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Prioritising International Sex Crimes before the Special Court for Sierra Leone: One More Instrument of Political Manipulation?

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4.1. Introduction

Over the past two decades the prosecution of international crimes[1] has become increasingly common, with international organizations and individual States taking political positions over their legitimacy and conduct. Efforts to ensure impartiality and independence in the selection of cases prosecuted however, have largely failed. Independent case selection has been compromised because States have sought to impede prosecution where they view doing so as antithetical to their interests. Unsurprisingly, States have been happy to allow prosecutions where they view them as furthering their interests. The power to impede, to allow and to shape case selection has therefore become a useful instrument of foreign policy for States.

Historically prosecution of international crimes has not provided proportionate case selection attention to sex crimes. Advocacy groups have rightly sought to ensure sex crimes are represented amongst cases

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[1] International crimes include crimes against the peace (the 'crime of aggression'), genocide, war crimes, crimes against humanity and other serious violations of international humanitarian law. International crimes are generally considered under customary international law to be those for which individual criminal responsibility may be applied. For an examination of these crimes, see Antonio Cassese, *International Criminal Law* (Second Edition), Oxford University Press, New York, 2008; Dapo Akande *et al.* (eds.), *Oxford Companion to International Criminal Justice*, Oxford University Press, New York, 2009; and M. Cherif Bassiouni *Introduction to International Criminal Law*, Transnational Publishers, New York, 2003.

selected for prosecution. However, the prioritisation of sex crimes cases for prosecution is a step further still and confronts an emerging norm of case selection prioritisation that applies greater gravity to murder than sex crimes or torture.[2]

This paper employs the case of the Special Court for Sierra Leone to examine the efficacy of prioritising sex crimes in selection of international crimes cases. The empirical data supporting this material is drawn from over 100 interviews dating from April 2003 to January 2011 and experience working at both the Special Court and the Truth and Reconciliation Commission. The interviewees include Sierra Leonean victims, perpetrators, lawyers, politicians, civil society activists and of course practitioners working at the Court. Perhaps more important for the theme of this paper, interviewees also included defence and prosecution counsel and investigators at the Court, a former British High Commissioner, State delegates to the Security Council, U.S. diplomats as well as Senators and Representatives, their staffers working on U.S. policy in West Africa and key personnel at the State Department working on transitional initiatives and U.S. policy in the region.

The paper seeks to examine Special Court case selection and the nature of investigative practices within the context of the politics of the conflict's conclusion. I argue that the Court's creation was driven more by a politically expedient British narrative and a partisan shift in U.S. policy, than independent intent to address impunity. I also argue that pressure created by advocacy groups for prosecution of international crimes in the region was employed more because of its political utility rather than its perceived merit. In short, actors who designed the Court and controlled critical elements of its function, cherry picked and manipulated transitional justice discourse for their own interests. In the process of doing so, they undermined an authentic pursuit of justice for the victims of Sierra Leone's conflict. This paper cautions against diversion from an emerging norm of case prioritization criteria (that places murder as the most serious of crimes). To do so suggests that those creating and designing internationalised courts, and those creating local frameworks for prosecution of international crimes, would not employ or refuse to employ this policy based on political consideration, rather than a case's merit. It also suggests that prosecution personnel at the local and international level would

[2] Morten Bergsmo, Chapter 1 above.

not selectively employ thematic criteria based on considerations relating to current and future state co-operation. Circumstances lending greater scope for selective prosecution, I argue, undermine rather than further the need to ensure independent prosecution of sex crimes.

My argument is premised by the assumption that States, particularly powerful States best placed to affect negotiation of Court creation and design, employ a constructivist approach to courts trying international crimes. In order to interpret a constructivist approach in international law, we must employ "practical reason" in understanding the human agency's power in building social structures.[3] Brunnee and Toope argue that:

> [l]aw is persuasive when it is viewed as legitimate, largely in terms of internal process values, and when, as a result of the existence of basic social understandings, it can call upon reasoned argument, particularly analogy, to justify its processes and its broad substantive ends, thereby creating shared rhetorical knowledge.[4]

Furthermore, the authors argue that legitimacy is derived from rules and norms created by mutual construction via a wide range of participants.[5]

I argue that rules and norms relating to case selection bear little resemblance to those that might derive legitimacy according to Brunnee and Toope. I employ the succinctly stated summary of the constructivist explanation of international relations, that:

> Rules and norms constitute the international game by determining who the actors are, what rules they must follow if they wish to ensure that particular consequences follow from specific acts, and how titles to possessions can be established and transferred. In other words, norms do not cause a state to act in a particular way, but rather provide reasons for a state to do so.[6]

I will start off by examining the conflict, particularly its conclusion, before addressing the design of the court and the nature and impact of

[3] Jutta Brunnee and Stephen Toope, "International law and constructivism: Elements of an interactional theory of international law", in *Columbia Journal of Transnational Law*, vol. 39, 2000, pp. 19–74, 27.

[4] Brunnee and Toope, 2000, p. 72, *ibid*.

[5] Brunnee and Toope, 2000, p. 74, *ibid*.

[6] Ngaire Woods, *Explaining International Relations since 1945*, Oxford University Press, Oxford, 1996, p. 26.

State co-operation on case selection. I will conclude by considering the nature and effect of key case selection norms inherent in court design and function – what would a departure from an emerging norm that places murder as the most serious crime before torture and sex crimes mean for retributive, deterrent and expressivist goals?[7]

Sierra Leone is a small coastal West African country and a former British colony. It is bordered by Guinea to the North and East and Liberia to the South. The causes and motivations behind the conflict are a point of scholarly contention. In West Africa, American, British, and French interests have commonly been aligned in attempting to solicit external commercial penetration and diplomatic and security influence. However, these States have historically competed amongst one another for the fruits external hegemony bear. This competition has been pursued through the development of regional allies such as Libya for the French and Nigeria for Britain and the United States. These two regional powers have often supported friendly parties in conflicts in the region in furtherance of their patron's interests. The Sierra Leonean civil conflict is a case study in the theory of external leveraging of regional power politics.

In March 1991, an armed insurgency called the Revolutionary United Front ('RUF') led by Foday Sankoh and supported by Charles Taylor's Liberian National Patriotic Front ('NPFL') entered eastern Sierra Leone from Liberia to try to overthrow the government of Joseph Momoh. Both the RUF and the NPFL leadership had received training and financial support from Libya and, according to western intelligence, held French third party tacit support via Burkina Faso and the Ivory Coast from which Taylor launched his Liberian rebellion.[8]

The war would cause tens of thousands of deaths, over a million displacements, and upwards of 400,000 amputations of one or more limbs. The number of victims of sex crimes is unknown. They constituted just 3.3 per cent of total crimes reported to the Truth and Reconciliation Commission.[9] Low reporting of sex crimes suggests more about the stig-

7 Morten Bergsmo, Chapter 1 above.

8 *Prosecutor v. Charles Taylor*, SCSL-2003-01-T, Transcript, 31441, 9 November 2009, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=jV62eXBfZ4w=&tabid=160, last accessed at 28 April 2010.

