Review of International Studies (2006), 32, 587–602 Copyright © British International Studies Association
doi:10.1017/S0260210506007170

Politics, anti-politics, international justice: language and power in the Special Court for Sierra Leone

TIM KELSALL*

For most people the law's power manifests itself . . . in the details of legal practice, in the thousands of mini-dramas re-enacted every day in lawyers' offices, police stations, and courthouses around the country. The dominant element in almost every one of these mini-dramas is language. To the extent that power is realized, exercised, abused or challenged in such events, the means are primarily linguistic.[1]

John M. Conley and William O'Barr

The Special Court for Sierra Leone (SCSL) is located in a fortified compound in central Freetown. Inside its militarised space a project of global significance is unfolding. Together with the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, the SCSL is an experiment in bringing the rule of international law and governance to regions recently destabilised by war and conflict.

The Court is prosecuting nine individuals for war crimes and crimes against humanity. It has a number of weapons in its arsenal: armed UN troops, the cooperation of a reconstituted Sierra Leonean state, the magnificent symbolism of the newly constructed courtroom, dedicated Public Relations and Outreach sections, expert lawyers both local and international, and language. As the quotation above advocates, the law's power is primarily linguistic.[2]

The current article provides an analysis of courtroom discourse to illustrate several ways in which the Special Court's prosecution team applies linguistic techniques to excavate a particular version of the truth from a contested history. The clearest is the attempt to delegitimise leaders of violent movements by construing their acts as

* The author acknowledges the generous support of the British Academy which provided funding for fieldwork between April and August 2004, and thanks his numerous friends and informants in Freetown. He would also like to thank Paul Richards, Stephen Ellis, Mariane Ferme, Allison Cooper and three anonymous referees for helpful comments. The author's project on transitional justice in Sierra Leone is ongoing.

[1] John M. Conley and William O'Barr, *Just Words: Law, Language, and Power* (Chicago, IL: University of Chicago Press, 1998), p. 2.

[2] In 2003–4 the SCSL had a budget of $34 million, in 2004–5, $29.9 m, and in 2005–6, $25.5 m. In each of the latter two years, staffing costs amounted to approximately $16 m. *Special Court for Sierra Leone Budget, 2005–2006*: ⟨http://www.sc-sl.org/Documents/budget2005–2006.pdf⟩.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

'criminal' rather than 'political'. The indictees, meanwhile, assisted by their legal teams, are resisting these efforts, also using linguistic means.

The aim of the article is to provide an insight into the modes of power and micro-physics of global governance. In keeping with international relations' linguistic turn, it argues that the future of global governance turns on the outcome of linguistic mini-dramas in micro-arenas such as the Special Court for Sierra Leone.[3]

Global governance, liberal peace, international law

The background to this article is provided by four interrelated processes. The first is the attenuation of national state capacities in the developing world under the influence of processes commonly referred to as 'globalisation'.[4] The second is a transformation of the way in which Africa, and other peripheral areas integrate into the world economy, namely through increasingly informal or illegal forms of economic activity that have led some commentators to speak of a 'criminalisation' of the state.[5] The third is an increase in civil unconventional warfare, also known as 'new war', conditioned in part, though only in part, by struggles over resources.[6] In the 'complex political emergencies' characteristic of new wars, 'emergent political complexes' accumulate force and resources by engaging with transnational corporations, international criminal networks, arms dealers, private security companies, humanitarian NGOs and peacekeeping missions.[7] The fourth process is the international response, namely, a merging of development, security, and 'transitional justice' apparatuses in an attempt to rebuild societies in a liberal mould: what some commentators have called 'post-Westphalian peace building'.[8] Western governments have become increasingly concerned not only by the appalling human costs of new wars, but also by the potential they hold to destabilise the global North. According to Tony Blair, 'We cannot turn our backs on conflicts and the violation of human rights in other countries if we still want to be secure.'[9]

[3] See for example, Jim George, *Discourse of Global Politics: A critical (re)introduction to International Relations* (Boulder, CO: Lynn Rienner, 1994), esp. ch. 8.

[4] See for example Ankie Hoogvelt, *Globalisation and the Postcolonial World: The New Political Economy of Development* (London: Macmillan, 1997). David Held, Anthony McGrew, et al., *Global Transformations: Politics, Economics and Culture* (Cambridge: Polity Press, 1999).

[5] See among others Jean-Francois Bayart, Stephen Ellis, et al. (eds.), *The Criminalization of the State in Africa* (Oxford: James Currey, 1999); Jean-Francois Bayart, 'Africa in the World: A History of Extraversion', *African Affairs*, 99:395 (1999), pp. 217–68; William Reno, *Warlord Politics and African States* (Boulder, CO: Lynne Rienner, 2000); Christopher Clapham, *Africa and the International System* (Cambridge: Cambridge University Press, 1996); Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (Zed Books, 2001).

[6] Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Cambridge: Polity Press, 2001). Mark Duffield, *Global Governance*.

[7] Bayart et al., *The Criminalization of the State*; Reno, *Warlord Politics*; Thomas Callaghy, Ron Kassimir, et al. (eds.), *Intervention and Transnationalism in Africa: Global-local Networks of Power* (Cambridge: Cambridge University Press, 2001); Duffield, *Global Governance*; Kaldor, *New and Old Wars*.

[8] Duffield, *Global Governance*; Alex J. Bellamy, Paul Williams and Stuart Griffin, *Understanding Peacekeeping* (Cambridge, Polity Press, 2004).

