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## THE SPECIAL COURT FOR SIERRA LEONE: THE MANDATE AND THE CHALLENGES

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### Abstract

**Purpose:** The Special Court for Sierra Leone was set up in 2002 as a transitional justice mechanism after the country's ten year civil war. The court concluded its sitting in 2013. The study explored the nexus between expectations of the people and the actual mandate of the court in respect of compensation and also ascertained the appropriateness of the court as a transitional justice mechanism.

**Methodology:** The study adopted multi stage sampling technique in selecting the four towns in Sierra Leone which were studied. The major instrument of data collection was validated questionnaire supplemented by a semi structure interview guide.

**Findings:** The study found that though the court had no mandate to compensate victims, 63% of the respondents expected that the court would give monetary compensation to the victims while 60% felt that the victims should have been compensated. The study concluded that there was a divergence between the expectations of people and the actual mandate of the Special Court though the court was the appropriate mechanism at the time for transitional justice in Sierra Leone.

**Unique contribution to theory, practice and policy:** The study recommended that future criminal tribunals employed as transitional justice mechanisms should be empowered to compensate victims and also such tribunals should be ad hoc and sit in the country of conflict.

**Key words:** *International criminal tribunals, Post conflict stability, Special court for Sierra Leone, Transitional justice*

## 1.0 INTRODUCTION

There is perhaps no period in human history that the world was free from one kind of war or the other. Such conflicts always exist, (Carneiro, Novais & Novere, 2014). Sometimes, the war is within a particular nation or it may be international. Usually, during these conflicts, civilians who are non parties to the conflict suffer right abuses and other atrocities committed by the parties to the conflict. Because of the existence of such abuses, once the conflict ends, the victims of these abuses seek for justice. Such demand for justice is generally regarded as demands for transitional justice. The demands for transitional justice had generally not been left for individual countries to handle alone (Jalloh, 2007). The international community have generally gotten involved in redressing conflict era atrocities and abuses usually because the local country's judicial institutions are incapable of handling the share size of the demands or because such national judiciary is "too weak, too corrupt or politicised" to address such justice demands (Stensrud, 2009).

The first major involvement of the international community in transitional justice process after World War II when the victorious allied forces set up the International Military Tribunal for Germany (Kerzan, 2016; Nkansah, 2014) and the International Criminal Tribunal for the Far East to try German Nazi Soldiers and Japanese leaders respectively who had committed atrocities during the war.

After this came the International Criminal Tribunal for Yugoslavia (ICTY) set up by the United Nations (UN) to try those accused of grave human rights abuses and atrocities during the Yugoslavian civil war which claimed the lives of about 250,000 civilians (Arieff, Mergerson, Brown and Weed, 2011; Dame 2015; Dushimimana, 2013; UNSC Resolution 827). In 1994, the International Criminal Tribunal for Rwanda was established by the United Nations to redress issues of atrocities and human rights violations which arose from the Rwandan genocidal war that resulted in the death of more than 800,000 people (Kaufman, 2008; Szpak, 2013; UNSC resolution 955). In 2002, the UN, in agreement with the government of Sierra Leone constituted the Special Court for Sierra Leone (The Special Court) to try those who bear the greatest responsibility for atrocities committed during the 10 year long civil war. Again, the UN, in 2002, set up the International Criminal Court (ICC) with headquarters in The Hague, as a permanent international criminal tribunal to try people who are accused of war time atrocities and abuses anywhere in the world after 1<sup>st</sup> July, 2002 (ICC Statute, 1998; Nkansah, 2014).

### Statement of the Problem

The Special Court for Sierra Leone was set up to in 2002 as a transitional justice mechanism after the country 10year civil war. The court concluded its sitting in 2013. Since then, the country seemed to enjoy peace and stability and had even conducted three general elections without a reversion to conflict. Even though the country has since appeared to enjoy peace and stability, it is not clear if the position has been as a result of the trials conducted by the special court. The study explored the nexus between actual mandate and expected mandate of the court as well as whether in the circumstance of the peculiar context of Sierra Leone during and after the war, the Special Court was the most appropriate choice of a mechanism for transitional justice.

### 1.2 Objectives of the Study

The objectives of the study are to:

1. Examine the adequacy of the objectives of the Special Court for Sierra Leone with respect to the expectations of Sierra Leoneans;
2. Assess the role of the Special Court for Sierra Leone as a transitional justice mechanism in Sierra Leone.