9 Report of the Sierra Leone Truth and Reconciliation Commission, vol. 2, 2004, GPL Press, Accra, p. 35, available at http://www.sierra-leone.org/Other-Conflict/TRC Volume2.pdf, last accessed on 16 January 2007.

ma experienced by victims than its prevalence during the conflict. The commission did not attempt to estimate the totality of these crimes. However, it is commonly recognized that rape is widespread in Sierra Leone – particularly so during the conflict.[10] UN Special Rapporteur on the Elimination of Violence Against Women, Radhika Coomaraswamy, estimated that more than 50 per cent of Sierra Leonean women and girls were victims of sexual violence.[11]

In 1992, a group of Sierra Leone Army ('SLA') soldiers venting discontent at poor treatment by the government conducted a *coup*, establishing the National Provisional Ruling Council ('NPRC'). In power, the army were ineffective in countering the RUF. As a consequence many rural communities formed local Civil Defence Forces ('CDF') to defend themselves from both the RUF and an increasingly ill-disciplined army. The CDF would also end up committing numerous and egregious violations during the conflict but comparatively few crimes sexually oriented in nature.

In 1995, the NPRC's then greatest source of revenue, the SIERMCO and Sierra Rutile mines, were captured. With British personnel and commercial interests threatened, the British government helped secure a deal that provided diamond-mining concessions worth $2 billion and interests in Sierra Rutile to a British firm. In return for these commercial interests, the firm organised a mercenary force to capture the two sites, defend Freetown, and engage the RUF.[12]

[10] Amnesty International, *Sierra Leone: Rape and other forms of violence against girls and women*, 29 June 2000, AI Index: AFR 51/35/00, available at http://www.amnesty.org/en/library/asset/AFR51/035/2000/en/bf9f0ced-deed-11dd-b263-3d2ffbc55e1f/afr510352000en.pdf, last accessed on 10 January 2007.

[11] "Violence Against Women Rife During Sierra Leonean War", *Agence France-Presse*, 20 March 2002, cited in Stephanie H. Bald, "Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for Its Children?", in *American University International Law Review*, vol. 18, no. 2, 2002, pp. 537-583, 546.

[12] Ian Douglas, "Fighting for diamonds – Private military companies in Sierra Leone", in J. Cilliers and P. Mason (eds.), *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies*, Institute for Security Studies, Pretoria, 1999, pp. 179–180; EO deployed 150 to 200 men and a helicopter gunship. P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, 2003, p. 104; David Keen, *Conflict and Collusion in Sierra* Leone, James Currey, 2005, p. 151; David J. Francis, "Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation", in *Third World Quarterly*, 1999, vol. 20, no. 2, pp. 319–338; Report of the Sierra Leone Truth and Reconciliation

In 1996, dubious elections were held bringing NPRC advisor Ahmed Tejan Kabbah to the Presidency.[13] A failed attempt at peace led Kabbah to depend more heavily on the CDF for support. The SLA were viewed by the Kabbah government as commonly operating alongside the RUF.

Kabbah's perceived hostility towards the army prompted it to conduct a *coup* in May 1997.[14] At the army's request, RUF leader Foday Sankoh, then in detention in Nigeria, ordered the RUF to join the SLA in the government.[15] Kabbah fled to Guinea where, in close counsel with the United Kingdom, he established a government in exile. The U.K. then procured a large Nigerian force under the banner of regional peacekeeping to assist CDF efforts to force Kabbah's return.[16] The SLA marginalised the RUF from peace talks, fermenting distrust between the SLA and the RUF – something that former President Kabbah would later exploit.[17]

Next door in Liberia, Charles Taylor comprehensively won the Liberian presidency. The U.S., having previously viewed Taylor as an agent of Francophone encroachment in a historically U.S. sphere of influence, actively engaged the RUF's Liberian supporter in diplomacy. Taylor's

Commission, vol. 3B, 2004, GSL Press, Accra, p. 68, available at http://www.sierra-leone.org/Other-Conflict/TRCVolume3B.pdf; E. Barlow, *Executive Outcomes: Against All Odds* Alberton, Galago Publishing, 1999, p. 325; Deborah D. Avant, *The Market of Force: the Consequences of Privatizing Security*, Cambridge University Press, Cambridge, 2005, p. 86; David Shearer, *Private Armies and Military Intervention*, Adelphi Paper 316 IISS, Oxford University Press, Oxford, 1998, p. 49; Sandline International, "Public Comment on Book Entitled 'Mercenaries – an African Security Dilemma'", 14 March 2000, available at http://www.privatemilitary.org/publications/Sandline-BookMercenariesAnAfricanSecurityDilemma.pdf, last accessed 5 November 2011.

13 Southern irregularities included 345 per cent turn out in Pujehun, 155 per cent in Bonthe, 139 per cent in Kailahun, 117 per cent in Kenema, and 90 per cent in Bo. J.D. Kandeh , "Transition without Rupture: Sierra Leone's Transfer Election of 1996", in *African Studies Review*, 1998, vol. 41, no. 2, pp. 98, 105.

14 Keen, 2005, pp. 197–201, *supra* note 12; Sierra Leone Truth and Reconciliation Commission, vol. 3A, 2004, pp. 234–236.

15 Sierra Leone Truth and Reconciliation Commission, 2004, pp. 245–246, *supra* note 14.

16 Interview with a former Tunisian delegate to the UN Security Council, The Hague, 11 June 2009.

17 Conakry Peace Plan, "Agreement between the Armed Forces Revolutionary Council and ECOWAS", 23 October 1997, available at http://www.c-r.org/our-work/accord/sierra-leone/conakry-peace-plan.php, last accessed on 16 October 2011.

strongest U.S. relationships were developed with U.S. Special Envoy for human rights and democracy in Africa, Jesse Jackson, and Black Congressional Caucus leader Donald Payne.[18] Despite rapprochement with the U.S., Taylor maintained close ties to France, visiting Paris in 1998 to declare Liberian plans for privatisation and for French business to spearhead the process.[19] French encroachment into the historically British sphere of influence in Sierra Leone posed a tremendous threat to British commercial, diplomatic and security interests.

The Kabbah government was returned to power by an Economic Community of West African States Monitoring Group ('ECOMOG') and CDF attack planned and co-ordinated by the British Mercenary group Sandline. British support of the CDF violated UN sanctions that Britain had proposed and lead.[20]

In March 1999, circumstances demanded a conciliatory British stance. At the time Nigeria sought to draw down ECOMOG forces in Sierra Leone[21] while the U.S. and France continued to support Taylor and the RUF. British Foreign Minister Robin Cook met with his French counterpart Hubert Vedrine in Abuja from where he instructed a reluctant Kabbah to pursue dialogue with the RUF.[22] U.S. Special Envoy Jesse Jackson confronted President Kabbah at a conference in Ghana and brought him to Togo to negotiate the Lome Peace Accord with the RUF.[23] President Kabbah and RUF leader Foday Sankoh eventually agreed a power sharing peace deal, amnesty for crimes committed and the re-

[18] Timmerman, "Jesse, Liberia and Blood Diamonds", in *Insight Magazine*, 25 July 2003, available at http://www.frontpagemag.com/Articles/Read.aspx?GUID=D16F17D3-CD47-4443-913B-6667650D7014; Ismail Rashid, "The Lome peace negotiations, Conciliation Resources", September 2000, available at http://www.c-r.org/our-work/accord/sierra-leone/lome-negotiations.php, last accessed on 11 July 2006.

