DON'T FORGET THE FAR EAST: A MODERN LESSON FROM THE CHINESE PROSECUTION OF JAPANESE WAR CRIMINALS AFTER WORLD WAR II

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Nothing the Nazis under Hitler would do to disgrace their own victories could rival the atrocities of Japanese soldiers under Gen[eral] Iwane Matsui.[1]

I. Introduction

In the early morning hours of December 13, 1937, approximately 50,000 Japanese soldiers breached the walled city of Nanking, China.[2] The troops carrying out the assault were part of a larger force—the 200,000-strong Japanese Central China Area Army (CCAA), led by General Iwane Matsui—sent to encircle and annihilate the remaining

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[1] ROBERT LECKIE, DELIVERED FROM EVIL: THE SAGA OF WORLD WAR II, at 303 (1987).

[2] IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II, at 42 (1997); *see also* Fujiwara Akira, *The Nanking Atrocity: An Interpretive Overview*, *in* THE NANKING ATROCITY, 1937–38: COMPLICATING THE PICTURE 29, 38–40 (Bob Tadashi Wakabayashi ed., 2007). Nanking is located nearly 300 kilometers west of Shanghai on the southern bank of the Yangtze River. The city was not a part of the Japan's original invasion plan. However, after the Japanese failed to destroy the Chinese army in Shanghai in the fall of 1937, the imperial army received new orders to expand their operations to a broader "central China area." CHANG, *supra*, at 42.

Chinese forces inside the ancient capital.[3] Upon entering the city, the Japanese were instantly outnumbered by 90,000 Chinese soldiers and more than half a million civilians.[4] The Japanese commanders leading the assault fully appreciated the potentially disastrous ramifications if their men failed to contain the civilian population.[5] Within hours, the Japanese began the systematic separation and execution of Chinese prisoners of war (POWs), leaving no one to protect the Chinese civilians.[6] Soon the Yangtze River was a logjam of bobbing and bloated human corpses.[7]

The acts committed by the Japanese forces in Nanking were arguably the most heinous and barbaric war crimes committed during World War II. In the six weeks following the fall of Nanking, Japanese forces killed approximately 260,000 Chinese civilians.[8] Japanese methods of torture and execution included: burying people alive, carving long strips of flesh from people before killing them, setting people on fire after gouging out their eyes and cutting off their noses and ears, freezing people to death, and impaling babies with bayonets.[9] In addition to the mass executions, Japanese soldiers raped between 20,000 and 80,000 women, including children, elderly women, and women in the late stages of pregnancy.[10] Yet, the atrocities committed in Nanking were not isolated incidents. Japanese forces committed similar acts throughout China and numerous other countries across the Pacific theater.[11]

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[3] CHANG, *supra* note 2, at 35.
[4] *Id.* at 42.
[5] *Id.*
[6] *Id.* at 42, 45. The Japanese used perfidy to trick the Chinese forces into surrendering *en masse* by promising fair treatment. Upon surrender, the prisoners of war (POWs) were divided into groups of 100 to 200 men, led to different locations throughout Nanking, and executed. *Id.*
[7] LECKIE, *supra* note 1, at 303.
[8] CHANG, *supra* note 2, at 102. Given the lack of an accurate pre-December 1937 census of Nanking's civilian population, scholars often disagree on civilian casualty estimates. However, recent calculations estimate the actual death toll to range between 300,000 and 400,000. *Id.* at 101–03.
[9] *Id.* at 87–88. *See also* Richard J. Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT'L & COMP. L. 59, 64–66 (2003).
[10] CHANG, *supra* note 2, at 89. These rapes were frequently accompanied by the slaughter of entire families. *Id.* at 91.
[11] Galvin, *supra* note 9, at 63. Between 1941 and 1942, in the Communist-controlled areas of China, Japanese forces implemented the "three-all" policy—sanko seisaku: "kill all, burn all, destroy all"—that purportedly decreased the population by nineteen million people. *Id.* at 64–65 (citing JOHN W. DOWER, WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR 43 (1986)). The atrocities that started in China spread to other

Following Japan's official surrender on September 2, 1945,[12] perhaps no other country, short of the United States,[13] had a greater interest in post-war justice in the Pacific theater than China. China used a three-system approach to effectuate that interest: it participated in the International Military Tribunal for the Far East (IMFE), also known as the "Tokyo Tribunal" or "Tokyo War Crimes Trials"[14] as one of eleven nations; it allowed another country (i.e., the United States) to hold trials within its borders; and it conducted its own domestic trials at various

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Japanese-occupied territories in Malaya, Burma, Singapore, Thailand, the Philippines, Vietnam (formerly Indochina), and Korea. Galvin, *supra* note 9, at 63. For example, from mid-1942 and continuing into 1943, the Japanese set out to build a railway military supply line connecting Bangkok, Thailand, with Rangoon, Burma, using slave labor. The Japanese mobilized more than 61,800 allied POWs for the project; one in every five (approximately 12,300) died from mistreatment. The Japanese also forced more than 200,000 civilians from Southeast Asia to work on the railway's construction—between 42,000 and 74,000 died because of mistreatment. YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II, at 142–43 (2008). Ultimately, the Japanese were responsible for an estimated 2,850,000 Chinese civilians deaths and 758,000 deaths throughout the rest of Asia and the Pacific regions. Galvin, *supra* note 9, at 63 (citing R.J. RUMMEL, DEATH BY GOVERNMENT 143–56 (1994)).

[12] *Featured Documents*, NAT'L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/exhibits/featured_documents/japanese_surrender_document/index.html (last visited Mar. 21, 2014) [hereinafter Instrument of Surrender].

[13] The atrocities committed against U.S. POWs included the infamous Bataan Death March, which resulted in deaths of more than 17,200 American and Filipino captives; the mock trial and execution of captured American pilots, including eight of the Doolittle Raid fliers shot down over China in 1942; and countless POW camp abuses, such as the torture, starvation, and improper medical care of POWs at Kokura prison camp No. 3 that resulted in approximately 150 deaths. PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951, at 66, 68–74, 84–85 (1979). In total, 27,465 American POWs were held by the Japanese during World War II, more than 40.44% (11,107) died while in detention. GARY K. REYNOLDS, CONG. RESEARCH SERV., CRS-11, U.S. PRISONERS OF WAR AND CIVILIAN AMERICAN CITIZENS CAPTURED AND INTERNED BY JAPAN IN WORLD WAR II: THE ISSUE OF COMPENSATION (2002) *available at* http://www.history.navy.mil/library/online/usprisoners_japancomp.htm.

[14] The terms "Tokyo Tribunal" or "Tokyo War Crimes Trials" technically refer to the work of the International Military Tribunal for the Far East (IMTFE) at Tokyo between May 3, 1946, and November 12, 1948. However, over the years, these terms have expanded to include all the trials held across the Asian/Pacific region. TIMOTHY MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS, at xiii (2001). For the purposes of this article, the term Tokyo Tribunal will refer specifically to the IMTFE conducted in Tokyo and will be used synonymously with IMTFE. The term "domestic trials" will be used to describe the prosecution of suspected Japanese war criminals in forums outside of the international tribunal at Tokyo.

locations throughout China.[15] China's three-system approach is an overlooked but valuable model for prosecuting current and future war crimes committed during an armed conflict.

The recently completed Special Court for Sierra Leone (SCSL) presents an interesting case study regarding the modern-day application of China's "lessons-learned."[16] The parallels between China and Sierra Leone—in terms of both conflict brutality and post-war instability—are sufficiently similar to merit further examination. First, both countries endured more than a decade of war that was marred with horrific crimes committed against their respective civilian populations.[17] Second, the governments in both China and Sierra Leone struggled to retain authority over their territory after the end of hostilities—in China, the Nationalist Government clashed with the Communists,[18] while Sierra Leone's peace agreement with the Revolutionary United Front (RUF) was shaky at best.[19] Third, both countries recognized the immediate importance of soliciting outside assistance—China sought help from the United States, while Sierra Leone requested aid from the United Nations (UN). Finally, both China and Sierra Leone dealt with the difficult challenge of prosecuting (or failing to prosecute) a head of state—China with Japan's Emperor Hirohito (who was ultimately granted immunity)[20] and Sierra Leone with Liberia's Charles Taylor (who was convicted after a nearly

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[15] For the purposes of this article, the term "China" refers to the internationally-recognized sovereign government of China led by Chiang Kai-shek. Although the Chinese communists, led by Mao Tse-tung, played a key role in opposing Japanese forces throughout World War II, this article only examines the actions of the Chinese government recognized by the United States during the time period in question.

[16] The Special Court for Sierra Leone (SCSL) is the international community's latest experiment in prosecuting war crimes. Established in 2002, the SCSL indicted thirteen war criminals, ultimately prosecuting ten of them. The court officially closed in December 2013. Residual Special Court for Sierra Leone, *The Special Court for Sierra Leone, the Residual Special Court for Sierra Leone*, http://www.rscsl.org/ (last visited Oct. 31, 2014) [hereinafter RESIDUAL SPECIAL COURT FOR SIERRA LEONE].