[9] Cited in Kaldor, *New and Old Wars*, p. 153.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

The international response has been both discursive and practical. At the discursive level, political acts and actors have been 'de-politicised', reallocated into criminal categories, for example through terminology such as 'warlords', 'gangs', 'thugs', 'bandits', or just plain 'criminals';[10] war has been explained by World Bank analysts as an activity driven by desires for criminal economic gain.[11] And practically, the international community has sent peacekeeping missions to areas such as the former Yugoslavia, Rwanda, Sierra Leone, East Timor, Democratic Republic of Congo, and Liberia, and created international courts and issued indictments for the first three. As a result scores of political and military leaders of violent social movements have been arrested, arraigned, and charged as criminals. A clutch of international organisations broadly supports these developments, ranging from the United Nations Office of Legal Affairs, the US State Department (which has a War Crimes Ambassador), and the British Foreign and Commonwealth Office (which has appointed a War Crimes Coordinator), to non-governmental organisations such as Human Rights Watch, the International Centre for Transitional Justice (ICTJ), 'No Peace Without Justice' (NPWJ), the International Coalition of NGOs for the International Criminal Court, Lawyers without Borders, and others.

International criminal justice is instantiated in what Michel Foucault has called a 'discursive regime', namely an institutional edifice with specific precepts, rules and conventions of behaviour.[12] The discourse of international law, which includes its enforceable statutes, the international tribunals with their rules of procedure and evidence and the concrete practices of the courtroom work in combination to produce particular historical 'truths' (events happened this way not that; these considerations are relevant, those are not). These truths underwrite the criminalisation of violent forms of political leadership and empower a punitive penal machinery. Here, discursive practices create truth which issues in power: 'It's the characteristic of our Western societies that the language of power is law, not magic, religion, or anything else'.[13]

Under this regime violent struggles for territory, resources, or allegiance, which lay people, political scientists or sociologists might deem to be 'political' or 'sociological', come to be reclassified as 'criminal'. By being removed from the political sphere, these strategies, acts and modes of behaviour are extracted from the arena of popular debate and struggle (or indeed expert analysis), and rendered susceptible to the intervention of policing, juridical and penal agencies. To borrow a concept from James Ferguson, the apparatus of international justice can be construed as an

[10] Stanley Cohen, 'Crime and Politics: Spot the Difference', *British Journal of Sociology*, 47:1 (1996), pp. 1–21.

[11] See P. Collier and A. Hoeffler 'On the Economic Causes of Civil War', *Oxford Economic Papers*, 50 (1998), pp. 563–73 and for a critique, C. Cramer, 'Homo Economicus Goes to War: Methodological Individualism, Rational Choice and the Political Economy of War', *World Development*, 30:11 (2002), pp. 1845–64.

[12] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), p. 133.

[13] Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994), p. 42. A future article will address the ways in which magical and religious narratives are screened out of the courtroom.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

'anti-politics machine',[14] part of a larger developmental complex that depoliticises new political formations rendering them amenable to technical solutions.[15]

Sierra Leone: war, peace and the creation of the Special Court

The war in Sierra Leone is estimated to have cost some 75 000 lives, with thousands of others suffering atrocities 'unique in their grotesquery'.[16] Among its root causes, social scientists have pointed to a history of corrupt and unaccountable governance; a deep-rooted political culture of violence; a crisis in youth employment and opportunities; a rural social and legal order that dealt unfairly with youth, especially allochtons; and an unstable regional context, in particular the war in neighbouring Liberia. The conflict was fuelled by an economy of plunder and predation, along with the organised exploitation of diamond resources.[17]

The war began in 1991 when a group of one to two hundred fighters calling themselves the Revolutionary United Front crossed the Liberian border into Eastern Sierra Leone. Thirteen months later a group of disgruntled government soldiers displaced the ruling All People's Congress regime in a coup that established a military dictatorship: the National Provisional Ruling Council. The war continued in spite of increased army recruitment, the intervention of a West African peacekeeping force (ECOMOG), the hiring of South African mercenaries (Executive Outcomes), and the popular mushrooming of civilian militia, later to be coordinated by one Chief Sam Hinga Norman into a national, Civil Defence Force (CDF). A palace coup in 1996 paved the way to democratic elections in which Ahmad Tejan Kabbah of the Sierra Leone People's Party was elected president, only to be overthrown in 1997 in another coup. The coup-makers invited the rebels to join the government, giving birth to the Armed Forces Revolutionary Council (AFRC)-RUF junta. The junta was itself chased from Freetown in 1998 and the SLPP government restored. Rebel forces continued to control parts of the country, however, and invaded Freetown in January 1999. Though the government survived it remained critically weak and signed a peace treaty and power sharing agreement in Lomé in 1999. In 2000 UN peacekeepers were kidnapped by rebels and the agreement broke down. The RUF leader, Foday Sankoh, then Chairman of the Strategic Minerals Resources Commission with

[14] James Ferguson, *The Anti-Politics Machine: 'Development', Depoliticization and Bureaucratic Power in Lesotho* (Cambridge: Cambridge University Press, 1990).

[15] Cf. Duffield, *Global Governance*; Michael Hardt and Antonio Negri, *Empire* (Cambridge: MA, Harvard University Press, 2001).

[16] The Special Court for Sierra Leone, promotional booklet, March 2003, p 3.

