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Donors' Justice: Recasting International Criminal Accountability

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Abstract
International legal scholarship to date has largely neglected the donor-driven dynamics of international criminal justice. This article advances what I term 'donors' justice' as an analytic frame for interpreting the work of international criminal tribunals. Donors' justice is defined as third-party financial support for tribunal activity. It imports market rationalities into the field of criminal accountability, which assume overlapping discursive, political, and economic forms. The Special Court for Sierra Leone provides a case study of the implications of donor-driven logics for international criminal justice, particularly the material problems of insecure funding and the ethical problems of limited personal jurisdiction.

Key words
criminal tribunals; governance; international criminal law; neo-liberalism; Sierra Leone

1. Introduction

> [I]nternational 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.
>
> Carla Del Ponte, former Prosecutor for the International Criminal Tribunal for the former Yugoslavia[1]

The logic of the market has become so embedded in late modern thought that this claim from a 2005 speech by then-Prosecutor at the International Criminal Tribunal for the former Yugoslavia to an audience at the investment bank Goldman Sachs may at first seem unremarkable. The fact that international criminal justice draws upon market-based rationalities is unsurprising – perhaps even an existential necessity – if it is to sustain itself in its current institutional forms. International criminal tribunals are expensive to operate, given the restricted number of individuals that they try.[2]

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1 C. Del Ponte, 'The Dividends of International Criminal Justice', 6 October 2005, text available online at www.icty.org/x/file/Press/PR_attachments/cdp-goldmansachs-050610-e.htm.

2 According to the then-UN Secretary-General, as of 2004, the ad hoc tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) were consuming roughly 15 per cent of the UN's budget; see the UNSC, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, UN Doc. S/2004/616 (2004). Estimates of the average cost of trials vary, with Rupert Skilbeck arguing that ICTY and ICTR trials cost between $10 and $15 million per accused and Mark Drumbl noting that convictions at the ICTR cost in the region of $25 million each. See M. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 *Northwestern University Law Review* 539; and

In light of the relatively high costs per defendant in an international criminal trial, tribunal proponents must regularly explain to government donors and other interested parties why individual criminal accountability for a small number of alleged perpetrators should contribute to a broader set of interests involving peace, security, and development – in the words of Del Ponte, why these trials yield 'high dividends for a low investment'.

Proponents of international criminal justice increasingly describe its work in a neo-liberal idiom,[3] invoking the language of performance-based appraisals and cost-effectiveness. This language appears to varying degrees in the scholarly literature: for example, a recent publication undertakes what its author terms a 'balanced scorecard analysis' of international criminal tribunals,[4] and others ask whether the ad hoc tribunals for Rwanda and the former Yugoslavia are 'providing value for money'.[5] Such market-driven logic may also seem familiar to administrators of international criminal courts, who frequently double as fund-raisers for their institutions while dealing with the daily responsibilities of court operations. Seeking financial support directly from states and private-sector donors seems to be the main way to fund international criminal justice in cases in which tribunal operating costs are not officially covered by the UN budget.[6]

This article argues that this familiar market-oriented framing of international criminal justice deserves further critical consideration, as the objectives and imperatives of justice may not be so readily translated into the terms of a market economy as the discourse suggests. Instrumental visions of post-conflict tribunals seem particularly contentious when compared with the field's public-law aims, which, in theory, aspire to generate international criminal accountability as an end in itself or as a basis for deterring future crimes. What does it mean to instead conceive of international criminal justice as a kind of product on a market? What sort of market would it be competing in? Who invests in it, and what is their anticipated return? The rise of donor-driven logics within the field of international criminal justice has

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R. Skilbeck, 'Funding Justice: The Price of War Crimes Trials', (2008) 15(3) *Human Rights Brief* 6. A recent article on the Special Court for Sierra Leone claims that this tribunal has spent roughly $23 million per trial; see C. Jalloh, 'Special Court for Sierra Leone: Achieving Justice?', (2011) 32 Mich. JIL 395.

3 Michel Foucault's description of the American form of neo-liberalism that emerged in the first half of the twentieth century accurately captures the phenomenon that I wish to describe here: 'generalizing [the economic form of the market] throughout the social body and including the whole of the social system not usually conducted through or sanctioned by monetary exchanges.' As a consequence, 'analysis in terms of the market economy or, in other words, of supply and demand, can function as a schema which is applicable to non-economic domains'; see M. Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978–1979* (2008), 243.

4 M. Heikkilä, 'The Balanced Scorecard of International Criminal Tribunals', in C. Ryngaert (ed.), *The Effectiveness of International Criminal Justice* (2009), 27, at 42. The author grants that '[i]n contrast to most business enterprises, the tribunals are primarily legal actors and only secondary economic actors.'

5 D. Wippman, 'The Costs of International Justice', (2006) 100 AJIL 861, at 862, quoting D. Raab, 'Evaluating the ICTY and Its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals', (2005) 3 JICJ 82.

6 See C. Romano, 'The Price of International Justice', (2005) 4 *Law and Practice of International Courts and Tribunals* 281. Tribunal funding is generally divided into 'voluntary' and 'assessed' contributions. The ad hoc tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) are funded through assessed contributions from the UN budget; similarly, the International Criminal Court (ICC) is funded through assessed contributions from ICC member states.

been underexplored to date within the scholarly literature on international criminal tribunals. As the field expands, accompanied by new court forms and new funding arrangements, the phenomenon of donor-driven international criminal justice should be explored more thoroughly.

This article addresses what I call 'donors' justice' as a contemporary form of international criminal accountability. Section 2 of this article sketches the contours of donors' justice, which I describe as a constellation of discursive, political, and economic forms that contemporary international criminal justice may assume. Section 3 links international criminal accountability to other donor objectives, including security, governance, and development. Section 4 turns to the Special Court for Sierra Leone (the 'Special Court' or the 'SCSL') as an example of the various implications of donor logics for the field of international criminal justice. The phenomenon of donors' justice appears quite clearly at the Special Court for structural reasons: as I will explain in greater detail below, the SCSL's reliance upon voluntary contributions makes it particularly susceptible to market fluctuations and shifting donor imperatives.

2. Conceptualizing donors' justice

Donors' justice can be defined as third-party financial support for the work of international criminal-justice institutions, where funders are not a party to the conflict that the court was set up to adjudicate.[7] As an analytic frame, it includes discursive, economic, and political strands that overlap in practice. Discursively, donors' justice begins from the neo-liberal premise that justice can be subjected to market rationalities. International criminal accountability is described as an investment for interested third parties, as Del Ponte's speech suggests. Politically, donor states may regard international criminal courts as vehicles for their own foreign-policy objectives, including security, governance, and development. The pursuit of international criminal justice thus offers donor states another avenue for furthering their interests, whether benevolent or strategic. Economically, institutions and their proponents offer international criminal justice as a product on a broader market in competition with other tribunals and recipients of donor support. Courts with voluntary funding arrangements particularly suffer from underfunding as a result of this subjection to market forces and, as a consequence, more institutional energy is devoted to fund-raising activities.[8] In addition to revealing how international criminal justice

7 This third-party status distinguishes 'donors' justice' from 'victor's justice', the common criticism of post-Second World War tribunals set up by the victorious allied powers. The founders and funders of tribunals at Nuremberg and Tokyo had been parties to the conflicts, whereas the contemporary international criminal tribunal is typically supported by third-party states. This is partly due to the fact that armed conflicts are increasingly of an internal rather than an international character. A related logic may also be at work in externally funded *domestic* court structures, such as the partially donor-financed War Crimes Chamber in the Courts of Bosnia–Herzegovina, but this article focuses primarily on tribunals that have been described as international in character.

