INTRODUCTION: THE RULE OF LAW AND ITS IMBRICATIONS – JUSTICE IN THE MAKING

PROLOGUE: THE INTERNATIONAL CRIMINAL COURT AND THE DEMOCRATIC REPUBLIC OF THE CONGO

In November 2006, the International Criminal Court (ICC) – in pursuit of the quest for justice – began its first-ever hearing before the Pre-Trial Chamber. Thomas Lubanga Dylio, the accused, was charged with using child soldiers to commit violent murders. The prosecution presented him as the alleged leader of a Congolese militia responsible for ethnic massacres, torture, and rapes in the eastern part of the Democratic Republic of the Congo (DRC).[1] Jean Flamme, the lead defence attorney for Lubanga at the time, countered by characterizing his client as a nonviolent man, a shepherd who wanted to lead his flock to peace and whose principal goals were to secure ethnic reconciliation and the equitable distribution of natural resources within the DRC.[2] Lubanga "is a patriot," Flamme contended. "He is a man who wants to defend his people." Portraying Lubanga as a pacifist politician, Flamme maintained that tribal conflict in Congo's "lawless" Ituri region was so violent that people were often hacked to death and sometimes even eaten in the years before Lubanga managed to forge peace in 2003. Lubanga was described as having "entered the political realm by chance in a country that was in chaos. . . . [H]e was considered a man who was able to put an end to the violence." According to Flamme, the reality was that Lubanga, by advocating equitable distribution of Congo's vast mineral wealth, had upset powerful business opponents in both Congo and neighboring Uganda. "The people of the Congo are poor; the country,

however, is rich," he said. "He wanted the wealth of the Congo to belong to the Congolese people."[3]

While crafting the accused as an innocent subject whose fate was shaped by poverty and nationalist sovereign opinion against competing business interests in the region, Flamme also asserted the importance of protecting Lubanga's rights and claimed that the prosecution's case was based on flimsy evidence. For Flamme, the prospect of Lubanga on trial represented the advent of the newest and most intolerable kind of justice – what he called "NGO justice."[4] He asserted that much of the prosecution's case was reliant on NGO (nongovernmental organization) research studies and that "NGO justice" was produced through highly biased data fuelled through donor-sponsored agendas. He went on to criticize this evidence as deficient in rigor and objectivity, thereby asserting the absence of a case against his client.

Together the ICC's prosecution and Flamme's defense exemplify the kinds of display that constitute international justice as it is performed and contested on the world stage today, particularly in relation to countries throughout the Global South. Within those performances, however, a conceptual incommensurability concerning how to define the victim and justice often surrounds questions for determining the responsibility of those who actually kill, as well as the socioeconomic and political conditions under which such death occurs.

The actual trial began on January 26, 2009, but a number of stays on the legal proceedings had delayed an earlier commencement. On June 13, 2008, a stay on the proceedings was ordered in the case of *The Prosecutor v. Thomas Lubanga Dyilo* when it was determined that it was not possible to secure a fair trial. The accused was released and transferred back to the DRC five days later.[5] No finding of guilt or innocence was reached. The court decided that the prosecution's case was built on evidence from the United Nations (UN), procured through agreements of nondisclosure. At the time, the prosecution could not change the nondisclosure agreement, which restricted the sharing of evidence and disabled the defense in building its case. However, the judges and defence lawyers were eventually granted access to the evidence by the United Nations, and the trial of Lubanga began some seven months later.