[17] R. Fanthorpe (2001) 'Neither citizen nor subject? ''Lumpen'' agency and the legacy of native administration in Sierra Leone', *African Affairs*, 100:400, pp. 363–86. M. Ferme (2001) *The Underneath of Things: Violence, History and the Everyday in Sierra Leone* (Berkeley, CA: University of California Press). J. Kandeh (2002) 'Subaltern Terror in Sierra Leone', in T. Zack-Williams, D. Frost and A. Thomson, *Africa in Crisis: New Challenges and Possibilities* (London: Pluto Press);. P. Richards (1996) *Fighting for the Rainforest: War, Youth and Resources in Sierra Leone* (Oxford: IAI, J. Currey); R. Shaw (2002) *Memories of the Slave Trade* (Chicago, IL: University of Chicago Press, 2002); William Reno, *Corruption and State Politics in Sierra Leone* (Cambridge: Cambridge University Press, 1995); John Hirsch, *Sierra Leone: Diamonds and the Struggle for Democracy* (Boulder, CO: Lynne Rienner, 2001). The most detailed account is to be found in *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, vol. 2 (available online at ⟨www.trcsierraleone.org⟩).

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

protocol status of Vice President, was besieged in his house by a mob and later captured and paraded through the streets of Freetown.[18]

Following these events, on 12 June 2000 Tejan Kabbah invited the UN to 'set up a court powerful enough to bring justice to his country'.[19] Five days later, in resolution 1315, the Security Council declared that, 'a credible system of justice and accountability for the very serious crimes committed [in Sierra Leone] would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace'.[20] In March 2002 Sierra Leone's parliament ratified the treaty between the Government and the UN, providing for a Court that would, 'prosecute persons who bear the greatest responsibility' for war crimes and crimes against humanity committed after the Abidjan Peace Accord of 1996.[21] The first staff to work at the Court arrived in Freetown in July 2002, the first indictments were approved in March 2003 and arrests took place in the weeks that followed.[22] To date thirteen persons have been indicted for crimes that include murder, rape, enslavement, looting and burning, sexual slavery, extermination, acts of terror, conscription of children into an armed force, forced marriage, and attacks on UNAMSIL peacekeepers.[23]

The trials of global governance

The nine indictees currently in the custody of the Court are being tried in three trials, each dedicated to one of the main factions in the conflict: the RUF, CDF and AFRC.[24]

The trial of the three RUF indictees opened in Freetown on 5 July, 2004. In its opening statement, the Prosecution alleged that in 1991 a group of some 200 rebels assisted by Liberian warlord Charles Taylor, invaded Sierra Leone, constituting a joint criminal enterprise, the aim of which was to take control of the country's territory and resources, in particular the diamond mining areas, by any means

[18] Hirsch, *Diamonds and the Struggle for Democracy*, pp. 113–34. Though other versions suggest he was almost lynched before being quickly spirited to a local guest house (Paul Richards, pers. comm.).

[19] The Special Court for Sierra Leone, promotional booklet, March 2003, p. 8.

[20] Cited ibid., p. 2.

[21] The war was finally declared at an end in January 2002, following Guinean military operations, the intervention of British troops and an expanded UN presence, which created a context in which demobilisation and disarmament could proceed.

[22] For a useful review of the debates surrounding the establishment of the Special Court, see Beth K. Dougherty, 'Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone.' *International Affairs* (April 2004). pp. 311–28. For a critical early reading, see Lansana Gberie, 'Briefing: the Special Court of Sierra Leone', *African Affairs*, 102:409 (2003), pp. 637–49.

[23] The Special Court for Sierra Leone: Basic facts. Available at ⟨http://www.sc-sl.org/basicfactspamphlet09.pdf⟩. It should be noted that by the time of the indictments the RUF was already a spent force. However, this was not the case in 2000 when Kabbah appealed to the UN for a Court. At the time of indictments, Sam Hinga Norman and Johnny Paul Koroma commanded popular followings in the CDF and Republic of Sierra Leone Armed Forces respectively. To some extent their arrests cut off the heads of two potentially lawless and violent organisations.

[24] Four indictees alleged to be at the centre of the conflict escaped the court's grasp: Foday Sankoh, leader of the RUF who died in custody; Field Commander Sam Bockarie, killed in Liberia, allegedly on the instructions of Charles Taylor; Johnny Paul Koroma, one-time President and leader of the AFRC, now missing; and Charles Taylor, at the time of writing exiled in Nigeria.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

necessary. 'Their motive: power, riches, and control in furtherance of a joint criminal enterprise that extended from West Africa north into the Mediterranean Region, Europe, and the Middle East'.[25] Then, in 1997, a group of disaffected soldiers staged a military coup and took power in Freetown, calling themselves the AFRC. They formed a pact, or junta, with the RUF, and thereafter the two groups were, according to the Prosecution, indistinguishable. Of the three RUF indictees, Issa Sesay occupied a number of senior positions, including RUF Area Commander, Battle Group Commander and Battle Field Commander, and, after Sankoh's imprisonment directed RUF activities countrywide; Morris Kallon was a senior officer and member of the Junta governing body; Augustine Gbao was, among other positions, Commander of the RUF Internal Defence Unit and in charge of its Security Units. Together, these three were accused of 18 counts of war crimes and crimes against humanity.[26]