[19] Star Radio, "Liberian Daily News Bulletin", in *All Africa.com*, 30 September 1998, available at http://allafrica.com/stories/199809300154.html, last accessed on 16 October 2011.

[20] Lansana Gberie, "War and Tate Collapse: The Case of Sierra Leone", 1997, p. 166; Interview, *supra* note 16; BBC News *Britain's Role in Sierra Leone*, 10 September 2000, available at http://news.bbc.co.uk/1/hi/uk/91060.stm, last accessed on 16 October 2011.

[21] "IRIN Update 420 for 11 March 1999", University of Pennsylvania, African Studies Center, available at http://www.africa.upenn.edu/Newsletters/irinw420.html, last accessed on 16 October 2011.

[22] Keen, 2005, p. 250, *supra* note 12.

[23] Rashid, 2000, *supra* note 18.

placement of ECOMOG with a UN force. Britain was isolated in its support for Kabbah and antipathy towards Taylor and the RUF. Two key dynamics changed in Britain's favour in 1999 and 2000.

4.2. Local Security and External Politics Shift in Favour of Kabbah and the U.K.

The first change to occur in favour of the U.K. was the Kabbah government's rapprochement with the Sierra Leonean Army. The SLA/RUF alliance had been undermined by the SLA's exclusion from the Lome negotiations and Agreement by the RUF. This tension was exacerbated when RUF field commander Sam Bockarie briefly took captive SLA leader, Johnny Paul Koroma.[24] These events pushed the SLA away from the RUF and towards President Kabbah. This changed the security dynamic dramatically in favour of President Kabbah and his British supporters. President Kabbah now had the majority of the SLA (some SLA elements remained aligned to the RUF), a large ECOMOG force, and of course the CDF at his disposal.

Perhaps the most important swing of support came from the Republican-controlled U.S. Senate that sought to change Clinton administration policy in the region against the Liberian President Charles Taylor and the RUF. The foreign affairs appropriations committee chairman has the power to block money for foreign policy without hearings, debate or votes.[25] Then Republican chairman, Senator Judd Gregg, used that power to block funding of $96 million for the UN's Sierra Leone mission – money required for education and vocational programs promised to combatants under the Lome Accord. Senator Gregg, a fiscal conservative, was also impeding payment of $1.77 billion owed to the UN by the United States.[26] Senator Gregg had argued that U.S. finance would be better spent domestically than on policy he viewed as ill informed and unethical,

[24] Sierra Leone Truth and Reconciliation Commission, 2004, pp. 343, 344, *supra* note 14; Sierra Leone Web Archives, October 1999, available at http://www.sierra-leone.org/Archives /slnews1099.html, last accessed on 16 October 2011.

[25] Tim Weiner, Solitary Republican Senator Blocks Peacekeeping Funds, New York Times, 19 May 2000, available at http://www.nytimes.com/2000/05/19/world/solitary-republican-senator-blocks-peacekeeping-funds.html?scp=4&sq=juddgreggsierra leone&st=cse, last accessed 20 November 2011.

[26] *Ibid*.

citing Liberia and Sierra Leone.[27] The Sierra Leone UN funding represented the only real incentives for ordinary RUF combatants to disarm. Emboldened by his emerging local security strength and by Republican support in the U.S., President Kabbah refused to grant many allocated RUF positions in government.[28] In congruence with the British government, President Kabbah continued to cite RUF reluctance to disarm as the sole driver of post-Lome instability. This narrative was adopted by the mass media. Little attention was drawn to the non-disarmament of the CDF or the refusal of the Kabbah government to fulfil its obligations under the peace agreement.

The pressure on combatants to disarm without any incentive to do so culminated in their May 2000 seizure of over 550 United Nations Mission in Sierra Leone ('UNAMSIL') peacekeepers. Four peacekeepers were killed and three injured.[29] In response, President Kabbah deployed the SLA alongside the CDF to arrest senior RUF figures in Freetown. This included a CDF and SLA attack, under cover of protest, on Foday Sankoh's house.[30] The government described the fracas as hostile RUF action against a democratic government, a narrative actively deployed by the British government and adopted by the mass media.[31] In response, the RUF marched on Freetown but were met and repelled by a coalition of SLA, CDF, ECOMOG and British troops (co-ordinated, armed and trained by the British).[32] The RUF had been effectively labelled the aggressors as Britain began to act without Security Council approval but with moral legitimacy derived from the narrative it had manufactured.

[27] Interview with former staffer to United States Ambassador to the United Nations, Richard Holbrooke, 13 January 2011; see also *ibid*.

[28] Sierra Leone Truth and Reconciliation Commission, 2004, p. 249, *supra* note 14; United Nations, *Fourth Report of the Secretary General on the United Nations Mission in Sierra Leone*, S/2000/455, 19 May 2000, p. 3, available at http://www.ess.uwe.ac.uk/SierraLeone/sierraleone7.htm, last accessed on 16 October 2011.

[29] Sierra Leone Truth and Reconciliation Commission, 2004, p. 358, *supra* note 14.

[30] Sierra Leone Truth and Reconciliation Commission, 2004, pp. 415–421, 245–249, *supra* note 14.

[31] Sierra Leone Truth and Reconciliation Commission, 2004, pp. 405–406, 415–421, 233, 245–249, 393, 377, *supra* note 14.

[32] Sierra Leone Truth and Reconciliation Commission, 2004, pp. 331, 457–458, *supra* note 14; International Crisis Group ('ICG'), "Liberia: The key to ending regional instability, in *Africa Report*, vol. 43, 24 April 2002, p. 4, available at http://www.crisisgroup.org/en/regions/africa/west-africa/liberia/043-liberia-the-key-to-ending-regional-instability.aspx, last accessed 5 November 2011.

The British government was now working with U.S. Senator Judd Gregg to change U.S. policy against Charles Taylor. In response to the hostage taking, Gregg stated he would continue to block U.S. peacekeeping funds until Lome was abandoned and all feasible efforts were used to undermine Charles Taylor's rule in Liberia.[33] Gregg also called for "an international war crimes tribunal" to "investigate and punish atrocities committed by the RUF", the first time such a tribunal had been publicly proposed.[34]

Judd Gregg and his staffers had met with then U.S. Ambassador to the UN, Richard Holbrooke and his staffers to discuss U.S. policy towards Sierra Leone and Liberia.[35] Gregg made the case that the United States was using taxpayer dollars for ill-informed policy and that $368 million of overdue U.S. peacekeeping funding would remain withheld until U.S. policy changed.[36]

4.3. The Clinton Administration Concede

Indications of an Anglo-American compromise could be seen in a statement from the Kabbah government that private security firms from either the U.S. or Britain would be contracted to provide security in the diamond mining areas. Charles Taylor's pledge of 3,000 Liberian troops to an Economic Community of West African States ('ECOWAS') peacekeeping contingent in Sierra Leone, and his call for RUF leader, Foday Sankoh to be moved to a third country, indicated his acknowledgement of a change in Clinton administration policy.[37] Ambassador Holbrooke and Senator Gregg had agreed on a shift in policy against Charles Taylor, directed at the removal of his regime using a diversity of instruments.[38] These would include sponsoring an armed rebellion against Taylor's government, es-

[33] Judd Gregg, A Graveyard Peace, The Washington Post, 9 May 2000, available at http://www.highbeam.com/doc/1P2-525556.html, last accessed 12 January 2009.