In the unfolding of the pretrial hearings as well as the trial itself, the terms of determining guilt and innocence were built on notions of personal criminal responsibility that linked Lubanga as head commander to the murder and rape of thousands of people. The defense attempted

to point to root causes of violence in Ituri, such as challenges of poverty and sovereign control of the wealth of the land, but the prosecution's case surpassed such considerations. Instead, it attempted to assign guilt to a single person – Thomas Lubanga – identified as having orchestrated widespread violence in the region. One consequence of the increasing power of international justice in these contexts is its ability to use statutes, codify laws, and establish new transnational procedures to set new terms of engagement within which defendants, lawyers, and prosecutors reclassify evidence and articulate crime in legally relevant terms. This reclassification of responsibility has had the effect of sublimating root causes of violence, reassigning accountability to those few high-ranking leaders in sub-Saharan Africa who are seen as responsible for mass violations. These terms are circulating within new international forms of jurisprudence in which state and nonstate actors operate within reconfigured forms of governance. New legal mechanisms are being constructed for assigning guilt, and new procedures for victim protection are emerging beyond the domain of the nation-state. An example of this is the individualization of criminal responsibility, otherwise known as "command responsibility,"[6] which, in cases of mass crimes against humanity, is a way to reassign violence committed by many to only a few key leaders, so that commanders bear most of the responsibility. In *Prosecutor v. Lubanga Dyilo*, it was Lubanga Dyilo's designation as chief commander, and thus his responsibility for mobilizing mass murder that was at issue, rather than the root causes of the resource-related struggles. Concerns about larger sociopolitical factors contributing to resource extraction and violence were relevant only insofar as they facilitated the identification of people mobilizing as a result of such conditions. In the second half of the book, in which I deal with other attempts to construct and deliver justice under generalized conditions of neoliberal and postcolonial governance, we see that, like international criminal institutions, the key problematic of governance contributing to the revival of the radical criminal Sharia in the northern Nigerian states had to do with competition over the popular control of power – the challenges of democracy in relation to the distribution of resources.

In this contemporary period of free-market competition over resources, market demands for coltan and oil in the regions addressed in this book, for example, highlight the core intervention: that the rise of neoliberal governance and international institutions, as well as the return to traditional justice systems (Islamic Sharia and various Ugandan truth and reconciliation traditions) as answers to violence through

the protection of the victim, fail to engage in productive political action. Rather, this current period of growth in regimes dealing with international and local justice marks one in which violence is increasingly viewed in terms of individual rather than collective guilt and justice is articulated through the achievement of a guilty conviction. This convergence of the guilt of key perpetrators and the defence of the victim actually represents the fiction of justice today – the reassignment of criminal responsibility to the individual and the myth of legal pluralism as a viable way to address violence through both international and national mechanisms.

In a landmark speech in support of the ICC, Kofi Annan said to a packed audience, "To the survivors who are also the witnesses and to the bereaved we owe a justice that also brings healing. Only by clearly identifying the individuals responsible for these crimes can we save whole communities from being held collectively guilty. It is that notion of collectivity which is the true enemy of peace" (July 2002 speech at the United Nations). This approach to reassigning guilt committed by a collective to an individual is central to today's global rule of law movement and is narrativized in some of the most effective ways. But what is important is that this articulation of criminal responsibility in the defence of the victim has had the opposite of its intended effect by producing what Jacques Raniciere (2004) has called *disembodied political subjects* that allow agency to be reassigned to the institutionally powerful in their name.

The establishment of the ICC has been heralded as the answer to global violence. It emerged against the historical backdrop of the recently independent states in Africa and Latin America and the emergent states of Asia, as well as a range of justice-making projects that include nonjudicial truth and reconciliation commissions, reconfigurations of traditional justice mechanisms, and other international criminal tribunals and courts. In the last decade of the twentieth century, more than twenty-five quasi-judicial truth and reconciliation commissions and a range of ad hoc criminal tribunals were set up worldwide; notions of truth reconciliation and forgiveness became the mechanism for addressing systemic violence and transitioning societies into nonviolent democracies. Thus, before the establishment of the ICC, various ad hoc extranational tribunals had become familiar players on the world's stage, contributing to a widespread and growing corpus of international criminal law. These justice-making bodies included United Nations

