

Can the Subaltern Speak within International Law? Women's Rights Activism, International Legal Institutions and the Power of 'Strategic Misunderstanding'

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Introduction

Since the 1990s there has been a well-documented proliferation of international legal institutions as well as 'Rule of Law' projects established in a variety of post-conflict settings: famous examples include the International Criminal Tribunals for the former Yugoslavia and Rwanda, 'hybrid' tribunals such as the Special Court for Sierra Leone and the Cambodian Extraordinary Chambers and the establishment of the International Criminal Court in 2002. Advocates of this development argue that aside from assisting to build economically and politically stable and secure regimes these interventions hold an emancipatory potential for marginalised populations across the globe. Meanwhile critics point to the elitism and inefficacy of international institutions and law and the potential for these interventions to reproduce processes of cultural, political and economic domination.

In this chapter I explore the ways in which international legal interventions engage with the subaltern subject. Focusing on the work of the Special Court for Sierra Leone, I will show how international legal discourses continue to marginalize the subaltern through either failing to include her perspective or, where attempts are made, by only being able to hear what we expect to hear. However, I also seek to show that this is not the entire picture and indeed to focus on only this, as I myself and many other critical scholars have, is in fact reproducing a particular power dynamic. Instead, I conclude by suggesting that a shift towards analyzing the strategic ways in which subaltern subjects engage (and disengage) with the Enlightenment ideas embodied in international law opens up an important and productive site of resistance.

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As Boaventura de Sousa Santos and César Rodríguez-Garavito note, much of the existing literature on law and globalization focuses on the top-level actors and institutions (2005: 2). While they speak specifically of transnational corporations and 'Northern' states, I would add to this list international NGOs and international community professionals ('experts'). In the process, these actors are reinscribed with the power to effect change within specifically located sites reproducing the dichotomy between those who 'right' and those who are perpetually 'wronged' (Spivak 2004, see also Douzinas 2007). What remains under-observed and analysed are the forms of "subaltern cosmopolitan legality" (de Sousa Santos and Rodríguez-Garavito 2005), which may be making use of the law as a tool for counter-hegemonic struggles.

Part of the problem has been the production of a binary between the enlightened space of 'abstract universal law' and the specifically located site of ('non-Western') culture and tradition. International law has in this way been both claimed to reflect the embodiment of 'Western' Enlightenment principles and simultaneously abstracted to assert a universal applicability. In this sense its very founding assumptions have been both informed by and constitutive of imperialism (Anghie 2005). As the SCSL's engagement with forced marriage as a crime against humanity illustrates, the reproduction of a classic colonial logic remains at the heart of many international legal ventures. While perhaps not overtly imperialistic in its designs (although this too is hotly debated), the manner in which local marginalized subjects are incorporated into the realm of international law demonstrates an underlying set of assumptions which continue to be informed by a colonial imaginary of Enlightenment principles versus the barbaric, uncivilised 'non-West.'

At the same time, the quest to identify and engage with an authentic 'local woman's voice' highlights the constrained space within which 'non-Western' subjects are able to participate in international legal discourse. While women's rights remains everywhere a debate that is highly diverse, nuanced, conflicting and contradictory, in the context of international law it becomes a 'problem' to be managed by the international community. This flattening, of the complexity stands in contrast to the lived realities of those supposedly being 'emancipated.' And at the same time it is the ways in which these subaltern subjects nonetheless draw on and utilize these discourses, which perhaps best point to the subversive and emancipatory potential of international law.

The Imperial Origins of International Institutions

The implications of international law in the imperial project and the inevitable legacies of this to be found within contemporary international legal frameworks are well-documented. As scholars such as Anthony Anghie and Balakrishnan Rajagopal have argued, colonialism has been a central feature in the formation of international law (Anghie 2005: 742; Rajagopal 2006). Indeed in an effort to explore the nature

and impact of this relationship between imperialism and international law, the 'Third World Approaches to International Law' (TWAIL) movement was established in the 1990s (inspired by the Bandung conference in 1955) and has produced a vast body of scholarship exploring the political, philosophical and economic implications of the colonialist foundations of international law (Matua and Anghie 2000; Rajagopal 2000; Chimni 2006).

Beyond the historical continuities within institutions and laws, the very essence of rights discourses has been the promotion of Enlightenment values: rationality, secularity, individualism and universalism. Again, these values not only provide the basis for justifying contemporary humanitarian interventionism but were also the foundation for the asserted 'civilising mission' at the heart of many European colonial projects.¹ At the same time, in his description of contemporary debates about global governance, Himadeep Muppidi (2005) also identifies the continuum in colonial logic in the construction of the 'Other' as object whose responsibilities are already defined and whose rationality is never presumed.

It has also been convincingly argued by scholars such as Jean and John Comaroff (2006) and Achille Mbembe (2001) that this new obsession with law and lawlessness within the 'Global South' is a form of reconstructing the traditional colonial divide between the disorder of the colony and the civilisation offered by the metropole. Susan Silbey (1997) has described a form of 'postmodern colonialism' within which—despite forms of local invention and innovation attempting to reshape them—standardised global exports are imposed regardless of context and serve to structure not only local institutions, but the very terms of local debate. Thus, according to Boaventura de Sousa Santos, social transformation is no longer seen as a political problem but rather an economic and technical one: "The rule of law and the judicial system are thus conceived of as principles of social ordering, as instruments of a depoliticised conception of social transformation." This results, he concludes, in "... the streamlining of the emancipatory potential of the rule of law and the conversion of the latter into just one more technique of regulation" (2002: 340).