[34] *Ibid*.

[35] Interview, Holbrooke staffer, 2011, *supra* note 27; Interview with former staffer to Senator Judd Gregg, 13 December 2010, Washington D.C.

[36] Interview, Holbrooke staffer, 2011, *supra* note 27; Interview, Gregg staffer, 2010, *supra* note 35; Weiner, 2000, *supra* note 25.

[37] Sierra Leone Web Archive, June 2000, available at http://www.sierra-leone.org/Archives/slnews0600.html.

[38] Interview, Holbrooke staffer, 2011, *supra* note 27; Interview, Gregg staffer, 2010, *supra* note 35.

tablishing a tribunal that would indict him, placing sanctions on his government that would weaken his ability to repel a rebel force, and provide support to local political opponents.[39] Ambassador Holbrooke and Senator Gregg intended that one or a combination of these methods would force President Taylor from power.[40]

On 5 June 2000, the U.S. State department announced it was in consultation with the UN and the U.K. to bring perpetrators of crimes in Sierra Leone to justice, indicating that crimes committed since the Lome Amnesty were not covered by it.[41] This implied that the U.S. considered that crimes committed prior to Lome were. Jesse Jackson was fired as Special Envoy for the Promotion of Democracy and Human Rights in Africa. The next day U.S. senator Judd Gregg released $368 million in peacekeeping funds ($96 million for Sierra Leone) that he had been blocking.[42] Until this time, the Clinton administration had termed Senator Gregg's blockage of the funds "a grave mistake".[43] The Clinton administration had officially indicated its shift in policy in a letter to Senator Gregg from U.S. Ambassador to the UN Richard Holbrooke. The letter, the contents of which the two had negotiated, stated that Mr. Sankoh should have no political future, that the UN should try to disrupt the RUF's hold on diamonds, and that the U.S. should come up with a strategy to deal with Liberian President Charles Taylor.[44] On June 6, Senator Judd Gregg made the following statement:

> The United States will not turn a blind eye to the rape of the people and of the land of Sierra Leone. We will demand that brutal thugs are held accountable for their atrocities and regional troublemakers must look with fear to their own future.[45]

39 Interview, Gregg staffer, 2010, *supra* note 35.

40 *Ibid.*

41 Sierra Leone Web Archive, 2000, *supra* note 37.

42 *Ibid*; Weiner, 2000, *supra* note 25.

43 Tim Weiner, G.O.P. Senator frees millions for UN mission in Sierra Leone, New York Times, 7 June 2000, available at http://www.nytimes.com/2000/06/07/world/gop-senator-frees-millions-for-un-mission-in-sierra-leone.html, last accessed 17 March 2012.

44 *Ibid.*

45 Sierra Leone Web Archive, 2000, *supra* note 37.

4.4. Negotiating a Tribunal

The U.S. and Britain began to negotiate the possibility of a tribunal at the Security Council. However, France, Russia and China viewed this move as an attempt to deal with Liberia through the back door.[46] The three permanent members of the Security Council concluded that any tribunal should be funded by the U.S. and Britain themselves unlike the Tribunals for the former Yugoslavia and Rwanda.[47] The U.S. and Britain also favoured a hybrid model funded by voluntary donations. They viewed the Court's hybridity as less costly than its predecessors while granting donor States greater fiscal control over the selection and behaviour of key court personnel.[48] British UN representative Jeremy Greenstock stated a comprehensive resolution was being proposed to expand the UNAMSIL force, to bring to justice those that had attacked peacekeepers and committed violations of international law and to address the illegal RUF trade of diamonds for arms.[49]

4.5. The Emergence of Regime Change Strategy for Liberia

Within a month of the meeting between Ambassador Holbrooke and Senator Gregg the proposed U.S. strategy was materialising for Charles Taylor's government in Liberia. The British government asked Kabbah to write a letter to the Security Council requesting it to establish an international criminal tribunal.[50] After a closed session, the Security Council found that the RUF had violated the Lome agreement and that those responsible for taking UN peacekeepers hostage should be "brought to justice".[51] An armed militia called the Liberians United for Reconciliation and Democracy ('LURD') that was in contact with military officers from

46 Interview, Tunisian delegate, 2009, *supra* note 16.

47 *Ibid.*; Interview with former U.S. Department of State, Deputy Ambassador at Large for War Crimes Issues, Michael Miklaucic, *via* telephone, 20 September 2011.

48 Interview, Tunisian delegate, 2009, *supra* note 16; Interview, Holbrooke staffer, 2011, *supra* note 27; Interview, Gregg staffer, 2010, *supra* note 35.

49 Sierra Leone Web Archive, 2000, *supra* note 37; Interview, Holbrooke staffer, 2011, *supra* note 27; Interview, Gregg staffer, 2010, *supra* note 35.

50 Interview, Tunisian delegate, 2009, *supra* note 16.

51 United Nations Official communiqué of the 4163rd meeting of the Security Council, S/PV.4163, 21 June 2000, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/492/44/PDF/N0049244.pdf?OpenElement, last accessed 17 March 2012.

both the U.S. and Britain, attacked North Western Liberia from Guinea.[52] Guinean leader Lansana Conte had been a strong U.S. ally in the region. His forces were provided with increased U.S. military training and ammunition for their offensive against Taylor.[53]

The Liberian Government, with support from ECOWAS, France, China and Russia, appealed to the Security Council to lift sanctions placed on it. However, the U.K. and U.S. remained steadfastly opposed.[54] In the face of Anglo-American hostility, President Taylor attempted to appease the U.S. through diplomatic patrons in both the democratic and republican parties. However, all arms, as well as both parties of U.S. government now appeared unified in their opposition to Taylor's Liberian regime. In October 2000, the Clinton Administration banned entry to the U.S. to President Taylor and other senior Liberian officials.[55] In 2001, after meeting with George Bush on Taylor's behalf, prominent republican evangelist Pat Robertson told Taylor:

> [T]he only thing I can advise you to do, Mr President, is appeal to God, because what I'm hearing from George Bush, there's nothing that you can do about what America intends to do.[56]

[52] ICG, 2002, p. 4, *supra* note 32.

[53] ICG, 2002, p. 5, *supra* note 32; *Prosecutor v. Charles Taylor*, SCSL-2003-01-T, Transcript, 9 November 2009, p. 31332–31333, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=jV62eXBfZ4w=&tabid=160, last accessed on 17 March 2012); United States House of Representatives, Hearing before Subcommittee on Africa, global human rights and international relations, "*The impact of Liberia's election on West Africa*", 8 February 2006, pp. 61–62, available at http://commdocs.house.gov/committees/intlrel/hfa26015.000/hfa26015_0f.htm, last accessed on 29 April 2010; Interview, Gregg staffer, 2010, *supra* note 35.