## **2.0 LITERATURE REVIEW AND THEORETICAL FRAMEWORK**

### **2.1 Concept of transitional justice**

Tracing the history of the transitional justice concept, Fischer (2011) noted that transitional justice arose from the activities of human rights activists. Aligning with the democracy credentials of transitional justice is Chitsike (2012) who opined that the transitional justice process constitutes the real “test of democratic value for a country that is committed to moving away from war”. More specifically, Sharp (2013) opined that transitional justice, while addressing abuses, “seeks to nudge the affected state on to a more democratic path”. In the opinion of Fischer (2011), transitional justice was originally aimed at addressing human rights abuse by pre-democracy oppressive regimes. He contends that it was later that the concept came to cover the process for addressing “war crimes and massive human rights abuses in violent conflict”. Olsen, Payne and Reiter (2010) adopted the view of Teitel (2003) that transitional justice is a process which is associated with ‘periods of political change’ for the purpose of confronting the wrongs and abuses of past regimes.

A definition which takes a broad look at the concept of transitional justice is that given by Lundy and McGovern (2008) who noted that transitional justice is all about “the various judicial and non-judicial approaches to dealing with ... the legacy of human right violations in societies emerging from conflict and or an era of authoritarian rule” (p. 269). Similarly, Benyera (2014) attempts at defining transitional justice in a way which encompasses a wide range of activities than previous scholars did. To Benyera, transitional justice would at different levels refer to “choices, mechanism and quality of justice implemented by states emerging from episodes of gross human rights abuses, civil wars, totalitarian rule to respond to past oppression and injustice while constructing a new future based on democracy and rule of law”.

By whatever way it may be conceptualised, the transitional justice concept has not remained static. Its growth is credited to the believe by influential (world) leaders and institutions that a durable world peace requires that countries demand accountability from human right violators (Leebaw, 2008) while allowing little tolerance for impunity (Chitsike, 2012). Transitional justice has grown from the core initiative of achieving justice in post conflict setting and has expanded to include such initiatives as the reform of the country’s judicial institutions, the prisons and the security apparatus. This, as noted by Vielle (2012), “cannot be divorced from the efforts to build enduring peace” in troubled societies (p. 59). Along this path too, there is the view that transitional justice is not a value neutral process but reflects contemporary social norms and can properly be regarded as a “political process of negotiated values and power relations” (Rubli, 2013). To that extent, the sway of transitional justice process would depend on the value and powers of the actors. The more power the actors hold, the greater their ability to shape the transitional justice process in a way that would best serve their interests (Rubli, 2013). On his part, Arthur (2009) advocated for a shift in the transitional justice (thematic) paradigm. He suggested, for example, that the present term –



‘transitional justice’ should be abandoned and replaced with the term ‘mass atrocity’ justice. It does not appear that this suggestion has found support in literature. For one thing, this suggested substitution may also face scope and conceptual challenges like the term it intended to replace. A similar sentiment (to that of Arthur) was expressed by Wierzyńska (2006) who asserted that if democratisation requires a change in political culture, then transitional justice should be better called “transformative justice” (p. 389) in order to better reflect the scope of its mandate. Wierzyńska, (2006) asserts that unlike transition which is a top down process ... (which) does not reach deep into the new society ...” (p. 389), transformation calls upon a society to “reinvent itself”. It seems that Arthur and Wierzyńska are not alone in the rejection of the term ‘transitional justice’ as Sooka (2006) had wondered (too) whether the term ‘transitional justice’ was aptly used since that term gives the impression of ‘an end in itself’. Besides this, according to Sooka (2006), there would be the need to determine the point at which transition ends as well as the ultimate goal of the transition.

Still on the conceptual challenge of transitional justice, Sharp (2013) opined that words like ‘local ownership’ which is used to advocate indigenous set of international criminal tribunals are “buzz words without precise meaning”. The same may be said of the term “justice” itself as used in transitional justice project. Reporting a research in Rwanda carried out between 2004 and 2005, Apuuli (2011) noted he discovered that the meaning of the term ‘justice’ as used in the transitional justice was relative as it did not mean the same thing to everyone concerned. Along this line too, Olsen *et al* (2010) had noted that to some people, ‘justice’ implies retribution or prosecution while to others it connotes restorative measures that heal victims. A similar view had earlier been echoed by Fletcher (2009) when he asserted that in his experience, “justice means many things to many survivors” (p. 54) of conflict period violence and abuses. This would indicate that in order to be meaningful, the term ‘justice’ in the process of transition has to be contextualised. Mutua (2015) had stated that the body of human rights upon which the transitional justice project is built is not universal and that in fact, the language with which “rights” are couched is really a western construct (Mutua, 2015). To that extent, practicalities of transitional justice which would in, for instance, in Africa may fail completely in Asia. To Mutua (2015) therefore, the proper way to ensure the future relevance of the transitional justice project is “to reconstruct notions of transitional justice that are informed by a wider moral and social universe” (p. 5). Perhaps this is what Leebaw (2008) earlier alluded to when he stated that if transitional justice is to contribute to reconciliation (in post conflict societies) it must be “responsive to local context, tradition and political dynamics”.