This shift from politics to governance—or to draw on the language employed by Jacques Rancière (1999), from politics to 'police'—serves two purposes. On the one hand it secures the power of elites (both local and international) who then 'manage' the masses viewed less as citizens and more as 'populations' (Chatterjee 2004). On the other it reinforces a picture of a 'rights and rule-of-law' endowed international order seeking to bring civilisation to those who have yet to experience their Enlightenment: those Douzinas' pithily describes as the "infants of humanity" (2007: 83).

¹ While admittedly this 'mission to civilise' was often invoked cynically to sanitise more ruthless aims of economic and military exploitation—a criticism that has similarly been made of US interventionism in recent times—at least within French imperialism, historians have argued that the 'civilising mission' cannot be excluded from one of the core justifications for colonization (Conklin 1997).

Gender in the New (Neo)colonial World Order

At the same time, the specific ways in which gender is understood and treated within international governance and legal regimes is also reflective of more than simply a gender bias (by now thoroughly documented and critiqued by feminist scholars). The construction of femininity and masculinity within international law discourses also relies on and reinforces specific colonial discourses (Otto 2006). The constructed distinction between the experiences of sexual violence in times of ‘peace’ and times of ‘war’ may say less about the different contexts and more about the sorts of women who will always be attributed autonomy and those who will perpetually be constructed as victims (a point I will return to later in this chapter).

Wairimū Ngarūiya Njambi (2004) has argued in relation to the debates regarding female genital mutilation that there is a disturbing continuum from colonial exhibitions, which showed African female genitals to the detailed descriptions within human rights scholars’ (including feminists) texts of mutilated, violated labia. In international criminal law there is a similar (porno)graphic tendency to reproduce detailed accounts of the degradation, violation and mutilation of African women’s vaginas. Meanwhile, this voyeuristic fascination with Black women’s bodies and sexualities also contributes to what the ‘West’ ‘already knows’ about the lives of ‘non-Western’ women: the violence and subjugation they face by virtue of being victims of their ‘non-Western’ traditions and cultures. This is the ‘Third World Woman’ of whom Chandra Mohanty has written (1988: 65).

Adding to this, Ratna Kapur has argued that without adequately addressing both the colonial legacies and ‘First World’ ideological hegemony contained within the law, feminists from all different ideological positions themselves contribute to the ongoing marginalisation and exploitation of subaltern and ‘Third World’ subjects (Kapur 2005: 5). Just as the ‘Hindu wife’ in colonial *sati* debates was, as Sunder Rajan describes, “both indispensable (the justification for the imperialist project itself) and eminently dispensable (the sacrifice offered to an emergent Western feminist individualism)” (2004: 46), the ‘non-Western’ female victim is both a justification for intervention and ultimately consumed in a reiterated celebration of the ‘feminism’ only the ‘West’ can bring. This is perhaps best-illustrated by the way in which the Special Court for Sierra Leone dealt with the issue of forced marriage as a crime against humanity.

The Special Court for Sierra Leone

Following the end of the 10-year civil war in Sierra Leone, there was a mass international community intervention. This took the form of various aid programs dedicated to post-conflict reconstruction and state reform, the establishment of a Truth and Reconciliation Commission and an internationalised court (the Special Court for Sierra Leone, hereafter the SCSL): a joint initiative of the United Nations and

the government of Sierra Leone. A number of key atrocities were identified as a focus of concern: the huge rate of amputations carried out by rebel groups during the conflict, the use of child soldiers (prosecuted for the first time as an international crime) and the extensive sexual and gender-based violence inflicted by all parties to the conflict. This latter issue became key to the SCSL's cases following a statement by the SCSL Chief Prosecutor that gender would be the 'cornerstone' of the prosecution strategy.²

Alongside charges of rape, sexual violence and sexual slavery (explicitly named for the first time within the list of crimes of the SCSL Statute) the Prosecution also decided to include a separate count in the indictments of the RUF³ and AFRC⁴ accused of forced marriage as 'other inhumane act.' This decision was reported as reflecting the SCSL's commitment to the wishes of local Sierra Leonean women and widely celebrated within international feminist legal networks (Frulli 2008; Muddell 2007; Park 2006; Nowrojee 2005; Damgaard 2004; Eaton 2004). And indeed, many women's rights and human rights activists in Sierra Leone expressed optimism for how this might assist with addressing the historical disempowerment and discrimination women had faced.⁵ However the ways in which the violation was characterised raises some interesting insights into the ways in which women, human rights and the relationship between the 'local' and the 'international' interact within international criminal trials.

'Forced Marriage' Versus 'Arranged Marriage': The Nature of the Violation

Finding the accused guilty of forced marriage as a crime against humanity, in her partly dissenting opinion in the AFRC case (which was later endorsed on appeal and in the RUF judgment) Justice Doherty made the following observation:

On the evidence I find that the intention of the 'husband' was to oblige the victim to work and care for him and his property, to fulfil his sexual needs, remain faithful and loyal to him and to bear children if the 'wife' became pregnant. In return, he would protect the 'wife' from rape by other men, give her food when food was available and, depending on his status, confer a corresponding status upon the wife. In effect, these are rights and obligations

²For a more detailed discussion and background to the SCSL see Grewal (2012a); Babbitt and Lutz (2009).

³RUF stands for the Revolutionary United Front, the rebel group led by Foday Sankoh. Of five initial indictees, three alleged 'leaders' were prosecuted from this group: Issa Hassan Sesay, Morris Kallon and Augustine Gbao.

⁴AFRC stands for the Armed Forces Revolutionary Council, a group of military personnel who staged a coup in 1997 and, after being ousted, fled to the countryside where they sporadically fought against and with the RUF. Three individuals were indicted from this group: Alex Tamba Brima, Ibrahim Bazy Kamara and Santigie Borbor Kanu.