[54] Interview, Tunisian delegate, 2009, *supra* note 16; *Prosecutor v. Charles Taylor*, SCSL-2003-01-T, Transcript, 9 November 2009, pp. 31338–31339, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=jV62eXBfZ4w=&tabid=160, last accessed on 28 April 2010.

[55] The White House Office of the Press Secretary (Philadelphia, Pennsylvania), "A Proclamation by the President of the United States of America: Suspension of Entry as Immigrants and Nonimmigrants of persons impeding the peace process in Sierra Leone", 11 October 2000, available at http://reliefweb.int/node/70495, last accessed on 10 October 2009.

[56] *Prosecutor v. Charles Taylor*, SCSL-2003-01-T, Transcript, 9 November 2009, 31335, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=jV62eXBfZ4w=&tabid=160, last accessed 28 April 2010.

[56] Interview, Tunisian delegate, 2009, *supra* note 16.

4.6. Creating a Special Court as a Part of Strategy Aimed to Affect Liberian Regime Change

On 14 August 2000, the United Nations Security Council requested the UN Secretary General to create a "Special Court" for Sierra Leone by negotiating an agreement with the Government of Sierra Leone.[57] President Taylor hoped France would be able to push through sanctions on Guinea for its support of the LURD, since Liberia was under sanctions for supporting the RUF.[58] He had overestimated French clout.

The initial leanings of the Special Court were inherent in the empowering resolution that commended the efforts of the government of Sierra Leone and ECOWAS for bringing lasting peace to Sierra Leone.[59] In August 2001 the Security Council passed a resolution to create the Special Court and the White House asked Department of Defence ('DoD') lawyer David Crane to "help set up an experiment in West Africa".[60] Crane began utilising DoD intelligence information to formulate who he believed was most responsible for crimes committed during the conflict.[61]

The Security Council resolution made ambitious claims as to the impact a "Special Court" might have for Sierra Leone. It states that:

> In the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace […].[62]

Once Security Council consensus had been reached on the Court's creation and financial independence from UN coffers, Britain and the

[57] United Nations, *Resolution 1315 (2000)*, 14 August 2000, S/RES/1315, available at http://daccessdds.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement; United Nations Security Council, *Liberia Diamond Ban and travel Ban come into Force*, Press Release, SC/7058, 7 May 2001, available at http://www.un.org/News/Press/docs/2001/sc7058.doc.htm.

[58] ICG, 2002, p. 25, *supra* note 32.

[59] United Nations, 2000, *supra* note 57.

[60] David Crane, "The investigation, indictment, and arrest of Charles Taylor: A regional approach to justice", presented at *The Baldy Centre for Law and Social Policy*, University of Buffalo, 17 February 2010, available at http://www.youtube.com/watch?v=Vm7dyByqVpc, last accessed 20 November 2010.

[61] Crane, 2010, *ibid*.; Interview with David Crane, Former Chief Prosecutor, Special Court for Sierra Leone, *via* telephone, 17 August 2010.

[62] United Nations, 2000, *supra* note 57.

United States largely controlled the Security Council's position towards the Court.[63]

Resolution 1314 proposed a tribunal which had, based upon conclusions it had already made, assumed non-culpability for crimes by the leadership of one party to the conflict. Further, in drafting and negotiating the resolution, permanent Security Council members either assumed non-culpability for their own financial, political or military role, or sought to impede investigation of that role. Resolution 1314 was widely lauded by rights groups as evidence of the international community's intent to address impunity no matter what office perpetrators hold.

4.7. The Statute

The Special Court Statute provides *ad hoc* amnesty to peacekeepers and government aligned private military contractors. It places those persons within the primary jurisdiction of their State and requires Security Council approval for the Court to investigate them.[64] This puts ECOMOG soldiers or British Military officers, beyond the reach of the Court. It may also have excluded from prosecution British diplomats and servicemen co-ordinating the military support of the CDF. British support for the CDF, in spite of sanctions, was documented by a British Parliamentary inquiry which found that the British High Commissioner had co-ordinated armaments supply and had briefed the Foreign Office of his doing so.[65] Whether or not the Article provides immunity to the CDF is an argument its counsel did not raise.

But the statute left President Kabbah's government open to indictment. The Kabbah government had made clear to the Secretary General's office its reluctance to agree to co-operate with a Special Court until the Court was established and the prosecutor had been appointed.[66] Article 2

63 Interview, Tunisian delegate, 2009.

64 Statute of the Special Court for Sierra Leone, 2002, Article 1(2)–(3).

65 Legg and Ibbs, **"**Report of the Sierra Leone Arms Investigation", 27 July 1998, HC 1016, p. 28, available at http://collections.europarchive.org/tna/20080205132101/www.fco.gov.uk/servlet/Front%3Fpagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029395708; Keen, 2005, p. 218, *supra* note 12.

66 United Nations, "Report of the Secretary-General on the establishment of a Special Court for Sierra Leone", 4 October 2000, S/2000/915, para. 8, available at http://www.afrol.com/Countries/Sierra_Leone/documents/un_sil_court_041000.htm, last accessed 20 November 2011.

of the agreement between the UN and the Sierra Leonean government stipulates that the Secretary General and the President of Sierra Leone will appoint key Court personnel.[67]

4.8. Prosecution Case Selection

In the years within the jurisdiction of the Court (30 November 1996 onward), the Truth and Reconciliation Commission attributed 57 per cent of abuses to the RUF, 30 per cent to the SLA and 12 per cent to the CDF with a negligible percentage committed by ECOMOG forces.[68] Prosecution of ECOMOG personnel was, therefore, unwarranted, under the exercise of numeric gravity. Nonetheless, ECOMOG abuses were brought to the attention of prosecution personnel by investigators. They were not pursued because of the amnesty, not because of the comparatively lesser scale of ECOMOG offending.[69] More importantly the *ad hoc* amnesty protects any personnel in a peacekeeping role in an agreement with the government. This meant that British or British procured advisors coordinating pro-Kabbah forces against the RUF could not be held accountable.

Because the British and United States governments were responsible for funding the Court, they also recommended court appointments critical to case selection and could withhold funding where case selection fell or threatened to fall, outside expectation.[70] The United States recommended DoD lawyer David Crane to be the Court's first Chief Prosecutor. The Government of Sierra Leone appointed Desmond De Silva, a former colleague of President Kabbah's, as Crane's deputy.[71]

67 Statute of the Special Court for Sierra Leone, 14 August 2000, Freetown, Sierra Leone, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&, last accessed on 10 January 2007.

68 Report of the Sierra Leone Truth and Reconciliation Commission, 2004, p. 39, *supra* note 9.

69 Interview with former prosecution investigator for the Special Court for Sierra Leone ('SCSL'), *via* telephone, 26 August 2010.