[17] Although Sierra Leone's conflict if often classified as a non-international armed conflict (NIAC), its cross-border components—especially, the roles of Liberia and Burkina Faso—present clear international armed conflict characteristics. John R. Morss & Mirko Bagaric, *The Banality of Justice: Reflections on Sierra Leone's Special Court*, 8 OR. REV. INT'L L. 1, 13 (2006) (citing Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L. J. 391, 408, 417 (2001)).

[18] *See generally* U.S. DEP'T OF STATE, UNITED STATES RELATIONS WITH CHINA: WITH SPECIAL REFERENCE TO THE PERIOD 1944–1949, at 311–13 (1949) [U.S. DEP'T OF STATE].

[19] DANNY HOFFMAN, THE WAR MACHINES: YOUNG MEN AND VIOLENCE IN SIERRA LEONE AND LIBERIA, at xii (2011).

[20] PICCIGALLO, *supra* note 13, at 16.

six-year trial).[21]

Drawing on the practices of the SCSL, the remaining sections of this article survey how each of the three systems China employed could have been used to alleviate or eliminate the key shortcomings of the SCSL. Part II examines the background and key legal characteristics of the International Military Tribunal for the Far East (IMTFE), which includes a brief review of the International Military Tribunal at Nuremberg (IMTN)—the precedent used to create the IMTFE. After gaining an understanding of the circumstances surrounding the establishment of the IMTFE and its legal components, Part III examines China's role in the IMTFE and assesses the "hybrid" court established in Sierra Leone.[22] This Part also considers two major shortcomings of the SCSL—jurisdictional limitations and the exclusion of interested parties—and how these perceived defects could have been limited (or even prevented) by considering the international model used in the Far East. Then, Part IV explores the two domestic forums used in China—one American-led and one Chinese-led—and discusses how these distinct trial systems could have enhanced the perception of justice in Sierra Leone. This article concludes by highlighting the value of China's three-system approach and the practical lessons-learned it offers for prosecuting future war crimes.

II. Background

A. The International Model after World War II

While many scholars have written about the long-lasting, positive impact of the European model for prosecuting war crimes after World War II—the International Military Tribunal at Nuremberg (IMTN)—the war trials conducted in the Pacific following Japan's surrender have

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[21] Afua Hirsh, *Charles Taylor Is Guilty—But What's the Verdict on International Justice?*, THE GUARDIAN (Apr. 26, 2012), http://www.theguardian.com/commentisfree/libertycentral/2012/apr/26/charles-taylor-guility-abetting-war-crimes.

[22] The SCSL is referred to as a "hybrid" tribunal because it is a combination of efforts between the international community (i.e., the United Nations) and the national institutions of a country where war crimes were committed (i.e., Sierra Leone). Hybrid tribunals typically incorporate both domestic and international law into their statutes and employ both national and international judges, counsel, and staff personnel. David Cohen, *"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future*, 43 STAN. J. INT'L L. 1, 2 (2007).

received far less scrutiny. That said, what limited attention has been given to the IMTFE has been overwhelmingly negative.[23] When comparing the IMTFE to the IMTN, critics tend to focus on how the Tokyo Tribunal was created—through a unilateral executive decree rather than an international agreement—and four common deficiencies related to: (1) allowing Emperor Hirohito to escape prosecution; (2) prosecuting only certain types of crimes; (3) failing to prosecute all criminals and offenses; and (4) missing a key opportunity to educate the Japanese civilian population.[24] While some censure of the IMTFE is warranted, many critics fail to appreciate the unique challenges posed by the conditions in the Pacific theater and the abundant similarities between Tokyo and Nuremberg.

Several key characteristics of the IMTN must be considered since the IMTFE Charter "carefully copied" the IMTN language with few modifications.[25] The IMTN was established by charter (negotiated by the United States, the United Kingdom, France, and the Soviet Union (present-day Russia)) at the London Conference in the summer of 1945.[26] Jurisdiction for the trial of military commanders, as well as national leaders, was established in Article 6 of the IMTN Charter.[27] Specifically, Article 6 called for the trial and punishment of major war criminals of the European Axis countries for not only conventional war crimes but also for two new crimes: "crimes against peace" and "crimes against humanity."[28] Convened at Nuremberg's Palace of Justice in November

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[23] At the opening of the tribunal in 1946, the IMTFE was marked with bad publicity. *Time* magazine stated that the Tokyo Tribunal "looked . . . like a third-string road company of the Nuremberg show." RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 3 (1971) (citing TIME, May 20, 1946).

[24] *See* Galvin, *supra* note 9, at 72; Zhang Wanhong, *From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (on the Sixtieth Anniversary of the Nuremberg Trials)*, 27 CARDOZO L. REV. 1673, 1675–77 (2006); *see generally* Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT'L L. 1085 (2010).

[25] MINEAR, *supra* note 23, at 23.

[26] *Id.* at 7.

[27] *Id.* at 23. *See* Charter of the International Military Tribunal, U.S.-Fr.-U.K.-U.S.S.R, art. 6, Aug. 8, 1945, 59 Stat. 1544 [hereinafter Nuremberg Charter].

[28] MINEAR, *supra* note 23, at 23; *see* Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 16–17 (1973). The term "crimes against peace" was defined in Article 6(a) of the Nuremberg Charter as "planning, preparation, initiation, or waging of a war of aggression, or war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing . . . ." Nuremberg Charter, *supra* note 27, art. 6(a). The term "crimes against humanity" was defined in Article 6(c) of the Charter as "inhumane acts committed against any civilian population, before or during war." *Id.* art. 6(c).

1945, the IMTN tried twenty-two of the highest-ranking political and military leaders of Nazi Germany.[29] The IMTN lasted a full year and produced eleven death sentences.[30] Upon completion of the IMTN, thousands of Nazi war criminals were left to be tried in other military tribunals[31] and domestic courts throughout Europe pursuant to the Moscow Declaration[32]—a policy that would carry over to the Far East to guide the prosecution of the Japanese.[33]

B. The International Military Tribunal for the Far East

Unlike the Nuremberg Charter, which is universally accepted as a true international agreement—the product of lengthy negotiations between the Big Four—the IMTFE Charter was issued via a unilateral declaration.[34] On January 19, 1946, acting under orders from the U.S. Joint Chiefs of Staff, General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP),[35] established the IMTFE and

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[29] HILARY EARL, THE NUREMBERG SS-EINSATZGRUPPEN TRIAL, 1945–1958: ATROCITY, LAW, AND HISTORY 23 (2009).

[30] *Id.*

[31] E.g., such as the additional twelve subsequent Nuremberg proceedings conducted by the United States. *Id.*

[32] The Moscow Declaration called for German officers and men, who had been responsible for or had taken a consenting part in the atrocities, to be "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries. . . ." Suzannah Linton, *Rediscovering the War Crimes Trials in Hong Kong, 1946–48*, 13 MELB. J. INT'L L. 284, 289–90 (2012).

[33] *Id.* at 290.

[34] ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS 60 (1987). The Nuremberg Charter was later backed by nineteen other nations and ultimately endorsed by the General Assembly of the United Nations. MINEAR, *supra* note 23, at 36.

[35] General MacArthur had previously accepted the surrender of the Japanese "for the United States, Republic of China, United Kingdom, and the Union of the Soviet Socialist Republics, and in the interest of the other United Nations at war with Japan," on September 2, 1945. Instrument of Surrender, *supra* note 12. With the signing of the Instrument of Surrender, the Japanese government formally recognized the Allied Powers' right to prosecute Japanese war criminals. TOTANI, *supra* note 11, at 7. Almost immediately thereafter, the United States took affirmative steps to create an international military tribunal for prosecuting suspected war criminals. On September 22, 1945, General MacArthur received a U.S. Joint Chiefs of Staff (JCS) directive that included detailed instructions concerning the establishment of an international military tribunal. Within two weeks of Japan's surrender, the Supreme Commander of the Allied Powers's Legal Section initiated the process for apprehending major Japanese war criminals. By December 1945, President Harry Truman had appointed former assistant to the attorney

issued its Charter through executive decree.[36]

Although no formal negotiations preceded the IMTFE Charter,[37] this document relied heavily on the structure and language of the Nuremberg Charter, which incorporated the respective views of the countries attending the negotiations in London in 1945.[38] Further, without question, the other allied countries were included in the IMTFE policy-making process.[39] Following the Moscow Conference in December 1945, the allied nations established the Far Eastern Commission (FEC) to formulate the policies, principles, and standards to ensure Japan fulfilled its obligations under the terms of surrender.[40] In the end, the amended IMTFE Charter, issued on April 26, 1946, contained revisions proposed by the FEC.[41] The most notable change to the Charter gave each FEC member, not just the signatories of the Instrument of Surrender, the right to nominate a justice and an associate counsel (i.e., assistant prosecutor) to the IMTFE.[42]

The key differences between the IMTN and IMTFE Charters were these: the number of judges (eleven at Tokyo versus four at Nuremberg); the number of languages (two at Tokyo, as opposed to four at Nuremberg); the number of prosecutors (a chief prosecutor and eleven associate prosecutors at Tokyo instead of four co-equal prosecutors at Nuremberg); and the absence of a provision to prosecute criminal

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general Joseph B. Keenan as chief prosecutor for the tribunal in Tokyo in the hopes that a coherent prosecution staff and case would emerge. PICCIGALLO, *supra* note 13, at 10.

