness directed at the population of Sierra Leone. It extends its objectives beyond determining individual accountability for criminal acts to include efforts to reform the Sierra Leonean body politic in the interests of peace and security. This suggests a broader jurisdictional domain for these tribunals than the more obvious tasks of judgment and punishment. Put another way, the Court's work exceeds the retributive task granted by its statute. It interprets its jurisdiction granted by the statute to include extra-statutory concerns and effectively broadens out the domain of its own authority.

The breadth of the Court's concerns may come as no surprise to the architects of international tribunals who consider courts to be techniques of transitional justice. As chapter one notes, within the logic of transitional justice a backward-looking mechanism such as a court also has a forward-looking purpose: it should help facilitate a transition. Proponents of transitional justice claim it helps catalyze a political shift from an authoritarian to a democratic regime or a social transition from a state of conflict to a state of peace. For example, one commentator writes "precisely because international criminal justice addresses *mass* crimes, which inevitably dislocate societies, its ultimate aim is to heal fractured societies and help establish peace and reconciliation by addressing the root cause of such destabilization – impunity." [247] While the Special Court for Sierra Leone was intended to mark a shift from a shattered post-conflict state to a secure and peaceful future, it was also designed to shore up the power of the Sierra Leonean state's existing political regime rather than to inaugurate a new political order. As chapter three explained, this court was set up to accomplish what Sierra Leone's poorly functioning domestic judicial system presumably could not handle, and in doing so it would set an example of fair legal procedure to serve as the basis for broader institutional reform within Sierra Leone. In turn, the Court would educate the population of Sierra Leone about the importance of the rule of law. In procedural language the 'rule of law' is often used to refer to fair trial rights, including the presumption of innocence, the right to counsel, and due process protections, but the phrase also bears more ambiguous social and cultural meanings in court discourse as a kind of panacea for post-conflict instability.

What is presumed by using an internationalized criminal tribunal, a form of legal accountability, as a basis for broader social and political reform? What are its limits? This chapter shows how the Court moves beyond the Sierra Leonean government's original request for bringing alleged rebel fighters to justice and envisions itself as a vehicle for broader security and governance measures that are designed to benefit external stakeholders as much as – if not more than – the population directly affected by the conflict. The chapter examines tensions

[247] Kingsley Chiedu Moghalu, "Reconciling fractured societies: An African perspective on the role of judicial prosecutions," in *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (ed. Ramesh Thakur and Peter Malcontent, New York: United Nations University Press, 2004), 198.

between these different aims of the Special Court for Sierra Leone, as well as their implications for how we have come to think of international criminal law responses to post-conflict settings. *Ad hoc* international criminal courts such as the Special Court have made increasingly sophisticated efforts to signal their legitimacy to an international audience; I described one of these efforts made through the discourse of 'hybridity' in Chapter three. Yet there is an under-explored gap between the Court's statutorily granted task of bringing individuals before it and its broader ambitions of bringing security to the region by promulgating the rule of law. What does these broader ambitions amount to in practice?

The Special Court for Sierra Leone does not disguise its extra-statutory ambitions. From the Sierra Leonean president's original request for a court to opening statements by the prosecution, extending the rule of law to the region openly appears as one of the Court's objectives. Participants in the Court's process meanwhile disavow the institution's inherent political dimensions or the particular cultural values it dispenses. Although the 'rule of law' is invoked as what the Court will deliver through its practices, it is not clear what this would actually entail. Indeed, the material impact of the Special Court's work on the domestic criminal justice sector and on the lives of most Sierra Leoneans appears to be quite limited, and certainly far less successful than its triumphalist 'rule of law' discourse vowed it would be.

This chapter considers how the Special Court for Sierra Leone extends its work beyond projects of accountability. In the first section, I draw out the Court's ambitions by tracing their appearance in public statements by the Court's first prosecutor. These statements presume a lawless violence tied specifically to the West African region and offer a diagnosis of an entrenched regional problem that legitimates a set of methods or techniques to solve it. The second section shows how the Court accepts and responds to this presumed lawlessness enunciated by the prosecutor by embarking upon a project of reform that exceeds the retributive task of the Court's mandate. The third and forth sections explore how this reform project is figured as a form of governance and as a security strategy. The final section shows how all of these extra-statutory roles for the Court regard justice as an investment, which presumes a neoliberal view of the social and cultural value of post-conflict accountability.

The following section examines public statements by the Court's first prosecutor articulating the task of the Special Court, as he sees it, in combating the anomic violence of the West African region. As Prosecutor David Crane describes it, the Court was not merely established to apply the law as authorized by its statute. The court takes on a much more ambitious agenda, backed by the moral authority of the international community, in bringing security to the region through the rule of law.

Civilizational Discourse (and its Discontents)

> West Africa was a lawless land where accountability was nonexistent. The rule of the gun reigned supreme.[248]

[248] David Crane, "Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts," *Case Western Reserve Journal of International Law* 37 (2005): 2.

In this public remark during his tenure as Special Court prosecutor, David Crane explains the scope of his task to an American law school audience. Despite his narrow statutory mandate to prosecute "those bearing the greatest responsibility" for crimes committed in Sierra Leone in a bounded period of time, Crane characterizes his work more broadly: his object is West Africa, and its problem is lawlessness. Crane is not merely offering contextual background for an audience that might be unfamiliar with his mandate. Instead, as I argue, this account forms part of Crane's understanding of what the Court was established to address, and indeed what the Court itself takes its objective to be.

When *was* this "was," this time without law or legal accountability? Is Crane referring to the region's pre-colonial, colonial, or recent post-colonial history, or possibly a combination of all three? Crane later elaborates: West Africa, he claims, "has never really known the rule of the law."[249] To correct this problem of knowledge, its people "must come to understand three things related to the law, that it is fair, that no one is above it, and that the rule of law is far more powerful than the rule of the gun."[250] Crane suggests that the Court's role is didactic: through exposure to its practices, it will produce an enlightened understanding among the citizens of Sierra Leone. Here the people of West Africa must learn to grasp the rule of law in its omnipotent fairness – a truth that the people of Western liberal democracies have presumably grasped already. Crane maps binary categories of developed and undeveloped, enlightened and barbarous, onto the relationship between what the Court stands for – namely, the "international community" and those who speak in its name – and the people of this "lawless land." Crane's words ring with a familiar colonial logic, coupled with a utopian dream of what law will bring to the region.

The prosecutor's characterization of the region and the Court offer an easy target for critical readings, and it is arguably shortsighted to focus on how one individual frames the project of the Court for an audience that he is attempting to persuade of its merits. What might we then learn from this particular voice, among many, in the vast project of post-conflict accountability? Although by no means the sole authoritative voice of the Court and its work, Crane's role within the institution of the Court lends historical significance to his speech. His words reveal a set of presumptions, articulated elsewhere through other court figureheads and in official policy literature, that are here most distilled (and arguably least refined), in part due to the prosecutor's very public role in this adversarial institution. As its original prosecutor, Crane exercised interpretive discretion over the Court's mandate. His decisions framed the nature and extent of the indictments, including which individuals to charge, as well as what laws to charge them under according to the statute. Speaking as a former Defense Department official from the Court's largest donor country, Crane's language travels under multiple banners. Among other interpretations, it is read as American, as Western, and as the conduit of what locals reportedly referred to as "white man's justice."[251] Most notably, Crane's speech instantiates a conceit at work in the Special Court. By positing a violent absence of law in West Africa, the prosecutor seeks to ground and legitimate the Court. Crane contends that lawlessness is endemic to the

[249] Crane, 8.

[250] Crane, 8.

[251] See for example Hans Nichols, "Truth Challenges Justice in Freetown," *Washington Times*, January 5, 2005: "Negative perceptions of the court persist for several reasons, not the least of which is a local press corps that brand it an agent of 'white man's justice.'"

region - it is both naturalized and seemingly boundless without the corrective that the Special Court offers. The rule of law is deployed to counter and contain the rule of the gun.