70 Interview with Robin Vincent, former Registrar, Special Court for Sierra Leone, Cheltenam, United Kingdom, 19 April 2007.

71 United Kingdom Parliament, "Select Committee on Standards and Privileges", Minutes of Evidence, 19 July 2005, available at http://www.publications.parliament.uk/pa/cm200506/cmselect/cmstnprv/421/5071902.htm, last accessed 17 March 2012.

Prosecutorial policy, empowered to target "those who bear the greatest responsibility", bore the hallmarks of preferencing British and U.S. interests from the outset.[72] The original prosecutor, David Crane, admits available intelligence at the DoD was critically instructive in formulating whom to target.[73] Since being informed he was likely to be appointed as prosecutor in September 2001, he had had almost a year to examine DoD information. He also stated that after seeking NGO corroboration of DoD information, he held "a four corners idea as to who bore the greatest responsibility" before going to Sierra Leone to begin investigations.[74]

In exercising his prosecutorial discretion, the Security Council had directed the prosecutor to use "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone" as a guiding philosophy.[75]

One investigator noted that upon the arrival of the prosecutor in Sierra Leone, it was already clear which persons were going to be investigated.[76] The prosecution's confidence in its case selection appeared to draw upon rigid, yet commonly adopted narratives that failed to reflect the offending of one party to the conflict. The Court's first prosecutor, David Crane, viewed the conflict as beginning because of individual criminal gain.[77] He viewed his case against the RUF as the "blood diamond story" – "the movie for real" in which the motives for the RUF insurgency "all boiled down to a commodity, generally diamonds" and the personal criminal gain of the RUF leadership.[78] He also viewed the conflict as "a good news story" because "the good guys (Kabbah and the British Government) won".[79]

[72] Interview, Crane, 2010, *supra* note 61.

[73] *Ibid*.

[74] *Ibid*.; Interview, Miklaucic, 2011, *supra* note 47.

[75] See http://www.sc-sl.org/LinkClick.aspx?fileticket=CR6ODLk2IfA=&tabid=157, last accessed 20 November 2011.

[76] Interview, former prosecution investigator for SCSL, 2010, *supra* note 69;

[77] Crane, 2010, *supra* note 60.

[78] Crane, 2010, *supra* note 60; House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, "Prosecuting the use of children in times of conflict", Testimony of David Crane, 8 April 2008, p. 40, available at http://judiciary.house.gov/hearings/printers/110th/41697.PDF, last accessed 28 April 2010.

[79] Crane, 2010, *supra* note 60.

British Intelligence officers from MI6 who met with Crane in Europe and West Africa reinforced Crane's DoD analysis.[80] British and American intelligence officers were sharing intelligence on RUF procurement of financial, military and logistical support that was passed to the prosecution.[81] President Kabbah had directed the British-provided Inspector General of police, Keith Biddle, to co-operate with the Special Court. Biddle co-operated by providing Sierra Leonean police investigators who were prominent in the investigation of the CDF.[82]

Between a month and 45 days after the prosecutor's arrival in Sierra Leone, the crimes and who was to be prosecuted for them was sufficiently clear to allow indictments to be drafted.[83] Every major appointing authority and as a consequence key prosecution appointees, excluding the Human Rights Watch-seconded advisers, had a historical or institutional conflict of interest stemming from professional experience aligned to a party to the conflict. These professional allegiances were exaggerated by reliance on information from interested institutions, and, by functional impediments of State co-operation provided by the Kabbah government.

The Prosecutor indicted the RUF leadership and Charles Taylor but neglected to pursue foreign supporters such as Ibrahim Bah the arms dealer, Blaise Compaore, the President of Burkina Faso, and Libyan leader Muammar Gaddafi. Former registrar, Robin Vincent cites political pressure on then chief prosecutor David Crane not to indict Gaddafi, despite his culpability; due to the appearance of a Gaddafi indictment by a U.S. funded tribunal.[84] David Crane admits he "found Gaddafi to bear the greatest responsibility", but viewed his indictment as too politically sensitive.[85] The Court's dependence on voluntary contributions from the U.S. and Britain was also critically instructive. Explaining his non-indictment as "a political decision", Crane stated, "[i]f I had indicted Gaddafi and Compaore then we would have been shut down".[86] Mr. Crane visited the

80 Interview, Crane, 2010, *supra* note 61.

81 *Prosecutor v. Charles Taylor*, 2009, p. 31446, *supra* note 8.

82 Interview, Crane, 2010, *supra* note 61; Interview, former prosecution investigator for SCSL, 2010, *supra* note 69.

83 Interview, Crane, 2010, *supra* note 61.

84 Interview, Vincent, 2007, *supra* note 70.

85 Interview with David Crane, former Chief Prosecutor, Special Court for Sierra Leone, *via* telephone, 17 May 2007.

86 *Ibid*.; Interview, Crane, 2010, *supra* note 61.

U.S. State Department approximately four times annually where he sought the War Crimes Office view as to who was to be prosecuted.[87] Crane has cited Gaddafi's oil oriented clout at the Security Council, particularly with the United Kingdom as driving the sensitivity surrounding his potential indictment.[88] In response, former Foreign Secretary Jack Straw stated he "had no recollection of knowing any involvement by the U.K. in influencing investigations".[89] The U.K. Foreign Office stated that "the issue of indictments is a matter for the Prosecutor" and that "it is committed to ensuring there is no impunity for those alleged to have committed the most serious crimes".[90] In November 2002 a decision was therefore taken to pursue only one of the three heads of State allegedly involved in the RUF joint criminal enterprise.[91]

President Compaore and the weapons trader, Ibrahim Bah, who organised the facilitation of arms through Burkina Faso to the RUF, were originally thought to be within the political parameters of indictment. Their co-operation with the U.S. government on terrorism (Bah was on the payroll of U.S. intelligence), as well as the anticipated political and diplomatic fallout of indicting more than one head of state, outweighed the good of holding them accountable.[92]

The original list of potential accused was larger than the final number prosecuted. It did include Blaise Compaore, but on the side of the CDF, Hinga Norman was as high as the chain of command went. However, Norman's position as deputy Minister of Defence meant he reported to the Defence Minister, a position also held by President Kabbah.[93] The Court and many of its proponents have cited the prosecution of the CDF accused as demonstrating Kabbah's willingness to allow impartial inves-

87 Interview, Miklaucic, 2011, *supra* note 47.

88 David Crane, "Gaddafi Instrumental in Sierra Leone Conflict", in *Awoko*, 6 March 2011, available at http://www.awoko.org/2011/02/28/gaddafi-instrumental-in-sierra-leone-conflict-david-crane/, last accessed on 6 March 2011.

89 *Ibid.*

90 *Ibid.*

91 Interview, Crane, 2010, *supra* note 61.

92 Interview, former prosecution investigator for SCSL, 2010, *supra* note 69. According to intelligence reports, Bah had been given $10,000 by U.S. officials who also bought him a plane ticket to Abidjan where he spoke to U.S. officials in January 2002 as well as in Ouagadougou in February. See *Prosecutor v. Charles Taylor*, 2009, pp. 31451–31453, *supra* note 8.