⁵Interviews were conducted with human rights and women's rights organisations in Sierra Leone in 2006 and 2011.

of the type referred to by the Defence expert as being involved in traditional marriages but in there is no agreement of the family or kin of the 'wife' and the status is forced by violence or coercion upon the female partner.⁶

What is striking in this paragraph is the way in which Her Honour does not seek to problematise the assumed role of the 'wife' in a traditional Sierra Leonean marriage but simply qualifies the acceptability of this state of affairs as dependent on whether the 'wife's' family or kin have agreed to this arrangement. Given the intensity of feminist critiques of family as a site of discrimination and violence, both internationally and within Sierra Leone itself this is a startling finding. However it was in fact reflective of the overall approach taken to the prosecution of forced marriage and in particular the importance of separating forced marriage from legitimate customary marriage practices in Sierra Leone. This is made clear in the initial advice given to the Prosecutor's Office by law professor Michael Scharf.

Professor Scharf (writing with Suzanne Mattler), whilst noting the potential for overlap between those practices identified as 'arranged marriages' in peacetime and those identified as 'forced marriages' in times of war identifies what he considers to be the distinguishing features of the latter: the first is a lack of consent (if not from the prospective spouse at least from her family) accompanied by the payment of 'bridewealth' (Scharf and Mattler 2005: 81), the second is the intention of the practice: "The practice of arranged marriage is not injurious to the groups that practice it in intent or result. Forced marriage, in contrast, has no basis in the benevolent parental objectives to assist children or to perpetuate important values, and it is highly injurious to its victims" (2005: 89). This sentiment was reproduced repeatedly by Zainab Bangura, the Prosecution expert witness who testified in both the RUF and AFRC trials (a point I will discuss further shortly). Thus it was apparent 'cultural sensitivity' that justified the endorsement of an extremely conservative vision of Sierra Leonean marriage practices. This produces two problematic outcomes. First, certainly it would be dangerous to assert that all forms of arranged marriage are deeply injurious or ill-intentioned. However, so too is the assumption that arranged marriage in Sierra Leone is to automatically be seen as a 'benevolent' and legitimate practice. In the name of sensitivity for cultural difference, assumptions are made about the intent behind practices without any basis: a process which only serves to reinforce local structures of domination.

In fact, from talking to human rights activists in Sierra Leone, many expressed concern regarding the practice of early marriage in rural areas of Sierra Leone. Its continued practice was certainly not perceived by many local people committed to human or women's rights as an acceptable cultural practice. Furthermore, traditional marriage processes have been contested not just at the level of urban rights activists but also among rural communities themselves (Coulter 2009; Fanthorpe 2005; Hardin 1993). In fact Kris Hardin, in her anthropological study of a diamond mining town in Kono district, far eastern Sierra Leone, found that the majority of couples were living together without having completed customary bridewealth payments.

⁶ AFRC Trial Chamber Judgment, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriage) at para. 49.

Moreover young men and women both expressed reluctance to enter into formal marriages, seeing them as exploitative arrangements: the men for the reason of excessive financial burdens and the women because, “[they] generally felt that men were disrespectful to them and, moreover, tried to take advantage of them by expecting their labour and children but were unwilling to support them or be respectful of their families” (1993: 69).

In this light, the reification of ‘customary marriage’ in contrast to the condemnation of forced marriage during the conflict becomes worthy of greater interrogation. It raises significant questions about whose interests are served by presenting—and endorsing—an idealised picture of traditional marriage against which the wrong of forced marriage is constructed. It also demands us to be more cautious about reiterating values and standards, which may not in fact reflect the lived reality of the very people apparently being given redress.

At the same time, I would argue that this process not only reinforces existing hierarchies and discourses of domination in Sierra Leone, it also contributes to reinforcing another hierarchical relationship. This apparent ‘respect’ for local culture once again divides the communitarian traditional culture of Sierra Leone from the ‘enlightened’ feminist universalism of international law. A local, contextual feminist response thus becomes virtually impossible. Finally, while the ‘Third World Woman’ is provided some space within which to speak, it is a highly constrained and regulated space.

The Voice of the ‘Third World Woman’

In apparent response to potential allegations of imperialism and disconnect from context, the SCSL did hire a ‘local expert’ to comment on the issue of forced marriage. Zainab Bangura—a Sierra Leonean insurance broker and civil society activist—was selected and presented both a written expert report and testimony in the AFRC and RUF trials. However, her role within the trials points to far deeper issues of inequality and hegemony that cannot be addressed simply by allowing a different narrator to speak.

First of all, it is impossible to escape a feeling of instrumentalism on the part of the SCSL allowing the voice of the ‘expert’ to be a Sierra Leonean woman. Whilst Scharf and Mattler provided their advice to the SCSL Prosecutor in 2004, the Prosecution itself told the Trial Chamber that Ms Bangura was not selected to act as an expert witness and compile a report on the issue until February 2005.⁷ This was after another non-Sierra Leonean ‘gender expert’ had already prepared a report on sexual violence. The Prosecution told the Trial Chamber that, “given the distinct

⁷ Separate and Concurring Opinion of Justice Doherty on Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73bis (E) and Joint Defence Application to Exclude this Expert Evidence of Zainab Hawa Bangura or Alternatively to Cross-Examine Her Pursuant to Rule 94bis, 21 October 2005, Case No.SCSL-04-16-PT, at para. 5.

social and cultural consequences of forced marriage and its uniqueness to the Sierra Leone conflict, the best evidence in that regard would come from a Sierra Leonean expert.”⁸