[36] PICCIGALLO, *supra* note 13, at 10–12.

[37] MINEAR, *supra* note 23, at 20.

[38] *Id.* at 20–21. Typically, such action by the United States would have caused major friction amongst the Allies; however, General MacArthur's actions were generally accepted by the Allied Powers. *Id.*

[39] The initial JCS directive to General MacArthur was actually reviewed and approved by the allied countries. PICCIGALLO, *supra* note 13, at 10–11.

[40] *Id.* at 10–11. The Far Eastern Commission (FEC) was composed of representatives from eleven nations: the U.S., the U.S.S.R., United Kingdom, China, France, the Netherlands, Canada, Australia, New Zealand, India and the Philippines. JAMES F. BYRNES ET AL., REPORT OF THE MEETING OF THE MINISTERS OF FOREIGN AFFAIRS OF THE UNION OF SOVIET SOCIALIST REPUBLICS, THE UNITED STATES OF AMERICA, THE UNITED KINGDOM (Dec. 16–26, 1945), *available at* http://avalon.law.yale.edu/20th_century/decade19.asp. As part of the FEC, each nation was responsible, in varying degrees, for investigating, locating, apprehending, and prosecuting Japanese war criminals. PICCIGALLO, *supra* note 13, at xii. Much like the London Conference that preceded the signing of the IMTN Charter, the FEC provided a forum for the other allied countries to voice any reservations. *Id.* at 11.

[41] PICCIGALLO, *supra* note 13, at 11.

[42] MINEAR, *supra* note 23, at 21.

organizations.[43] However, arguably the biggest difference was the IMTFE Charter's "exclusive provision" that restricted prosecution to only those persons charged with an offense that included crimes against peace.[44] Article 5(a) of the IMTFE Charter explicitly mandated that the IMTFE would have the power to try and punish "war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace."[45] Since the IMTFE's authority to prosecute derived from this article, suspects prosecuted for such crimes became known as class "A" defendants.[46] With jurisdiction limited to only crimes against peace, just twenty-eight class "A" defendants were selected for prosecution at the Tokyo Tribunal.[47]

All but two of the defendants tried at the IMTFE "occupied the highest government and military posts" at some point between 1928 and 1945.[48] Unfortunately, Japan's Head of State, Emperor Hirohito, was

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[43] Robert B. Smith, *Japanese War Crime Trials*, HISTORYNET (June 12, 2006), http://www.historynet.com/japanese-war-crime-trial.htm. *See* MINEAR, *supra* note 23, at 22.

[44] PICCIGALLO, *supra* note 13, at 11–12; *see* International Military Tribunal for the Far East (IMTFE) Charter art. 5 (Jan. 1, 1946) [hereinafter IMTFE Charter], *available at* http://www.uni-marburg.de/icwc/dateien/imtfec.pdf.

[45] IMTFE Charter, *supra* note 44, art. 5. Article 5(a) defined "crime against peace" as "[n]amely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]" *Id.* The Charter's inclusion of "crimes against peace" directly reflected the precedent set at Nuremberg and the idea that war waged against peaceful countries in breach of the General Treaty for the Renunciation of War of 1928 (i.e., the Kellogg-Briand Pact) constituted a crime under international law. Although the Kellogg-Briand Pact did not establish individual criminal responsibility for such a war, Nuremberg established a new international standard. TOTANI, *supra* note 11, at 20–21.

[46] Galvin, *supra* note 9, at 70. The IMTFE Charter also addressed "violations of the laws or customs of war" and "crimes against humanity" under articles 5(b) and 5(c) respectively (commonly referred to as class "B" and "C" violations). IMTFE Charter, *supra* note 44, art. 5. However, because of the "exclusive provision"—limiting the IMTFE's prosecution to only class "A" defendants—the Charter essentially compelled domestic courts or commissions to prosecute the class "B" and "C" cases. PICCIGALLO, *supra* note 13, at 12.

[47] PICCIGALLO, *supra* note 13, at 14.

[48] *Id.*; *see* Galvin, *supra* note 9, at 70. The accused included four former prime ministers, four former foreign ministers, five former war ministers, two former navy ministers, and four former ambassadors, amongst others. Smith, *supra* note 43. At arraignment, all the defendants pled not guilty to all counts except for Shumei Okawa, who was dismissed from court to undergo psychiatric treatment. MINEAR, *supra* note 23, at 25. Of the twenty-eight defendants arraigned, only twenty-five were ultimately sentenced. *Id.* Two

omitted from the list of accused—arguably the single biggest contributing factor to the IMTFE's negative legacy.[49] Critics of the Tokyo Tribunal emphasize the apparent lack of justice done in the Far East because the person ultimately responsible for Japan's armed forces—and by extension the atrocities committed by Japanese forces—was never prosecuted.[50]

But these same critics forget (or purposefully ignore) the fundamental differences of the military occupations in Germany and Japan. Specifically by the time Germany surrendered on May 7, 1945, little was left of the German military and the former Nazi regime.[51] Hitler was dead, Berlin had fallen to the Soviets, and the United States and Great Britain controlled Western Europe from the Atlantic to the Elbe River.[52] On the contrary, the four main islands of Japan were never occupied by the United States or any other allied country before the landing of the 11th Airborne Division troops on the outskirts of Tokyo on August 30, 1945.[53] And while the Instrument of Surrender was considered unconditional, concessions were clearly made to avoid the large number of casualties that were predicted for the invasion of Japan's main islands.[54] Yet, despite its deficiencies, the IMTFE proved to be a valuable and efficient international forum for executing justice.[55]

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defendants died before completion of the trial, and Shumei Okawa was found unfit to stand trial. *Id.*

[49] Galvin, *supra* note 9, at 71–72.

[50] *Id.*

[51] James B. Griffin, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 410 (2001).

[52] *Id.*

[53] E.M. FLANAGAN, JR., AIRBORNE: A COMBAT HISTORY OF AMERICAN AIRBORNE FORCES 340–41 (2002).

[54] Although Japan's navy and industrial capacity had been destroyed by 1945, millions of armed Japanese soldiers remained resolved to fight for Emperor Hirohito. Griffin, *supra* note 51, at 414. Without question, no concession was greater than granting immunity to Emperor Hirohito—"a calculated political decision undertaken in the best interests of the Allied powers." PICCIGALLO, *supra* note 13, at 16.

[55] On November 4, 1948—two-and-a-half years after the opening of the IMTFE—the eleven international justices, "after analyzing the enormous collection of evidence introduced at the trial," returned their verdict. Twenty days later, the representatives of the Allied Council for Japan reviewed and confirmed the verdicts. PICCIGALLO, *supra* note 13, at 23, 31. In comparison, the trial of Charles Taylor alone took more than six years to complete. Indicted by the SCSL on March 7, 2003, Taylor was taken into custody and transferred to the SCSL on March 29, 2006. *Background on Prosecutor v. Charles Ghankay Taylor*, http://www.sc-sl.org/CASES/CharlesTaylor/tabid/107/Default.aspx (last visited Mar. 19, 2014). His sentence was announced on May 30, 2012. Owen

III. International Tribunals

A. China's Role in the International Military Tribunal for the Far East

China's role in the development of international war crimes policy in the Pacific theater pre-dated Japan's official surrender on September 2, 1945.[56] In January 1942, a Chinese minister attended the signing of the Allied Declaration of St. James, which declared Nazi atrocities to be in violation of the laws and customs of war, and subscribed to its principles.[57] The Chinese joined in the establishment of the UN War Crimes Commission (UNWCC) in October 1943, and spearheaded the creation of the Far Eastern Sub-Committee (FESC) in 1944.[58]

Following Japan's surrender, the Chinese attended the Far Eastern Advisory Committee (FEAC) meeting in Washington, D.C., in October 1945.[59] Once the FEAC was reconstituted as the Far Eastern Committee (FEC) in December 1945, China presided over sub-committee No. 5, "War Criminals," throughout its duration.[60] In May 1946, when the IMTFE finally convened, a Chinese judge sat on the bench (alongside the other ten judges from the represented nations), and a Chinese attorney worked on the international prosecution team.[61] Additionally, the Chinese assisted a fact-finding group that "scoured China for evidence

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Bowcott, *Charles Taylor Sentenced to 50 Years in Prison for War Crimes*, THE GUARDIAN, May 30, 2012, http://www.theguardian.com/world/2012/may/30/charles-taylor-sentenced-50-years-war-crimes.