In their many scholarly forms, postcolonial theory and critical theory have long recognized the limited and problematic conceptions of the developing world that appear through Western representations. In *On the Postcolony*, for instance, Cameroonian theorist Achille Mbembe claims that the views of Africa revealed through Western discourse draw upon weathered tropes of negation and bestiality. Figured as the West's deficient Other, Africa appears as "the world par excellence of all that is incomplete, mutilated, and unfinished, its history reduced to a series of setbacks of nature in its quest for humankind."[252] Western discourse on Africa carries the additional conceit that "[w]e can even, through a process of domestication and training, bring the African to where he or she can enjoy a fully human life."[253] Crane's conception of West Africa as "a region that has never really known the rule of the law" opens itself to both of these critiques: the region's development has been stunted in relation to the presumably universal measure of the West, and through exposure to an exemplary discourse of lawfulness, it might be brought into the civilized fold.

The prosecutor's language draws from a perception of existential threats and organic metaphors that naturalize the violence of conflict that the Court is thought to combat. Crane muses, "The real threat to humanity on several levels is bred in the fields of lawlessness in the third world. Fertilized by greed and corruption, what grows out of these regions of the world are terror, war crimes, and crimes against humanity."[254] Here humanity as a whole is threatened by a malignant expansion of third world lawlessness. His overreaching metaphor casts greed and corruption as endemic and generative, cultivating anomie and its attendant violence. The region is both the source and victim of violence, and its subjects inhabit volitional extremes. Combatants are either "war criminals" or "mere pawns" in broader criminal networks, and their victims are entrenched in an unshakeable helplessness.

Elaborating upon the caricatured Western view of Africa, Mbembe writes, "War is seen as all-pervasive. The continent, a great, soft, fantastic body, is seen as powerless, engaged in rampant self-destruction."[255] Perhaps unintentionally, the Special Court prosecutor invokes these tropes and their historical baggage. He depicts the people of Sierra Leone as lacking agency or legal knowledge and casts them as victims of a lawless history. This deficit will be remedied by the pedagogical workings of the Court, as if mere knowledge of law yields talismanic effects against violent conflict. As part of its outreach efforts, for instance, the Court has distributed a pamphlet in Krio, Sierra Leone's lingua franca, entitled "Wetin Na Intanashonal Umaniterian Lo? (International Law Made Simple)." The Outreach Coordinator explained that the pamphlet was partly aimed at Sierra Leoneans with limited literacy, and added that it would contribute to "helping them understand that even in wartime, soldiers and civilians have rights and obligations."[256]

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[252] Achille Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001), 1.
[253] Mbembe, 2.
[254] Crane, 4.
[255] Mbembe, 8.
[256] Special Court for Sierra Leone Press Release, 17 February 2006.

The discourse of lawlessness advanced by Crane is reminiscent of the tone of an influential article by American journalist Robert Kaplan published in the Atlantic Monthly in 1994. Entitled "The Coming Anarchy," the piece was widely disseminated in diplomatic circles, and some scholars argue that it shaped American foreign policy toward the West African region following its publication.[257] Anthropologists and historians have contested Kaplan's "New Barbarism" thesis, as one critic calls it, a view which foregrounds the supposedly "irrational" aspects of the region's culture born out of environmental scarcity and cultural disorientation.[258] Crane's descriptions of what transpired in Sierra Leone (and of what the rule of law would bring to a hitherto lawless region) replicates the New Barbarism thesis, and it reduces a nuanced conflict to a simplistic melodrama of good and evil. While not responding directly to Crane's reductive reading of the role of law in the region, some of the critics of New Barbarism raise critical counter-arguments to his premises. In their detailed ethnography of hunter militias in Sierra Leone, for instance, Mariane Ferme and Danny Hoffman argue that the pro-government Civil Defence Force (CDF) expressed an awareness of international laws of war in some of their official statements, and claimed that they were fighting to restore the rule of law in Sierra Leone.[259] Paul Richards' work attempts to directly refute the New Barbarism thesis by contending that even the rebel group known as the Revolutionary United Front (RUF), arguably responsible for much of the conflict's most brutal atrocities, had its own political rationality.[260]

In a more reflective speech further into his tenure as prosecutor, Crane addresses the criticism that the Court is imposing a form of justice that may not align with the desires of the population directly affected by the conflict. He cautions:

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[257] Robert Kaplan, "The Coming Anarchy: How Scarcity, Crime, Overpopulation and Disease are Rapidly Destroying the Social Fabric of our Planet," *Atlantic Monthly*, February 1994: 44-76. Paul Richard's *Fighting for the Rain Forest: War, Youth & Resources in Sierra Leone* (London: The International African Institute, in association with James Currey and Heinemann, 1996) named Kaplan's thesis "New Barbarism" and is largely devoted to challenging his arguments. Lansana Gberie notes that "the U.S. State Department had Kaplan's article faxed to every one of their embassies around the world" in *A Dirty War in West Africa: the RUF and the Destruction of Sierra Leone* (Bloomington: Indiana University Press, 2005), 144.

[258] See Richards (*supra*) as well as Stephen Ellis, *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War* (New York: New York University Press, 2007), 18-20; Mariane Ferme, *The Underneath of Things: Violence, History, and the Everyday in Sierra Leone* (Berkeley: University of California Press, 2001), 221; and Danny Hoffman, "Disagreement: Dissent Politics and the War in Sierra Leone" in *Africa Today* 52.3 (2006), who argues that the violence of the conflict should be considered as a form of political speech.

[259] Mariane Ferme and Danny Hoffman, "Hunter Militias and the International Human Rights Discourse in Sierra Leone and Beyond," *Africa Today* 50.4 (2004): 73-95. Ferme and Hoffman argue that the hunter militias demonstrated some knowledge of human rights discourse while also acknowledging the "local ethical and legal codes in operation" (83). Notably the authors' claims are limited to the pro-government CDF groups, and do not include other factions of the conflict such as the Revolutionary United Front (RUF) or the Armed Forces Revolutionary Council (AFRC).

[260] Richards argues further that "*Contra* New Barbarism the violence of the Sierra Leone conflict is shown to be moored, culturally, in the hybrid Atlantic world of international commerce in which, over many years, Europeans and Americans have played a prominent and often violent part." *Fighting for the Rain Forest: War, Youth & Resources in Sierra Leone* (London: International African Institute in association with James Currey and Heinemann, 1996), xvii. For a detailed account of the *absence* of a revolutionary theory or guiding principles in the RUF, see Ibrahim Abdullah, "Bush Path to Destruction: The Origin and Character of the Revolutionary United Front/Sierra Leone," 36(2) *The Journal of Modern African Studies* (June 1998), and for direct criticism of Richards' argument, see Lansana Gberie, 143-145.

> We approach the insertion of international justice paternalistically. I would even say with a self-righteous attitude that borders on the ethnocentric.[261]

While Crane acknowledges the hubris that accompanies the project of international justice, he spares the "insertion" of international justice from critique. Insertion involves interference from outside; in using the term, Crane acknowledges that international justice does not grow organically from out of the scorched earth of conflict. Crane's plural subject – the "we" who "insert" – both interrupts and adds something to the post-conflict context. Who is this subject, a subject that inserts laws and legal institutions? Crane grants that the Court's work has been characterized as "white man's justice" within the region, though he dismisses this as a manipulative claim of "cynical African politicians" who raise the specter of colonialism to turn attention away from their own corrupt practices. Crane also notes the call for "African solutions to African problems," but skeptically, as it may also be used to avoid accountability under international law. Despite the prosecutor's avowed awareness of the Court's paternalism, resistance to this paternalism is suspicious: when Africans resist the "insertion of international justice" on the grounds of autonomy and nationalism, their claims should be viewed skeptically. In a seamless framework where the principles of international criminal justice are construed as universal, attempts to deviate from them can only originate in unenlightened error or in deceit.

Crane suspects that African leaders deplore "white man's justice" and celebrate "African solutions to African problems" in order to prevent international intervention and avoid accountability. His suspicion is not without merit: Charles Taylor's asylum, granted by Nigerian president Obasanjo for years following his indictment by the Special Court, is just one example of a strategic use of the "African solutions" argument.[262] But Crane disregards or dismisses the particular Western liberal values that he and the Court bring to bear, both implicitly and explicitly, in the discourse and practices of the Special Court. He presents post-conflict options as either African or international, not African or Western liberal, heavily influenced by the legal norms and practices of former colonial powers.