At the opening of the CDF trial on 3rd June, the prosecution alleged that in the aftermath of the 1997 coup, Chief Samuel Hinga Norman – then exiled deputy minister for defence – assumed leadership of a poorly organised band of traditional hunters – the *kamajors* – and, together with Allieu Kondewa, who became the movement's High Priest, and Moinina Fofana, its Commander of War, conscripted civilians into a transformed *kamajor* movement, preparing them for battle 'by means of cultish rituals' intended to make them impregnable to bullets.[27] In this way they 'schemed to take a traditional belief system and manipulated (sic) it to their own ends'.[28] By employing the *kamajors*, and other civilian militias, they began a 'joint criminal enterprise', hatching a 'common plan' to use 'every means, including illegal and forbidden means, to defeat the RUF and AFRC forces and to gain and exercise control over the territory of Sierra Leone'.[29] In the course of carrying out this plan the three committed, planned, instigated and ordered criminal acts in a widespread and systematic fashion; in other cases, they let criminal acts by their subordinates – which were a foreseeable consequence of the plan – go unpunished. According to the prosecution, this rendered the indictees guilty of war crimes – namely violations of Article 3 common to the Geneva Conventions and Additional Protocol II – as well as other serious violations of international humanitarian law.[30] The opening statements gave a graphic foretaste of testimony to come, offering up stories of rape, immolation, decapitation and cannibalism.

The rhetoric of these opening statements is deserving of a paper in its own right. In the case of the RUF the Prosecutor, David Crane, emphasised the greed of the indictees and evoked a deviant criminal organisation whose tentacles penetrated even Western Europe. Each of his opening statements was pervaded by tropes of light and darkness, civilisation and barbarism, and the law was accorded an almost religious status. In the trials proper, these evocative rhetorical strategies were superseded by

[25] The Prosecutor of the Special Court v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao, case no: SCSL-04-15-T, 5 July, pp. 20, 19–21.
[26] Sesay et al., 5 July.
[27] The Prosecutor of the Special Court v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa, case no: SCSL-04-14-PT, 3 June, pp. 25, 11–12.
[28] Ibid., pp. 16, 11–12.
[29] Ibid., pp. 18, 12–14.
[30] Ibid., pp. 30, 22–5.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

more prosaic ones. But though the language was more mundane, it was just as strategic and just as important in expanding the law's domain.[31]

The article turns now to an analysis of the courtroom's linguistic mini-dramas, pointing to the exercise of power through language, the attempts at resistance, or a counter-discourse, on the part of the indictees, and the efforts of the bench and prosecution to suppress this.

Language and power

In the trials of the CDF and RUF indictees, language has been used to exercise power in at least two distinct ways. To begin with, it has been used to redefine history, carving a set of criminal acts from the continuous flow of political events. Second, it has been used to set boundaries to the types of statement that are permissible or sayable in the courtroom. Both depend on what Foucault might call, 'dividing practices', demarcating the social world into a domain appropriate to 'politics' and a space suitable to the intervention of 'the law'.[32]

The first strategy is illustrated by a recurring theme in the Prosecutor's opening statements: the claim to a distinction between political and criminal acts, 'Despite the obvious political dimensions of this conflict' he said, 'these trials – this trial is about crimes . . . war crimes and crimes against humanity'.[33] Going on to say:

> The issues before you are not – cannot be political. We have not charged political crimes. The court of law – this Chamber must focus on the alleged acts of these jointly charged indictees; politics must remain barred from these proceedings.[34]

Crane alleged that, 'the Accused committed international crimes, their actions were criminal, their mindset criminal, not political'.[35] And instructed the court to keep in mind that, 'they are charged with crimes as individuals, jointly and severally, not with political acts'.[36] Crimes, he declaimed, 'are committed by men, not by abstract entities', continuing, 'only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[37]

In an interview with the Prosecutor I asked him what he meant by 'politics':

> TK: you draw a clear distinction, in your opening statement, between 'crime' and 'politics'. Can you give me a definition of 'crime' and a definition of 'politics', as you understand them?
> DC: sometimes they merge don't they? And there are political crimes, such as corruption is a political crime, I think . . . but these are international crimes that the world has said that all men are not absolved from . . . things such as war crimes and crimes against humanity . . . there's a real issue about injecting politics into a court of law. That's why you have balances of power, not balance of power, but the separation of power, you have an

[31] John M. Conley and William O'Barr, *Just Words: Law, Language, and Power* (Chicago, IL: University of Chicago Press, 1998), p. 2.
[32] Paul Rabinow, 'Introduction', in *The Foucault Reader: An Introduction to Foucault's Thought* (London: Penguin, 1994), pp. 3–29.
[33] Norman et al., 3 June, pp. 7, 26–8.
[34] Ibid., pp. 12, 23–5.
[35] Ibid., pp. 12, 29–30.
[36] Ibid., pp. 13, 4–5.
[37] Ibid., pp. 9, 11–13. Here Crane is invoking Robert Jackson's opening statement at Nuremburg.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

independent judiciary, you have a legislature and you have an executive, or some variation on that theme . . . and the judicial system is always removed from the political process because the tradition and culture have always said that politics and diplomacy have to be removed from the law which is blind, equal and I'm talking in the pure sense now . . . the concept of justice is a fair dealing with an issue void of outside influence, er, to include politics. If you inject politics into justice, you have, you don't have a just result, because again they don't mix.[38]

Two themes emerge here: Firstly, the Prosecutor is suggesting that any act that infringes an international law is by definition criminal, not political. Secondly, any attempt to exert undue influence in the courtroom, for example through popular pressure, is also 'political'. Taken together, the two readings imply that acts that transgress international law and the perpetrators of those acts are criminal, no matter how locally popular they might be. In the RUF trial, Crane made clear that:

We are not going to question whatever initial politics surrounded the RUF. We are going to show, however, that this abuse of a political process and the discontent of the citizens of Sierra Leone was a mask for these actors' own criminal purposes. This trial is not, cannot be, about this subterfuge of frustrated political aspirations, but about war crimes, the crimes against humanitarian (sic).[39]