Yet the question of what in fact qualifies Bangura as an expert remains unanswered. Is it on customary marriage or marriage practices in Sierra Leone? On the situation of women’s rights in Sierra Leone? The experience of being a ‘bush wife’? It seems Bangura cannot and does not speak authoritatively on any of these topics, which raises the question of what her testimony adds to that of the ‘bush wives’ themselves. Her evidence slides between generalised statements and personal anecdotes drawn from her own life and beliefs, a point also made by one of the defence counsel: “Is it fair to say in that regard, when it comes to the selection of your sources, that for you an important factor was your personal account of the events during the war?”⁹

For the defence the significance of this is the undermining of her testimony. However for my purposes it is interesting and important for another reason. Essentially, Bangura becomes positioned as a ‘native informant’ whose ‘lived experience’ allows her to speak as someone who ‘was there’ and ‘knows’:

...if you have gone through trauma yourself, you know what it means and you know how you feel about it and you know how you respond to questions about it.¹⁰

... Because I was here in Freetown. I worked here, I stayed here. And even when I went into exile for 9/10 months, I came back. So when it comes to the reality of the situation on the ground, because I was very much involved in the process, I develop a relationship with the AFRC and RUF.¹¹

Accepting the distinction between the abstract reporting of a situation and that of ‘living it,’ having not herself been a ‘bush wife’ however, the question remains of what Bangura’s testimony adds to that already presented by the women themselves. Bangura’s role could perhaps be seen as that of the “urban elite activist from the Global South” who, “understand[s] and state[s] a problem intelligibly for the taste of the North” (Spivak 2004: 528). In this sense she becomes the ‘native informant,’ brought in to render transparent the otherwise opaque culture of the ‘non-West.’

Yet, as Uma Narayan cautions: “The ‘Authentic Insider’ position becomes profoundly limiting for Third-World individuals when they get routinely cast as Native Informants while being denied auditions for other roles they could play just as well” (1997: 145). This is an argument I have made elsewhere in relation to Dutch Somali writer Ayaan Hirsi Ali whose positioning of herself as ‘previously oppressed now enlightened Muslim/African woman’ has both drawn on and subverted postcolonial feminist theory (Grewal 2012b). The main danger is that this positioning ultimately

⁸ Decision on Prosecution Request for Leave to call an Additional Witness (Zainab Hawa Bangura) pursuant to Rule 73 bis (E), and on Joint Defence Notice to inform the Trial Chamber of its position vis-à-vis the proposed Expert Witness (Mrs. Bangura) pursuant to Rule 94 bis.

⁹ AFRC transcript of hearing, 3 October 2005, p85, lines 20–22. <http://www.rscsl.org/Documents/Transcripts/AFRC/AFRC-100305.pdf>. Accessed 2 Nov 2015.

¹⁰ Ibid., 97, lines 15–17.

¹¹ Ibid. 86, lines 10–14.

does little to disrupt dominant gendered or racialised hierarchies: and the case of Bangura's testimony in the SCSL is no exception.

Looking at Bangura's testimony, a fascinating and contradictory account of both her own life and that of 'Sierra Leonean women' more generally emerges. She begins by reiterating a classic narrative of a subjugated African woman (escaping an arranged early marriage at 12, facing discrimination as an adult) who becomes disillusioned with her culture, is offered access to democracy, rights and knowledge in the 'West' (facilitated by UNDP and the American Embassy, she attended training programmes in the US) and comes home to educate her less fortunate sisters.¹²

She goes on to provide an explanation for the 'wrong' associated with forced marriage that does not differ significantly from that provided by Scharf and Mattler some 2 years earlier. When asked to define what she means by 'forced marriage,' Bangura states:

I use it for girls who have been who had been [sic] abducted and literally taken as wives, because when I spoke to this girl, I said, "What happened?" She said, "When he comes to the house, when he captured, he said, 'You now me wife.'" That you are my wife...¹³

The repeated use of the term 'wife' by women Bangura interviewed supports the claim made by various commentators that the decision to name the violation 'forced marriage' reflected an incorporation of the victims' perspective (Muddell 2007: 95). However, I think it is important to dig a little deeper into the significance of this terminology being used. As Bangura identifies earlier in her testimony, in peacetime within more traditional communities in Sierra Leone, wives are considered their husband's 'property': "When the husbands die, they dispose you with the rest of the property."¹⁴ She goes on to explain that, in the context of forced marriage,

... right from the beginning of the entire relationship with him he identifies you as his wife, which means you belong to him. You are with him and you are part of his property, I might say, because he takes care of you, he protects you, he feeds you. So you are part and parcel of him.¹⁵

And, in response to the question of why the men used the term 'wife': "It is a sign of control. It is a sign of ownership. It is like—because in our tradition when somebody is your wife, you have complete control over him [sic]."¹⁶ Added to this, Bangura's intermittent use of consent to mean that of the girl/woman herself and that of her family raises significant questions about the extent to which the prosecution of forced marriage is really motivated by a desire to protect the rights of women. Instead it seems to reiterate Scharf and Mattler's argument that the crime of forced marriage should be prosecuted because "forced marriages demean and distort the institution of marriage itself" (2005: 77). Rather than calling into question the role

¹² Ibid., 5–20.

¹³ Ibid., 52.

¹⁴ Ibid., 20, lines 1–2; see also 53, lines 17–27.

¹⁵ Ibid., 51–52.

¹⁶ Ibid., 53, lines 13–15.

of 'wives,' the patriarchal conception is reinforced and naturalised with the violation being positioned as the misuse of the term rather than the content of the role itself. This seems to further demonstrate Nivedita Menon's (2004) argument that the law tends to fix essentialised (and often oppressive) identities rather than opening up more emancipatory possibilities.