[56] As previously discussed in footnote 35, although General MacArthur officially accepted Japan's surrender on behalf of the Allied Powers, China was one of four signatories to the Instrument of Surrender. Instrument of Surrender, *supra* note 12.

[57] PICCIGALLO, *supra* note 13, at 158. Signatories of the St. James Declaration, which included representatives in exile of the nine European countries under German occupation, committed themselves to punish, "through the channel of organized justice," those guilty of or responsible for war crimes. Wen-Wei Lai, *Forgiven and Forgotten: The Republic of China in the United Nations War Crimes Commission*, 25 COLUM. J. ASIAN L. 306, 309 (2012).

[58] PICCIGALLO, *supra* note 13, at 158. On multiple occasions, Chinese representatives at the UN War Crimes Commission argued for the expansion of jurisdiction over Japanese war crimes to include offenses committed starting with the Manchuria invasion. Lai, *supra* note 57, at 315–18. At China's urging, the IMTFE's prosecutorial branch eventually expanded its jurisdiction to cover war crimes committed since April 1928, when the Japanese assassinated Chinese Generalissimo Zhang Zuolin, whose forces occupied Manchuria. *Id.* at 318.

[59] PICCIGALLO, *supra* note 13, at 158.

[60] *Id.*

[61] *Id.*

and witnesses for use at the [Tokyo] tribunal."[62]

The IMTFE Charter established specific procedural safeguards and guaranteed certain rights for the twenty-eight Japanese defendants tried in Tokyo.[63] Similar to Nuremberg, the Allies recognized the unique character of war-crimes trials and relaxed the rules of evidence; they adopted and applied "to the greatest possible extent expeditious and non-technical procedure," admitting any evidence deemed to have probative value.[64] At the close of the IMTFE, all of the defendants were found guilty of at least one of the charged counts.[65] The findings were fully supported by eight of eleven judges, including the judge from China.[66]

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[62] *Id.* at 158–59. China had a strong interest in promoting justice through the prosecution of war criminals under the IMTFE Charter. From the Chinese standpoint, two of the most infamous defendants prosecuted at the Tokyo Tribunal were General Iwane Matsui, former Commander of Japan's Central China Area Army during the Rape of Nanking, and Mr. Hirota Koki, the foreign minister at same time (1937–1938). MINEAR, *supra* note 23, at 71–72.

[63] These rights and safeguards included: public indictments and statement of plain, concise charges in the Japanese language; bilingual (English/Japanese) trials; the right to counsel (specifically, freely chosen counsel subject to the tribunal's approval); the right to examine witnesses and conduct a defense; and aid in the production of evidence. MINEAR, *supra* note 23, at 21–22. Allied authorities even established an International Defense Staff, consisting of distinguished Japanese attorneys and Western attorneys (mostly American), brought on "to assist Japanese counsel" with Western legal concepts, trial procedures, and style. PICCIGALLO, *supra* note 13, at 13–14.

[64] PICCIGALLO, *supra* note 13, at 12. This guidance opened the door for government and ICRC documents that "appeared" genuine, which included: any affidavit, deposition, or signed statement; sworn and unsworn statements (to include diary entries and letters); copies of the aforementioned documents (rather than originals); and hearsay. The evidentiary realities (e.g., repatriation of ex-POWs, witnesses and evidence scattered across the Pacific, destruction of key documents, difficulties identifying, locating, and apprehending suspects, etc.) made trying these cases very difficult. Following any restrictive rules of evidence (like any rules of evidence that were applicable at the time) would have made prosecution nearly impossible. *Id.* at 12–13. Article 13 of the Charter outlined the rules of evidence applicable at the tribunal. IMTFE Charter, *supra* note 44, art. 13.

[65] MINEAR, *supra* note 23, at 31. On the other hand, none of the defendants were convicted of all counts. Sentences for the defendants included death by hanging (seven), life imprisonment (sixteen), twenty years' confinement (one), and seven years' confinement (one). *Id.*

[66] *Id.* The three dissenting justices were France (who dissented in part because Emperor Hirohito had not been indicted and because the decision came from "the tribunal" versus "the majority"), the Netherlands (who dissented on the reasoning behind the finding that aggressive war was a crime, but not the finding itself, and on the issue of civilian responsibility for military acts), and India (who stated that the evidence had been slanted in favor of the prosecution, that the counts had not been proved, and that all accused were innocent on all counts). *Id.* at 32–33.

The defendants were granted ten days to appeal to the SCAP. After consultation with the diplomatic representatives of the nations comprising the FEC, General MacArthur confirmed the sentences.[67]

B. The Special Court for Sierra Leone

Created by an international agreement between the Government of Sierra Leone and the United Nations,[68] the SCSL was a departure from the international ad hoc criminal tribunals and the International Criminal Court, which employ only international law.[69] Instead, the SCSL combined international and domestic law into one system, enabling it to prosecute both international and national crimes.[70] Consequently, proponents of hybrid tribunals argue that these courts are less likely to be manipulated by politics and corruption or compelled to use limited or antiquated laws as domestic courts might.[71] Additionally, unlike entirely international tribunals, hybrid courts are arguably better suited to meet the needs of countries emerging from conflict and are less likely to be removed from the circumstances where the crimes occurred.[72] In the

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[67] *Id.* at 33 (citing Solis Horwitz, *The Tokyo Trial*, INT'L CONCILIATION, Nov. 1950, at 573).

[68] Tom Perriello & Marieke Wierda, *Prosecutions Case Studies Series: The Special Court for Sierra Leone Under Scrutiny* 1 (2006), ICTJ, http://ictj.org/publication/special-court-sierra-leone-under-scrutiny. In June 2000, Sierra Leone's president, Ahmed Tejan Kabbah, sent a letter to the UN Security Council requesting international support for a "special court" to prosecute members of the Revolutionary United Front (RUF) for their crimes against the Sierra Leone and UN peacekeepers. Letter from the Permanent Representative of Sierra Leone, to the United Nations to the President of the Sec. Council, U.N. Doc. S/200/786 [hereinafter Kabbah's Letter]. The UN Security Council responded by passing UN Security Council Resolution (UNSCR) 1315 authorizing the Secretary-General to negotiate the creation of an international special court with Sierra Leone. S.C. Res. 1315, para. 1, U.N. SCOR., U.N. Doc. S/RES/1315 (Aug. 14, 2000), *available at* http://unscr.com/en/resolutions/doc/1315 [hereinafter UNSCR 1315].

[69] Chandra Lekha Sriram, *Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone*, 29 FORDHAM INT'L L.J. 472, 474 (2006).

[70] *Id.* at 474.

[71] *Id.*

[72] *Id.* In the case of Sierra Leone, while there was a functioning national government at the time the SCSL was created, the country's civil and judicial infrastructure had been severely damaged, and the RUF was on the verge of another coup. LANSANA GBERIE, A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE 166 (2005). Arguably, the hybrid nature of the court gave Sierra Leone a sense of "ownership" over the cases since national law alone was not capable. Charles Chernor Jalloh, *The Contribution of the Special Court for Sierra Leone to the Development of International Law*, 15 AFR. J. INT'L & COMP. L. 165, 173 (2007).

case of the SCSL, the court was completely independent of the country's regular judicial system and exercised concurrent jurisdiction with, but also primacy over, the domestic courts.[73]

Established in January 2002 following a decade-long civil war that devastated Sierra Leone, the SCSL "emerged from a unique convergence of a government eager for justice in the wake of a failed amnesty . . . and an international community anxious to stabilize the region by removing those who threatened the peace."[74] The conflict began in 1991 when the Revolutionary United Front (RUF), a partly indigenous rebel group, invaded Sierra Leone from neighboring Liberia,[75] resulting in the disintegration of state authority.[76] By the close of the war in 2000, Sierra Leone had suffered two military coups (in 1992 and 1997), a partial restoration of the government (in 1998), and a failed negotiated peace agreement, the Lomé Accord (in 1999).[77]

The conflict in Sierra Leone was notable for the war crimes committed against tens of thousands of civilians, which included torture, rape, mutilation, and murder.[78] But it was the widespread use of child combatants,[79] systematic amputations, and the trafficking of "blood diamonds" that made the conflict infamous.[80] Further, although

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[73] Sriram, *supra* note 69, at 480–81. This meant that the SCSL had the authority to compel Sierra Leone's domestic courts to relinquish certain cases upon request. *Id.* at 481.

[74] Perriello & Wierda, *supra* note 68, at 1, 14.

[75] *Id.* at 4. Out of the 100 RUF fighters who initially invaded Sierra Lone, almost fifty of them were Liberian and Burkinabe mercenaries. Matiangai Sirleaf, *Regional Approach to Transitional Justice: Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia,* 21 FLA. J. INT'L L. 209, 218–19 (2009) (citing Int'l Crisis Group, Africa Reports No. 43, Liberia the Key to Ending Regional Instability 2 (2002)).