8 The former registrar of the Special Court for Sierra Leone reportedly attended 250 meetings in 15 months, according to a leaked US diplomatic briefing, 'to drum up support from potential donor countries.' See 'US Embassy Cables: The Protracted Case against Charles Taylor', *The Guardian*, 17 December 2010, available online at www.guardian.co.uk/world/us-embassy-cables-documents/196077.

operates within and between these discursive, political, and economic fields, the analytic frame of donors' justice highlights the different actors – states, civil-society organizations, and the institutions themselves – who participate in the production and consumption of international criminal justice. Largely absent from this analytic frame are the conflict-affected communities in whose name these tribunals claim to operate, although they often provide the ethical and rhetorical force for justifying donor investments in tribunal proceedings.

Critical scholarship on international criminal courts and tribunals has focused on a number of issues, including their political origins,[9] their participation in other governance objectives,[10] their overly Western legal approach at the expense of other cultural considerations,[11] their failure to acknowledge the economic dimensions of conflict,[12] and even the shortcomings of their expatriate personnel.[13] What has been largely missing from this body of critical scholarship is an interrogation of the donor–beneficiary relationship between states and private-sector actors on the one side and the tribunals themselves on the other. Little has been written about the figure of the donor or what the consequences of this dynamic might be for contemporary forms of international criminal justice. When tribunal funding is mentioned, it is usually recounted descriptively – as a fact to report – rather than as a subject deserving further attention.[14] Academic articles and reports from non-governmental organizations frequently document the problems of underfunded tribunals, but the donor-driven funding phenomenon itself is rarely analysed within the scholarly literature.[15]

This article attempts to address this gap by examining the phenomenon of donors' justice at the site of one of three currently operating international criminal tribunals that rely on voluntary contributions from states, the Special Court for Sierra Leone, which is nearing completion of its mandate. The Special Court was the first of these

9 Much of this literature considers the ICTY. For example, Martti Koskenniemi argues that 'there is no doubt that the The Hague trials are an effect of Western policy. The Tribunal would not have come to existence without pressure from the Clinton administration and quarters in the French government'. M. Koskenniemi, 'Between Impunity and Show Trials', (2002) 6 MPYUNL 1, at 18. See also J. Laughland, *Travesty: The Trial of Slobodan Milosevic and the Corruption of International Justice* (2006); P. Hazan, *Justice in a Time of War: The True Story behind the International Criminal Tribunal for the Former Yugoslavia* (2004); D. Zolo, *Invoking Humanity: War, Law and Global Order* (2002); H. Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads* (2008); and J. Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century* (2004).

10 M. Findlay, *Governing through Globalised Crime: Futures for International Criminal Justice* (2008).

11 T. Kelsall, *Culture under Cross-Examination: International Justice at the Special Court for Sierra Leone* (2009); K. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009).

12 Z. Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice', (2008) 2 *The International Journal of Transitional Justice* 266.

13 E. Baylis, 'Tribunal Hopping with the Post-Conflict Justice Junkies', (2008) 10 Oregon RIL 361.

14 See, e.g., T. Ingadottir, 'The Financing of Internationalized Criminal Courts and Tribunals', in C. Romano, J. Kleffner, and A. Nollkaemper (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (2004).

15 For some exceptions, see B. Oomen, 'Donor-Driven Justice and Its Discontents: The Case of Rwanda', (2005) 35 *Development & Change* 887–910; Romano, *supra* note 6, at 281; and S. Petersen, I. Samset, and V. Wang, 'Foreign Aid to Transitional Justice: The Cases of Rwanda and Guatemala, 1995–2005', in K. Ambos, J. Large, and M. Wierde (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (2009), at 438.

tribunals designed to be funded entirely through voluntary state contributions, although similar financial models followed at tribunals for Cambodia (ECCC) and Lebanon (STL). The voluntary funding structure pioneered by the SCSL casts states as potential donors rather than as assessed contributors to court operations, which distinguishes it from the United Nations-backed ad hoc tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY).[16] Although this article focuses on the work of the SCSL, the donors'-justice analytic is also applicable to aspects of the work of the ad hoc tribunals and the permanent International Criminal Court (ICC).[17] The Special Court presents a particularly strong case study for the implications of donors' justice given its funding through voluntary state contributions, which makes it more vulnerable to market forces than tribunals funded through United Nations-assessed contributions.

One qualification is in order: the fact that tribunals are funded through state or private-sector donors does not necessarily taint the outcomes of their judicial processes by compromising judicial independence or the integrity of the proceedings. These arguments have been made elsewhere, often by defence lawyers working in the tribunals with their own clients' interests to consider.[18] I am not suggesting that the outcome of donors' justice is a foregone conclusion, nor do I claim that donor relationships impact tribunal proceedings directly by influencing judicial behaviour. Instead, this article explores the implications of conceiving of international criminal justice as an investment for interested third parties: a political economy of the 'new tribunalism'.[19]

16 Prior to the Special Court's creation the then-UN Secretary-General suggested funding the Court by assessed contributions as 'the only realistic solution' that would 'produce a viable and sustainable financial mechanism affording secure and continuous funding'. UN Secretary-General, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000), para. 71. Instead, the SCSL was established with a voluntary funding mechanism that has been heavily criticized in the scholarly literature; for a recent example, see Jalloh, *supra* note 2.

17 Although a detailed account of other tribunals is beyond the scope of this article, all currently operating internationalized tribunals bear some elements of 'donors' justice'. The ICC's independent Trust Fund for Victims is one of the more obvious examples, as it receives support from voluntary contributions that may be earmarked for particular projects. Following the UK government's £500,000 donation to the Trust Fund, the British ambassador to the Netherlands stated that 'the UK has called on the Court to take tough decisions in response to the continuing global economic crisis. But we recognize that states also have a responsibility to ensure that the Court has sufficient resources to carry out its task. That is why the UK made a donation of 200 000 pounds to support witness relocation in the Kenyan investigation'; press release, 'UK Donates Over 550,000 Euros to Trust Fund for Victims', 22 March 2011, available online at www.hirondellenews.com/content/view/14175/1184/.

18 For example, legal anthropologist Kamari Clarke notes how the attorney for International Criminal Court (ICC) indictee Thomas Lumbanga criticized what he termed 'NGO justice' or, as Clarke described it, 'highly biased data fuelled through donor-sponsored agendas', Clarke, *supra* note 11, at 2. At the Special Court for Sierra Leone, defence counsel for Charles Taylor alleged that 'the impartiality and independence of the Court may have been compromised' based on suggestions in diplomatic cables that 'sensitive information about the trials has been leaked to the United States Embassy in The Hague by unnamed contacts in the Trial Chamber, the Office of the Prosecutor (OTP) and the Registry'. See *Prosecutor v. Taylor*, Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, The Prosecution and the Registry Based on Leaked USG Cables, Case No. SCSL-03–01-T, T.Ch. II, 10 January 2011.

19 T. Skouteris, 'The New Tribunalism: Strategies of (De)Legitimation in the Era of International Adjudication', (2006) 17 *Finnish Yearbook of International Law* 307.