Security Council tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), which led to the 1999 indictment of Slobodan Milošević, and the International Criminal Tribunal for Rwanda (ICTR), which established crimes of the Rwandan genocide. Other international courts have included the Special Court for Sierra Leone (SCSL; known as a hybrid court that functions independently using international treaty provisions), the Iraqi Special Tribunal for crimes against humanity,[7] and the recently established Extraordinary Chambers in the Courts of Cambodia (ECCC, 2006). These justice mechanisms being pursued alongside the rise in more circumscribed religious and "traditional" spheres, I explore in Part Two of the book, have re-emerged to compensate for some of the most gruesome effects of neoliberal intervention of our time – perceptions of predatory imperialist resource extraction competing with a more populist assertion of resource control. And while legal pluralism, as a way to deal with judicial difference, has been heralded by scholars as having the answer to the diversity of justice approaches that emerge from the fall out of such violence, the question before us is not simply that of judicial diversity. The key problematic to be addressed by this book has to do with the uneven competition over resources and power and the ways that these differences are articulated, put in friction, and at times rendered incommensurate even in seemingly parallel judicial capacities.

In what is to follow, the book moves beyond basic anthropological relativist principles on human rights that see culture as enacted differently in different places or legal pluralism that views law and its various forms of social regulation as simply manifestations of social difference that must be understood in culturally specific terms. Rather, it posits the array of liberalist values and their colonial and postcolonial, post–Cold War spread as embedded in the same micropractices of freedom in the Global North that constitute related forms of violence elsewhere. In other words, various Northern neoliberal values are not just conceptually "different"; they are also mutually constituted and operate within discursive constellations that are able to reflect and refract different core values in different ways (Clarke and Goodale 2009). These processes try to capture and shape other relations, and their success is justice's viability as an apparition (see Coutin, Maurer, and Yngvesson 2002), as a myth, as an illusionary site of aspiration, of fiction, of securing the perception of political and civil rights for its citizenry.

As a political project, international justice regimes have succeeded in laying the foundations for this illusion of justice. However, the *failure*

of liberalist conceptions of justice is in their apparitional quality and their inability to guarantee economic and social equality to all – a principle that runs contrary to the very nature of the capitalist project itself. By exploring the associated circulation of international treaties that are being propelled by NGOs, this book articulates the limits of and challenges to the liberalist human rights project that aims to choreograph the management of life without attention to those who are sacrificed in the process.

I call for the development of a new analytic domain within which we can dissect the workings of the emergent rule of law movement. In so doing, international rule of law tribunals provide mechanisms for understanding one of the most radical types of politicization: the interrelationship between the specter of justice – the victim – and the spectacularization of the law in such a way that produces a representational domain in which performances on the world stage are institutionalized through the ethical cultivation of human rights principles and the crowding out of others.

The foregoing complexities are explored through the workings of what is popularly referred to as "international justice" and its interface with human rights violations in Nigeria, Uganda, the Sudan, and the DRC. In the midst of exploring the operationalization of ICC mechanisms, I interrogate the relationships among individual, state, regional, and international legal practices – that is, how various forms of law travel, how they are taken up, resisted, recalculated, and at times incongruently located alongside everyday life. At the intersection of global and more circumscribed legal formations are culturally constituted conceptions of justice that shape the ways that people express their understandings of appropriate forms of recompense. These more circumscribed practices are neither merely shaped by transnational relations nor are they merely translated by local agents into vernacularized forms. Rather, there are multiple domains of interconnection through which notions of law and justice travel and within which its forms of logic and reasoning are packaged. As will be seen, some of these outcomes take shape in mutually convergent ways. However, where religious conceptions of ancestral land ownership, for example, are seemingly incongruent with particular conceptions of liberalist personhood and property, or in cases in which the introduction of the imagery of the "victim to be saved" represents a necessary component for humanitarian intervention, there exists a dueling, sometimes incongruent, set of relations that require that we engage their meanings

within the specific contexts of power in which they are constituted and made real.