## **2.2 Justification for transitional justice**

Closely related to the clarification of the concept of transitional justice is the examination of the need for the adoption of transitional justice in today’s world. According to Olsen *et al* (2010) the transitional justice mechanisms had been applied as tools to redress right abuses around the world for “most of the past 4 decades”. They argue that such mechanisms may be applied as part of the peace process to pave the way for transition or introduced after the transition. In addition, it is widely believed that the pursuit of transitional justice would act as deterrence to occurrence of future abuses (Nkansah, 2011). The transitional justice process has also been available to provide answers to the challenges of abuses through the provision of restorative and rehabilitative measures (Corradetti, 2013). It was noted (Grotsky, 2009)

that it is only through the individualisation of blame (which is a product of the transitional justice process) that the “dangerous culture of collective guilt”, which is a factor in transiting communities, can be avoided. For example, Fletcher (2016) had opined that one of the motivations for the Nuremberg trials was to ‘decouple the Nazi regime from the German state’. On the other hand, Leebaw (2008) asserts that a fundamental reason given to justify transitional justice is that it helps to “establish a historical record of...violence” and also assists in countering denial of “responsibility for past violence”. though Aiken (2008) had postulated that “preventing recurrence of violence and stabilising post conflict peace are the ultimate goals” of almost all transitional justice process. For Bisset, Moxham and Zyl Smit (2014) and Chistike (2012), however, the cardinal objective of the transitional justice is to confront past abuses in a holistic manner and to ensure (that the abuses) do not recur. A former President of post-apartheid South Africa, Nelson Mandela, had expressed a victim centric justification for transitional justice when he noted that the justification for the transitional justice process in a post conflict community is not limited to redressing such right abuses but also to ensure the restoration of the victims dignity (Quinn, 2009).

### **2.3 Transitional justice mechanisms**

There exists a range of mechanisms which are applied in the transitional justice process. In a 2004 report to the UN Security Council, the then Secretary General of the UN, Kofi Annan, reported that available transitional justice mechanism include “both judicial and non-judicial mechanism” such as individual prosecutions, reparation, and truth seeking “or a combination thereof” (Lundsey & McGovern 2008, p. 269). Other models that has been employed as transitional justice mechanisms are; the African traditional justice (Hoile, 2015); Amnesty (Dukic, 2007; Fischer, 2011); and Lustration (Goes, 2013; Posner & Vermeule, 2004).

Several of these mechanisms have been employed in the transitional justice project and there has been literature highlighting the values of each of the mechanism (Grotsky, 2009) though there remain “theoretical arguments concerning how and under what conditions each mechanism is expected to be utilized” (p. 819) as transitional justice actors still do not have “a real idea of the practical impact that the selection of one instrument over another or perhaps in tandem with another would have” (Quinn, 2009, p. 36). The African Union considers it settled though that transitional justice mechanisms are “most effective when used as part of a holistic strategy” to confront abuses committed during conflict (African Union, 2013).

It has been suggested that the way by which a conflict ends would influence the kind of transitional justice mechanism employed. Sooka (2006), for example, postulated that a military victory by one side will usually give rise to a criminal justice mechanism. Where a negotiated agreement gave rise to a transition to democracy, it will, in most cases, result in a truth commission. In a situation where the abusers have the potential to bring about further violence that could destabilize the country, the negotiated settlement may include the grant of some form of amnesty. Adding his own perspective, Grotsky (2009) opined that, for example, “if new elites believe peace and justice are reconcilable (under the particular circumstance), they will prosecute but otherwise they will opt for truth commission”. However as was cautioned by Wierzynska (2006), all mechanisms could play a useful role but “no one mechanism suffices to address the complex undertaking of ... a post conflict society”. This reality was pointed out by Fischer (2011) who cautioned that post conflict

societies would require a “combination of approaches” available in the transitional justice pack in order to effectively achieve post conflict reconciliation and healing

## **2.4 Theoretical Framework**

The study raised issues of restoration of the society that has been divided due to right abuses and atrocities committed during violent conflict; and the purview of the responsibility of the international community to intervene to ensure such restoration. To that extent, the Conflict Transformation theory and the Responsibility to Protect Principle forms the theoretical framework for the study.