The dominant narrative employed by the Court and its personnel presumes a particular kind of violence that it is responding to, a violence that is born in and cultivated from out of a lawless context. For the Special Court's first prosecutor, the figure of the Court is posed against violence, "the rule of the gun," as violence's counter-force – an institutional response to conflict that dissolves and tames it. Law then takes on a number of meanings: as a corrective and punitive mechanism, but also as a more abstract ideal of governance traveling under the discourse of the rule of law, as shall be seen in the following sections.

Beyond Judgment, Toward a Discourse of Reform

The legal and political discourse circulating within the Court first presumes a state of

[261] David Crane, "White Man's Justice: Applying International Justice after Regional Third World Conflicts," *Cardozo Law Review* 27(4) (2006): 1686.

[262] Taylor was harbored by Nigeria for over two and a half years before he was turned over to the Special Court. Nigerian president Obasanjo described his decision to grant asylum to Taylor as "a unique peaceful African solution to a potentially dangerous and bloody situation." Opening Speech at the Fifth Ordinary Session of the African Union Assembly, Sirte, Libya (http://www.africa-union.org/Summit).

lawlessness to which it responds. The Court responds with a project of reform that extends beyond the traditional tasks of judgment and punishment. These ambitions of reform are certainly not unique to the Special Court for Sierra Leone. Brought into being through an interpretation of Chapter VII of the United Nations Charter, which addresses threats to peace and security, the *ad hoc* tribunals for Rwanda and the former Yugoslavia emerged as juridical instruments tasked with restoring peace. Some legal scholars have criticized how backers of the International Criminal Tribunal for the former Yugoslavia "sought to expand its legal mandate beyond the goal of prosecuting alleged perpetrators of war crimes. They wanted the court to achieve a larger, more ill-defined, and unrealistic objective of promoting reconciliation among warring groups. These aspirations raise the provocative question of whether trials can promote reconciliation."[263]

Whether such ambitions can be construed as appropriate objectives for a court depends on what one's starting point is for justifying legal judgment and punishment following the commission of mass atrocities.[264] Hannah Arendt's critique of the extra-statutory pedagogical aspirations of the Eichmann trial is relevant for many contemporary international criminal courts as well. From a deontological perspective – the implicitly Kantian position that Arendt expresses in the beginning of *Eichmann in Jerusalem* – a court should purely seek retribution for the crimes committed by specific individuals.[265] A utilitarian perspective would foreground the importance of deterring potential future lawbreakers, which requires that the process is made as visible as possible to the target audience. Deterrence was the stated aim of the prosecutor at the Tokyo Tribunal,[266] and the American prosecutor at the Nuremberg Tribunal combined retribution and deterrence when he suggested to President Truman, "through these trials we should be able to establish that a process of retribution by law awaits those who in the future similarly attack civilization."[267] Both justifications commonly appear in both domestic and international criminal law. The prevailing view in Anglo-American jurisprudence regards deterrence as the general justifying aim and retribution as the limiting condition of punishment.[268] Reconciliation inhabits a different register, as a form of restorative justice that seeks to repair the harm to a community. It may take the form of truth commissions, monetary

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[263] Laurel Fletcher and Harvey Weinstein, "A world unto itself? The application of international justice in the former Yugoslavia," in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Violence* (eds. Eric Stover and Harvey Weinstein, Cambridge: Cambridge University Press, 2004), 30. See also Ruti Teitel's discussion of what she refers to as the "core tension" between transformative law and conventional legality in "Transitional Justice: Postwar Legacies," 27:4 *Cardozo Law Review* (2006).

[264] For a survey of different post-conflict institutional forms and their philosophical premises, see Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).

[265] Lawrence Douglas criticizes this "crabbed and needlessly restrictive vision of the trial as a legal form," and Mark Osiel supports the use of criminal trials as "public spectacle" in order to foster liberal values. See Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2005), 2, and Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers, 1997).

[266] "Our purpose is one of prevention or deterrence. It has nothing whatsoever to do with the smaller meaner purpose of vengeance or retaliation." Joseph Keenan, in *The Tokyo major war crimes trial: the transcripts of the court proceedings of the International Military Tribunal for the Far East* (ed. Prichard, Lewiston: E. Mellen Press, 1998), 387.

[267] Robert Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials: London, 1945* (Washington, D.C.: U.S. Department of State, 1947), 5.

[268] See H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968).

compensation, and public apologies, but a criminal court is less frequently associated with restorative forms of justice in legal scholarship. In its official discourse, the Special Court for Sierra Leone asserts that reconciliation is one of its main objectives, even though this objective does not appear in its statute.

The Court claims a restorative post-conflict role despite the operation of a distinct Truth and Reconciliation Commission in Sierra Leone. As chapter one explained, the TRC was established as one of the conditions of the 1999 peace accord concluded between the Sierra Leonean government and Revolutionary United Front forces in Lomé, Togo. While there was some temporal overlap in the work of these two institutions, their separate methods and objectives did not produce a harmonious relationship. The TRC makes this plain in its official report, which criticizes the Court for refusing to let several indictees testify before the Commission, claiming this decision "denied the right of the Sierra Leonean people to see the process of truth and reconciliation done in relation to the detainees."[269] The TRC report also notes the different mandates of the two institutions: "a criminal justice body will have largely punitive and retributive aims, whereas a truth and reconciliation body will have largely restorative and healing objectives."[270] Whether the TRC was capable of fulfilling its own objectives is a matter of dispute,[271] but its presence begs the question of how the Court then defines its own reconciliatory task. How does the Court differ from more widely recognized forms of restorative justice, such as truth commissions, and how can it reconcile this set of objectives with its legally oriented and backward-looking project of accountability?

The language of reform features prominently in official statements from different parties in the Court's process. The call for reconciliation is not limited to the dramatic opening statement of the Court's first prosecutor, where the legal process is cast as a transformative mechanism that will guide the people of Sierra Leone from victims of anarchic violence to empowered subjects. The project of restoring peace and the rule of law was envisioned during the early planning stages for the Court, and it appears in the UN Secretary General's initial report to the Security Council, nearly four years before the prosecutor's opening statement. This document sets out the legal framework for the Court, including its jurisdiction and its institutional organization. It also addresses the rhetorical issue of its national audience, and what pedagogical task it must fulfill for that audience:

> If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities.[272]

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[269] Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission* (Freetown, 2004), Executive Summary, 14.

[270] *Ibid,* 15.

[271] For a critical approach to the "truth-producing" objectives of the Commission's work, see Tim Kelsall, "Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone," *Human Rights Quarterly* 27.2 (2005).

[272] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915 (4 October 2000), paragraph 7 (p. 2).

I consider the content of this pedagogical campaign later in the chapter. What I want to point out here is the way in which the Court articulates its normative ambitions. I borrow this language from Michel Foucault, who characterizes the work of the norm descriptively as an average or value, but also as an "optimum towards which one must move",[273] and thus as a prescriptive basis for crafting a population to accord with a particular vision. Building on a premise of regional "lawlessness" and impunity, the language of rehabilitation – of crafting a law-abiding citizenry conforming to the normative standards of the international community – signals a broader reform project at work in and through the Court. As much as the Court is interested in accountability and punishment by making examples of a few members of the fighting factions who were allegedly most responsible for the conflict, this interest is paired with a desire to extend the reach of law and to regularize the population of Sierra Leone to behave in accord with an ideal of lawfulness.