In the end, the goal of this book is to show that the logic of neoliberalist legalism exists alongside multiple processes by which justice conceptions are procured, borrowed, and made intelligible. When there appears to be struggle over jurisdiction or the production of juridical guilt or innocence, neither declaring the problem as a simple conflict of laws nor insisting that one approach should simply trump another (e.g., ICC justice versus that of "traditional" truth and reconciliation mechanisms) is enough. The Rome Statute and its language of secular objectivity and universalism – its image of freedom and fairness for all of humanity and its discourses of nonpartisan and secular sensibilities, for example – represents a language of freedom with an ontology that reflects "Western" religious roots that have traveled and become hegemonic in a range of contexts (Tsing 2005). The key is in understanding the arena of the political as a space of unequal contests within materially unequal spheres of power. Because of this inherent unevenness, it has taken somewhat longer to grasp many of the phenomenal corollaries. Political predicaments long identified, often exclusively, with postcolonial African states (e.g., their diminished capacity to regulate successfully their own economies, the constraining dictates of international financial institutions) have now played out more visibly across the globe. State contraction, the erosion of social safety nets, the demands for flexibility in forms of work and sociability, large-scale privatizations of social goods and utilities on one hand and enterprises and security operations on the other, the diminished capacity of states to discipline their citizens by means of consent – these widespread transformations witnessed in political systems of various kinds have made aspects of Africa's "exceptional" crises seem suddenly mainstream. Such phenomena have played out across much of the globe, in distinct social contexts and with distinct cultural and political consequences.

The inequality of power among a range Africa's people threatened by war is emblematic of the continent's marginal status but reflects similar enmeshments of local and global dynamics. If the resulting formations render contemporary Africa an "alternative" form of modernity, another example of pluralism, then various Africanist scholars have been early forerunners to the insight that there exist nothing *but* alternative modernities, nothing but alternative legal domains: every region is a product of particular local and translocal histories, including those at the center of global economic and political power. Yet those formations

celebrated by some scholars as "global," such as the rule of law, are neither "global" nor the result of a series of isolated events that have led to an uncontested union of universal practices. They do not represent an empirically "better" system of human protectionism of care and do not reflect the continuity of an evolutionary goal toward the betterment of society. Further, it would be incorrect to assume that the promise of individual protections exists within some political, historical, or economic conditions and not others. Rather, the growth of democratization and rule of law embodies a spectacularization that works through historical formations of the secular to craft its micropractices as ordinary, yet hegemonic. As a result, the conceptual alliances of these formations within relations of power reflect an ease of association that produces an ordinariness that is often taken for granted as "natural."

The exports of these hegemonic forms are not totalistic and do not always succeed in establishing new norms (Tsing 2005). Rather, they also engage in disjunctural encounters that, at times, are incompatible with various tenets of liberalist personhood and, thus, produce divergent spaces of justice making, the meanings of which are relevant in different spheres of power. Different agents engage in different practices within a range of cultural histories and meanings, and within this context, individuals choose how they want to live within particular sociopolitical spheres (W. Brown 2004:456). This space of the sociopolitical sphere is the space of agency, which produces the effect of freedom in multiple domains. However, significant studies of justice, as well as related studies regarding the emergence and growth of international law movements, have tended to argue that human rights and rule of law activism are paramount because their calling is derived from a transcendent truth, that they carry with them an ultimate set of principles for humanity, or that the justice they derive from international adjudication is founded on fairness and judicial diversity (Ignatieff 2001). These scholars often argue that human rights secure agency, autonomy, and individual protections from an abusive state or individual power, enabling people to protect themselves from injustice and to gain empowerment to choose their life options. These liberalist conceptions of individual personhood are shaped by a political economy of human rights that draws its power from ritual spectacles funded through donor capitalism and positioned within new biopolitical bureaucracies comprising governmental and nongovernmental organizations.

However, to enter into a discussion about civil and political rights and freedoms without considering the conditions necessary for cultural

and economic security is to locate a starting place for rule of law instrumentalities in what Derrida (1992) would call its *mystical foundations of authority*, a notion he used to disrupt the idea that seemingly "secular" formations celebrating the absence of religious moralities are themselves mystical constructions. In disrupting the fiction of law, he located both the religious and the secular as social fictions and then articulated notions of justice not as an answer but as an ongoing process. Applied here, Derrida's concept of mystical foundations clearly calls into question the "transcendency" of any truth from which human rights and rule of law activism might derive and their assumed "natural" supremacy over other domains of "justice" making.