### **Conflict transformation theory**

Conflict transformation theory has its roots in the work of Galtung (born, 1930) who suggested that conflict has both “life-affirming and life-destroying” aspects and that such conflict arises out of the contradictions in the community foundation or structure. According to Galtung (1996), the incompatibility that exists between parties in conflict could be eliminated by transcending such contradictions by compromise, by deepening or widening the conflict structure (Miall, 2004). This approach focuses on transformation of rooted armed conflict into peaceful ones based on a different understanding of peace-building. According to him, there is the imperative to address the root causes (of conflict) and focus on the “structural, behavioural and attitudinal” factors of the conflict.

John Paul Lederach (born, 1955) is credited with developing the first comprehensive conflict transformation oriented approach to peace building (Paffenholz, 2009). Building on the contemporary school (which focuses on the strength of possible congruence between the conflict management and conflict resolution schools in peace building), Lederach envisaged the needs to resolve the dilemma between short term conflict management and long term relationship building as well as the imperative to resolve the underlying causes of the conflict (Paffenholz, 2009). According to Lederach, conflict transformation is more than a set of specific techniques. It is a “set of lenses” through which the actors can “make sense” of social conflict. Lederach sees the need to develop enduring structures of building peace by focusing on reconciliation in the community – the need to rebuild destroyed relationships. In this model, third party intervention in conflict should focus on supporting the (internal) parties to the conflict to achieve peace (Paffenholz, 2009).

### **Responsibility to protect principle**

As a consequence of the gross human rights atrocities in Rwanda and the Balkans in the early 1990’s, the necessity dawned on the international community for the need to consider how to react effectively when the rights of citizens of a particular country are grossly and systematically violated either by their states or in circumstances where the state is helpless in controlling the abuses. The core of the debate then was whether individual states have inviolable sovereignty over its affairs or whether, under some circumstance, the international community would have a responsibility to intervene in the internal affairs of a particular country for to redress conflict period abuses to citizens. The dilemma was whether, in order not to violate the sovereignty of a particular state, the international community should watch helplessly while humanitarian disasters evolve through violence period atrocities. The phrase “responsibility to protect” (as a principle of international law) was first used in the report of the International Commission on Intervention and State Sovereignty (ICISS). The commission was set up by the Canadian government in 2001, in response to Kofi Annan’s

“acknowledgement of the international need to develop a new response to massive intra-state human rights violations” (Pupparo, 2015, p. 8) particularly as to when it would be acceptable for the international community to intervene to prevent a humanitarian crisis happening in a particular country’ (Gagro, 2014, p. 64). The ICISS in its report, noted that even though the right of a state to control its internal affairs gave it a responsibility to protect the people within its borders, there is a concomitant responsibility on the international community to offer such protection in a situation where the state is either unable or unwilling to offer such protection. The responsibility to protect has been described as “an emerging international norm, which sets forth that states have the primary responsibility to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing, but that when the state fails to protect its populations, the responsibility falls to the international community” (Foley, 2013, p.10).

Notable theorists in this filed are Buchanam, 2003; Luck, 2013; and Sigman, 2013 (Gagro, 2009). Their writings revolved round clarification of the attitude of States (to humanitarian crisis) which could justify international intervention and the modalities for such intervention. Sigman (2013) opined that intervention could be justified in situation of violations of human rights after diplomatic efforts have failed. Buchanan (2003) stated that unilateral intervention would be justified on the basis of moral necessity, protection of human right and for moral improvements on the legal system (Gagro, 2014). A major criticism of the Responsible to Protect principle is that it may be used as an excuse by stronger nations to invade the sovereignty of smaller or weaker states. This may be exemplified by the US invasion of Iraq in 1989 under the pretext of destroying weapon of mass destruction. Another example is the controversial involvement of US and Russia in the Syria crisis

### **Sierra Leone and the civil war in perspective.**

Sierra Leone is a former British Colony which gained political independence on 27<sup>th</sup> April, 1961 (Country Watch, 2017) and with a population of about 7 million (Government of Sierra Leone, 2015). The West African country with Freetown as its capital is bounded by Guinea in the North and Liberia in the East and has 17 ethnic group (Higbie and Moigula, 2017).

The country fought a brutal 10 year war which officially ended in 2001. The war began on March 23, 1991 with an invasion of the country by Rebels of the Revolutionary United Front (RUF) led by Foday Sankoh (Akinrinade, 2011; Higbie and Moigula, 2017)

Between the beginning of the war and the end of hostilities, attempt were made to broker peace in the country. These attempts resulted in the Abidjan peace accord of 1996, the Conakry peace plan of 1997, The Lome peace agreement of 1999 and the Abuja cease fire agreement of 2000 and 2001 (Sesay & Suma, 2009). However, none of these peace deals ended the hostilities (Dana 2014; Hayner, 2007; Jalloh 2015,).