This normalizing objective is not limited to the Secretary General's report to the United Nations Security Council. It circulates in American policy discourse just a few months after the Secretary General's public report, when a representative from the U.S. State Department's Bureau on African Affairs announces,

> Only when the rule of law is extended to all of Sierra Leone's territory and those most responsible for the horrendous atrocities are held accountable before a court of law will the population experience the freedom and the confidence necessary to rebuild their war-ravaged country.[274]

This claim about the rule of law takes place on several registers: the temporal, the geographical, and the human. Temporally, the claim adopts a futural orientation toward a time when the rule of law has been extended, and a geographical orientation that encompasses the political territory of Sierra Leone. In this imagined future, the population of that territory will experience "the freedom and the confidence" to recover from the ravages of war, presumably through the vehicle of justice that a court offers. In language that prefigures the speech of the Court's first prosecutor, the population has been stripped of its own collective agency and must rely upon the intervention of a legal institution to restore it – hence the logic of "restorative justice."

The project of enhancing the rule of law in the region is not merely inflated rhetoric of the Court's first prosecutor, then, but is also expressed in official policy literature concerning the Court's work. The project of reform is markedly absent, however, from the statute of the Special Court for Sierra Leone itself. As discussed in chapter two, the statute serves as the Special Court's constituent power and the source of its binding authority. The statute's silence regarding the project of reform may be an effect of the document's own debt to legalism; that is, the statute

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[273] Michel Foucault *Discipline and Punish: the Birth of the Prison* (New York: Vintage Books, 1995), 183. Drawing from Foucault's intellectual mentor, Georges Canguilhem, Marianne Constable offers a helpful explanation of this term: "*norm* refers both to an observable average or regularity (what is 'normal') and to a standard or prescriptive measure or test ('normative')." *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press, 2005), 120.

[274] Prepared Statement of Susan E. Rice, Assistant Secretary of State for African Affairs, US Congress Senate Committee on Foreign Relations, Subcommittee on African Affairs, "United States Policy in Sierra Leone," Hearing and public meeting before the Subcommittee on African Affairs of the Committee on Foreign Relations, 106th Congress, Second Session, October 11, 2000, 8.

establishing a court is not a place to explicitly lay out its objectives and underlying philosophies, but rather to articulate the relevant law and the rules governing the institution. The silence of the statute also indicates a tension at the heart of the reform project and in the use of the rule of law as its guiding principle. From a *legal* perspective, the reformist ambition does not register. It is something of an invisible supplement to the Court's work - invisible in the sense that it does not appear in the governing laws of the tribunal. Statutorily, the task of the tribunal is to apply the laws governing armed conflict to specific individuals who allegedly broke them. Deterring future perpetrators may be a desired effect of this formal application of law, but such deterrence requires a secondary set of practices to render the Court's work visible and knowable to the target population. Reforming the Sierra Leonean population is even more remote from the Court's legal mandate; it is a political addition or supplement that exists in the policy literature surrounding the Court's work.

The Court's punitive practices are re-cast as a form of what Michel Foucault would call the power of government, where the rule of law is deployed as a tactic or technique directed broadly toward the conduct of the Sierra Leonean population.[275] The next section turns to Foucault's work as a way of thinking through the reform project that takes place under the auspices of the Special Court for Sierra Leone.

(The Rule of) Law as Governance

The previous section showed that the Court prosecutor, the report of the UN Secretary-General, and U.S. foreign policy advisors, as proponents of the Court, describe its task as bringing the rule of law to the state of Sierra Leone and the West African region. Proponents claim this intervention is welcomed in Sierra Leone, both by the official state and by its inhabitants. They point to the Sierra Leonean president's written request to the United Nations, discussed in chapter three, as the sign of this consent.

According to its proponents, the Special Court is not only a vehicle for holding certain parties to the conflict accountable for past deeds that violate international criminal law. It is also a welcomed catalyst for domestic legal reform and for educating the population about what is broadly referred to as the 'rule of law.' As it appears in official statements and in the language of Court proponents, 'rule of law' discourse is distinct from the body of international criminal law that the Special Court for Sierra Leone is set up to apply. Rather than working toward the Court's retributive objectives, I argue that it instead forms part of a broader governance project undertaken toward the end of security and order.

By governance, I am referring to a form of power that is forward-looking (as opposed to the retrospective mechanism of the criminal law), and directed at a population (in this case, the people of Sierra Leone, and possibly the broader region).
Governance as I use it here is informed by Michel Foucault's notion of 'government,' forming part of a triad of power – along with sovereignty and discipline – that targets the population

[275] In her essay "Indefinite Detention," Judith Butler explains how Foucault's understanding of governmentality works as a form of power that makes law into a tactic, which she reads in relation to U.S. government action concerning Guantanamo Bay detainees. See *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004), 51-100.

through security mechanisms.[276] Foucault notes that by the term 'government' he is not referring to an institution, but rather to "the activity that consists in governing people's conduct within the framework of, and using the instruments of, a state,"[277] or, put another way, the "rationalization of governmental practice in the exercise of political sovereignty."[278] Foucault's understanding of government is mindful of the discursive dimension of power, as well as its links to – but not equation with – the state, its presence in practices, and the way in which it seeks to shape the conduct of populations.

I use the term 'governance' in explaining the Court's work to avoid confusing the task of governing with the common nominalized form of 'government' as a state entity. I am not referring here to the government of Sierra Leone, for instance, as the agent that is carrying out this project. What I am describing as 'governance' follows from Foucault's analysis of government as a form of power that takes the conduct of a population as its object. Calling this power 'governance' also invokes international relations literature that uses the term to indicate a form of political power that is not exclusively tied to the state, but also includes non-state actors.[279] Governance is often linked with neo-liberalism in fostering individual responsibility, a weakened state structure, and market-based political rationalities. Drawing on Foucault, legal scholar Mark Findlay has pointed out how "[g]lobal governance is tending to transform criminal justice into a mechanism for conflict resolution and state restoration."[280] According to Findlay, this is achieved through marshalling the mechanisms of international criminal justice for reform projects that reflect the security interests of strong states.

Rather than a juridical phenomenon, like the Court's forensic application of a body of law to the actions of specific individuals, 'rule of law' discourse works as a mode of governance. Perhaps most strikingly, while it is clear who its audience is, 'rule of law' discourse leaves a field of ambiguity around who will carry out the task of reform. Neither the Sierra Leonean state nor the discursively produced international community in whose name the Court sometimes acts can implant the rule of law. In 'rule of law' discourse, it seems that the rule of law *itself* is intended as the agent of its own development, de-centering the agency of the state and, in this case, even the Court's own agency. Foucault's understanding of power as a field of diffuse force-relations, not issuing from a centralized or sovereign locus, is helpful in characterizing this governance project.

In contrast to accounts that grant law an autonomous existence from society, Foucault's account places law in relation to other normative social and political forces: "I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but

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[276] *The Foucault Effect: Studies in Governmentality* (ed. Graham Burchell, Colin Gordon, and Peter Miller, Chicago: University of Chicago Press, 1991), 102.
[277] Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (ed. Michel Senellart, New York: Palgrave McMillan, 2008), 318.
[278] *Id.*, 2.
[279] For example, David Held claims that governances is pluralistic and political authority is fragmented: "[t]he rapid growth of transnational issues and challenges has generated a multicentric system of governance both within and across political borders." *Global Governance and Public Accountability* (ed. David Held and Mathias Koenig-Archibugi, Oxford: Blackwell Publishing, 2005), 242.
[280] Mark Findlay, *Governing through Globalised Crime: Futures for international criminal justice* (Portland: Willan Publishing, 2008), xiii.

rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are the most part regulatory."[281] The norm works in two senses: first descriptively as a kind of average, and then prescriptively, as this descriptive average becomes a "normative" ordering principle among subjects. The norm appears both as a form of disciplinary power directed at individual subjects and as a form of government directed more broadly at a population: "The norm is something that can be applied to both a body one wishes to discipline and a population one wishes to regularize."[282] The norm disciplines or regulates bodies or populations through what Foucault terms "biopower,"[283] distinguished from the centralized juridical form of sovereign power and related to the more diffuse form of governmental power. What is significant here is the absence of a centralized site of agency: this form of power works instead through a "set of processes" or mechanisms that do not all tie directly back to the figure of the state, though Foucault grants that the state can work as a relay for these processes.