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3. Juridical investments

We are now nearly two decades into a widely acknowledged expansion of international criminal law, which is often categorized as 'transitional justice' in the scholarly literature. This expansion is largely attributed to the end of the Cold War and to a renewed interest in accountability for mass crimes, and it has produced a number of beneficiaries beyond the individuals seeking legal redress for the wrongs they suffered. A growing class of international criminal lawyers has emerged as a set of professional stakeholders in the field's development, and legal education has expanded to include specializations in what was previously a subfield of public international law.[20] It would seem that the 'dividends of international criminal justice', to quote the title of former ICTY Prosecutor Del Ponte's speech noted above, are multiple and diverse: there is an expanding field of professional knowledge accompanied by a market-driven demand for teaching, training, and practice, as well as the indirect effects that this profession has on state and local economies, whether in Freetown, Phnom Penh, or The Hague. This is a different set of 'dividends' from what the prosecutor's speech envisions. Del Ponte focuses instead on the impact that international criminal justice might have on conflict and post-conflict settings, and tribunals are described as wise, low-cost investments in regional stability. In addition, Del Ponte notes the benefits that private corporate entities – such as Goldman Sachs, the addressee of her speech – might stand to gain from international criminal proceedings:

> The UN is dealing with many issues that the private sector is not able to deal with. It is dangerous for companies to invest in a State where there is no stability, where the risk of war is high, and 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. In short, our business is to help you make good business, in the expectation that a stable, reasonably prosperous democracy will be a factor of peace and stability in the world.[21]

Neither the proceedings directed at individual criminal accountability nor the possible advantages these proceedings might provide for regional peace and security are presented to this particular audience as the ends of international criminal justice. Instead, Del Ponte tells Goldman Sachs employees that her objective is to 'create stable conditions so that safe investments can take place'. The ICTY is thus cast as a United Nations-backed public institutional guarantor of private economic interests. This high-level court representative suggests that the purpose of the tribunal is to route economic objectives through the vehicle of an international criminal court. 'Our business is to help you make good business,' Del Ponte claims, suggesting that the ICTY is providing a security service to lay the groundwork for economic development. Here, the objectives of ending impunity and securing regional peace appear to be overshadowed by the economic dimensions of transitional justice.

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20 For a critical view on both the progressive narrative of the field's development and the 'developments' themselves, see T. Skouteris, *The Notion of Progress in International Law Discourse* (2010).

21 Del Ponte, *supra* note 1.

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As Del Ponte's account illustrates, international criminal justice is increasingly presented in neo-liberal terms; that is, the objectives and processes of international criminal tribunals are described in the language of the market economy. The 2005 Goldman Sachs speech thus serves as a particularly striking example of the wider discursive phenomenon of donors' justice. International criminal courts are described as one of many investment options for states or other organizations. States and private-sector actors are often figured as 'donors' within this relatively recent marketplace of security and development objectives. For example, at a 2007 conference entitled 'Donor Strategies for Transitional Justice: Taking Stock and Moving Forward', most participants were affiliated either with the development branches of wealthy states or with charitable foundations.[22] Accountability for international crimes was featured among the various projects that these states or other actors might elect to fund. From their positions as donors, states and foundations are encouraged to assess whether the aims of an international criminal tribunal might fit with their particular policy objectives in development or in the 'rule of law'.

Conceptualizing post-conflict criminal justice as an investment marks a broader shift in the social role of international criminal tribunals, which are commonly regarded by potential donors as security or development initiatives. A technocratic field of expertise has developed around 'rule-of-law' interventions[23] and criminal tribunals are presented as one option in a field of governance and development techniques. David Kennedy has argued that law and development have become increasingly bound up together: 'the "rule of law" defines the good developed state . . .. As a result, implementation of familiar legal institutions and constitutional forms has become central to development policy making'.[24] Fostering accountability for crimes under international law may appear as a 'rule-of-law' project to prospective donors, more akin to domestic legal-reform initiatives and judicial capacity building than to the traditional justifications for punishment such as retribution, deterrence, and incapacitation.

Law-and-development literature offers a number of relevant insights for 'donors' justice', particularly where the literature intersects with the field of transitional justice, as it places the phenomenon of international criminal accountability in a broader set of relations and values. Paralleling the growth of international criminal justice, law and development has expanded in the last 20 years, with economic

22 The conference, which was hosted by the International Center for Transitional Justice and the British Department for International Development, sought to develop means of evaluating progress in the field of transitional justice. It included representatives from the United Kingdom, Canada, Belgium, Finland, the Netherlands, Germany, Morocco, and Liberia, as well as representatives from private grant-making bodies such as the Oak Foundation and Aegis Trust. The conference report's executive summary credits 'international donors' for playing an 'immense role' in the growth of the field of transitional justice. See 'Donor Strategies for Transitional Justice: Taking Stock and Moving Forward', Seminar Report, 15–16 October 2007, London.

23 D. Kennedy, 'Challenging Expert Rule: The Politics of Global Governance', (2005) 22 *Sydney Journal of International Law* 5.

24 D. Kennedy, 'The "Rule of Law", Political Choices, and Development Common Sense', in D. Trubeck and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (2006), 158–9.

liberalization as one of its key principles.[25] Some scholars have asked about the impact of liberalism and other donor value systems on recipient countries given the overrepresentation of Northern donors in transitional justice projects,[26] thus recognizing that juridical interventions are neither value-neutral nor benign in many circumstances. Although other conceptions of what is good for recipient countries are widely contested, there appears to be widespread consensus among donors about the value and priority of the 'rule of law'.[27] As critical interrogations from within the field have pointed out, however, the 'rule of law' 'advances both principles and profits';[28] that is, it seeks 'to create a "level playing field" for economic actors'.[29]

As one of several policy options for strengthening the 'rule of law', then, international criminal tribunals may work to 'create stable conditions so that safe investments can take place', to return to Carla Del Ponte's claim. Tribunals thus appear as one instrument in a 'box of foreign policy tools'[30] that can be deployed by donor states. Prioritizing this instrument over others has its costs: funding tribunals may come at the expense of restricting other distributive justice efforts.[31] In the Sierra Leone case, for example, a press release from the Human Rights Commission of Sierra Leone laments the international community's privileging of criminal accountability over victims' reparations:

> HRCSL notes that while over US$82.million has been spent so far on the Charles Taylor trial, as at 30th June 2010, less than US$45,000, has actually been paid into the Sierra Leone War Victims Fund, almost all of it by Sierra Leoneans and their Government.[32]

As some scholars have rightly noted, however, the fact that one mechanism, such as a criminal tribunal, receives funding does not necessarily mean that other development or aid projects would have been funded in the absence of the tribunal.[33] Nevertheless, what is striking here is who gets to set the funding priorities, or where agency predominantly lies within the framework of donors' justice. In a donors' market that is increasingly characterized by blurred boundaries between justice, security, and development objectives, recipient states are the beneficiaries of funding that aligns with donor states' foreign-policy objectives. As James Goldston argues:

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25 J. Otto, 'The Odds of "Liberalisation" as an Informing Principle of Law, Governance and Development', in E. Niewenhuys (ed.), *Neo-Liberal Globalism and Social Sustainable Globalisation* (2006), 150.

26 Petersen, Samset, and Wang, *supra* note 15, at 464.

27 T. Carothers, 'Rule of Law Temptations', in J. Heckman, R. Nelson, and L. Cabatingan (eds.), *Global Perspectives on the Rule of Law* (2010), 19.

28 T. Carothers, 'The Rule-of-Law Revival', in T. Carothers (ed.), *Promoting the Rule of Law Abroad: in Search of Knowledge* (2006), 3.

29 W. Channell, 'Lessons Not Learned about Legal Reform', in Carothers, ibid., at 137.

30 D. Scheffer, 'International Judicial Intervention', (1996) 102 FP 51.

31 T. Addison, 'The Political Economy of the Transition from Authoritarianism', in P. De Greiff and R. Duthie (eds.), *Transitional Justice and Development: Making Connections* (2009), 114.