93 Interview, former prosecution investigator for SCSL, 2010, *supra* note 8.

tigation of all parties. Since 1997, however, the relationship between Hinga Norman and President Kabbah had been one of deep mistrust.[94] Many observers believed Norman sought to usurp Kabbah as leader of the Sierra Leone People's Party and that Kabbah and those close to him, particularly Vice President Solomon Berewa, viewed Norman as a political threat.[95]

The security threat the CDF posed was also diminished through the stigmatisation associated with the prosecution's labelling of the organisation as criminal.[96] From the time of the prosecution's arrival in October 2002, there was no suggestion of investigating anyone in the CDF chain of command higher than Hinga Norman. Some elements of the prosecution provided leads for investigation of the political and military supporters of the CDF. Those sources did not believe the information was actively pursued.[97]

The first apparent impediment to pursuit of President Kabbah appeared to be Court dependency upon local co-operation with security forces. Prosecution personnel were conscious that the investigation and prosecution of accused depended on Sierra Leonean state co-operation. They were particularly cognisant of the experience of Carla Del Ponte at the ICTR who was forced from her post after investigating elements of the Rwandan government's culpability.[98] Attempts to vigorously pursue incriminating information relating to President Kabbah, other senior elements of the Sierra Leone People's Party or elements of the British government, may have caused a cessation of co-operation similar to that experienced at the ICTR. However, David Crane insists there was no evi-

94 Report of the Sierra Leone Truth and Reconciliation Commission, 2004, *supra* note 14.

95 Interview with Sierra Leone Law Reform Commissioner, Peter Tucker, 5 April 2007, Freetown; Interview with Campaign for Good Governance director, Olayinka Creighton-Randall, Freetown, 3 April 2007; Interview with Truth and Reconciliation Commission "Military and political history of the conflict" chapter author, Gavin Simpson, Freetown, 30 March 2007; Interview with Alhaji Ibrahim Ben Kargbo, President of the Sierra Leone Association of Journalists, Freetown, 4 April 2007.

96 Danny Hoffman, "Citizens and Soldiers: Community Defence in Sierra Leone Before and After the Special Court", in *Rescuing a Fragile State: Sierra Leone 2002–2008*, Lansana Gberie (ed.), Wilfrid Laurier University Press, Ontario, 2009, pp. 119–127.

97 Interview, former prosecution investigator for SCSL, 2010, *supra* note 69.

98 Interview with former adviser to the prosecutor, Special Court for Sierra Leone, Washington D.C., 23 July 2010.

dence available to the prosecution implicating either Kabbah or Berewa.[99] To what extent, British, American or Sierra Leonean intelligence would or did make such information available, is unclear.

The government's posturing towards potential deviation from politically expedient case selection was evident when Sierra Leone's Attorney General responded to a defence request to subpoena President Kabbah to appear as a witness. The Attorney General told the Court it should not act "in vain" because the non-enforcement of the subpoena by the Sierra Leonean government would "diminish" the Court's authority.[100] The Court ate humble pie and refused to subpoena President Kabbah.[101]

In his concurring but separate opinion, Justice Itoe exuded the kind of judicial subordination to politics that fed discontent amongst many combatants who took up arms against the State. Itoe stated that the President's position as one of "the princes who govern us" requires:

> […] an environment, an atmosphere, and an institutional framework for them to perform their duties in all tranquillity and without any unnecessary interferences which could result from the issuance of a Subpoena.[102]

Prosecution case selection was also reinforced by the Court's functional characteristics that severely compromised the right to a fair trial.

[99] Interview, Crane, 2010, *supra* note 61.

[100] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-T, Transcript, 14 February 2006, p. 74, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=j0IL5eouGEQ=&tabid=154, last accessed on 6 June 2010.

[101] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Trial Chamber, Decision on motions by Moinina Fofana and Sam Hinga Norman for the issuance of a subpoena ad testificandum to H. E. Alhaji Dr. Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, 13 June 2006, Justice Thompson dissenting, available at http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberDecisions/tabid/153/Default.aspx, last accessed 29 April 2010; *Prosecutor v. Norman*, Fofana and Kondewa, SCSL-2004-14-T, Appeals Chamber, Decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, 11 September 2006, Justice Robertson dissenting, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=mva0C3kA94E=&tabid=193, last accessed 29 April 2010.

[102] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Trial Chamber, Decision on motions by Moinina Fofana and Sam Hinga Norman for the issuance of a subpoena ad testificandum to H. E. Alhaji Dr. Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, 13 June 2006, p. 42, available at http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberDecisions/tabid/153/Default.aspx, last accessed 29 April 2010.

Because donors had a vested interest in successful prosecutions, the prosecutor's office was provided totally disproportionate funding. The prosecutor was able to appeal directly to donors for funding, but the defence was reliant upon the Registrar to make its case.

The most prominent compromise of the defendant's rights was the prosecution's jurisdiction over witness protection. The location of the Special Court's Witness and Victims Section, in the secure prosecution area, is inaccessible to other court organs including the defence. Further, the prosecution had its own witness protection program supplementary to the court program.[103] Egregious prosecution practices such as leisure trips for insider witnesses to one of Sierra Leone's premier beach resorts severely undermined witness legitimacy.[104]

Prosecution witness engagement, finance and jurisdiction create a conflict of interest and potential witness inducement. The trial chamber refused to examine these practices-citing the need for an expedient trial.[105] Tim Kelsall best describes the impact of inauthentic and evasive witness narratives in his book "Culture Under Cross-Examination". Kelsall describes SCSL counsel's difficulties in extrapolating truth from witness testimony and the tendency of some members of the bench to extract selectively.[106]

4.9. Conclusion

The Special Court's design and function had serious consequences for case selection and for the Sierra Leonean transitional justice experience. The Security Council, referring to a potential Special Court, described how "a credible system of justice and accountability would end impunity and contribute to the process of national reconciliation and to the restoration and maintenance of peace".[107]

[103] Chris Mahony, *The Justice Sector Afterthought: Witness protection in Africa*, Institute for Security Studies, Pretoria, 2010, pp. 84–86.

[104] Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Transcript, Trial Chamber I, SCSL-2004-15-T, 20 June 2007, pp. 48–52, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=NNGbAcOFbQI=&tabid=156, last accessed 13 June 2009; Mahony, 2010, pp. 84–86, *supra* note 103.

[105] *Ibid*., pp. 52–59, 61.

[106] See Tim Kelsall, *Culture under cross-examination: International justice and the Special Court for Sierra Leone*, Cambridge University Press, Cambridge, 2009.

[107] United Nations, 2000, *supra* note 57.

A credible system of justice might have contributed to addressing impunity in Sierra Leone, and the region. However, my findings indicate that the Special Court was more about prosecuting 'Victor's Justice' and administering Liberian regime change than conducting an impartial investigation of all parties to the conflict. The absence of quantitative or qualitative criteria instructing case selection reinforced this. The primary concerns behind the Court's creation were to assist regime change in Liberia and regime consolidation in Sierra Leone. Mitigating the threat the CDF posed to President Kabbah, by prosecuting its military leadership, served the latter of these concerns. Case selection criteria that prioritize sexually oriented offending may have justified non-prosecution of CDF crimes because CDF offending in this area was particularly reduced.