[76] Sirleaf, *supra* note 75, at 218.

[77] Perriello & Wierda, *supra* note 68, at 5–7. The Lomé Accord remains a matter of controversy. Critics feel it was a failure because Charles Taylor was able to dictate the terms of the agreement despite his ties to the RUF. Additionally, the final agreement included an amnesty "for all fights from all factions from all crimes." *Id.* at 7 (citing Lomé Peace Agreement, Sierra Leone-RUF, July 7, 1999, art. IX). Moreover, the Lomé Accord failed to end all hostilities. In May 2000, the RUF took 500 UN peacekeepers hostage and a week later "closed in on Freetown." *Id.* British paratroopers were deployed to evacuate citizens, provide security, and free hostages." *Id.*

[78] Cohen, *supra* note 22, at 11.

[79] Sriram, *supra* note 69, at 475.

[80] Cohen, *supra* note 22, at 11. Notoriety of these blood diamonds can be attributed, in part, to the Oscar-nominated Warner Bros. film *Blood Diamond* (2006), starring Leonardo DiCaprio. *See Blood Diamond*, INTERNET MOVIE DATABASE,

considered a non-international armed conflict, the violence in Sierra Leone had unique regional elements, specifically the involvement of citizens of neighboring states as both targets and combatants.[81] The conflict's cross-border aspect was underscored by the direct support provided to the RUF by the former Liberian president, Charles Taylor.[82]

Unfortunately, the jurisdictional reach of the SCSL was extremely limited, and thus it did not sufficiently cover the conflict's gruesome war crimes.[83] Yet, limited jurisdiction was just one of several pitfalls that plagued the SCSL, many of which likely could have been avoided if China's three-system approach to prosecuting war criminals had been considered.

C. Lessons Learned from the Tokyo Tribunals

When the United Nations and Sierra Leone developed the concept of the SCSL, they apparently did not consider the similar challenges seen at the Tokyo Tribunals. As a result, they failed to adequately resolve several common (and easily foreseeable) shortcomings.

1. Jurisdictional Limitations

The SCSL was established as a court of limited personal, territorial, and temporal jurisdiction.[84] While limited jurisdiction is not uncommon in international criminal tribunals—for instance, the IMTFE Charter limited personal jurisdiction to only those defendants "charged with

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http://www.imdb.com/title/tt0450259/. And, to hip-hop artist Kanye West, who won a Grammy Award for "Best Rap Song" in 2005 for "Diamonds from Sierra Leone." *See Kanye West*, GRAMMY, http://www.grammy.com/artist/kanye-west.

[81] Sriram, *supra* note 69, at 482 (citing Fritz & Smith, *supra* note 17, at 408, 417). Both Liberia and Burkina Faso provided considerable support to the RUF, such as training, ammunition, money, and safe-haven. Additionally, Guinea was a victim of cross-border attacks. Fritz & Smith, *supra* note 17, at 417.

[82] At the time, Taylor was the leader of the National Patriotic Front of Liberia (NPFL), which had invaded northern Liberia in December 1989. Taylor believed that the Economic Community of West African States was blocking his attempts to take control of Liberia's capital. In an effort to destabilize the region, Taylor backed the RUF. The RUF received weapons, training, and safe haven in NPFL held territories. Sirleaf, *supra* note 75, at 218–19.

[83] Perriello & Wierda, *supra* note 68, at 2.

[84] *Id.* at 15–16.

offenses which include[d] crimes against peace"[85]—the SCSL's jurisdictional restrictions negatively impacted the notion of post-war justice.[86] Under the SCSL Statute, personal jurisdiction was limited to only "those who bear the greatest responsibility."[87] As a result, only thirteen individuals were indicted for war crimes after more than ten

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[85] IMTFE Charter, *supra* note 44, art. 5. *See* PICCIGALLO, *supra* note 13, at 12.

[86] Another key component that impacted the post-war justice process in Sierra Leone was the creation of the country's Truth and Reconciliation Commission (TRC). A product of the 1999 Lomé Accord, the TRC promised full amnesty to combatants (on both sides) as part of the peace settlement. William Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, CRIM. LAW FORUM 15, 3–54, 3 (2004) *available at* http://center.theparentscircle.org/images/19c948eced2d4fde8a8dd5c1324def04.pdf. While continued hostilities between Sierra Leone and the RUF dissolved the agreement (and prompted Sierra Leone's President Kabbah to request UN support for the creation of the SCSL), Sierra Leone's Parliament eventually passed the Truth and Reconciliation Act in February 2000. *Truth Commission: Sierra Leone*, U.S. INST. OF PEACE, http://center.theparentscircle.org/images/19c948eced2d4fde8a8dd5c1324dcf04.pdf (last visited Oct. 31, 2014). The TRC was mandated "to produce a report on human rights violations beginning in 1991, provide a forum for both victims and perpetrators, and recommend policies to facilitate reconciliation and prevent future violations." *Id.* However, at times, the parallel operations of the TRC and SCSL created unnecessary tension. Both institutions respected the role of the other and appreciated their respective contributions to post-war justice but full cooperation between the two never fully matured. Schabas, *supra* note 85, at 5. In fact, during the final months of the TRC's existence, the SCSL's prosecutor was forced to litigate a major dispute over the testimony by indicted prisoners (who requested to testify in a public hearing at the TRC) before the court's judges. *Id.* President of the Appeals Chamber, Geoffrey Robertson, ruled that the accused could testify, but not publicly—a decision that split the proverbial "baby." *Id.* Given the intended scope of this article, examination of post-war justice is limited to war-crimes prosecution since a TRC was not conducted in China after World War II. *See generally* Galvin, *supra* note 9.

[87] Article 1(1) of the SCSL Statute states that

> [t]he Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law . . . including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

Statute of the Special Court for Sierra Leone art. 1(1), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176 [hereinafter Special Court Statute]. Article 2 provides the court with authority to prosecute "crimes against humanity," while Article 3 grants the court jurisdiction over conventional war crimes (i.e., violations of Article 3 common to the Geneva Conventions and of Additional Protocol II). *See id.* arts. 2, 3.

years of war;[88] other perpetrators, who played an important role in the violence but did not reach the "greatest responsibility" threshold, avoided prosecution by the SCSL altogether.[89]

The SCSL was also restricted by limited temporal and territorial jurisdiction. Although the Sierra Leonean conflict dated back to 1991, only crimes committed after November 30, 1996, were prosecuted before the SCSL; thus, any atrocities that occurred during the five years prior to that date fell outside of the court's purview.[90] Even more troubling than this temporal restriction was the decision to limit the SCSL's territorial jurisdiction to crimes "committed in the territory of Sierra Leone."[91] The war crimes committed during the conflict were not limited to Sierra Leone. And unfortunately, crimes committed elsewhere in the region—particularly in Liberia and Guinea—were not heard by the court.[92]

As previously noted, limited jurisdiction is not uncommon to international tribunals. The IMTFE Charter, which also recognized the existence of Class B and C violations (i.e., "violations of the laws or customs of war" and "crimes against humanity"), only enabled the

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[88] *Court Records Documenting System*, SPECIAL COURT FOR SIERRA LEONE, http://www.sc-sl.org/scsl/Listcases.asp [hereinafter *Court Records Documenting System*] (last visited Mar. 9, 2014). Three indictments—against RUF leader Foday Sankoh, his chief of staff Sam Bockarie, and Sierra Leone's interior minister, Sam Hinga Norma—were subsequently dismissed because the defendants died. J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N.Y. INT'L L. REV. 37, 42 (2006). Ten more individuals were charged by the SCSL for contempt of court resulting from their testimony. *Court Records Documenting System*, *supra*.

[89] Cohen, *supra* note 22, at 26.

[90] Perriello & Wierda, *supra* note 68, at 16. Some proponents of the November 30, 1996 start date argued that going back to 1991 would make prosecution very difficult, if not impossible. Yet, most of the crimes that took place in Sierra Leone's outlying provinces were committed before the conflict reached the capital, Freetown, in 1997. Thus, the Court's temporal jurisdiction limitation appeared to ignore the crimes committed against people outside of Freetown. *Id.*

[91] Special Court Statute, *supra* note 87, art. 1(1). Arguably, this limited territorial jurisdiction is appropriate for war crimes committed in a non-international armed conflict. However, as previously discussed, given the cross-border elements of the conflict, this limitation adversely effected post-war justice—especially for the Liberians.

[92] Fritz & Smith, *supra* note 17, at 417. *See* Sirleaf, *supra* note 75, at 220–21. Charles Taylor was not only responsible for crimes committed in Sierra Leone, but also for "grave international crimes occurring in the territory of Liberia." *Id.* at 238. Liberia's exclusion from the SCSL will be discussed in greater detail in the next subsection.