This fixing of hegemonic identities must be further problematized when placed within the framework of international human rights. As Douzinas (2007) has argued, it is precisely the simultaneous assertion of an universal humanity and the establishment of one specific set of ('Western' Enlightenment) values as legitimate (and defensible by force if necessary) that has led to the hegemony of human rights and its capacity to reinforce existing power relations. It has also been an effective means of reducing the individual subjectivity of the 'non-Western' human rights 'victim' and reinforcing the 'civilisation' of the 'West':

We can feel great pity for the victims of human rights abuses; but pity is tinged with a little contempt for their fickleness and passivity and huge aversion towards the bestiality of their compatriots and tormentors. We do not like these others, but we love pitying them. They, the savages/victims, make us civilized. (Douzinas 2007: 71)

In this sense, the Sierra Leonean bush wife becomes the means for affirming a number of core beliefs the West has about itself: that (patriarchal) marriage is an inherently human good, that the perversion of this good is the result of the acts of 'non-Western' 'others' (from whom this is perhaps to be expected), the 'non-Western' woman is an inherently pitiable victim in her homogenised state of oppression and it remains the 'white man's (and woman's) burden' to bring civilisation in the form of rights and law to rescue this victim from her culture, her men and herself. The continuation of a colonial logic is unquestionable. What makes the case of 'forced marriage' doubly difficult for a postcolonial feminist is that to condemn the SCSL for its affirmation of local marriage practices is to apparently conform to a narrative in which tradition is inherently repressive and African women always oppressed, yet to recognise the cultural context within which women experience marriage—in both conflict and peace—in Sierra Leone, potentially legitimates a conservative, patriarchal understanding of local customary law, kinship and gender relations.

In critiquing Bangura's role and narrative within the SCSL trials, I do not wish to suggest she had no right to speak. Rather, I see her as demonstrating the constrained space within which the 'Third World' female subject must situate herself: as both a narrator of universalised suffering and a representative of her culture and tradition. As I have argued elsewhere (Grewal 2012b), the colonial residues within feminist and culturalist discourses continue to make it virtually impossible for many women to find a space that is both sensitive to the gender and race/cultural politics at stake. Bangura seems to once again—in a manner similar to that which I have identified elsewhere in relation to Somali writer Ayaan Hirsi Ali—demand further interrogation of "how the legacies of colonial racial and gender orders continue to be rejuvenated and reproduced through the bodies of postcolonial subjects" (Grewal 2012b: 589).

But it is precisely her role as the 'voice of the Sierra Leonean woman' presented as authoritative and authentic within the arena of international law that obscures the diversity of practices, processes of domination and acts of resistance and agency Sierra Leonean women experience in both times of war and times of peace. Not only is her testimony contradictory as a result—as she struggles to simultaneously present an accurate account of 'Sierra Leonean culture' and women's experience of violence and discrimination—it also silences other potential voices and perspectives, reducing them to the silent, victimised mass Douzinas describes (2007:69). Perhaps this is in part the result of the epistemic discontinuity with the subaltern Spivak sees as inevitable when postcolonial elites utilise human rights discourse (2004: 527). But it is also a means of confirming a particular vision of Sierra Leonean women's lives that does not allow space either for 'bush wives' to be seen as anything other than victims¹⁷ nor for resistance in peacetime to be expressed *within and according to* Sierra Leonean cultural norms as the individualist feminist perspective becomes antithetical to the naturalised conflation of individual and familial consent within Bangura's testimony.

International Law as Site of Domination, Resistance and Struggle

So to return to the initial question this chapter sought to answer: can international legal arenas really live up to their emancipatory aspirations or are they yet another site for the reinforcement of ethnocentric universalism and the silencing of the subaltern? When analysing the SCSL proceedings, it becomes easy to identify with Ratna Kapur's characterisation of the law as, "a site of discursive struggle, where the role and place of the world's cultural Others who are peripheral subjects... have been and continue to be fought out" (2005: 3). Not only do the characterisations of forced marriage by the international expert and the SCSL collude with the most conservative, traditional patriarchal representations of culture and marriage in Sierra Leone—in a manner parallel to Narayan's identification of 'Western' feminists adopting a 'colonialist stance' to 'Third World Women'—they further legitimate this position by imbuing it with the authority of law. Meanwhile, the contortions that become evident in the process of Bangura's testimony highlight that it is not simply a matter of allowing the 'Third World Woman' to speak but also addressing the conditions within which her voice can possibly be heard. Her selection as 'expert witness' to speak about the experience of Sierra Leonean women (as a whole) and her evidence would seem to once again reinforce Spivak's argument that the subaltern can never be heard in her own terms.

¹⁷ And indeed, the ethnographic studies of 'bush wives' suggest a much more complex and ambiguous experience with some achieving significant power within the rebel force, perpetrating serious acts of violence themselves and in some cases falling in love with their husbands and remaining with them after the war: see for example Coulter's (2009) fascinating study.

At the same time, to conclude that any attempt at engagement with international rights discourses on the part of ‘non-Western’ women is a condemned and counter-productive enterprise is a far from ideal outcome. Nor is it the argument I wish to make here. In the words of Uma Narayan: “given that [...] negative attitudes and stereotypes about Third-World communities are produced in a number of powerful institutional sites, I find it unlikely that the solution for ‘Western cultural arrogance’ lies in Third-World feminist silence about the problems women face in their national and cultural contexts!” (Narayan 1997: 135).