32 The Human Rights Commission of Sierra Leone, Press Release No. 21: 'Transfer of "Blood Diamonds" to War Victims Fund in Sierra Leone', 10 August 2010.

33 Charles Jalloh writes that 'it would appear *highly unlikely* that, even without the creation of the tribunal, the money that was spent on the Court would have ended up in the impoverished country to fund development projects or other things deemed more desirable by Sierra Leoneans', Jalloh, *supra* note 2, at 450–1.

> thematic and geographic choices often reflect foreign policy imperatives as much as, if not more than, the relative merits of respective programs . . . rule of law priorities are, to a great extent, shaped by those donor governments who dominate the 'international community', and its rule of law expert fellow travelers.[34]

While this may be unsurprising within a law-and-development context, where there is an acknowledged relationship between donor and client, the figure of the donor (and its attendant interests) has rarely appeared in discussions about international criminal accountability.

These insights from law-and-development scholarship highlight the significance of the foreign-policy imperatives of donor states as well as the link between 'rule-of-law' priorities and economic development. As previously noted, donors' justice is characterized by third-party financial support for tribunal activity; unlike so-called 'victors' justice', where tribunals appear as liberal institutional mechanisms for dispensing with political enemies,[35] donors' justice is more akin to development aid and 'good-governance' initiatives. The tribunal donor is not a direct stakeholder, a victor in a conflict, but rather an interested external actor who stands to benefit in the future rather than meting out a form of legalized retribution in the present. Thus, these tribunals are figured as 'investments' in future peace and stability that may yield valuable dividends for agents with financial interests in stable outcomes, as Del Ponte's speech suggests.

On the one hand, this broadening of tribunal stakeholders has the consequence of making the process more public; rather than a relationship between two affected parties, a plurality of actors may participate in the process.[36] On the other hand, defining interested parties as 'donors' restricts membership to states and organizations that are able to offer financial assistance. International criminal justice thus becomes a marketplace for the global 'haves' to participate based upon their foreign and domestic agendas. It also may fuel criticism about subsequent decisions that tribunals take in interpreting their mandates. As Martti Koskenniemi points out in relation to the ad hoc International Criminal Tribunal for the former Yugoslavia, 'The fluctuation of Western support, the visible impunity enjoyed by a large number of important Balkan war criminals, and the failure to prosecute the NATO bombings of Serbia of 1999 have provided space for cynicism and denial.'[37] The criticism here is twofold: first, donor support waxes and wanes in response to a number of considerations, both political and financial, as the case of the Special Court for Sierra Leone shows. Successful fundraising is linked to performance benchmarks, such as the opening or closing of trials and the perception that cases proceed efficiently. Second, tribunals are beset by structural criticisms related to this donor–beneficiary relationship, where allegations of bias may be perceived as having more merit due to the funding structure itself.

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34 J. Goldston, 'The Rule of Law at Home and Abroad', (2009) 1 *Hague Journal on the Rule of Law* 41.

35 G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Trials* (2000).

36 At the Special Court for Sierra Leone, for example, many donor states assumed positions on the Court's 'Management Committee', an administrative body that provided advice and assistance on the non-judicial aspects of the Court's work.

37 Koskenniemi, *supra* note 9, at 9.

4. Donors' justice at the Special Court for Sierra Leone

This section attempts to illustrate some of the attributes of donors' justice by taking the Special Court for Sierra Leone as one symptom of the state of contemporary international criminal accountability. The Special Court is a timely and relevant case: it is nearing completion of its mandate and thus offers an extensive history of donor relations, and it was the first tribunal to be funded through voluntary contributions. I argue that the restrictive interpretation of the Court's mandate – which includes a small number of indictees and a heavy reliance upon insider witnesses – as well as the insecure financing of the Court are two notable manifestations of donors' justice in this case, and the funding structure of the Court renders it particularly susceptible to allegations of political influence by donor states. The Special Court offers examples of the three different strands of donors' justice described above: its work is described in neo-liberal terms and oriented towards a donor audience, it can be seen as a conduit of political interests in security and development, and its sustainability is tied to broader market forces that affect the funding of its work. The following section briefly sketches the emergence of the Special Court and highlights some of its key attributes before returning to the theme of donors' justice.

4.1. Background to the SCSL

The history of the decade-long conflict that the Special Court was set up to address has been well documented and is beyond the scope of this article, although it should be noted that in the scholarly literature there are competing accounts of the roots of the conflict, the extent of casualties, and the roles played by external parties.[38] Most academic commentary notes that the conflict that occurred in Sierra Leone between 1991 and 2002 was causally complex and influenced by residues from the colonial period, post-independence political struggles, and issues of resource allocation. While some accounts centre on the role of diamonds, including statements from the Special Court's first prosecutor,[39] Sierra Leone's own post-conflict Truth and Reconciliation Commission concluded that 'unsound governance provided a context conducive for the interplay of poverty, marginalization, greed and grievances that caused and sustained the conflict'.[40]

Many factors contributed to the creation of a post-conflict criminal tribunal in Sierra Leone: an increase in civil-society organizations pressing for legal

38 L. Gberie, *A Dirty War in West Africa: the RUF and the Destruction of Sierra Leone* (2005); P. Richards, *Fighting for the Rain Forest: War, Youth and Resources in Sierra Leone* (1996); I. Abdullah, 'Bush Path to Destruction: The Origin and Character of the Revolutionary United Front (RUF/SL)', (1998) 36 *Journal of Modern African Studies* 203; J. Hirsch, *Sierra Leone: Diamonds and the Struggle for Democracy* (2001); D. Keen, *Conflict and Collusion in Sierra Leone* (2005); A. Sawyer, 'Violent Conflicts and Governance Challenges in West Africa: The Case of the Mano River Basin Area', (2004) 42 *Journal of Modern African Studies* 437. Sawyer argues that 'African intrastate conflicts typically reveal complex patterns 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', at 439.

39 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 (ICG), *The Special Court for Sierra Leone: Promises and Pitfalls of a 'New Model'* (2003), 14, available online at www.unhcr.org/refworld/docid/3f5218d64.html.

40 Sierra Leone Truth and Reconciliation Commission Report, Executive Summary, para. 16.

accountability for gross violations of human rights and the international humanitarian law, a broader cultural climate that fostered the use of internationalized legal mechanisms for post-conflict accountability, the growth of a professionally invested class of legal practitioners and administrators who move from tribunal to tribunal, and a leader in Sierra Leone with a background in diplomatic work. Strong state politics contributed as well: as one commentator recounts, 'some have even suggested that the promotion of the Court is part of the larger US campaign against the International Criminal Court, as it attempts to demonstrate that alternative models can work'.[41]

At the time of its emergence in 2002, the Special Court for Sierra Leone was widely regarded as a new 'hybrid' model of post-conflict justice, pairing the advantages of international criminal justice with a greater awareness of and concern for the domestic context. The Court was consciously designed to address some of the shortcomings of the work of the two ad hoc tribunals for Rwanda and the former Yugoslavia through a less expensive, more streamlined institutional structure.[42] It was mandated to bring individuals 'bearing the greatest responsibility' to account for crimes committed during a specific period of Sierra Leone's decade-long conflict.