IMTFE to prosecute class A violations (i.e., "crimes against peace").[93] Additionally, certain categories of crimes were excluded from prosecution at the IMTFE, to include crimes related to the procurement and use of "comfort women" (i.e., forced prostitution)[94] and the use of biological and chemical weapons.[95] Finally (and arguably the greatest criticism of the IMTFE), the IMTFE had no jurisdiction over Emperor Hirohito, who had been granted immunity by the allied nations.[96] While Sierra Leone did not repeat the IMTFE's decision to immunize a Head of State from prosecution, it failed to expand the scope of personal, temporal, and territorial jurisdiction to include more crimes and more perpetrators, and therefore, it missed an opportunity to bring justice to a larger percentage of victims.[97]

2. Exclusion of Other Interested Parties

The SCSL, which was composed of two Trial Chambers (each with three judges) and one Appeals Chamber (consisting of five judges),[98]

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[93] IMTFE Charter, *supra* note 44, art. 5. Thus, class B and C violations were left to the domestic tribunals assembled outside of Tokyo. PICCIGALLO, *supra* note 13, at 12, 33.

[94] Galvin, *supra* note 9, at 74. Apart from one national trial regarding the rape of Dutch comfort women, no other cases involving such crimes were prosecuted in either the Tokyo Tribunal or national-level tribunals. *Id.*

[95] *Id.* at 74–75. The U.S. prosecutors decided to grant immunity to Japanese soldiers assigned to Unit 731 in return for information obtained from medical experiments. *Id.* at 74. Unit 731 was a Japanese military unit that produced biological weapons, engaged in biological warfare, and conducted nonconsensual medical experiments, such as testing "plague-infested flea bombs" and releasing anthrax bombs. *Id.* at 65.

[96] Lai, *supra* note 57, at 320–21; *see* Wanhong, *supra* note 24, at 1675. Granting Emperor Hirohito immunity arguably had significant unintended consequences; specifically, failure to prosecute Hirohito greatly reduced "any sense of national shame or guilt over the atrocities committed by Japanese forces." Galvin, *supra* note 9, at 72 (citing GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 191 (1999)).

[97] *See* Cohen, *supra* note 22, at 26.

[98] RESIDUAL SPECIAL COURT FOR SIERRA LEONE, *supra* note 16. The original composition of the court was two Chambers—one Trial Chamber and one Appeals Chamber. Perriello & Wierda, *supra* note 68, at 19. The second Trial Chamber was added six months later in January 2005. Cohen, *supra* note 22, at 12. Trial Chambers judges were appointed by both Sierra Leone (one appointment) and the UN Secretary-General (two appointments). As for the Appeals Chamber, two judges were appointed by Sierra Leone and three were appointed by the UN Secretary-General. Perriello & Wierda, *supra* note 68, at 19.

never fully integrated representatives from all interested parties.[99] Initially, Sierra Leone only used three of its four judicial nominations.[100] Even after replacing two judges in the Appeals Chamber[101] and adding two judges as alternates,[102] no judges were ever appointed from neighboring Liberia, Burkina Faso, Guinea, or Cote d'Ivoire[103]—all of which, to varying degrees, had an interest in stabilizing the region and prosecuting war criminals involved in the conflict.[104] Furthermore, the court's Office of the Prosecutor, which included approximately sixty-five professional staff employees, was overwhelmingly comprised of Americans and Canadians.[105] From an equity standpoint, the Sierra

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[99] The following countries were represented in the three SCSL chambers: Austria, Cameroon, Canada, Nigeria, Northern Ireland, Samoa, Sierra Leone, Sri Lanka, Uganda, and the United Kingdom. Justice Hassan Jallow (The Gambia) was formerly appointed as an Appeal Chamber judge, but left the court in September 2003 to become the Chief Prosecutor of the International Criminal Tribunal for Rwanda. Perriello & Wierda, *supra* note 68, at 19.

[100] Sierra Leone appointed two Sierra Leonean judges, Justices George Gelaga King and Rosolu John Bankole Thompson, and a Samoan judge, Justice Richard Lussick, to the court. *Id*. The decision to only nominate two national judges contributed to the perception that the court was not a true hybrid institution. *Id*.

[101] Justice Geoffrey Robertson (the United Kingdom) resigned over allegations of bias in 2007. *Geoffrey Robertson QC's Replacement Appointed*, HARV. INT'L L. J. ONLINE (Nov. 14, 2007, 9:28 AM), http://www.harvardilj.org/tag/scsl/feed/. Justice A. Raja N. Fernando (Sri Lanka) died in 2008. Press Release, Special Court for Sierra Leone, Justice A. Raja N. Fernando Passes Away (Nov. 24, 2008), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=woFmRisBcRA%3d&tabid=181 (on file with the Special Court for Sierra Leone Outreach and Publication Office). The two vacant positions in the Appeals Chamber were filled by Justice Jon Kamanda (Sierra Leone) in November 2007 and Shireen Avis Fisher (the United States) in May 2009. THE APPEALS CHAMBER, THE SPECIAL COURT FOR SIERRA LEONE AND THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, FREETOWN, AND THE HAGUE, http://rscsl.org/Appeals_Chamber.html (last visited Oct. 31, 2014) [THE APPEALS CHAMBER].

[102] Justice El Hadji Malick Sow (Senegal) was appointed alternate judge to the Trial Chamber II by the United Nations in May 2007. *See* TRIAL CHAMBER II, THE SPECIAL COURT FOR SIERRA LEONE AND THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, FREETOWN, AND THE HAGUE, http://rscsl.org/Trial_Chamber_II.html (last visited Oct. 31, 2014) [TRIAL CHAMBER II]). Justice Philip Nyamu Waki (Sierra Leone) was appointed alternate judge to the Appeals Chamber and joined the court in Feb. 2012. *See* THE APPEALS CHAMBER, *supra* note 101.

[103] *See* THE APPEALS CHAMBER, *supra* note 101; TRIAL CHAMBER II, *supra* note 102; TRIAL CHAMBER I, THE SPECIAL COURT FOR SIERRA LEONE AND THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, FREETOWN, AND THE HAGUE, http://rscl.org/Trial_Chamber_I.html (last visited Oct. 31, 2014).

[104] Sirleaf, *supra* note 75, at 220–21.

[105] While Sierra Leoneans held approximately one-third of the staff positions, nearly half the posts (and almost every senior position) were occupied by the individuals from the

Leoneans were underrepresented.[106] Furthermore, Liberia, which arguably had a greater interest in prosecuting its former Head of State, Charles Taylor, than Sierra Leone, was left out of the trial process entirely.[107]

Unlike the SCSL, the Tokyo Tribunal provided an international forum that included all the allied nations that were involved in the Pacific-theater conflict. And although not commonly recognized as a true international court, the IMTFE included representatives from eleven different nations when it opened in May 1946.[108] In contrast, the absence of Sierra Leone's neighboring West African countries—especially Liberia—only supports the assertion that the SCSL was not truly international (nor truly regional) in nature.[109] Undoubtedly, the conflicts in Liberia and Sierra Leone, "which resulted in nearly 300,000 deaths and created millions of refugees and internally displaced people[,]" were tied to Taylor and his relationship with the RUF leader, Foday Sankoh.[110] Yet, despite the SCSL's successful prosecution of

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"Global North" (i.e., the United States and Canada). Perriello & Wierda, *supra* note 68, at 21.

[106] In a hybrid system, appointing local judges and hiring local staff can help shape local perception of the legitimacy of the system. However, marginalizing local institutions and actors undermines the hybrid court's authority. *See* Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 361–62 (2006). Until the additions of Justices Kamanda (in 2007) and Waki (in 2012), only two Sierra Leoneans occupied SCSL judge positions (out of thirteen available). *See* Perriello & Wierda, *supra* note 68, at 19; *see also supra* note 97 and accompanying text. Furthermore, the first Sierra Leonean Acting Prosecutor of the Special Court, Joseph Kamara, was not appointed until the fall of 2009. *See* Press Release, Special Court for Sierra Leone, Joseph F. Kamara Named Acting Prosecutor (Sept. 8, 2009), *available at* http://www.rscsl.org/Documents/Press/2009/pressrelease-090809.pdf (on file with the Special Court for Sierra Leone Outreach and Publication Office).

[107] No Liberians were selected to serve as judges or prosecutors. Participation as a defendant or witness was the exception. *See generally* Sirleaf, *supra* note 74.

[108] The countries included the United States, the United Kingdom, Australia, the Netherlands, China, the Philippines, France, the Soviet Union, Canada, New Zealand, and India. PICCIGALLO, *supra* note 13, at xii–xiii. The Chief Justice of the IMTFE, Sir William Webb, was an Australian and sat beside justices from the ten other countries. *Id.* at 11. The official indictment, primarily a British document, was modified to represent each of the eleven legal systems involved, and was signed by all eleven prosecutors. *Id.* at 14.

[109] *See generally* Sirleaf, *supra* note 75; Perriello & Wierda, *supra* note 68, at 2.