Moving to the second exercise of power through language, we find that statements of a political nature, such as those that might take issue with the Prosecutor's attempt to define the ground on which the trial would operate, are rendered unsayable by the Court's rules of procedure. During his introductory remarks to the RUF trial, Presiding Judge Benjamin Itoe, stressed that:

The occasion to make opening statements is not an occasion to make political declarations. We are in a court of law and we will only tolerate matters to be raised here which are strictly acceptable within our judicial practices and that any statement that tends to be political will be called to order and would, of course, not feature in our records.[40]

He warned the Prosecutor himself that the content of his statement must be, 'bereft of anything political'[41] and warned Augustine Gbao that the Court, 'will resist all attempts to transform what should be a proper adjudication of charges before the Court into a political melodrama'.[42] In an exchange with the latter (see below), Judge Thompson made clear, 'our determination to resist any move by anyone, high or low, to allow politics to intrude into the domain of the impartial and dispassionate administration of justice'. This stance was supposedly empowered by Rule 84 of the Rules of Procedure and Evidence, which states that, 'each party may make an opening statement *confined to the evidence* he intends to present in support of his case' (my emphasis).[43]

The attempt to preserve the courtroom as an apolitical sphere was a constant struggle, since the Court as an institution was conditioned by 'politics' on at least three different levels: international, national and local. Internationally, the Court was born out of wrangles between the UN Security Council and the Secretariat.[44] Its

[38] Interview with David Crane, 15 June 2004.
[39] Sesay et al., 5 July, pp. 21–2, 36–7, 1–3.
[40] Ibid., pp. 5, 1–9.
[41] Ibid., pp. 19, 4.
[42] Ibid., 6 July, pp. 8, 2–3.
[43] Rules of Procedure and Evidence – Special Court for Sierra Leone, p. 33. Available at ⟨http://www.sc-sl.org/scsl-procedure.html⟩.
[44] Dougherty, 'Right-Sizing International Justice'.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

mandate – to prosecute those who 'bear the greatest responsibility' was inscrutable to some and rested on the shakiest of philosophical foundations. The Prosecutor himself described it to me as, 'a piece of pure political compromise' claiming however that 'once you actually create the justice ship or boat, once you actually put it in the water and it begins to float away, it literally floats away and leaves the political process and becomes a justice system in the purest sense, and that is equality before the law'.[45] Certainly, the decision to use the Abidjan Peace Accord of 1996 as the start date for the Court's remit was controversial. Arguably this protected certain private military companies from scrutiny,[46] while the decision to circumvent the general amnesty provided at Lômé in 1999 doubtless left the defendants feeling double-crossed (see the testimony from Gbao below).

From an early stage the US was one of the Court's biggest backers. A popular belief in the international community and civil society in Freetown in 2003–4 was that this was a result of America's desire to find an alternative international justice model to the ICC in the Hague, though academic evidence provides little support for this.[47] It was also common to hear Court staff themselves say that the appointment by the UN of David Crane, a former Pentagon lawyer as Prosecutor, reflected the US's disproportionate influence. Meanwhile UN patronage politics was said to have been reflected in the judicial appointments process: none of the judges had relevant experience at international level, and the Registrar of the Court was reportedly denied access to the deliberations surrounding their appointment.[48]

Turning to the national political scene, the trials were arguably convenient for President Kabbah since they neutralised his key opponents and rivals, in particular Hinga Norman. Conspiracy theorists in Freetown suggested that the split between Kabbah and Norman mapped onto a historical intra-SLPP divide. The fact that Kabbah, Norman's former boss, had himself escaped indictment was a source of perplexity to most of the Sierra Leoneans with whom I spoke. The plot was thickened by the fact that defence counsel for Norman's co-defendant Allieu Kondewa, was Charles Margai. Margai, the son of former Prime Minister Albert Margai, had lost to Kabbah in the competition to lead the SLPP. In 2005 he declared his intention to contest the SLPP presidential nomination again. Court *cognoscenti* speculated about the import of this for his relation to Bankole Thompson, a trial chamber judge from Sierra Leone.

The Court was also home to a local organisational politics expressed through numerous personal rivalries. For example, some at the Court raised eyebrows at the fact that Deputy Prosecutor, Desmond da Silva, who had vastly more courtroom experience than Crane, did not appear in the first two months of trial. Personal and political rivalries between the Judges were also apparent. For instance, a ferocious and ridiculous disagreement occurred between Judges Geoffrey Robertson and Renate Winter surrounding the ruling on the criminality of the recruitment of child soldiers, a dispute that spilled over into Chief Hinga Norman's defence team, and just

[45] Interview with David Crane, 15 June 2004. A historical precedent is to be found in the political nature of the charges in the Nuremburg trials – see Richard Overy, 'The Nuremburg trials: international law in the making', in Philippe Sands, *From Nuremburg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003), pp. 1–29.

[46] I owe this point to Paul Richards, personal communication.

[47] See Dougherty, 'Right-Sizing International Criminal Justice.