The Court was established through a treaty between the United Nations and the government of Sierra Leone. In July of 2000, then-President Ahmed Tejan Kabbah sent a letter to the United Nations requesting international assistance in establishing a 'Special Court' to try leaders of the Revolutionary United Front (RUF), the rebel forces that had previously driven him into exile in neighbouring Guinea, 'for crimes against the people of Sierra Leone and the taking of United Nations peacekeepers as hostages'.[43] The domestic criminal-justice sector appeared to be incapable of holding trials itself due to lack of capacity; furthermore, RUF combatants had been granted amnesty by the Sierra Leonean government in a 1999 peace agreement. Roughly a year and a half after Kabbah's initial request, representatives of the United Nations and the government of Sierra Leone signed an agreement founding the Special Court for Sierra Leone on 16 January 2002. The tribunal diverged from President Kabbah's original vision of a court that would try leaders of the RUF, as the Court's international prosecutor also indicted individuals from a pro-government militia that had supported Kabbah's regime. The prosecutor ultimately indicted a total of 13 individuals; ten were brought to trial, including the former Liberian president Charles Taylor, despite early estimates of a larger number of potential indictments. As I will discuss in greater detail, this restricted number of indictments is one of the consequences of the Court's voluntary funding structure.

41 C. Sriram, *Globalizing Justice for Mass Atrocity: A Revolution in Accountability* (2005), 101. This concern was also noted by Thierry Cruvellier: 'some have argued that the United States is deliberately promoting the Special Court as an alternative to the International Criminal Court', International Center for Transitional Justice, *The Special Court for Sierra Leone: The First Eighteen Months* (2004), 7. The Special Court was established around the time that the ICC Rome Statute came into effect.

42 A. Cassese, *Report on the Special Court for Sierra Leone* (2006), 8, available online at www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx.

43 Fifth Report of the Secretary General on the United Nations Mission in Sierra Leone, UN Doc. S/2000/751 (2000), para. 9.

The Court was 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 away from the conflict-affected populations in Rwanda and the former Yugoslavia.[44] 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 and better equipped to engage in a broader pedagogical project on the 'rule of law'.[45] The 'rule of law' featured prominently in the UN Secretary-General's report on the Court's establishment and in the Security Council resolution authorizing the Court's founding agreement. The SCSL has been lauded throughout its operation as an innovative 'hybrid' form of post-conflict justice.[46] It was designed to integrate international and national criminal law as well as personnel from different jurisdictions, including Sierra Leonean judges and attorneys. In practice, however, the Special Court was less 'hybrid' as a matter of law than many of its proponents claimed[47] and the charging of only international crimes in the indictments was a departure from Kabbah's original vision of a court mandated to 'administer a blend of international and domestic Sierra Leonean law on Sierra Leonean soil'.[48]

4.2. Security, governance, and the 'rule of law'

What generated this interest in establishing an ad hoc court in response to mass atrocities when similar efforts in other contexts failed to generate sufficient political will?[49] The United States, which would eventually become the largest financial

44 Despite the advantages of locating the tribunal *in situ*, the SCSL President made an administrative decision to relocate the trial of former Liberian president Charles Taylor to The Hague in 2006 due to security concerns. Representatives from Sierra Leonean civil-society groups challenged the move, arguing that it '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'; see *Prosecutor v. Taylor*, Civil Society *Amicus Curiae* Brief Regarding Change of Venue of Taylor Trial Back to Freetown, Case No. SCSL-2003–01-PT, T.Ch. II, 9 March 2007, para. 5.

45 As the Court's first prosecutor put it, the people of Sierra Leone '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'. D. Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts', (2005) 37 CWRJIL 8.

46 See, e.g., L. Dickinson, 'The Promise of Hybrid Courts', (2003) 97 AJIL 295; B. Dougherty, 'Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone', (2004) 80 Int.Aff. 311; P. McAuliffe, 'Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone Trial to The Hague Defeats the Purposes of Hybrid Tribunals', (2008) 55 NILR 365; J. Mayr-Singer, 'Hybridgerichte: Eine neue Generation international Strafgerichte (I). Der Sondergerichtshof für Sierra Leone', (2008) 56 VN 68; S. Rapp, 'The Compact Model in International Criminal Justice: The Special Court for Sierra Leone', (2008) 57 *Drake Law Review* 11.

47 While the Court does include elements of international criminal law and Sierra Leonean law in its governing statute, none of the indictments include counts under Sierra Leonean law. See S. Kendall, '"Hybrid" Justice at the Special Court for Sierra Leone', (2010) 51 *Studies in Law, Politics and Society* 1. Nevertheless, some scholars continue to claim that the Court drew upon both bodies of law in practice. For example, 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 McAuliffe, ibid. M. Goldmann also writes that 'the Special Court relies heavily on Sierra Leonean law and lawyers' in 'Sierra Leone: African Solutions to African Problems?', (2005) 9 MPYUNL 457, at 459.

48 Ahmad Tejan Kabbah, Annex to the Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786 (2000).

49 Stef Vandeginste recounts the failed attempts to establish a tribunal for Burundi in 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error', (2009) 3 *Africa Spectrum* 63. On the absence of

contributor to the Court, assumed a key role in the Special Court's establishment.[50] Commentary on the Sierra Leonean conflict noted a dearth of international interest in addressing the atrocities before the Revolutionary United Front took UN troops hostage in the spring of 2000, although 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.[51] US policy at the time emphasized negotiation and power-sharing arrangements between former enemy factions rather than judicial accountability. This position appeared to shift following the UN troop abduction, when the assistant secretary of state for African affairs 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.[52]

'Rule-of-law' and 'accountability' discourse supplanted pragmatism and political compromise.

This push towards 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'.[53] In the post-9/11 political climate, the Bush administration was interested in pursuing various avenues that might provide intelligence related to terrorist financing. The Court's Chief of Investigations as well as the first prosecutor had prior experience in US intelligence organizations, and evidence surfaced suggesting that the Office of the Prosecutor had been co-operating with the CIA to pursue regional al-Qaeda links.[54] Indeed, the third SCSL prosecutor

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political will to prosecute crimes in Liberia, see C. Jalloh and A. Marong, 'Ending Impunity: The Case for War Crimes Trials in Liberia', (2005) 1 *African Journal of Legal Studies* 53.

50 J. Cerone, 'Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals', (2007) 18 EJIL 277.

51 R. Kaplan, 'The Coming Anarchy: How Scarcity, Crime, Overpopulation and Disease Are Rapidly Destroying the Social Fabric of Our Planet', *Atlantic Monthly*, February 1994, 44. Paul Richards notes that Kaplan's article was 'faxed to every American embassy in Africa, and has undoubtedly influenced U.S. policy'; see Richards, *supra* note 38, at xv. The Sierra Leonean Truth and Reconciliation Commission also highlighted the significance of Kaplan's article in their Executive Summary: see *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission* (2004), available online at www.sierra-leone.org/TRCDocuments.html.

52 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.

53 P. Richards, 'War and Peace in Sierra Leone', (2001) 25(2) *Fletcher Forum of World Affairs* 41, at 47.

54 A report marked 'Confidential' from the SCSL Office of the Prosecutor detailing links between al-Qaeda operatives and Charles Taylor as well as co-operation between SCSL investigations and CIA operations is available at journalist Douglas Farah's website: see 'Special Court for Sierra Leone Report on al Qaeda ties to the Diamond Trade', available online at www.douglasfarah.com/materials.php.