If we accept that the law is a site of contestation (as Kapur suggests) and that human rights discourses, for all their investment in maintaining existing power structures, cannot be completely contained by this, then it is possible to also see the SCSL prosecutions from a different perspective. As Muppidi also identifies, “[s]ubalterns might not just accept or reject the definition [of the political order of responsibilities] but also misread, misunderstand, appropriate, or rearticulate the carefully defined scope of their putative responsibilities” (2003: 283). It is precisely this scope for ‘misunderstanding’ to which I now wish to turn.

The Power of ‘Strategic Misunderstanding’

In their 1987 article, Silbey and Sarat are critical of the law and society tradition for oversimplifying both the relationship of law to society and the concepts of ‘law’ and ‘society’ themselves: “We [the law and society movement] looked for the connections between law and society as if the two were separate and singular. They are not” (1987: 172). As the relationship between women’s rights activism and the Special Court for Sierra Leone demonstrates, the relationship between law and society is extremely ambiguous and diverse. And while Silbey and Sarat are concerned to highlight the negative impact of law on marginalised members of society, in the final section of this chapter I will identify some of the ways in which less privileged groups and individuals may in fact also make creative use of law, exercising an agency that those of us working within the logic of law’s hegemony have all too often not seen. In this sense, law emerges as both an instrument for governance *and* a tool of the governed (Chatterjee 2004) to be used instrumentally.

Returning to Sierra Leone in 2011 and based on my reading of the judgments that had been handed down by this point, I was prepared to find that the SCSL’s gender prosecutions had at best achieved no real change in the local context and at worst had reinforced patriarchal structures for the reasons set out above. My conversations with members of the human rights and women’s rights community to that point had been far from optimistic and there were already reports that while for a brief period women were speaking of sexual violence they experienced in the war, this was no longer possible in the post-conflict context (Grewal 2012a). In terms of formal

reforms, while three of the Gender Acts¹⁸ passed in 2007, The Sexual Offences Act (relating to sexual violence) remained stalled at the drafting stage.¹⁹

What I discovered over the course of my interviews therefore came as a big surprise. A key finding of my 2011 fieldwork was that the further from the SCSL and the less their knowledge of the detail of its work, the more women's rights actors seemed to be supportive and see it as a positive intervention. This could be—and indeed all too often is—read as evidence of their ignorance. Certainly the educated local elites were more sceptical of its value, for very similar reasons to my own. These educated elites were also responsible for 'training' their less privileged sisters (and others) in women's rights as if knowledge of legal norms were in itself a source of empowerment. I would however like to offer another reading of this positive engagement with the SCSL by extremely marginalised actors: one that draws on and expands Chatterjee's (2004) concept of the 'politics of the governed.'

For many more marginalised and disadvantaged women, while the SCSL did not directly impact upon or improve their lives it provided to their mind a powerful ally. The details of *what* the SCSL had actually said about forced marriage were less important to them than the fact that the SCSL had said *something*! In this sense, it might be seen as a parallel to studies such as that by McCann (1994), which found that even as lawsuits on pay equality were unsuccessful, they played a significant role in mobilising women and raising public consciousness.

Added to this, when I asked whether any of the women had in fact read the judgment (or a summary) and whether they were concerned with the ways in which the SCSL had apparently legitimated customary marriage practices, even where the woman's or girl's consent was disputable, they looked at me as if I was insane. No, they had not read the judgments—who had? They were hundreds of pages and full of legal jargon—but nor had the local authorities, chiefs, lawyers and magistrates. What mattered was that they could assert, "Forced marriage is a crime! The SCSL said so!". The distinction drawn by the judges between 'forced marriage' and 'arranged marriage' was an irrelevant detail. It is this that I am calling 'strategic misunderstanding.'

The notion of 'strategic misunderstanding' is one that I have sought to develop following a lecture also in 2011 given by postcolonial scholar Dipesh Chakrabarty. Commenting on the concept of cosmopolitanism, Chakrabarty remarked that while everyone was very concerned with talking to each other and achieving understanding, a certain amount of talking at cross purposes and *not* understanding each other might actually create a more productive space.

In an attempt to evidence the positive qualities of misunderstanding, Chakrabarty gave the example of a correspondence relationship that lasted for many years between Bengali poet Rabindranath Tagore and an American businesswoman whom he had met on a visit to the University of Chicago. While I found Chakrabarty's

¹⁸ In 2007 the Sierra Leonean parliament passed the Domestic Violence Act, The Devolution of Estates Act and The Registration of Customary Marriage and Divorce Act: 3 of a suite of legislation drafted and lobbied for by a wide range of local and international civil society actors.

¹⁹ It was finally passed in 2012: UN Women (2012).

reading of this relationship problematic for reasons I won't go into here, I was provoked by the essence of his argument about how the ability of each party to talk at cross purposes for years meant both gained from the relationship. In that case it was not intentional but rather neither party was either capable or really cared to truly understand the 'other.' Instead they took what they needed from the relationship and through it fostered what both sides found to be a mutually beneficial cross-cultural amity.

This started me thinking about what I had seen in Sierra Leone earlier in the year. I had been working on the assumption that the SCSL jurisprudence was not only disconnected and potentially disempowering for Sierra Leonean women's activism. However this assumption was working on the basis that they even knew or cared what the SCSL had in fact ruled. In fact, many women's rights activists were happily referring to the SCSL's prosecution of forced marriage and claiming it as a victory which allowed them to campaign against ongoing forced early and arranged marriages. This is despite the fact that the SCSL had specifically sought to differentiate between these practices and forced marriage in the context of the conflict.