[48] Informal discussions with Court officials, April–August 2004.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

one example of friction between Robertson and the other judges. In August 2004 an employee of the Court was charged with having sexual relations with a thirteen-year-old girl; rumours were rife about the political machinations that might lie behind this murky affair. These examples, it should be said, were just the tip of an iceberg that threatened to tear a hole in Crane's pure justice ship.[49]

Resistance

The difficulty of keeping politics and justice apart was highlighted during the RUF trial when, at the close of the Prosecution's opening statements, Augustine Gbao was given the opportunity to make an opening statement in his defence. He declared that the indictees were 'against the manner in which the Special Court for Sierra Leone was established'[50] but was immediately cut short by the Bench, which informed him that these questions had already been adjudicated upon. It is worthwhile quoting the ensuing exchange at length:

THE ACCUSED GBAO
Your Honour, it will be very difficult to convince any critical mind that this Court is not political and it will also be very difficult to –

JUDGE THOMPSON
I shall again intervene here and advise you that you must keep the contents of your speech –:

THE KRIO INTERPRETER
Sorry, the interpreter cannot get you clearly because the mike is not on.

JUDGE THOMPSON
Within the limits of the provisions of Rule 84
Continue.

THE ACCUSED GBAO
Your Honour, I will stand to say there is no judicial – judicial exercise without politics.

JUDGE THOMPSON
I will again interrupt you at this point and tell you that even if that is your own mindset, this Court has been set up with a clear understanding that it must fulfil its mandate as an independent tribunal, guaranteed judicial independence, and not to be influenced by any extraneous considerations, be they political or otherwise; hence our determination to resist any move by anyone, high or low, to allow politics to intrude into the domain of the impartial and dispassionate administration of justice.
Continue.

THE ACCUSED GBAO
Your Honour, the whole world, even the United Nations, knew that the conflict in Sierra Leone was concluded on the basis of no winner no loser and, therefore, the party that set up the Special Court –

JUDGE THOMPSON
Again, I must interrupt you. It would seem that you have not been sufficiently sensitised to the importance – to the importance of answering, in a preliminary way, the gravity of these allegations against you and your fellow Accused.

[49] For a critical insider's view of the Court, see James Cockayne, 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals' Mimeo, NYU, 2004.
[50] Sesay et al., 6 July, pp. 7, 24–5.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

Since this Court will not be able to evaluate any political statements that you may want to make, it is difficult for us to allow you to continue in this frame of mind. For this reason, we will not allow you to proceed further with the making of what this Bench deems is a political statement, since Rule 84 does not allow an Accused person to make a political statement in response to the opening statement of the Prosecution.

Please sit down.[51]

At this, Gbao threatened to walk out (though this option, given the uniformed prison guards at his side, was unavailable to him), and continued to plead: 'Your Lordship, what I'm trying to say here is that the Special Court is political and it is politics that even established the Special Court . . .'. The President instructed him to sit down. In subsequent days, Gbao, refusing to recognise the legitimacy of the Court, remained in his cell.

These were not the only tactics of resistance the defendants deployed. On the opening day of the CDF trial, First Accused Sam Hinga Norman – a man regarded by many Sierra Leoneans as a hero and saviour of the nation – followed the Prosecution's powerful opening statement with a dramatic intervention of his own. During the lunch break he passed a letter to the judges expressing his desire to dismiss his entire legal team and represent himself.[52] Ensuing days witnessed a number of exchanges between Norman and the bench, in which they haggled over the nature and composition of Norman's representation. Norman manipulated these occasions to considerable public effect, requesting at one point to be tried *in absentia*. Indeed, some months into the trial Norman was successful in persuading all the defendants to boycott proceedings.[53] This, however, was a short-lived victory.

On 15 June the trial resumed and Norman made a brief opening statement in which he refused to recognise the legitimacy of the court, claiming, inter alia, that it lacked constitutional authority. His supporters, who took up more than half of the public gallery, cheered and waved their arms jubilantly at the close of his speech, earning a reprimand from the presiding judge:

Please, this is not – I'm sorry, let me warn the gallery, please. This is not a political forum, it's not a political arena, and if anybody is caught behaving as if he were in a political arena, he will be called upon to withdraw from this courtroom. . . . Please, you are here to follow the proceedings which are judicial proceedings. We are not here in politics.[54]

Norman's statement, making a challenge which had already been ruled upon, would not have impressed the judges. But the chief was playing to a different audience. He hoped to be tried in the court of public opinion, not of international law.

Subsequently the first witness was called. Led by Charles Caruso, counsel for the prosecution, he narrated the tale of an attack by *kamajors* on his home town of Koribundo (part of Norman's chiefdom) on 13 February 1998, in which civilians were killed and houses burned. He told of how he had fled to the neighbouring town of Bo, where he was subsequently captured by *kamajors*, who tortured him and killed his brother, telling him they intended to eat the latter. At a later date, after returning to Koribundo, he attended a public meeting in which Hinga Norman told the people of Koribundo not to blame *kamajors* for the attack, but to blame Norman himself.

[51] Ibid., pp. 8–9, 12–37, 1–7.
[52] His tactic echoed a strategy pursued by Slobodan Milosovic at the ICTY.
[53] Lansana Fofana, 'Sierra Leone: war crimes trials are opening old wounds', *Exodus Online*, 19 January 2005 (available at ⟨http://www.exodusnews.com/worldnews/world059.htm⟩).
[54] Ibid., 15 June, pp. 5, 1–6.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

Norman was later given an opportunity to cross-examine this witness. He began by calling him by a joking, or nick-nickname, 'Kotoba', which means 'short rice' in the *Mende* language. He assured him that, 'You and I know each other very well'. By using this diminutive term, Norman was reminding the witness that he was socially junior to him.[55] He was trying to insert local social hierarchies into the courtroom, upsetting the 'equality of arms' demanded by courtroom procedure. He was implying that there was something improper in a subject telling public tales about his chief. The bench later barred Norman from using familiar names such as this. The exchange continued as follows:

NORMAN: Do you like me or really dislike me?
WITNESS: I like you
NORMAN: Can you tell the court whether I did good or bad?
WITNESS: That time when you were chief you didn't do bad.
NORMAN: I really want to sympathise with you when you were crying . . . for the brother you lost. But do you realise that what was happening and this country was at war . . .[56]

The tactic seemed to work, since the witness was unwilling to say that Norman was a bad chief. Having confirmed his virtuosity as a leader, Norman then used his cross-examination to widen the field of debate: to go beyond a narrow description of events to the broader context of war, and, by implication, to shift moral responsibility from individuals to larger social forces; or, to put it in the language of moral philosophy, to have the testimony evaluated on consequentialist rather than de-ontological grounds.