(also a US national) suggested a relationship between the crimes the Court was set up to address and the global problem of terrorism.[55]

The interests of strong states undoubtedly played a role in the creation of the Special Court. As the largest donor to court operations, the United States regarded post-conflict justice in Sierra Leone as part of a broader investment in regional security. This seemed evident in a 2006 speech by David Crane, the former SCSL prosecutor, addressing a US congressional committee shortly before former Liberian president Charles Taylor was apprehended and turned over to the Court. Here, Crane suggests a causal link between the work of the Special Court and peace in neighbouring Liberia, claiming that 'there will be no prospect for peace in Liberia or the Mano River region as long as [Taylor] remains outside the custody of the international tribunal in Freetown'. Crane elaborates:

> If one takes these four recommendations – justice, truth, good governance, and the rule of law – the future of Liberia as a new democracy may be less cloudy and tenuous. To have a sustainable peace in Liberia, you must have truth and justice under the mantle of the rule of law and good governance. It is a simple A+B = C proposition. Truth plus justice equals a sustainable peace. Certainly, with this equation, Congress could be more assured that any funding and political capital expended would not be flushed down the drain.[56]

The former SCSL prosecutor imbricates international criminal accountability with 'good governance' and the 'rule of law', suggesting that US aid to the region will be unsuccessful without all of these elements of the equation. The problem with such calculations is that donor funding is zero-sum: as some scholars have argued, 'tribunal funding is simply another form of aid', and thus 'tribunals must compete with other assistance categories to obtain resources necessary to apprehend, to try, and to deliver justice'.[57] How might this shift the character of international criminal accountability if it is reconceived as an 'assistance category' competing on a market of development mechanisms?

The Court has adapted to the contemporary international criminal-justice environment by developing its own set of marketing strategies. Faced with perennial budget shortfalls, the SCSL administration has been pulled into fund-raising activities, as Judge Cassese noted in his commissioned report on the SCSL:

> For example, the Registrar and Prosecutor have travelled extensively to raise money for the Court. The Court has also convened a pledging conference to generate additional funds. The annual reports of the Special Court are professionally reproduced in a glossy colour pamphlet, suitable for distribution to potential donors. In contrast, the annual reports of the ICTR and ICTY are printed on plain paper and distributed electronically. These fundraising activities are expensive and require additional staffing.[58]

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55 Rapp, *supra* note 46, at 15.

56 US House of Representatives, *The Impact of Liberia's Election on West Africa: Hearing before the Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations*, 109th Cong., 2d sess., 2006, 76.

57 S. Roper and L. Barria, 'Gatekeeping versus Allocating in Foreign Assistance: Donor Motivations and Contributions to War Crimes Tribunals', (2007) 51 JCR 285, at 300–1.

58 Cassese, *supra* note 42.

The Special Court's most recent annual report documents the extensive visits made by the prosecutor and registrar to potential donors, a substantial 'investment' of limited court resources that are directed towards the possible 'dividend' of further donations.[59] The reports themselves work both as accounts of its progress and as marketing brochures to current and prospective donors, with 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 product 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.[60] Yet, the justice market is volatile and donors are often reluctant to invest. A 2009 diplomatic cable noted that the current SCSL registrar's 'marathon campaign' to raise funds for the court led to disappointing results 'due to donor fatigue, the difficult economic situation, and contributions going to other tribunals (e.g., the Special Tribunal for Lebanon (STL) or the Extraordinary Chambers in the Courts of Cambodia)'.[61] In the brave new world of donors' justice, tribunal employees double as marketing agents to foreign governments, and funding relies upon the vicissitudes of state interest and the global economy.

4.3. Economies of justice

Many of the Special Court's challenges can be tied to its funding structure, which the UN Secretary-General had warned against from the early stages of the tribunal's foundation.[62] The two United Nations-backed tribunals for Rwanda and the former Yugoslavia were created through Chapter VII powers of the UN Charter, which allowed them to benefit from compulsory assessed contributions of UN member states. Unlike these tribunals, which were criticized for their expensive operations, the Special Court was designed to be funded directly through voluntary contributions from states rather than through assessed contributions from the UN budget.[63] Four countries – the United States, the United Kingdom, the Netherlands, and Canada – provided two-thirds of the Court's first-year budget.[64] Approximately 50 countries in total have contributed to funding Court operations. As previously noted, the United States is the largest donor overall, having contributed over $80 million as of November 2010,[65] followed by the United Kingdom and the Netherlands.

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59 Seventh Annual Report of the President for the Special Court for Sierra Leone (June 2009–May 2010), 39.

60 A 2007 Investment Climate Statement published through the US 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', US Department of State, 2007 Investment Climate Statement – Sierra Leone', available online at www.state.gov. The statements are published through the State Department Bureau of Economic and Business Affairs International Finance and Development unit.

61 'US Embassy Cables: The Protracted Case against Charles Taylor', *The Guardian*, 17 December 2010, available online at www.guardian.co.uk. The cable, dated 15 April 2009, is entitled 'SCSL's Taylor Trial Meets Key Milestone, But SCSL Still Faces Serious Hurdles'.

62 *Supra* note 16.

63 In practice, however, the Court has had to draw on a UN 'subvention fund' of unallocated assessed contributions to fund its operations in 2004–05 and again in 2010–11.

64 International Center for Transitional Justice, *supra* note 41, at 10.

65 Press Release, 'The US Provides $4.5 million to Fund Special Court for Sierra Leone Trial of Charles Taylor', 23 November 2010, available online at www.state.gov/r/pa/prs/ps/2010/11/151810.htm. At the time of the press release, the USA had contributed $81,189,445 to the Special Court.

Some observers have argued that this financing arrangement, which tends to rely heavily on funding provided by a few states, might negatively impact upon perceptions of the Special Court's independence. The International Center of Transitional Justice noted that 'the budget is tight overall, and these few states theoretically have great influence'.[66] The Special Court's voluntary funding structure also served as the basis of an early defence challenge to its jurisdiction on the grounds that the patron–client relationship between contributing states and the Court might compromise its judicial independence. The Appeals Chamber's response to this challenge asserts the moral authority of the Court's state 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.[67]

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.

Despite this ethos deficit of the Court's main donor, most observers have noted that the donor-driven funding structure of the SCSL does not appear to affect the Court's independence in practice. The main space of potential state influence appears to be through the Court's Management Committee. Composed of states – Canada, Nigeria, the Netherlands, Sierra Leone, the United Kingdom, and the United States – as well as members of the UN Secretariat,[68] the Management Committee is empowered to 'provide advice and policy direction on all non-judicial aspects of the operation of the court, including questions of efficiency'.[69] In line with its name, which is more reminiscent of a corporate board than of a tribunal oversight body, some commentators have suggested that 'questions of cost and efficiency' dominate Management Committee discussions while 'other important criteria are often neglected'.[70]

In addition to creating the appearance of state influence through donor status, the funding structure makes the Court vulnerable to the vicissitudes of the global market

66 International Center for Transitional Justice, *supra* note 41, at 10.

67 *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), SCSL-2004–14-AR72(E), A.Ch., 13 March 2004, para. 41.

68 Sixth Annual Report of the President for the Special Court for Sierra Leone (2008–2009), 67.

69 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone', 16 January 2002, Art. 7.