[110] Sirleaf, *supra* note 75, at 218–19. The connection between the Liberian and Sierra Leonean conflicts dates back to December 1989 when the National Patriotic Front of Liberia, led by Taylor, invaded northern Liberia. Because Taylor's attempts to seize control of Liberia's capital were blocked by the Economic Community of West African

Taylor at The Hague,[111] the Liberians were left with only a shaky Truth and Reconciliation Commission to address the human-rights abuses they endured.[112] By failing to include all interested parties in the prosecution of these war crimes, the SCSL arguably delegitimized (even if only by perception) the post-conflict justice efforts in the region. This failure was then exacerbated by Sierra Leone's inability to recognize the importance of domestic war-crimes tribunals.

IV. The Use of Domestic Tribunals

In the aftermath of World War II in the Pacific, the Chinese relied heavily on their relationship with the United States to effectuate post-war justice.[113] With only twenty-eight Class A defendants indicted at the IMTFE, the vast majority of Japanese war criminals—ranging somewhere between 2,200 and 5,700—were left to be tried in domestic tribunals.[114] China's complex post-war political, economic, and military landscape was not conducive to a unilateral prosecutorial effort.[115] The

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States Cease-Fire Monitoring Group (ECOMOG)—in which Sierra Leone's then-President Momoh played a major role—Taylor began supporting the RUF's efforts in Sierra Leone. Even after taking power of Liberia via election in July 1997, Taylor's on-going support of the RUF continued to destabilize the region. *Id.* at 218–20.

[111] Taylor was found guilty of eleven counts of aiding and abetting war crimes and crimes against humanity and was sentenced to fifty years in jail. Bowcott, *supra* note 54. However, some critics argue that Charles Taylor's prosecution was a failure of the SCSL. For years, Taylor was able to avoid prosecution by seeking asylum in Nigeria. If not for the actions of Nigerian President Obasanjo (who handed Taylor over to the newly elected Liberian president Ellen Johnson-Sirleaf, who in turn transferred him to the SCSL on March 29, 2006), Taylor may have never been brought to justice. Higonnet, *supra* note 106, at 388. Taylor's prosecution (from extradition to verdict) took six years to complete, and cost an estimated $35–40 million per year to secure a conviction. Hirsh, *supra* note 21.

[112] *See generally*, Sirleaf, *supra* note 75.

[113] With assistance from the United States, the Nationalist government was able to affect the surrender of the vast majority of the 1.2 million Japanese troops in China proper. U.S. DEP'T OF STATE, *supra* note 18, at 312. Following Japan's surrender, American personnel and Chinese nationalist worked closely to coordinate the movement of witnesses and suspects from Japan to China for Chinese war crimes trials. Smith, *supra* note 43.

[114] China was just one of several countries/territories to hold Class B and C prosecutions; Allied military commissions were also conducted in Australia, Guam, and the Philippines, to name a few. PICCIGALLO, *supra* note 13, at xiv.

[115] Although Chiang Kai-shek's government was the internationally-recognized sovereign, the Chinese communists had gained considerable strength in central and north China. Additionally, parts of the country (western and southwestern China) were controlled by local warlords, more or less independent from Chiang Kai-shek's

Chinese needed outside assistance—American financial, military, and humanitarian aid—to rebuild their nation (including their judiciary) and strengthen their national security.[116] Likewise, the United States needed a strong and unified China to balance the growing power of the Soviet Union in Asia,[117] and continued to provide both financial and military support to the Chiang Kai-shek's government until 1949.[118] In furtherance of "the close and friendly Sino-American relationship" developed during the war, the Chinese continued to back American-led post-war efforts in the Pacific—as they had done at the IMTFE in Tokyo.

A. American Military Commissions in Shanghai

The Chinese understood that an enduring partnership with the United States was necessary to achieve their post-war justice efforts.[119] In an extraordinary yet calculated decision, Chang Kai-shek granted the United States "temporary authority" to conduct war-crimes trials within China's borders.[120] Conducted in Shanghai, the American-led commissions consisted of at least three members with proper qualifications (e.g., professional competency and strict impartiality)[121] and followed China-

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government. *See generally* RANA MITTER, FORGOTTEN ALLY: CHINA'S WORLD WAR II, 1937–1945 (2013).

[116] At the time of Japan's surrender, in addition to the threats posed by the Chinese communists, the Soviets occupied all of Manchuria. Chiang Kai-shek's government simply could not enforce post-war orders throughout the country without American support. *See generally* U.S. DEP'T OF STATE, *supra* note 18, at 311–13.

[117] *See id.*

[118] *See id.*

[119] PICCIGALLO, *supra* note 13, at 68–69.

[120] *Id.* at 68. The U.S. position during the latter stages of the war held that "in the absence of any agreement to the contrary," the invitation of U.S. forces to enter the country and repel the enemy "includes" the right and duty to conduct war crimes trials. *Id.* at 22 (citing U.S. DEP'T OF THE ARMY, REPORT OF THE JUDGE ADVOCATE, UNITED STATES FORCES, CHINA THEATER, UNITED STATES ARMY FORCES CHINA, NANKING HEADQUARTERS COMMAND AND ADVISORY GROUP CHINA (JAN. 1, 1945–JUNE 10, 1947)). However, Chiang Kai-shek actually granted such authority to remain in the good favor of the United States after the war. Chiang Kai-shek also recognized the advantages of an enduring partnership with the United States, which included joint investigations, pooled resources (such as housing and office space), and assistance with witness and suspect transportation. The Chinese were also the primary benefactor of an American-constructed courtroom on the top floor of a modern Shanghai jail. But perhaps no benefit was greater than China's ability to use the SCAP's authority and personnel to extradite suspects and witnesses from Japan to China for trial. PICCIGALLO, *supra* note 13, at 69.

[121] PICCIGALLO, *supra* note 13, at 36–37.

specific SCAP regulations.[122] In total, the United States tried eleven cases involving seventy-five defendants.[123] Eight of the seventy-five defendants were acquitted; ten were sentenced to death and subsequently executed.[124]

B. Chinese Domestic Trials

In addition to the U.S. commissions in Shanghai, China established thirteen of its own tribunals to prosecute war criminals not previously tried in Tokyo.[125] However, China's approach to war crimes fundamentally differed from that of the United States (and the rest of China's allies).[126] China's "Law Governing the Trial of War Criminals of October 24, 1946" ("Law of 24 October 1946"), which defined the applicable rules, offenses to be tried, and the jurisdiction of the court,[127] provided Chinese courts with very broad jurisdiction.[128] Article I explicitly stated that the courts would follow, in order of precedence,

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[122] *Id.* at 36. These SCAP regulations defined war crimes in language nearly identical to Article 5 of the IMTFE but did not permit the commissions operating in China to prosecute crimes against peace (only crimes against humanity and conventional war crimes), and they did not permit mixed inter-allied military tribunals. *Id.* at 36, 39. The regulations also established specific safeguards to ensure that every defendant received a fair trial. These safeguards included: open/public trial; complete and clear record of proceedings submitted to the convening authority after trial; notice, clear and complete, of all charges and specifications "well in advance of trial"; the right to counsel prior to and during the trial (which allowed court-appointed counsel, counsel of own choice, or self-representation); the right to testify on one's own behalf, present evidence, rebut evidence, and cross-examine; discovery (the required "the production of documents and other evidentiary material"); and finally, all sentences required approval by the convening authority prior to execution. *Id.* at 36.

[123] Almost all of the early trials in Shanghai involved the prosecution of Japanese troops who had participated in the mock trials and executions of the American pilots shot down over mainland China. Smith, *supra* note 43. The two most notable trials were the Hankow Airmen trial (eighteen Japanese charged with the humiliation, beating, torturing, and "cremation" of three pilots) and the Doolittle Raid Fliers trial (four Japanese officers responsible for the execution of eight U.S. pilots of the famous Doolittle Raid). PICCIGALLO, *supra* note 13, at 71–72; *see also* ALFRED E. CORNEBISE, THE SHANGHAI STARS AND STRIPES: WITNESS TO TRANSITION TO PEACE, 1945–1946, at 55 (2010).

[124] PICCIGALLO, *supra* note 13, at 74.

[125] THE POSTWAR JUDGMENT: II. NANKING WAR CRIMES TRIBUNAL, THE NANKING ATROCITIES, http://www.nankingatrocities.net/Tribunals/nanjing_02.htm (last visited Oct. 31, 2014).

[126] PICCIGALLO, *supra* note 13, at 159.

[127] 14 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS, at 152 (UN War Crimes Commission ed., 1949) [hereinafter LAW REPORTS].