Norman's counsel, Dr. Bu-Buakie Jabbi, subsequently took up the reins, continuing to try to paint a favourable portrait of Norman, and to elicit exculpatory evidence: 'Did you ever hear that Chief Norman saved the people of Jaima Bongor chiefdom?', 'Did you hear or did you see the *kamajors* repel RUF attacks?', 'Can you tell the court why you gave the prosecution no record of Chief Norman protecting lives and property in Koribundo?'. With a subsequent witness TF2–157, Dr. Jabbi cross-examined on the nature of the APC government in power when the rebel invasion began in 1991: 'Can you say how that government came into being?' he asked the witness, and 'Can you say whether it was a legitimate government or not?' The point he was presumably trying to make was that Hinga Norman and the *kamajors* had been fighting a rebel group that from its inception had sought to overthrow an elected government.[57] 'And would you agree that they were therefore – the *kamajors*, they were therefore defending both the local people and the government of the country?'

If the previous section provided examples of the way in which the law seeks to delegitimise non-liberal leaders of the poor by means of discursive operations that firstly define the actions of the former as criminal and secondly prevent the questioning of that definition, this section has shown some of the modalities by which these leaders fight back. The attempt to confine the accused within a grid of power is met by a microscopic tactics of resistance. As de Certeau says, 'The space of a tactic is the space of the other. Thus it must play on and with a terrain imposed on it and

[55] I thank Mariane Ferme for this point.
[56] Author's notes, 15 June.
[57] Author's notes, 16 June. Note that one would be hard pushed to call the APC regime legitimate.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

imposed by the law of a foreign power'.[58] The weaker party in a relation of domination typically resorts to ruses, *métis*, and strategies to 'navigate among the rules'.[59] The defendants were trying to exonerate themselves, using whatever means lay at their disposal, but principally by challenging the way in which the Prosecution's case and court procedures screened out political context. The larger objective was to call into question not so much 'the facts' of the Prosecution's case, as the labelling of those facts as criminal acts, their significance within the context of Sierra Leonean history, and the right of the Court itself to adjudicate on these matters.

Suppression

But just as the defendants used language to try and stand up to the power of the Court, so the Court used language to suppress them. Defence tactics often ran aground on the rules of cross-examination and the conventions of courtroom discourse, together with the judges' preconceptions of the kind of evidence 'material' to the case. Take the following exchange as an example:

THE ACCUSED NORMAN:
Are you aware that the evidence you are giving here is being heard by people who lived in Koribundo, and who lived in Telu?

MR CARUSO:
Objection, Your Honour. How is that relevant and second – sorry, how is that relevant, and secondly, what is the point of that question? It seems to me that his point might simply be intimidation.

Asked to justify his line of questioning, Norman initiated an exchange that goes to the heart of this paper:

THE ACCUSED NORMAN:
What I'm trying to achieve is in fact to assist the Prosecutors that the investigation in this country, based on this case, is of significance and is relevant to issues that occurred in this country. And it all emanated from this conflict in Sierra Leone that went to international bodies, started in fact from these incidents.

MR CARUSO:
Your Honour, we still don't see the relevance of that and we don't need the help.

JUDGE THOMPSON:
Yes, I am in fact – as I listen to the question I am taking the view here that it is speculative, it is argumentative and it might end up multiplying the issues before the Court. Whether this witness is aware of that or not does not seem to be of materiality to the issues before us. . . . It would seem therefore that this line of cross-examination does not really seem to be of much materiality at all.[60]

[58] Michel de Certeau, *The Practice of Everyday Life* (Berkeley and Los Angeles, CA: California University Press, 1984), p. 37.
[59] de Certeau, *The Practice of Everyday Life*, p. 54. A similar tactic was evident in some of the complaints made by defendants about their detention conditions and in their day to day interactions with prison guards.
[60] Norman et al., 17 June, pp. 26, 30–7; pp. 27, 1–8.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

On being told that the question was impermissible, and that he must at least reframe it, Norman pleaded, 'I seem to be in a jacket. I am on trial for my life and this is no place for anybody to joke . . .'.[61]

On other occasions, Norman's tactics were thwarted by the bench's insistence that he frame his cross-examination as a series of questions: 'Please try to ask short questions, so the witness can answer'. In addition, the Defence was frequently interrupted by the Prosecution objecting to the 'irrelevance' of their questions. Sometimes these objections were overruled, but they were frequently sustained.

MR MARGAI:
Q: . . . you are sitting here today because of the invaluable contribution made by the *kamajors* in the defence . . .
OTP:
Objection!