70 T. Periello and M. Wierda, 'The Special Court for Sierra Leone under Scrutiny', International Center for Transitional Justice Prosecution Case Studies Series (March 2006), 1. Human Rights Watch expressed a similar concern: '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', Human Rights Watch, 'Bringing Justice: The Special Court for Sierra Leone', September 2004, Section IX(B), available online at www.hrw.org/reports/2004/sierraleone0904/. A management committee has been established for the Special Tribunal for Lebanon, which is also funded through voluntary contributions.

as well as to the changing funding priorities of donor states. A number of observers of the Court's work have noted the 'immediately apparent weakness'[71] of using voluntary contributions as a material basis for international criminal justice. Speaking generally, one commentator noted that voluntary contributions 'are by their nature highly volatile and unreliable. They run fast and easily into donor fatigue'.[72] A critic of the Special Court's work argued that the financial uncertainty accompanying voluntary contributions 'infects all of the Special Court's activities'.[73] A former ICTY judge observed that the SCSL 'has not been able to overcome entirely the persistent problems of volatile out-of-country financing'.[74] In his independent expert report on Special Court operations commissioned in 2006, Judge Cassese lists 'the financial insecurity resulting from funding based on voluntary contributions' as the first of three reasons why the SCSL has not lived up to its original expectations.[75] Relying on voluntary contributions rather than on United Nations-assessed contributions creates uncertainty in the Court's budget and financial life: donor states may provide their pledged contributions at the last minute, creating budgetary uncertainty and making it more difficult for the Court to plan its work.[76]

The Court has publicized through its official reports the difficulties it has faced in securing enough funding to complete its mandate.[77] It had to approach the United Nations for financial assistance in 2004 when it was unable to raise enough money from donors to pay for its operations. In 2009, then-Prosecutor Stephen Rapp explained to the press that it was possible that the judges would have to release Charles Taylor due to the effect of the global economic crisis on Court funding.[78] In the autumn of 2010, the United Kingdom observed that 'the current global economic climate poses particular challenges for the three tribunals which rely on voluntary contributions from States'[79] while urging other donors to continue contributing to the tribunals for Sierra Leone, Cambodia, and Lebanon. The Special Court approached financial insolvency again in 2010 and Court officials appeared before the UN Administrative and Budgetary Committee to make an appeal for a subvention grant to carry the court through to its then-anticipated closure in

71 Sriram, *supra* note 41, at 97. See also Sriram, 'Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone', (2006) 29 Fordham ILJ 472.

72 Romano, *supra* note 6, at 309.

73 J. Cockayne, 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals', (2004) 29 *Fordham International Law Review* 616, at 630.

74 P. Wald, 'International Criminal Courts: Some Kudos and Concerns', (2006) 150 *Proceedings of the American Philosophical Association* 241, at 254.

75 Cassese, *supra* note 42, at 2.

76 Ibid., at 11.

77 Seventh Annual Report of the President of the Special Court for Sierra Leone (2009–2010), 40, available online at www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx.

78 X. Rice, 'Civil War Crimes Tribunal under Threat as Donations Dry Up', *The Guardian*, 25 February 2009, available online at www.guardian.co.uk/world/2009/feb/25/civil-war-crimes-tribunal. Rapp's remarks were criticized as 'ill considered' in a diplomatic cable and ostensibly 'raised anxiety here [in Liberia] about Taylor's imminent return', 'US Embassy Cables: The Protracted Case against Charles Taylor', *The Guardian*, 17 December 2010, available online at www.guardian.co.uk/world/us-embassy-cables-documents/196077.

79 United Kingdom Foreign and Commonwealth Office, 'United Kingdom Statement to the Sixth Committee Debate on the Rule of Law and the National and International Levels', 13 October 2010, available online at www.ukun.fco.gov.uk/en/news/?view = Speech&id = 23024295.

February of 2012.[80] The Court was also able to secure last-minute support from some donors, including the United States, which noted the risk of suspending the Taylor trial before a verdict was reached if the Court was unable to obtain more funding.[81] As of the time of writing, it appears that the Court will be funded through a UN subvention grant until February of 2012, although the United Nations has requested the Court to continue its fundraising activities.

4.4. Insider witnesses and the downside of 'efficiency'

In addition to the perennial insecurity that accompanies the SCSL's funding structure, some critics have noted that it bears upon court practice. According to Gerhard Anders:

> The financial constraints and political pressure to be 'lean and mean' as staff in OTP recalled during my fieldwork has had effects on the jurisdiction of the court, the operation of OTP and the conduct of trials heard at the Special Court.[82]

The Court's 'lean and mean' structure has particularly affected the number of the individuals brought before it. Charles Jalloh claims that the prosecutor's narrow interpretation of his mandate 'seemed to have been driven by concerns about the limited funding available to the Court'.[83] James Cockayne has also argued that the voluntary funding structure limited the numbers of indicted individuals, adding 'this may be seen as a failure to meet its responsibilities to the international community: by indicting so few, the Special Court has in fact begun to replicate the high cost/conviction ratio seen in the *ad hoc* tribunals'.[84]

The Court was structured to avoid the perceived shortcomings of the ad hoc tribunals that had preceded it: its restricted 'greatest-responsibility' personal jurisdiction would limit indictments to high-level commanders in a bid to increase the efficiency of the proceedings. According to the International Crisis Group, the Court's establishment was shaped in reaction to the view that prior tribunals were 'overly large, cumbersome and virtually open-ended': in contrast, the mandate of the Special Court '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

80 General Assembly Department of Public Information, 'Fifth Committee Takes Up First Performance Report for 2010–2011 Budget Cycle: Increased Regular Budget Funding for Sierra Leone Tribunal', UN Doc. GA/AB/3976, Sixty-Fifth General Assembly Fifth Committee (2010); a 2010 report of the UN Secretary-General noted that 'since 2009, 174 fund-raising meetings have been held by the [Special Court for Sierra Leone] across capitals and diplomatic missions, and 225 fund-raising appeal letters have been sent to capitals and diplomatic missions. Despite these efforts it has proved impossible to secure voluntary contributions sufficient to complete the mandate of the Special Court', 'Report of the UN Secretary-General, Request for a subvention to the Special Court for Sierra Leone', UN Doc. A/65/570, Sixty-Fifth Session of the United Nations General Assembly, Agenda Item 129, Programme Budget for the Biennium 2010–2011 (2010).

81 The United States released a $4.5 million grant early, which was slated for the Court's 2011 operating costs, but 'was expedited due to the financial crisis the Court is currently facing', Department of State, *supra* note 60.

82 G. Anders, 'The New Global Legal Order as Local Phenomenon: The Special Court for Sierra Leone', in F. von Benda Beckmann, K. von Benda Beckmann, and A. Griffiths (eds.), *Spatializing Law: An Anthropological Geography of Law in Society* (2009), 142.

83 Jalloh, *supra* note 2, at 422.

84 Cockayne, *supra* note 73, at 628.

https://doi.org/10.1017/S0922156511000264 Published online by Cambridge University Press

costly'.[85] The Court's prosecutor indicted only 13 individuals and relied heavily on the testimony of high-level insider witnesses, whose commission of or command responsibility for crimes in the statute could have led to their own indictment under a less restrictive interpretation of the mandate.[86] Charles Jalloh criticized the 'extremely small' number of trials, noting that key actors in the Court's establishment envisioned at least double the number of indictments.[87] Many high-level commanders who were involved in planning and ordering operations and who were directly implicated in participating in crimes under the SCSL Statute were able to escape legal accountability due to the small number of indictments issued, as domestic criminal trials have been restricted by an amnesty agreement and by lack of political will. Furthermore, the prosecution's desire to pursue complex modes of liability such as 'joint criminal enterprise' ensured that these commanders, including some who had threatened to derail the peace process, became valuable sites of knowledge; many were absorbed into the court process as insider witnesses. The pressures of constraining the tribunal's operating costs and restricting the timeline of its proceedings thus produced a kind of impunity gap, where a number of individuals who testified about committing or ordering the commission of serious crimes were relocated or offered assistance from the Court in exchange for their testimony.[88]

If the International Crisis Group is correct in claiming that the Court's limited mandate was a product of the 'desire of all states that supported its creation',[89] there appears to be a constitutive relationship between third-party interests and

85 International Crisis Group, *supra* note 39. The International Criminal Court's Office of the Prosecutor has adopted a similar policy.