What parts of the women's rights movement had done in Sierra Leone was to take what they believed to be the best parts of the SCSL. They used it to show "the international community cares about Sierra Leonean women." They also turned the issue of women's rights into something that was no longer purely local and therefore dismissible but an issue with international meaning: an approach that has ramifications both economically and politically. As various commentators have demonstrated international HRs *does* now have power in the sense of being a part of the language of diplomacy. In many ways this would seem like a classic example of what Keck and Sikkink (1998) have famously called the 'Boomerang approach' adopted by transnational advocacy networks. The framing of an issue within an increasingly dominant international discourse—that of human rights—allows for the building of solidarity beyond bounded, isolated contexts and allows for other actors to also place pressure on the dominant local elite to change oppressive structures.

However what I am suggesting is that even within Keck and Sikkink's invaluable contribution, there remains a certain internationalised/ing logic. This logic assumes that the norms are generated in this mythical space known as 'the international' and are inherently radical and progressive (and I would add, 'Western' and based on Enlightenment principles). They are then adopted, deployed, rearticulated in specific contexts—known as 'the local' (Spivak makes a similar point: 2004: 526) that is inherently traditional, conservative and reactionary. This reproduces the linear timeline of the civilising mission. Remaining within the internationalised logic, one must either blindly endorse the external norm or reject completely.²⁰

What is in fact more interesting is that it was the effort to first get the SCSL to take up the issue of violence against women, then strategically misrepresent what the SCSL in fact said on the part of Sierra Leonean women's rights actors that has

²⁰ For interesting discussion of the much more complex, fluid and contingent process of norm internalization, see Acharya (2004).

opened possibilities for progressive change. This process is therefore both internationalised and locally contextual but not in the classic formulation which assumes international community and advocacy networks to be the gatekeepers of rights and progressive norms and the local community being intervened upon as the site of conservatism and tradition. This to me reflects an important shift in the way we think about the relationship between local and global activism. Too often it seems that international actors speak from a perspective that assumes the pre-existence of certain norms that then need to be adapted to 'fit' in different contexts (see Rajagopal 2003: 188 for a similar argument). It also opens up the possibility for viewing international institutions as potential sites of emancipation in a different way.

This is not to suggest that we should give up our critique of these institutions and accept them as they stand. I still believe them to be highly problematic and requiring ongoing decolonisation and democratisation. One of the major problems of course with strategic misunderstanding is the risk of forgetting the huge power imbalance and I do not at all suggest this. Rather I am inspired by Ilan Kapoor's reading and renegotiation of Homi Bhabha on agency, hybridization and resistance. As Kapoor notes: "For Bhabha, power produces much more than a resistant subject. It can bring forth a creative agent, capable of subverting authority in positive and unanticipated ways." The performativity identified by Bhabha will always operate within the constraints of the given discursive context but *how* this discursive context is acted within will always be open to the individual actor (2008: 132–133). As a result, hybridity occurs in the very process of domination.

I think this recognition of the creative space open even within highly restrictive hegemonic discourses and structures is important. To remain too focused on these institutions serves to force us to remain within their logic: a process that all too often means we miss other important practices, actors and sites of resistance. While I believe that the processes of domination and marginalisation enacted by institutions like the SCSL *should* and indeed *must* be constantly exposed and critiqued, to *only* focus on this as I—and most other commentators engaging with them—have means we elevate them in status. They become the sole means of empowerment: a position that reproduces their dominance even amongst those of us who are seeking to resist this. If, as Marshall and Barclay claim, "law is what people think it is, what they say it is, and what they do to implement the meanings they create" (2003: 621), then the significance of the SCSL's judgments is far beyond my own limited legalistic analysis of definitional failings. By recognising and valourising this I hope to contribute to the project to "*de-elitize* international law by writing resistance into it, to make it recognize subaltern voices" (Rajagopal 2000: 534, emphasis in orig.).

Conclusion

In this chapter I have sought to demonstrate that far from providing an inherently progressive response to existing global and local power relations, international legal institutions have proved to be significant sites for the reproduction and

legitimation of existing power structures. The assumption that the subaltern subject will be able to engage productively within this space—and be heard—requires much greater critical reflection. As the case of forced marriage demonstrates, the prevailing dominance of colonialist logics of rights, identity and civilisation (not to mention of uncontested patriarchy) continue to limit the space within which marginalised subjects from the ‘non-West’ are able to achieve recognition and redress for the wrongs they have suffered and challenge the hierarchies which continue to subjugate them.

At the same time, this is not the only picture to emerge. By shifting the focus away from how international courts like the SCSL themselves reconcile competing interests of culture, rights and identity, towards the ways in which subaltern subjects engage strategically with international processes and discourses, another picture of international law’s emancipatory potential emerges. What this points to is the importance of us continuing to engage critically and relentlessly with imperialist international institutions (as Ilan Kapoor has powerfully argued), while simultaneously recognising that the power of international legal discourses cannot and should not be contained within their institutional uses. To do this is to miss the important sites of agency and resistance within which the subaltern continues to seek to have her voice heard on her own terms.

References

- Acharya A (2004) How ideas spread: whose norms matter? Norm localization and institutional change in Asian regionalism. *Int Organ* 58:239–275
- Anghie A (2005) The evolution of international law: colonial and postcolonial realities. *Third World Q* 27(5):739–753
- Babbitt EF, Lutz EL (eds) (2009) *Human rights and conflict resolution in context: Columbia, Sierra Leone, and Northern Ireland*. Syracuse University Press, New York
- Chatterjee P (2004) *The politics of the governed: reflections on popular politics in most of the world*. Columbia University Press, New York
- Chimni BS (2006) Third world approaches to international law: manifesto. *Int Community Law Rev* 8:3–27
- Comaroff J, Comaroff JL (2006) *Law and disorder in the postcolony*. University of Chicago Press, Chicago
- Conklin A (1997) *A mission to civilize: the republican idea of empire in France and West Africa, 1895–1930*. Stanford University Press, Stanford
- Coulter C (2009) *Bush wives and girl soldiers: women’s lives through war and peace in Sierra Leone*. Cornell University Press, Ithaca, NY
- Damgaard C (2004) The Special Court for Sierra Leone: challenging the tradition of impunity for gender-based crimes? *Nord J Int Law* 73:485–503
- de Sousa Santos B (2002) *Toward a new legal common sense: law, globalization, and emancipation*. Butterworths, London
- de Sousa Santos B, Rodriguez-Garavito CA (eds) (2005) *Law and globalization from below: towards a cosmopolitan legality*. Cambridge University Press, Cambridge, UK
- Douzinas C (2007) *Human rights and empire: the political philosophy of cosmopolitanism*. Routledge, London