Like law's normalization of a population's conduct, biopower and government regularize the population they act upon by producing an evenly law-abiding citizenry. Foucault writes that such power "aims to establish a sort of homeostasis, not by training individuals, but by achieving an overall equilibrium that protects the security of the whole from internal dangers."[284] Thought in biopolitical terms, the rule of law seeks to apply normative conceptions of health and healing prescriptively to the population, where health is figured in relation to the security of Sierra Leone and, in turn, the security of the international community. The normative language of healing figures explicitly at the ceremony for the signing of the agreement between the government of Sierra Leone and the United Nations, for instance, as the UN representative concluded his speech by "expressing the hope that the Special Court for Sierra Leone will serve as an important contribution to the healing process that this beautiful country must undergo to be able to create a better future for those who live here."[285] Healing is a familiar trope in the language of transitional justice, invoking the restorative dimension of law and juridical bodies despite the clear gulf between the Court's punitive practices and its more ambiguous 'rule of law' projects.

The Special Court for Sierra Leone appears as an amalgamation of the highly juridical spectacle of punishment enacted upon discrete individuals, the sovereign power of punishment (in this context, of forcing confinement), coupled with the normative biopolitical aims of tending to the health of a population, "the people of Sierra Leone," and of neutralizing internal threats to the security of the nation-state (and by extension, of the region and of the world) through the rule of law. The practices of adjudication, sentencing, and incarceration at the Special Court are not oriented around reforming the convict, whose expressions of remorse as a mitigating factor at

[281] Michel Foucault, *The History of Sexuality: Volume I: An Introduction* (trans. Robert Hurley, New York: Vintage Books, 1990), 144.
[282] Michel Foucault, *"Society Must Be Defended:" Lectures at the Collège de France, 1975-1976* (ed. Davidson, New York: Picador, 2003), 253.
[283] *Id*., 243.
[284] *Id*., 249.
[285] Hans Corell, Under-Secretary-General for Legal Affairs, Legal Counsel of the United Nations, "Ceremony for the Signing of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone," Freetown, 16 January 2002, available at http://untreaty.un.org/ola/legal_counsel7.aspx.

trial is the only point when the state of his soul appears as a concern.[286] Despite the prevalent discourse of accountability, in many respects the part of this process resulting in the production of convicted war criminals, as incarcerated bodies is incidental to the broader work of the Court. The aim is not reforming the criminal - concerns about rehabilitation are reserved for the population rather than the convicted subject. Furthermore, the reform project will be carried out not by the state but by the Court, which represents the agency of the international community or of the rule of law itself.

(The Rule of) Law as Security Strategy

> Conflicts in these dark corners are evolving into uncivilized events. They appear to be less political and are more criminal in origin and scope.[287]

In the last section I drew from Foucault's conception of government as a form of power to describe the way in which the Special Court for Sierra Leone's governance objectives are de-centered, normativizing, prescriptive practices directed at the population through the discourse of the rule of law. While power operates through the Court in various ways, including through the spectacle of punishment and the sovereign power over life, it primarily takes the form of governance – perhaps surprisingly so, given the limited mandate granted by the Court's statute. The statute of the Special Court does not mention extending the 'rule of law' and fostering regional security, but instead suggests that the Court will be engaged in juridical processes of judgment and punishment. As Mark Findlay has pointed out, however, security has become the underlying justification for global crime control,[288] and the 'transitional' aspect of adjudicating mass atrocity means that these courts undertake broader projects. As an institution tasked with judging and punishing international crimes, the Court broadens its statutory ambitions to include governance objectives in the name of security. The criminality described above by Crane – the "uncivilized events" unfolding in "dark corners" of the globe – must be countered through judicial mechanisms, even if the crimes themselves are nascent, future products of a current state of insecurity.

In the context of post-conflict Sierra Leone, where the state was largely thought to be incapable of fulfilling its security role, governance includes sub- or supra-state actors acting under auspices of the rule of law. As the most evident transnational actor, the international community stands for a group of state stakeholders who support the Court financially and by providing personnel. At the sub-state level, various non-governmental organizations broadly described as civil society participate in dispensing 'rule of law' values.

The presence of these actors is officially sanctioned by the Sierra Leonean state. The president's letter to the United Nations claimed that legal accountability would not have been

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[286] This is in contrast to the carceral circumstances Foucault famously describes in the shift from the punitive spectacle enacted upon the body of the condemned to the hidden work of reform carried out in the penitentiary. See generally Michel Foucault, *Discipline & Punish: The Birth of the Prison* (New York: Vintage Books, 1995).
[287] David Crane, "Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts," 37 *Case Western Reserve Journal of International Law* (2005): 4.
[288] See generally Mark Findlay, *Governing through Globalised Crime: Futures for international criminal justice* (Portland: Willan Publishing, 2008).

possible with the existing post-conflict criminal justice system in Sierra Leone, and the UN resolution that was instrumental in establishing the Court noted the "pressing need for international cooperation to assist in strengthening the judicial system in Sierra Leone."[289] This letter works as an invitation to intervene, and the president's request to the United Nations has come to stand for a moment when the sovereign figurehead signals his consent for the sovereignty of the state to be breached in the interests of security. The application of international criminal law does not actually require such consent, as the Court's refusal to recognize domestic amnesty provisions of the Lomé peace treaty makes clear[290] - a state is not able to grant amnesty for violations of *international* criminal law. But much is made of this invitation to intervene, as when the United Nations representative notes at the signing of the Court's constitutive agreement, "The Special Court for Sierra Leone is different from earlier ad hoc courts in the sense that it is not being imposed upon a State."[291] With the blessings of the state, this court will tend to the metaphorical health of the population by ordering it around a set of 'rule of law' principles in the interests of security.

Security here is broadly construed, from the production of an internal order to the transnational security of a region, and to the broader economic and political relations that could be affected on a global scale. As the Court's first prosecutor claims, his task "is not just tackling the root causes of the conflict, impunity or corruption, but something more. It is a naïve prosecutor who comes into a third world country focused only on the law."[292] Indeed, this focus will include disseminating the liberal principles articulated through the rule of law, as both a measure for security and as an attempt to craft a lawful population in accord with the ideals of a projected international community. In a 2004 report on the subject, the United Nations Secretary General noted the "multiplicity of definitions and understandings" of the rule of law.[293] Legal scholar Brian Tamanaha claims that it has three clusters of meaning: limited government by law, formal legality, or the rule of law as against the rule of man. According to Tamanaha, formal legality is "the dominant understanding of the rule of law for liberalism and capitalism."[294] The law should be known, it should provide citizens with protections against the state and against each other, and it should generate the security and order needed to support market activity.

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[289] Resolution 1315 (2000) Adopted by the Security Council at it 4186th meeting, on 14 August 2000.

[290] The peace treaty concluded in 1999 between the government of Sierra Leone and the Revolutionary United Front offered a blanket amnesty to all combatants. The court subsequently ruled that this amnesty did not apply to violations of international humanitarian law.

[291] Hans Corell, "Ceremony for the Signing of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone," Freetown, 16 January 2002.

[292] David Crane, "Dancing with the Devil": 7.

[293] United Nations Security Council Report of the Secretary-General, "The rule of law and transitional justice in conflict and post-conflict societies," UN Doc. S/2004/616 (23 August 2004): 4. "It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

[294] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 119.

To further its objective of promoting the rule of law, the Court engages in a number of outreach efforts, including conducting town hall meetings and airing video updates on court proceedings in the provinces of Sierra Leone, producing pamphlets about the role of the Court and its governing law, and bringing school groups to the Freetown court facilities. The rule of law is an epistemological category – something that will come to be known through the educative practices of the Court. At the same time, the rule of law works as the aim and justification for the Court's efforts to secure accountability as well as its objectives of reform. Since it is regarded as an almost uncontestable universal good, the rule of law provides a vehicle for governance that advances the security concerns of external state stakeholders through a supposedly neutral discourse.