This was sustained on the grounds that it was 'argumentative' and 'speculative'. On other occasions the bench tired of attempts to elicit evidence flattering to the *Kamajors*:

Mr. Defence Counsel, we've given you some liberty to ask all these questions, but I think we would like to move in a different direction. I know you are in cross-examination, we've tried to accommodate you, but I would suggest you move in a different direction.[62]

Witnesses, it should be noted, were far from being passive objects of manipulation. Well prepared by the OTP, they often as not resisted the Defence's attempts to manoeuvre them into making statements that went beyond the forensic 'facts' of the case to the wider context of war. Take the following exchange:

Q: So can you say therefore why the *kamajor* movement started?
A: I can't tell you why the *kamajor* movement started because I was not there when it started. It was when the *kamajor* movement reached at my own location that I knew about the *kamajors*.[63]

Later Jabbi attempted to lead this witness into making further positive appraisals, by eliciting a picture of *kamajors* cooperating with soldiers and people to protect the town from rebels:

Q: So that means that for quite a few months the *kamajors* were working cordially with both the soldiers and the local people in Koribundo town?
A: Yes
Q: And would you agree that they were therefore – the *kamajors*, they were therefore defending both the local people and the government of the country?

However, the witness gives only qualified assent:

A: *At that time* (my emphasis) – at that time they were doing that hand-in-hand, together with the other fighters that were with us that we hosted.[64]

Later, Jabbi attempted to portray the *kamajors* as a voluntary, community organisation, but the witness qualified this by saying that civilians joined on orders of the chief: 'What I told you about is what you should know. Know that before you ask

[61] Ibid., pp. 27, 18–19.
[62] Norman et al., 16 June, pp. 34, 21–3.
[63] Ibid., pp. 29, 3–7.
[64] Ibid., pp. 30, 5–11.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

a question. If a chief gives an order and says that is – this is what should happen in this land, everybody would have to abide by that'.[65]

As previous examples show, trial procedures typically worked to screen out discussions of the macro-political scene. It should also be noted that witness protection policies tended to obfuscate *micro-political context*. The identity of witnesses was concealed from the gaze of the public gallery by a screen. Lawyers were instructed not to call them by name, nor to reveal intimate details of their residences or families.[66] In the case of the first witness in the CDF case, Norman's supporters in the public gallery speculated from the witness's ethnic identity that he was part of a rival chiefdom faction that had opposed Norman's accession to the regent chieftancy of Jaima Bongor.[67] He would therefore have an ulterior motive, they presumed, to testify against the Chief. I was unable to verify whether or not this was true. However, it is worth noting that the inability of the Defence to name the witness made it difficult, though perhaps not impossible, to discredit testimony by this route. It should also be mentioned that some witnesses spoke of atrocities committed against them by individuals whom they knew. But the local quarrels that might have motivated these acts of violence, and which might theoretically have mitigated the case against the defendants, were never properly opened up for discussion.

Conclusions

In the struggle to instantiate itself international criminal law pursues a dual strategy. In the first place, it surrounds itself with instruments of security and violence. As Foucault notices, 'Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination'.[68] Surveying the security of the Court compound, one is reminded of the eighteenth century spectacle of robed English judges accompanied by military squads.[69]

But having secured a space in which to operate, discursive strategies become pre-eminent. As its second technique, the project to institutionalise international law depends upon the production of historical truths that are narrowly confined to forensic 'facts'. As often as not, the historical and political context in which facts occurred is not of 'materiality' to the case. The effect of this narrow aperture is to cast the facts in a particular light, depoliticising certain modes of action by calling them criminal, motivated, where motivations are spoken of, by pure greed, and providing a point of leverage for the penal apparatus. This facilitates the separation of leaders of violent political movements from the rest of the population, and in the view of international jurists, sends a powerful message about impunity to other aspiring leaders. As this article has shown, an entire discursive regime comprising rules,

[65] Ibid., pp. 31, 17–19.
[66] Though these sometimes slipped out, making the witnesses fairly easily identifiable to anyone familiar with their home areas.
[67] I thank Martha Carey for alerting me to this.
[68] Hunt and Wickham, *Foucault and Law*, p. 42.
[69] Ibid.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press

procedures and micro-discursive practices is dedicated to this task. Depoliticisation has its original inscription in the articles of international law themselves and is reiterated in the courtroom day upon day.

Verbal reiteration is crucial to the law's project. In the first place it is necessary in order to police the boundaries within which court discourse must take place. In the second place, it is a form of ideological manipulation, in which the criminal nature of erstwhile political acts is drip-fed into the minds of the general population. The Court is assisted in this respect by a dedicated outreach programme with 14 district officers daily disseminating the court's moral message.

Nevertheless, as we have seen, the defendants are fighting back. They take issue with the attempt to depoliticise their actions by striving to reinsert questions of political context into the courtroom. In addition they attempt a variety of other tactics which range from intimidating witnesses to playing to the public gallery. These tactics redound upon the way the Court is viewed publicly. If the defendants can convince the public that the acts they committed were politically justified, even where technically illegal, then the normative force of the law will be considerably weakened. Indeed the ambition of the court to institutionalise the rule of law in Sierra Leone may crumble away.

The wider implication is that the extension of global governance depends not just on the high politics of international organisations and nation-states, with their ability to sign treaties, create institutions and stage dramatic quasi-military interventions. It depends also on the success of microscopic strategies that embed a regime of truth and change the way people in the South think and act. In locations such as the Special Court for Sierra Leone, these strategies are encountering an equally microscopic resistance. To understand global governance, I suggest, scholars must increasingly take such micro-arenas into account.

https://doi.org/10.1017/S0260210506007170 Published online by Cambridge University Press