If preference for thematic prioritization of sex crimes were employed in the future, it would serve to deconstruct the emerging norm of prioritising murder first.[108] A constructivist perspective argues, "[…] norms do not cause a State to act in a particular way, but rather provide reasons for a State to do so".[109] This tells us that real politic would first instruct who was to be prosecuted and who was not. Thematic prioritization criteria reinforcing expedient case selection would then be selected. In the case of the Special Court, thematic prioritization of murder, particularly where cannibalism was employed, would promote CDF prosecution. Cannibalism was committed by the CDF at a similar rate to the RUF.[110] It formed a prominent part of CDF member initiation, an element brought to the attention of President Kabbah without response.[111] Spiritual and moral undertakings not to commit rape also formed a prominent part of CDF initiation. The CDF believed pre-battle sexual relations or sexual contact would diminish their powers of immunity to withstand attacks or wounds. According to the TRC database, the CDF committed only six per cent of sexually oriented violations during the conflict.[112] This statistic could have justified non-selection of CDF for prosecution under a policy of thematic prioritisation of sex crimes. In future prosecution of international

[108] Bergsmo, 2011, Chapter 1 above.

[109] Ngaire Woods, "Explaining International Relations since 1945", Oxford University Press, Oxford, 1996, p. 26.

[110] Report of the Sierra Leone Truth and Reconciliation Commission, 2004, pp. 478, 496, *supra* note 14.

[111] *Ibid.*, p. 479.

[112] *Ibid.*, p. 176.

crimes, it is important that genuine proponents of international criminal justice recognise and act to mitigate selective use of thematic prosecution. Consolidating adoption of contemporary norms is critical. Continuing to place decisive emphasis on gravity and prioritizing murder, followed by sex crimes and torture, may go some way toward preventing politically expedient preferencing of thematic prosecution.

States have clearly developed and employed methods of shaping prosecution case selection in cases involving international crimes. These methods include designing tribunal jurisdiction, structure and dependence on external actors as well as methods of co-operation including, funding, seconding of personnel, provision of information, granting of access to witnesses and territory, arrest and provision of suspects and co-operation on witness protection and investigation.

Academia and interest groups need to better assess the need not only to prioritise sex crimes, but also to prioritise other themes of offending as well as thematic prioritisation against other modes of prioritisation such as temporal prioritisation or prioritisation of intent. The merits of all potential avenues of prioritisation need to be weighed individually and against each other in order to warrant adjustment of the emerging norm (prioritising murder first). To focus attention on justification for prioritising one theme without weighing it against others and without forming broad consensus as to how emerging norms should be changed undermines the legitimacy of thematic prioritisation.

Structural and functional independence, as well as a certain level of familiarity are required for punitive justice processes to hold legitimacy. A critical component of independence is clear criteria instructing case selection. The ICC has a role to play in providing more specific guidance as to what criteria should be employed in order for States to meet the complementarity threshold of 'capacity' and 'willingness'. The scope for interpretation of those two words leaves too much discretion in the prosecutor's hands. It also leaves too much discretion in the hands of States constructing extraordinary criminal justice processes to prosecute international crimes. States are arguably better positioned to shape domestic criminal justice processes for politically expedient outcomes than international criminal tribunals, where design is negotiated with other States. Co-operative methods employed by States to shape case selection may, where States wield inadequate clout, be over come by a savvy prosecutor cognizant of the nuances of State/court interaction and diplomatic sensitivities.

However, a savvy prosecutor may not simply overcome specific case prioritization criteria, such as the Special Court's instructed focus on crimes undermining the peace process, or temporal or territorial limitations on jurisdiction, with a deft strategic diplomatic touch. Equitable and entrenched norms that bind States and other actors designing the jurisdiction and structure of courts prosecuting international crimes provide the only impediment to design oriented manipulation.

I now turn to how a diffuse norm might affect retributive, deterrent and expressive goals of prosecution. Where shifting normative case selection to prioritise sex crimes over murder facilitates selective prosecution, retributive, deterrent and expressive goals of prosecution are undermined. Selective prosecution undermines retributive goals because retributive outcomes are provided to victims of politically expedient offending parties or individuals, but not victims of those wielding clout with designing and co-operating actors.[113]

Similarly, deterrent goals may be undermined because offending parties may not be deterred from engaging in sex crimes by selective prosecution. Instead, they may be deterred from losing a conflict, failing to ensure sufficient external patronage, or from negotiating sufficiently robust terms of amnesty or a manipulable transitional justice process.

Despite selective prosecution, expressivist goals may be retained where a culture is convinced of the stigma of engaging in sex crimes and the merit of prosecuting that form of criminality, despite the selectivity of prosecution. Selective prosecution may, however, lend manipulating actors a low cost expression of support for a co-operative international endeavour.[114] The Special Court's prosecution of "forced marriage", a criminal creation itself viewed by Tim Kelsall as culturally contentious,[115] I

[113] Selective retribution is not an unfamiliar phenomenon for Sierra Leoneans. They've witnessed before the trials and commissions of enquiry established by incoming regimes with expressive intent to justify themselves and discredit their predecessors. Upon examining Sierra Leone's history of regime change, be it the regimes of Juxton-Smith, Siaka Stevens or Valentine Strasser, one observes these processes.

[114] Oona Hathaway, "Do Human Rights Treaties Make a Difference?", in *Yale Law Journal*, 2002, p. 111; Boston University School of Law Working Paper no. 2–3.

[115] Tim Kelsall, "Culture under cross-examination: International justice and the Special Court for Sierra Leone", Cambridge University Press, Cambridge, 2009, pp. 243–255. Kelsall also argues that expressivist goals of engineering social change should not be pursued through international law with its notions of individual autonomy, self determination and sexual freedom (p. 255). This argument might be reinforced by the ab-

argue, presented a low cost affirmation of an international endeavour, unlikely to cause Sierra Leone's government to affect cessation of the practice.

A citizenry and international community sceptical of an institution pursuing selective prosecution may nonetheless acknowledge the criminality of sexually related offending and the legitimacy of its prosecution. However, it remains untenable that positive expressivist outcomes are achieved at the expense of retribution and deterrence. Where courts prosecuting international crimes are created and design by external actors with disparate cultural backgrounds, the expressivist impact of the institution may be impeded by perceptions of cultural hegemony and an absence of legitimacy.

States wield ever more discrete and sophisticated techniques to affect case selection that serves their interests. The neo-liberal rhetoric so often accompanying prosecution of international crimes, and in some cases underpinning scholarly consideration of case selection criteria, requires a more constructivist lens. Diversifying rather than homogenizing case selection criteria provides one more manipulative tool to those seeking to shape case selection for duplicitous purposes. As international criminal justice shifts towards pressuring States to carry out prosecutions domestically, preferencing thematic prosecution of sex crimes against the grain of consolidating emerging norms lends greater manipulative discretion to duplicitous actors.

sence of consultation with Sierra Leoneans, other than elites, during the court's design.