- Eaton S (2004) Sierra Leone: the proving ground for prosecuting rape as a war crime. *Georgetown J Int Law* 35(4):873–919
- Fanthorpe R (2005) On the limits of liberal peace. *Afr Aff* 105(418):27–49
- Frulli M (2008) Advancing international criminal law: the Special Court for Sierra Leone recognizes forced marriage as a 'new' crime against humanity. *J Int Crim Justice* 6:1033–1042
- Grewal K (2012a) International criminal justice: advancing the cause of women's rights? The example of the Special Court for Sierra Leone. In: St. Germain T, Dewey S (eds) *Conflict-related sexual violence: international law, local responses*. Kumarian Press, Sterling, pp 71–87
- Grewal K (2012b) Reclaiming the voice of the "Third World Woman": what happens if we don't like what she has to say? The tricky case of Ayaan Hirsi Ali. *Interv Int J Postcolonial Stud* 14(4):569–590
- Hardin K (1993) *The aesthetics of action: continuity and change in a West African town*. Smithsonian Institution Press, Washington
- Kapoor I (2008) *The postcolonial politics of development*. Routledge, London
- Kapur R (2005) *Erotic justice: law and the new politics of postcolonialism*. Glass House Press, London
- Keck Margaret E, Sikkink K (1998) *Activists beyond borders: advocacy networks in international politics*. Cornell University Press, Ithaca, NY
- Marshall A-M, Barclay S (2003) In their own words: how ordinary people construct the legal world. *Law Soc Inq* 28(3):617–628
- Matua M, Anghie A (2000) What is TWAIL? *Am Soc Int Law Proc Annu Meet* 94:31–40
- Mbembe A (2001) *On the postcolony*. University of California Press, Berkeley
- McCann M (1994) *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. University of Chicago Press, Chicago and London.
- Menon N (2004) *Recovering subversion: feminist politics beyond law*. Permanent Black, New Delhi
- Mohanty CT (1988) Under Western eyes: feminist scholarship and colonial discourses. *Fem Rev* 30:61–88
- Muddell K (2007) Capturing women's experiences of conflict: transitional justice in Sierra Leone. *Mich State J Int Law* 15(1):85–100
- Muppidi H (2003) Colonial and postcolonial global governance. In: Barnett MN, Duvall R (eds) *Power in global governance*. Cambridge University Press, Cambridge, UK, pp 273–291
- Narayan U (1997) *Dislocating cultures: identities, traditions and Third-World feminism*. Routledge, London
- Njambi WN (2004) Dualisms and female bodies in representations of African female circumcision. *Fem Theor* 5(3):281–303
- Nowrojee B (2005) Making the invisible war crime visible: post-conflict justice for Sierra Leone's rape victims. *Harv Hum Right J* 18:85–105
- Otto D (2006) Lost in translation: re-scripting the sexed subjects of international human rights law. In: Orford A (ed) *International law and its others*. Cambridge University Press, Cambridge, UK, pp 318–344
- Park ASJ (2006) "Other Inhumane Acts": forced marriage, girl soldiers and the Special Court for Sierra Leone. *Soc Leg Stud* 15(3):315–337
- Rajagopal B (2000) From resistance to renewal: the Third World, social movements and the expansion of international institutions. *Harv Int Law J* 41(2):529–578
- Rajagopal B (2003) *International law from below: development, social movements and Third World resistance*. Cambridge University Press, Cambridge, UK
- Rajagopal B (2006) Counter-hegemonic international law: rethinking human rights and development as a Third World strategy. *Third World Q* 27(5):767–783
- Rancière J (1999) *Disagreement: politics and philosophy*. Trans J Rose. University of Minnesota Press, Minneapolis
- Scharf M, Mattler S (2005) Forced marriage: exploring the viability of the Special Court for Sierra Leone's new crime against humanity. In: Ankumah E, Kwakwa EK (eds) *African perspectives on international criminal justice*. Africa Legal Aid Special Book Series, The Hague, Accra, Pretoria

- Silbey S (1997) “Let Them Eat Cake”: globalization, postmodern colonialism and the possibilities of justice. *Law Soc Rev* 31(2):207–236
- Silbey S, Sarat A (1987) Critical traditions in law and society research. *Law Soc Rev* 21(1):165–174
- Spivak GC (2004) Righting wrongs. *S Atl Q* 103(2/3):523–581
- Sunder Rajan R (2004) *Real and imagined women: gender, culture and postcolonialism*. Routledge, London.
- UN Women. 2012. Sexual Offences Act: “A Victory for Sierra Leoneans” says Minister Gaojia. <http://unwomenwestafrica.blog.com/2012/08/21/%E2%80%9Ca-victory-for-sierra-leoneans%E2%80%9D-says-minister-gaojia-of-sierra-leone%E2%80%99s-enactment-of-sexual-offences-law/>. Accessed 21 Oct 2013.

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