In addition to addressing the security of the internal population of the Sierra Leonean state, the Court addresses donor needs for regional and global stability. Referring to the United States government's need to support the then nascent court in Freetown, a member of the Foreign Relations Subcommittee on African Affairs framed this concern in realist terms:

> Ultimately, it is clearly in the United States' interest to stop the trend emerging in West Africa wherein violent regimes with really no political program beyond consolidating their own power and wealth hold entire civilian populations hostage in order to win concessions from the international community. These regimes sustain themselves through criminal activity and dangerous actors on the international stage.[295]

The Court is presented as a vehicle for addressing the security interests of its donor states. A panelist before the same committee suggested that the Court would form one of the "primary tools" in an American effort to bring peace and stability to the region, which also includes supporting military operations and training, placing diplomatic pressure on then-president Charles Taylor of Liberia, curbing the diamond trade, and helping the Sierra Leonean government with institutional reconstruction.[296]

Yet these aims do not always function harmoniously toward the same ends. As the Sierra Leonean Truth and Reconciliation Commission report argued, the Special Court may have inadvertently contributed to future instability by abandoning the amnesty provisions for former combatants that was granted in the Lomé Peace Agreement:

> In the Commission's view, the international community has signaled to combatants in future wars that peace agreements containing amnesty clauses ought not to be trusted and, in so doing, has undermined the legitimacy of such national and regional peace objectives.[297]

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[295] Senator Russell Feingold, US Congress Senate Committee on Foreign Relations, Subcommittee on African Affairs, "United States Policy in Sierra Leone," Hearing and public meeting before the Subcommittee on African Affairs of the Committee on Foreign Relations, 106th Congress, Second Session, October 11, 2000.
[296] *Ibid.* 11, Prepared Statement of Hon. Susan E. Rice, Assistant Secretary of State for African Affairs, Department of State.
[297] Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission* (Freetown, 2004), Executive Summary, 14.

Within the terms of international law, the Truth and Reconciliation's assessment of the Court's decision is irrelevant: the Court was technically correct in refusing to recognize the amnesty provisions as applying to violations of international criminal law.[298] This difference between the Truth and Reconciliation Commission and the Special Court goes to the heart of the rule of law problem, where rule of law understood as formal legality comes into tension with rule of law as rehabilitation, reform, and governance in the interests of security. The Truth and Reconciliation Commission has a broader purpose: if the Lomé peace agreement itself can be regarded as a manifestation of the rule of law – attempting to produce an end to a conflict by treaty, with its attendant principles of consent and public promulgation – how is this not also a competing claim to the same objective? How are we to gain clarity about the content of the rule of law, which has been widely invoked by this court and its personnel as both its animating principle and its aim?

The Truth and Reconciliation Commission understands the amnesty between the Sierra Leonean government and the Revolutionary United Front rebel group as a peace objective. This is one possible understanding of what the rule of law can bring: peace through binding agreements between different parties to a conflict. Here the rule of law is about honoring contracts made – the norm of *pacta sunt servanda* that by some accounts underpins the international legal order.[299] I am not arguing that the TRC was correct in criticizing the Court; instead I want to point out the different possible understandings of what constitutes lawfulness in these competing visions of the rule of law. For the Court's first prosecutor, as I discussed at length earlier in this chapter, the rule of law is a mechanism of security, a way of bringing order to a presumably lawless and dangerous region through enlightening its inhabitants. This suggests that the rule of law works as the ideological dimension of a broader governance project directed toward an end of stability, a project that seeks to reconfigure the population of Sierra Leone as law-abiding subjects, and will in turn benefit the external stakeholders who have "invested" in the work of this court.

The remainder of the chapter shows how the discourse of the Special Court for Sierra Leone incorporates a market-driven rationality addressed to an audience of stakeholders, whether legal stakeholders invested in advancing international criminal jurisprudence or civil society groups eager to advance their own development agendas and those of their donors. Security and the rule of law appear in this discourse as goods in circulation on the global market. Rather than an end in itself or a form of accountability, justice has become a wise investment.

Conclusion: Juridical Investments

> If you are a donor and are getting assessed for these kinds of tribunals it can be rather disconcerting when you don't see the results you expect to be achieved in a shorter amount of time. Perhaps this will be a more effective and efficient model that can be used in the future.[300]

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[298] The court found that a state does not have the authority to grant amnesty for crimes under *international* law.

[299] H.L.A. Hart notes this is sometimes regarded as the 'basic norm' of international law, but he argues that it has been largely replaced by the rule that "States should behave as they customarily behave." *The Concept of Law* (2nd Ed., New York: Oxford University Press, 1994), 233-234.

[300] Alan White, former Chief of Investigations at the Special Court for Sierra Leone, as quoted by Charles Cobb Jr. in "Sierra Leone's Special Court: Will it Hinder or Help?" *Allafrica.com,* 21 November 2002.

Describing the Special Court as a wise investment is not strictly rhetorical. There is an economic dimension at work in the Court as well, which can be traced through investment climate statements and strategy literature of states and non-state actors. The perception of post-conflict justice as a literal investment in security is not unique to the Special Court; it is symptomatic of a broader shift in perceptions of international judicial intervention. In a speech entitled "The Dividends of International Criminal Justice" before the London office of Goldman Sachs, for example, ICTY prosecutor Carla del Ponte reportedly claimed:

> It is dangerous for companies to invest in a State where the rule of law doesn't exist. This is where the long term profit of the UN's work resides. We are trying to help create stable conditions so that safe investments can take place…. International justice is cheap… Our annual budget is well under 10% of Goldman Sachs' profit during the last quarter. See, I can offer you high dividends for a low investment.[301]

Del Ponte's remark demonstrates that a tribunal's work may be presented as a good investment in stability to external stakeholders. Prosecutors of *ad hoc* criminal tribunals routinely meet with donor states and other potential funding partners as part of their work. As David Crane explained, "To keep the world's interest, to keep money coming in, and to ensure you have political buy-in ... you've got to be on the road talking to people or you'll lose the political support and interest that is so critical in a tribunal."[302] Unlike at the ICTY, the government of Sierra Leone also considers itself a stakeholder in the work of the Special Court. In this case security goals are not only the objective of outside parties, but also of the Sierra Leonean state, which took an active role in attempting to attract foreign capital by signaling that it takes investors' security concerns seriously.[303] One example of this neoliberal logic – a way of framing the Court's work that connects it to broader market-driven rationalities and interests – can be found in a 2004 report by the Foreign Investment Advisory Service, a joint project between the World Bank and the International Finance Corporation. The report, commissioned at the request of the Sierra Leonean Minister of Finance, credits the presence of the Special Court with improving the political situation in Sierra Leone. The Court was one factor among others that helped to generate "a positive impact on economic activity" by contributing to a more stable security situation. [304] The Sierra Leonean government thus bookends its original request for a court with

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[301] From a speech entitled "The Dividends of International Justice," as quoted in John Laughland, *Travesty: The Trial of Slobodan Milosevic and the Corruption of International Justice* (London: Pluto Press, 2007), 28. The ICTY link to the speech itself [http://www.un.org/icty/pressreal/2005/speech/cdp-goldmansachs-050610-e.htm] is no longer active, though the UN News Service website still hosts a press release dated 7 October 2005 entitled "UN Prosecutor for former Yugoslavia says investing in justice brings best dividends" [http://www.un.org/apps/news/story.asp?NewsID=16136&Cr=icty&Cr1=].

[302] Penelope Van Tuyl, "Effective, Efficient and Fair? An Inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone" (September 2008) 7, released through the UC Berkeley War Crimes Studies Center.

[303] According to USAID, as of 2006, the international donor community supported at least 60% of the government's budget.

[304] Foreign Investment Advisory Service, "Sierra Leone: Diagnostic Study of the Investment Climate and the Investment Code," May 2004, 3. The International Finance Corporation states that its mission is "to build the private sector in developing countries."

a request for an analysis of the investment climate in Sierra Leone several years later, signaling that this juridical investment has paid off by yielding a safer climate for foreign capital.