The war witnessed horrendous human rights abuses which have been described as the worst in living memory (Country watch, 2017) and as “unprecedented in the history of civil war not just in West Africa but also in other parts of the world” (Sesay & Suma, 2009, p. 6). By the end of the war, between 50,000 to 75,000 Sierra Leoneans had been killed (Ayittet, 2018); more than half of the population had been displaced; thousands had become victims of rape and other violent sexual abuses (Bellows and Miguel, 2009); about 40,000 became survivors of amputation of one or more limbs (Ainley, Friedman and Mahony, 2015); at least 5000



children have become “brutal combatants” (Nkansah, 2011b, p. 160); and 800 peace keepers killed. (Nkansah, 2011b).

In June 2002, following a request by the then President of Sierra Leone, Tijan Kabbah, the Special Court for Sierra Leone was established through a treaty between the UN and the government of Sierra Leone. The court, a hybrid international court, had the mandate to “prosecute persons who bear the greatest responsibility for serious violation of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30<sup>th</sup> November 1996 including those leaders who in committing such crime, have threatened the establishment and implementation of the peace process in Sierra Leone” (Article 1 of the Statute of the Special Court). By the time the court ended its sitting in 2013, 10 persons had been brought to trial and sentenced to various term of imprisonment. Those imprisoned included Charles Taylor, a former President of (neighbouring) Sierra Leone who was convicted and sentences to 50 years imprisonment.

### **3.0 METHODOLOGY**

The study adopted the survey research design. The population of the study consisted of the people of Sierra Leone. The sampling technique adopted was the multi stage sampling technique through which the 4 Sierra Leonean towns studied were selected. Data was collected using a questionnaire and semi structured interview. The sources of data for the study were both primary and secondary sources. The data collected from the questionnaire was analysed using descriptive statistics. The interview was thematically analyzed.

### **4.0 FINDINGS AND DISCUSSIONS**

#### **4.1 Objectives of the Special Court for Sierra Leone.**

Apart from the objective of conducting trials of right abusers (as stated in the Statute of the Court), there was disconnect a between the actual mandate of the court and the objectives which the people expected the court to have. 67% respondents thought that compensation of victims was one of the objectives of the Special Court just as 60% of the respondents thought the victims should have been compensated by the court.

#### **4.2 Impact of the Special Court as a transitional justice mechanism**

59% of the respondents and most of the interviewees agreed that the trial of the abusers by the Court represented the desires of the people of Sierra Leone though only 52% thought that the trial had been fair to the victims.

On the appropriateness of the court over local national court as the transitional justice mechanism for Sierra Leone only 35% of the respondents thought that the national court would have been a better choice.

#### **4.3 Challenges of the Special Court as a transitional justice mechanism.**

The Court faced funding constraints and also lacked a dedicated enforcement machinery for it activities. All interviews who were members of staff of the Court affirmed these as constraints on the activities of the court.

## 5.0 CONCLUSIONS AND RECOMMENDATIONS

### Conclusion

In so far as compensation was not ordered for the victims of the right abuses committed during the civil war, the judgment of the court did not meet the aspirations or expectations of the victims. This fact has therefore impacted negatively on the perceived effectiveness of the court. In spite of this, however, the people of Sierra Leone considered that the mandate of the special Court to try right abusers was substantially accomplished.

In the peculiar context of Sierra Leone the choice of a special court (rather than the country's national court) to try those who committed war period atrocities was appropriate. The sitting of the Special Court in Sierra Leone, unlike other international criminal courts before it, was substantially responsible for whatever effectiveness the court attained.

The Special Court faced funding challenges. This together with the lack of a dedicated enforcement machinery constrained the activities of the court and so affected its effectiveness.

### Recommendation

There is the imperative need to address the issue of compensation of victims wherever an international criminal tribunal would sit as a post conflict justice mechanism. In order to guarantee such payments it should be made payable by the UN (or the convening authority). It is considered that such payments would go a long way not only in assuring enduring peace but cementing reconciliation in the affected country thus leading to greater chance of post conflict stability in such country.

Adequate funding arrangements should be made for the activities of international tribunal set up with or by the United Nations. Such funding should be made from the budget of the UN. The idea of leaving an International Tribunal at the mercy of voluntary national donors would detract from the effectiveness of such tribunal. Adequate arrangements made to finance operational expenses of the tribunal would enhance the operations of the tribunal.

Future international tribunals should also be ad hoc and should sit in the country of conflict. This would ensure greater legacy impact and acceptability of such tribunals.

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