[128] PICCIGALLO, *supra* note 13, at 159.

international law, special war crimes rules (i.e., the present document), and provisions of the Criminal Code of the Republic of China.[129] In other words, the Chinese domestic courts were actually instructed to apply both international and domestic law to their war crimes proceedings, albeit with international law in the lead. China also incorporated (broad) definitions of war crimes, which reflected the circumstances "peculiar to China and the events she [had] gone through during the [previous] two decades."[130] Although the Chinese courts convicted considerably more Japanese war criminals than they acquitted, the most significant element of these domestic tribunals was how "frequently, broadly, [and] assertively" Chinese judges applied international law.[131]

C. Enhancing Post-War Justice Through Domestic Trials

The inability of Sierra Leone and the United Nations to fully appreciate the need to pursue the prosecution of low- and mid-level perpetrators through a supplemental forum was one of the SCSL-centric system's greatest deficiencies. Although prosecuting defendants in multiple forums may not be ideal,[132] in cases where the international forum is unwilling or unable to prosecute a larger number of perpetrators, an additional forum must be used. Given the limited scope and resource of the IMTFE, China (and the other allied nations) recognized that the Tokyo Tribunal could (and would) only handle a

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[129] LAW REPORTS, *supra* note 127, at 152.

[130] PICCIGALLO, *supra* note 13, at 159 (citing LAW REPORTS, *supra* note 127, at 152). Specifically, the Law of October 24, 1946, permitted prosecution of crimes against peace (in language similar to the IMTFE), conventional war crimes (in the narrower sense, "violations of the laws and customs of war,"), crimes against humanity (for instance, starvation, rape, and enforced collective torture), offenses involving narcotic drugs or poisons (crimes particular to China's past), and offenses as defined in Chinese common penal law. PICCIGALLO, *supra* note 13, at 159–60.

[131] PICCIGALLO, *supra* note 13, at 163. In total, the Chinese tried 883 individuals for war crimes, convicted 504, and sentenced 149 to death. *Id*. at 173.

[132] Doing so limits (or even eliminates) the possibility of replication and increases the likelihood of inconsistent results. Similar to the argument that "a patchwork of hybrid courts" are likely to apply different substantive rules in different areas of the world (*see* Higonnet, *supra* note 106, at 413–14), national courts will apply their own domestic laws in the ways they see fit. Domestic criminal laws are often highly codified, thus, limiting judicial discretion. Conversely, international law often grants judges broad discretionary powers to deal with the complexities of prosecuting war crimes. *See* Morss & Bagaric, *supra* note 17, at 25–26.

small percentage of war-crimes prosecutions.[133] However, the Chinese took affirmative steps to create domestic tribunals to try the remaining Japanese war criminals. By relinquishing, for a brief time, part of its sovereignty to the United States (to try cases on Chinese soil), China was able to secure the American support needed to successfully prosecute war criminals in its own domestic tribunals. Ultimately, the Chinese did what was necessary to ensure that a greater number of war criminals were brought to justice. In doing so, China presented Sierra Leone, specifically, and the international community more generally, with a template (however rudimentary) to address war crimes and increase the perception of post-war justice—a multi-forum approach in which the international tribunal is enhanced by domestic courts.

In contrast, Sierra Leone and the United Nations were so fixated on the SCSL (and its ability to apply both national and international law) that they neglected to properly rebuild and use Sierra Leone's national judiciary to supplement the SCSL.[134] Based on the language in the SCSL Statute, the purpose of the hybrid court was to apply domestic law in addition to international law—not completely replace Sierra Leone's national court system.[135] Thus, the SCSL Statute considers the possibility that the national courts *could* prosecute war criminals. And, by charging only thirteen perpetrators for war crimes, the SCSL essentially confirmed that the national courts *should* prosecute war

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[133] As previously discussed, the IMTFE Charter limited prosecution to only class A ("crimes against peace") offenses. PICCIGALLO, *supra* note 13, at 12. *See* IMTFE Charter, *supra* note 44, art. 5.

[134] In analyzing a hybrid court's impact on the local legal system, Etelle Higonnet, a former Bernstein Fellow in the Africa Division of Human Rights Watch, acknowledges that "in post-conflict states, seeing the local judicial system at least partially involved in important trials may be critical to rebuilding a sense of faith in the courts. *Besides* restoring the legitimacy of devastated legal systems, local connections with well-run, high-profile trials may benefit transitional governments' credibility." Higonnet, *supra* note 106, at 362 (emphasis added). Higonnet then explains that "on a day-to-day basis, more people rely on the protection and viability of their own local law and institutions than on international law or the U.N." *Id.* (citing Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 403 (1999)). The SCSL made an effort to include local judges and employ local staff, and held its trials on Sierra Leonean soil (with Charles Taylor's trial being the lone exception). However, a critical component in rebuilding the rule of law in Sierra Leone was omitted—the SCSL judges and staff were not required to interact and communicate with the judges and staff of the national courts. *Id.* at 388.

[135] The SCSL Statute explicitly states that the court "shall have primacy over the national courts of Sierra Leone." Special Court Statute, *supra* note 87, art. 8(1).

criminals.[136]

While Sierra Leone's judiciary was clearly affected by the civil war, assertions that the post-war climate in Sierra Leone did not support domestic trials are not persuasive.[137] Similar internal instability followed World War II in China. Just as Sierra Leone continued to fight with the RUF, the Chinese national government fought against the communist Red Army. Just as Sierra Leone required UN support to hold individuals accountable for their war crimes, China required assistance from the United States to do the same. Sierra Leone had the right idea when requesting UN support to create a special court: the prosecution of war crimes must employ both international and domestic law. China's model implemented this same concept. However, while China used three separate and distinct systems to effectuate justice (finding ways to resource and build its own war crimes courts through mutual cooperation), the SCSL combined international and domestic law under one roof and channeled its resources into that one forum to the detriment of Sierra Leone's national court system.

V. Conclusion

To date, none of the international criminal courts established to prosecute war crimes could be described as the perfect template. While some (Nuremberg) have enjoyed more international acceptance than others (Tokyo), each was created out of a unique set of circumstances, which makes duplication almost impossible. The Nuremberg Charter was only conceived after fifty million deaths, the total and unconditional surrender of a sovereign power, and an unlikely agreement between four major nations linked by a common enemy.[138] While the deaths of civilians and mass atrocities still dot the front pages of major media

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[136] As previously discussed, the SCSL's jurisdiction was limited to those persons bearing the "greatest responsibility." *Id*. Ideally, the national courts would be used to prosecute those perpetrators who fell outside of this threshold.

[137] After a decade of internal conflict, the Sierra Leonean government was concerned about the potential fallout from conducting purely domestic trials. Furthermore, Sierra Leone did not have the funds to investigate and try war crimes, and the existing national laws did not encompass war crimes or crimes against humanity. However, the government was able to provide considerable assistance to the SCSL (e.g., the site for the court, police assistance, etc.) and expeditiously integrated the SCSL Statute into domestic law. Perriello & Wierda, *supra* note 68, at 12–13.

[138] *See generally* Griffin, *supra* note 51, at 410–13.

outlets,[139] the likelihood of achieving unconditional surrender or seeing multiple sovereign nations—each with their own strong (and often opposing) political views—agree to a single forum and charter to prosecute war crimes is almost unimaginable.

For better or worse, the SCSL may be the best modern attempt at a standardized replicable model that blends international and domestic law and is convened in the country where the atrocities occurred. However, in order to avoid repeating the same failures, any future international hybrid court must ensure that: (1) jurisdiction is broad enough to include the greatest number of perpetrators and offenses feasible; (2) every interested State (i.e., party to the conflict) is adequately represented at the proverbial table; and (3) domestic courts are used to prosecute any remaining perpetrators who fall outside of the international court's jurisdiction. As a final and critical element, countries must be prepared to work through a litany of factors—political, social, and economic, as well as judicial—to build a legitimate venue to address war crimes and achieve post-war justice for their people.

Without question, the Chinese faced significant challenges in the aftermath of World War II, and their approach to effectuating post-war justice was not perfect. However, China's decision to work with other interested nations and to use multiple forums—international and domestic—proved to be an effective method for prosecuting war criminals. Future war crimes tribunals may incorporate more hybrid characteristics like the SCSL—sanctioned to apply both international and domestic law. Nevertheless, the three-system approach employed by the Chinese, despite its flaws, earned and deserves its due consideration.

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[139] In February 2014, the UN Commission of Inquiry on Human Rights released a 400-page report detailing the "murder, torture, slavery, sexual violence, mass starvation and other abuses" by North Korea. *See* Michael Pearson, Jason Hanna & Madison Park, *'Abundant Evidence' of Crimes Against Humanity in North Korea, Panel Says*, CNN, http://www.cnn.com/2014/02/17/world/asia/north-korea-un-report/ (last visited Oct. 31, 2014). On the day this article was submitted for publication, *The Washington Post* published an article calling for the International Criminal Court to take action against North Korea's leaders for the human rights abuses identified in that report. *See* Editorial Board, *North Korea's Leaders Must Be Held to Account for Human Rights Abuses*, WASH. POST, http://www.washingtonpost.com/opinions/ north-koreas-leaders-must-be-held-to-account-for-human-rights-abuses/2014/10/30/7e6026d4-603f-11e4-9f3a-7e28799e0549_story.html (last visited Oct. 31, 2014).