The Sierra Leonean government's own participation in "neoliberalizing" justice illustrates that it is no passive victim of external state interests. External state interests are apparent as well, however, even when they are couched in the language of altruistic concerns about regional security. This was evident in the language of U.S. congressional hearings on foreign policy described in the previous section, but it also appears in development discourse. In their 2006-2008 strategy statement, for instance, the American federal aid agency USAID noted that a "successful transition from conflict in Sierra Leone requires external investment and concerted internal commitment to improved governance which will help foster stability in West Africa." Programs funded by USAID "will focus on improving governance in order to promote stability, peace, security, recovery and democratic and economic reform in Sierra Leone, and, thereby, advance the foreign policy interests of the U.S. in the region."[305] West African regional stability is explicitly framed as a U.S. policy concern in the post-9/11 political climate, where illicit diamond revenues may work to finance terrorist activity. The USAID report claims that the United States "is committed to building transparency and accountability in the alluvial diamond sector, in order to ensure that government revenues are used for public good; to protect human rights; and to deny violent extremists (both international terrorist networks and regional interlocutors) access to financing." Concerns for the Sierra Leonean domestic context such as democratic governance and human rights are included with U.S. policy interests pertaining to the "war on terror."[306] For the U.S. as a major donor to the Court's operations, the Court offers a political investment in regional security, which in turn provides reassurance that *capital* investments will be secure. A 2007 Investment Climate Statement published through the U.S. State Department's webpage notes that "[a]lthough Sierra Leone is a 'fragile state,' the country is calm so insurance costs and risk premiums should not reflect the earlier realities of the 1990s."[307]

This investment logic is also evident in the Court's own discourse and practices. For each year of its operations, the Special Court for Sierra Leone is required to produce a report from its president, officially addressed to the UN Secretary-General and the government of Sierra Leone, detailing its progress and activities for that year. Unlike the *ad hoc* tribunals for Rwanda and the former Yugoslavia that preceded it, which were funded in part by the UN, the Special Court is funded solely on the basis of voluntary contributions from states and foundations. This self-described international criminal tribunal has adopted some of the attributes of a corporate entity, one which seeks to extend its brand and which is answerable to its investors – in this case, states who hope for a "streamlined" delivery of justice. Through a private foundation grant, for instance, the Court employs a fundraising consultant to "develop

[305] USAID Sierra Leone "Strategy Statement FY 2006-2008."
[306] Al White, the former Chief of Investigations working for the Office of the Prosecutor, had previously worked as a senior investigator at the Pentagon. During his tenure as Chief of Investigations he stated that West Africa is "a safe haven for terrorist activity" and referred to former Liberian president Charles Taylor as "a terrorist." See Chris Hansen, "Liberia's former President, a friend to terror?" *Dateline NBC*, July 17, 2005, available at http://www.msnbc.msn.com/id/8575495/.
[307] U.S. Department of State, "2007 Investment Climate Statement – Sierra Leone" available at http://www.state.gov. The statements are published through the State Department Bureau of Economic and Business Affairs International Finance and Development unit.

and implement a fundraising strategy for operations."[308] It also answers to a "management committee" comprised of representatives from donor states, not unlike the board of a corporation. As Human Rights Watch noted in a 2004 report, "Special Court staff expressed frustration that the Management Committee has tended to focus its attention more on where to cut budgets proposed by the Registry than on zealously advocating with governments and the United Nations as to why additional funding is necessary to ensure that the court can function fairly and effectively."[309]

The underlying premise of these aspects of the Court's work could be interpreted as accountability measures, ensuring that the Court abides by the rule of its own law provided by its governing statute. They may also be established in response to the drawn-out experience of post-conflict adjudication at the ICTR and ICTY. Alternately they could be read as symptoms of the encroaching claim of market rationalities on internationalized juridical institutions and practices, whether these intrusions are explained through the language of efficiency or through a discourse of political necessity. If, as is often quoted, justice must not only be done but must also "be seen to be done," the Court meets this ocular prescription with a vigorous public relations campaign. The Court's annual reports work both as accounts of its progress and as marketing brochures to current and prospective donors, with glossy photographs of prosecutors at outreach events and stiff portraits of the judges in their formal gowns. The reports convey the values of an increasingly market-driven global justice culture, where justice appears as a deliverable good that can be managed more or less efficiently, functioning as a wise investment for outsiders who have a stake in the stability of the region.

At first glance the Court's annual reports may be mistaken for brochures of a private organization rather than a public judicial institution, yet the Special Court's work is carried out under the auspices of the United Nations and the government of Sierra Leone. While employing market-driven conventions of corporate life – the public relations campaigns, the glossy funding pamphlets – this court also deploys the stamp of the UN's approval as a mark of its institutional legitimacy, and of its place within the international legal order. The Special Court for Sierra Leone is certainly not exceptional in this regard, as its so-called 'third wave' institutional kin – such as the Extraordinary Chambers in the Courts of Cambodia – engage in similar marketing practices. This melding of the public (international criminal justice) and the private (market-driven techniques and rationalities) is another way in which the Court is hybridized, though this is not the focus of its own claim to a hybrid ontology as described in previous chapters.

The Court claims its hybridity by drawing from two bodies of law – the law of the state and international humanitarian law – and from the mixed nationalities of its personnel. What I am suggesting is a different understanding of the Court's hybridity that occurs on two additional levels, both legal and political. On the political register, the Court's hybridity bears the marks of a growing influence of private market rationalities on the traditionally public good of judicial institutions. This neoliberal logic is not limited to the work of this court and the particular vulnerabilities of its institutional design, such as the fact that it has no fixed funding and must rely instead upon voluntary contributions. It may be a symptom of a much broader

[308] Fourth Annual Report of the President of the Special Court for Sierra Leone, January 2006 to May 2007, 37.
[309] Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone*, (September 2004) Section IX (B), available online at http://www.hrw.org/reports/2004/ sierraleone0904/.

reconfiguration of social life in relation to the market, which appears in the actuarial logic of domestic criminal law as well as in the domination of focus groups in contemporary political decision-making. In drawing inspiration from the language and practices of a corporate entity, the Court becomes another conduit of neoliberalism's logic.

On the legal register, the Court is hybrid by virtue of its dual aims of determining accountability (its narrow statutory task) and promoting reform (its broader governance objective carried out through the 'rule of law'). This chapter suggests that these two aims may not always work in effective and complimentary ways. What conception of law and of governance is being advanced through this discourse of transitional justice and the rule of law?

I have focused on the Special Court for Sierra Leone as an example of post-conflict accountability that reveals the extralegal ambitions of this contemporary institutional form of international humanitarian law. The Court can be viewed as a project of social justice intended to supplement law's limited framework or as a (predominantly Western, predominantly liberal) effort to imprint a set of legal values, including the rule of law, upon a field that is figured as lawless and in need of intervention. Here the Court is taken as a vehicle of democratization; along with domestic law reform, the work of nongovernmental organizations, and development work, the Court appears as a tool for crafting law-abiding populations. The rule of law becomes a means to an end of governance.

Conclusion

As the first chapter of this dissertation showed, the establishment of the Special Court for Sierra Leone was oriented as much toward the future – to "meet the objectives of bringing justice and ensuring lasting peace"[310] – as it was to the retrospective project of holding individuals accountable for their violations of international humanitarian law. While this forward-looking orientation may be a common feature of transitional justice mechanisms, I argue that the Special Court's work indicates a new conception of transitional justice. It reveals the emergence of a donor-driven culture of international criminal accountability in which some states literally invest in the stability of other states. External interventions by states in the sovereign affairs of other states is not unusual in international relations, but the use of tribunals as a vehicle for intervention is a relatively recent phenomenon, as David Scheffer's remark about international judicial intervention shows. Post-conflict courts thus offer another venue for states to pursue their security and governance interests under the banner of promoting the rule of law.