ANTECEDENTS TO THE ICC – THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE

Yugoslavia: Milošević and the ICTY

On May 27, 1999, ethnic Serbian President Slobodan Milošević of the Federal Republic of Yugoslavia (FRY) was indicted for ordering the death of thousands of ethnic Croatians. This act by the ICTY marked the first time in the modern period when a head of state had been denied immunity and prosecuted in accordance with powers drawn from an international convention. It represents one of the most radical modifications of the concepts of both criminal responsibility and territorial jurisdiction in modern criminal law.

Unlike the precedent-setting Nuremberg and Tokyo military tribunals, the ICTY is a nonmilitary court that was established in the midst of an ongoing violent conflict, making it difficult to collect evidence and execute warrants successfully. The indictment that led to the release of arrest warrants followed the widespread massacre of thousands of Croatians as a result of what was believed to be a Serbian ethnic-cleansing campaign. As a result, more than 300,000 Kosovo Albanians fled to neighboring Albania and Macedonia, with many thousands more displaced within Kosovo. From March 24 to June 10, 1999, NATO forces carried out a bombing campaign against the FRY. Justified as a form of humanitarian intervention to protect Kosovo Albanians from the military of the FRY, its irregular militias, and Serbian paramilitary police forces, the bombing led to the death of thousands of Croatians and Serbians.

By April 1999, 850,000 people of predominantly Albanian ethnicity had fled their homes, and this mass exodus of Croatians and Albanians

formed the basis of United Nations war crime charges against Slobodan Milošević and other officials deemed responsible for directing the Kosovo conflict. In analyzing the Albanian exodus, the pro-Serbian side has tended to claim that the refugee outflows were the result of mass panic generated by NATO bombs. For its part, the anti-Serbian side has tended to blame Serbian security forces and paramilitaries for emptying towns and villages of their Albanian inhabitants by forcing them to flee their homes or risk execution.

To attend to such violence, in which state actors and their commanders were seen as complicit, the key legal proceedings were not carried out within the juridical powers of the Yugoslavian state. Instead, the UN Security Council passed Resolution 780, creating a commission of experts to investigate possible violations of humanitarian law in the former Yugoslavia. Upon hearing the commission's findings, the UN Security Council passed Resolution 808 to legalize the establishment of an international criminal tribunal that would investigate and prosecute crimes allegedly committed in Kosovo, Croatia, and Bosnia and Herzegovina. The charges ranged from violations of the laws or customs of war (Article 3 – murder), four counts of crimes against humanity (Article 5) in Kosovo, nine counts of grave breaches of the 1949 Geneva Conventions, thirteen counts of violations of laws or customs of war (Article 3) in Croatia, ten counts of crimes against humanity (Article 5), and in Bosnia and Herzegovina two counts of genocide and complicity in genocide (Article 4); ten counts of crimes against humanity involving persecution, extermination, murder, and imprisonment; eight counts of grave breaches of the Geneva Conventions of 1949 involving willful killing, unlawful confinement, etc.; and nine counts of violations of the laws or customs of war. The subsequent passing of Resolution 827 on May 25, 1993, created the ICTY (Cryer 2005:52–4).

The first years of the Milošević trial represented the beginning of a remarkable experiment in international humanitarian and criminal law, a body of law previously rooted in international customs that lacked the power to bind states. At stake in the ICTY project, the cost of which since 2002 has exceeded $100 million a year,[8] was nothing less than the operationalization of international criminal law. When I observed parts of Milošević's defense during the summer of 2002 in the UN courtroom in The Hague, it was clear that his objections to the tribunal rested on his resistance to the transformations of conventional rules of state sovereignty. Milošević repeatedly refused to submit to the court's authority. Beginning his defense with a vengeance, he stood before