86 Prosecutor David Crane referred to this strategy of relying upon high-level commanders for insider witness testimony as 'dancing with the devil'; see D. Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts', (2005) 37 CWRJIL 1.

87 Charles Jalloh writes that 'Kabbah had stated his initial expectation that with a jurisdictional provision focused on those most responsible, the number of persons tried could be limited to "dozens" . . .. Similarly, Ralph Zacklin, the legal counsel to the United Nations who negotiated the SCSL Agreement reportedly stated in September 2000 that between twenty-five and thirty persons were expected to be prosecuted before the Court'; see Jalloh, *supra* note 2, at 420.

88 Defence 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. See *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case No. SCSL-2004–15-AR72(E) and SCSL-2004–16-AR72(E), A.Ch., 13 March 2004, para. 59. Particularly striking in this regard was the testimony of Albert Nallo, former CDF director of Operations for the Southeastern Region and National Deputy Director of Operations, who planned one of the most notorious CDF attacks on suspected RUF rebel collaborators; testimony of Borbor Tucker, head of the CDF 'Death Squad' that tortured and killed suspected junta collaborators; and the testimony of Osman Vandi, former CDF batallion commander, who allegedly commanded one of the most brutal attacks attributed to the CDF. Former AFRC commander George Johnson gave evidence of his own high-level involvement in operations and leadership, and other witnesses claimed that he had ordered attacks on towns and killings of suspected CDF collaborators. In the case against Charles Taylor, several high-level commanders admitted to directly participating in atrocities that included killing civilians, ordering amputations, engaging in cannibalism, and keeping women as sexual slaves (see the testimony of Isaac Mongor, former RUF commander and member of the RUF/AFRC Supreme Council; Alimamy Bobson Sesay, officer in the Sierra Leone Army and later in the AFRC, and Joseph Marzah, Taylor's former Chief of Operations). 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 public transportation costs, and some insider witnesses may have strategically opted to disclose their identities and testify openly in order to be relocated.

89 International Crisis Group, *supra* note 39.

the resulting institutional design of the SCSL. In the efforts by interested states to pre-empt another slow and expensive tribunal by developing a more 'streamlined' model of international criminal justice, impunity for high-level commanders seems to be a tragic and unintended consequence of this desire for increased efficiency. From the perspective of the affected population, it may be difficult to fathom that some high-level combatants effectively profited from their roles in the conflict. This suggests that the interpretation of the Court's mandate may be directed outward to a donor community that regards criminal justice as an efficient 'investment' in global security rather than towards an internal population that is attempting to recover from a decade of conflict, as these insiders will either be absorbed back into the Sierra Leonean polity or relocated abroad rather than held accountable for their crimes. On the one hand, this is merely an unintended consequence of the level of evidence required to convict individuals accused of grave international crimes and, in this sense, the phenomenon is not unique to the SCSL. On the other hand, the ratio of high-level insiders to indictees at the Special Court appears to be a product of a restrictive interpretation of the Court's mandate, generated in turn by the donor-driven desire to produce a 'lean and mean' judicial mechanism.

5. Conclusion

> 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.
>
> Al White, former Chief of Investigations for the Special Court for Sierra Leone[90]

The audience of the Special Court for Sierra Leone's 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, and it maintains an interest in 'capacity building' in the national courts and in Sierra 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 dividends, as suggested in the statement from the former Special Court Chief of Investigations above.

What factors correlate with this development in international criminal justice? For one, there is now a professional class of stakeholders in the field: as Thomas Skouteris claims, the 'agents of the new tribunalism', who may have 'professional interest in adopting an optimistic view about the importance of international judicial institution building'.[91] The relative newness of the field allows for a flexible

90 As quoted by Charles Cobb Jr in 'Sierra Leone's Special Court: Will It Hinder or Help?', an interview with Alan White for Allafrica.com, 21 November 2002, available online at www.allafrica.com/stories/200211210289.html.

91 Skouteris, *supra* note 20, at 209.

understanding of what constitutes 'expert knowledge' and tribunal professionals may go on to consulting positions in international criminal justice and its related fields of conflict prevention and management. The former Special Court Prosecutor David Crane and former Chief of Investigations Al White started their own consulting firm, CW Group International, delving even further into the 'business' of conflict management through acting as consultants for the government of Guinea.[92] Crane and White were hired to investigate whether international crimes were committed by government troops during a deadly pre-election demonstration in the country's capital. Their resulting report appears to clear the Guinean government of any culpability for international crimes. Unlike a trial chamber, which may retain its independence despite donor-based funding structures, this bilateral consulting relationship raises more serious concerns about partiality.[93] Among other things, it was a private transaction between two interested parties rather than a public forum of judgment: an extreme case on a continuum of market-driven forms of accountability.

The CW Group consulting example illustrates the emerging triangulation between justice, security, and development. While the scholarly field of international criminal law tends to look inward to its evolving jurisprudence with the occasional turn to political analysis of its structures, the broader relations between tribunals, 'rule-of-law' and governance agendas, and the provision of security to foster economic development is rarely considered. These relationships themselves are fluid, subjected to global economic forces and shifting state priorities, and there is no formulaic way of determining their implications for the field and for specific institutions. The important thing is to acknowledge them as the conditions of possibility of international criminal justice in its contemporary forms.

We are far from Hannah Arendt's famous claim that 'the purpose of a trial is to render justice, and nothing else', where any other aims would 'only detract from the law's main purpose: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment'.[94] While Arendt's restrictive vision of criminal justice may only be possible in theory – post-conflict tribunals are veritable 'theaters of justice'[95] in which the autonomy of law is a distant dream – it serves as a marker of how far contemporary 'donors' justice' has drifted from the objectives of retribution and deterrence. Barbara Oomen's warning thus seems particularly prescient and appropriate:

> As justice becomes more and more important to the development project, and there is a globalization of the justice sector with its own experts, interests, dynamics, political

92 For examples of the work of the CW Group, see their training slides made available through *Foreign Policy*: 'The Ultimate Idiot's Guide to Being an African Junta', 24 February 2010, available online at www.foreignpolicy.com/articles/2010/02/24/the_ultimate_idiots_guide_to_being_an_african_junta.

93 See 'The Junta Explains', *Africa Confidential*, 19 February 2010. See also C. Lynch, 'Guinea's Junta Hires Ex-War Crimes Prosecutors – and Gets a Favorable Report', FP, 24 February 2010.

94 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994), 253.

95 S. Felman, 'Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust', (2000) 1 *Theoretical Inquiries in Law* 201.

> economy, there is a real danger of losing sight of the original purpose of this industry, and other ways in which to achieve that purpose.[96]

When international justice is commodified, subjected to market pressures and the vicissitudes of foreign-policy priorities, and transformed into an agent of economic development, it becomes more of a means towards unknown ends than an end in itself.

This article has argued that international criminal justice is now described in the neo-liberal language of the market. The shift is both discursive and structural: international criminal justice is discussed in neo-liberal terms that reflect market-driven logics of 'investments' and 'dividends', and its institutions are established in a new paradigm where third-party donors are responsible for producing the material conditions that enable tribunals to do their work. Although the latter observation more accurately describes the ad hoc tribunals for Sierra Leone, Cambodia, and Lebanon, which are funded through voluntary contributions, than the permanent United Nations-backed International Criminal Court, the former observation is a more broadly applicable product of the late modern tendency to think of all areas of society in economic terms – even the traditionally incalculable social good of justice. While, in principle, an end in itself or a means of deterring future injustices, justice is now figured as an 'investment' in other social domains, with unclear implications for judicial institutions and for the societies in which they intervene.

96 Oomen, *supra* note 15, at 907.

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