The turn to international legal institutions in response to armed conflict is not unique to Sierra Leone, but the Special Court marks a departure from its institutional predecessors. The mid-twentieth century tribunals established in Nuremberg and Tokyo were the products of occupying powers, as I explained in chapter two: they were thus regarded either as internal creations of occupying states acting as the sovereign legislative authority or as external impositions by the victors of World War II. Put another way, the foundational authority of the IMT and IMTFE was either grounded *within* Germany and Japan, with the tribunals acting through the appropriated sovereignty of the respective occupied state, or located *outside*, with the tribunals acting as agents for the conquering powers that sought to dispense with political enemies (as is noted in the common criticism of these tribunals as "victors' justice"). The UN-backed tribunals established after the end of the Cold War offered a different paradigm of justice and a different standpoint from which to critique their work. These *ad hoc* tribunals established for Rwanda and the former Yugoslavia were produced through United Nations Security Council resolutions, which fostered the perception that they were products of the 'international community' enforcing a growing body of international humanitarian law rather than advancing particular state interests. In practice these tribunals were criticized as remote and disengaged from their respective contexts, and some critics regarded them as institutional *apologias* for failed military interventions.

The Special Court for Sierra Leone was established as a different kind of legal form. Although it attempted to build upon the legal authority of these previous institutions, as I detailed in chapter two, it also claimed to offer a new form of "hybrid" justice that would be more attuned to the domestic context of Sierra Leone. Chapter three noted the Court's failure to develop a meaningfully hybrid structure that would include Sierra Leonean law in practice. Rather than indicating a synthesis of domestic and international legal forms, then, "hybridity" served as part of the Court's legitimating discourse, which it used in order to claim a level of domestic engagement in an otherwise removed and inward-looking juridical process.

The ambiguity as to the Court's hybrid status served a strategic purpose. On the one

[310] United Nations Security Council Resolution 1315 (14 August 2000).

hand, the Court was able to argue that it was less of an external imposition than its institutional predecessors had been by claiming that it contained elements of domestic law and employed local personnel. Yet as chapter four showed, the Court also needed to claim that it inhabited a separate jurisdiction outside of the Sierra Leonean state in order to bring individuals like the former Liberian president before it, which was essential for demonstrating the Court's legitimacy and viability as a legal body. Commentators within and outside the Court have often expressed the well-worn sentiment "not only must justice be done; it must also be seen to be done": the space of the courtroom is also the space of appearance, where the spectacular display of a former head of state's submission before the law must be witnessed and documented.

Chapter five considered this didactic role of the Court, which extended beyond its mandate of holding individuals accountable for crimes to include educating the population of Sierra Leone about the rule of law. The last chapter thus returned to some of the issues of transitional justice that were raised in the first chapter: what sort of transition is the Special Court meant to instigate and foster? The Court addressed itself to the population of Sierra Leone as an instrument of transition – as an exemplar of lawfulness that might serve as a paradigm for domestic juridical forms. Conceptions of the rule of law figured prominently in the Court's own characterizations of its work as well as in the body of scholarly commentary and civil society policy literature that analyzes and assesses it. But what is the rule of law understood to mean in this context? And how does it inform the particular conception of justice at work in the Court?

The process produced through modern legal institutions harbors its own ideology – what Judith Shklar characterized in her study of political trials as the ideology of legalism. Legalism fixes, codifies, and seeks to integrate contested terrains into positivist rule-based terminology, including the agonistic political sphere and philosophical and ethical concerns with justice. As David Cohen explains, "the modern Western conception of the rule of law views the criminal legal process as proceeding on the basis of narrow definitions of offenses and a determination of whether the facts of a particular case present all the elements of that definition."[311] This procedural understanding of the rule of law links the work of the Special Court for Sierra Leone to other international post-conflict tribunals and to the body of law that they all draw upon. International humanitarian law presumes a kinship between kinds of violence that can be categorized across cultures and conflicts. For an individual indicted for crimes against humanity, for instance, the criminal elements that must be demonstrated to prove the charge serve as a link between the acts of a Bosnian Serb combatant and the acts of an RUF rebel in Sierra Leone, in form if not in substance. International criminal courts presume that diverse conflicts share similar, identifiable elements that can be evaluated according to the same set of laws. The law deployed in these contexts is thought to offer a trans-historical, trans-cultural standard or measure for holding individuals retrospectively accountable for criminal acts. Yet the rule of law understood in this way – as proceduralism – also distances the Court's work from the local context that it is intended to address.

To fall under the jurisdiction of the Special Court, as with any court, alleged crimes must be bounded and regularized in such a way that the broader social and cultural context is contained and to some extent suspended. The translation from deed to crime entails a loss of

[311] David Cohen, *Law, Violence and Community in Classical Athens* (Cambridge: Cambridge University Press, 1995).

cultural meanings to satisfy the logic of legalism: acts are pared down to legal elements, and their context is sheared away. The Court both narrows *and* broadens its object – by evaluating only what is deemed knowable within the framework of rule of law proceduralism on the one hand, and by extending its extra-judicial ambitions beyond the confines of the courtroom in a more comprehensive vision of governance on the other. The governance techniques used by the Court do not employ international humanitarian law *per se*, but instead draw from development discourses and peace-building strategies with the hope of aligning the population with a particular ideal of the international community and its norms. The Court not only offers a display of accountability, ensuring that justice "is seen to be done," but also an exemplar for reform, thereby expanding the retributive aims of this legal institution to incorporate governance techniques that are carried out in the interests of security. Yet even the Court's didactic display is oriented outward to an international audience of donors as much as it is directed at the population directly affected by the violence of the Sierra Leonean conflict.

Numerous commentators have noted the role of post-conflict justice as a cultural spectacle, including Hannah Arendt's famous account of the trial of Adolf Eichmann and more recently in the work of Guyora Binder, Lawrence Douglas, Shoshana Felman and Mark Osiel. Felman's observation that epic trials evolve into "veritable theaters of justice"[312] is particularly apt in the case of former Liberian president Charles Taylor, described in chapter four, where the spectacular display of bringing Taylor before the law serves a broader narrative of bringing the West African region as a whole under the influence of the rule of law.

Yet as chapter five showed, in addition to advancing a proceduralist view of justice, the rule of law is also conceived in neoliberal terms. This market rationality is not unique to the Special Court, though the Court's form of transitional justice pushes it farther than previous tribunals. Half a century ago Judith Skhlar observed that "peace through law is a cherished aspect of liberal ideology. Commercial relations would replace military ones, and law and commerce would go together internationally, as they do within the confines of domestic political society."[313] The vision of instilling peace through a law imbricated with commerce is thus not new, and Shklar's remarks applied to the Nuremberg tribunal that her text was written in part to address. Nevertheless, the Special Court for Sierra Leone adds a new dimension through the figure of the state donor. The states that voluntarily donate to fund the operations of the Special Court may appear politically divested (unlike, for example, the allied powers at Nuremberg and Tokyo) and thus seem able to claim that they share a neutral interest in advancing the rule of law on a global scale. Tracking the language of the market, transitional justice mechanisms such as the Special Court for Sierra Leone are figured as investments in peace and security, and even more literally, as investments that pave the way for further economic development. Justice is packaged as a product on the market that states can evaluate in relation to other possible investments in nation-building and regional stability. Donor-driven international justice offers the possible dividends of peace and security, as the Court prosecutors, judges and administrators made clear through their various fundraising missions to potential state donors. The paradigm of donor-driven justice developed at the Special Court for Sierra Leone is taking hold at other

[312] Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge: Harvard University Press, 2002), 4.
[313] Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964), 129.

tribunals as well, as the nascent Special Tribunal for Lebanon models its donor-driven structure and fundraising activities after the "best practices" and "lessons learned" from the Special Court.

Transitional justice projects have always been the exception rather than the norm. They are unusual creatures of political will. Any effort to provide a causal account of the Special Court's establishment invariably runs into explanations about U.S. political interests: the U.S. did not want to sign on to the International Criminal Court and thus needed to demonstrate that international criminal law could be enforced through temporary tribunals rather than a permanent international criminal court. Similar realist explanations exist for all of the international tribunals discussed in this dissertation, whereas cosmopolitan accounts tend to bracket these origin stories while focusing on the overarching trend toward legal accountability for international crimes. Yet the shift to voluntary state donations as the basis of international criminal justice – justice that continues to invoke the international community as its agent – presents a new sort of hybrid form distinct from the hybridity first envisioned at the Special Court for Sierra Leone. It suggests a configuration of public international law in relation to market forces that threatens to unsettle the moral authority of international criminal tribunals as post-conflict juridical forms.

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