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Sierra Leone: The Justice v. Reconciliation Archetype?

By Chris Mahony
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The archetypal nature of Sierra Leone's transitional justice experience draws from both the choice of adopted process and the issues those processes focus upon. Sierra Leone's societal trauma requires broader societal reconciliation that goes beyond the crimes within the conflict and considers structural grievances that cause conflict.

The Special Court for Sierra Leone ('SCSL') and Truth and Reconciliation Commission ('TRC') emerged from two very distinct conclusions to Sierra Leone's armed conflict. In my forthcoming co-edited collection 'Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone', I identify the two distinct conclusions and their consequences for justice and reconciliation.[1] The first conclusion occurred in 1999 when two key parties to the conflict, the Revolutionary United Front ('RUF') and the Government of Ahmed-Tejan Kabbah, signed the Lomé Peace Agreement. The second occurred in mid-2000 when RUF combatants, citing non-provision of payment and education benefits promised under Lomé, seized UN peacekeepers rather than disarm.

1. Political Underpinnings of the SCSL

To understand the impact of justice on reconciliation, we must understand the disposition of those designing and implementing the justice process. The RUF originally fought as part of Charles Taylor's National Patriotic Liberation Front in Liberia before invading Sierra Leone from Liberia in 1990. They enjoyed material and diplomatic support from Libya's leader, Muammar Gaddafi, Burkina Faso's President, Blaise Compaore, and the French government. Taylor, after convincingly winning Liberia's 1997 election, procured Clinton Administration support via then US Special Envoy for Human Rights and Democracy in Africa, Jesse Jackson.

The competing and disengaged positions of the British, French and American governments prolonged Sierra Leone's conflict. The parties' negotiating positions at Lomé were affected by President Kabbah's declining military strength within Sierra Leone. Kabbah, sensing the impending withdrawal of the supporting Nigerian forces, appealed to other ECOWAS states to provide military support.[2] Francophone West African states, other than Guinea, predominantly supported Taylor and the RUF.[3]

When the Lomé Peace Agreement was signed, the US government supported the RUF and Charles Taylor, along with the French government. That agreement provided political reconciliation, a power-sharing government, amnesty to all parties to the conflict and combatant incentives to disarm and demobilize, including lump sum payments and educational and vocational opportunities.

UK government support for Kabbah's regime had been significantly mobilized by British entrepreneur, Anthony Buckingham. His company, Branch Heritage Group, secured diamond-mining concessions valued at USD 2 billion, carrying all the risk for the concessions' security while providing a mercenary group to assist the government. By 1995, Sierra Leone's debt servicing amounted to 75 per cent of annual exports.[4] By the time of the 1999 Lomé Peace Agreement, the Sierra Leone Armed Forces

[1] I examine the politics of transitional justice in Sierra Leone in: Chris Mahony, "The Political and Normative Drivers of the Special Court for Sierra Leone and the Truth and Reconciliation Commission", in Kirsten Ainley, Rebekka Friedman and Chris Mahony (eds.), *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone*, Palgrave Macmillan, New York, 2015 (forthcoming).

[2] *Sierra Leone Web News*, February 1999; TRC, *Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 3A, GPL Press, Accra, 2004, p. 331 ('TRC Report').

[3] Interview with Tunisian delegate to the United Nations Security Council, The Hague, 2009.

[4] David Keen, *Conflict and Collusion in Sierra Leone*, James Curry, Oxford, 2005, p. 161.

('SLA') had begun operating with the RUF against the Kabbah government. Kabbah and the UK were dependent upon West African Peacekeepers and a predominantly southern militia, the Civil Defense Forces ('CDF'), for security.

As the relationship between RUF and SLA strained, Kabbah and the British military turned the SLA against the RUF, changing the post-Lomé military dynamic. Simultaneously, the UK Ambassador to the US brought Clinton Administration support of the RUF and Taylor to the attention of Republican Senator Judd Gregg. Gregg committed to block Senate approval on payments totalling USD 1.7 billion which the US owed the UN until policy was changed to seek Taylor's removal and the RUF's defeat. The blocked money prevented, among other things, provision of benefits to disarming combatants in Sierra Leone. RUF combatants consequently took 500 peacekeepers hostage in May 2000.

In early June 2000, Judd Gregg met with US Ambassador to the UN, Richard Holbrooke. Holbrooke committed to removing Charles Taylor and the RUF from power in Liberia and Sierra Leone upon release of the money. Holbrooke informed Gregg of Liberian regime change strategy. Firstly, the US would increase military aid to Guinea enabling an insurgency from Guinea into Liberia against Taylor. Secondly, US sanctions would be imposed on Taylor to hurt his capacity to repel the insurgency. Thirdly, a war crimes court would be established that would indict and stigmatize Taylor and the RUF, enabling Security Council political will to impose multilateral sanctions which would severely weaken Taylor's government. Fourthly, USAID and the CIA would increase support to political opponents of Taylor. Fifthly, a significant peacekeeping force would be deployed in Sierra Leone to compel the RUF's surrender. Holbrooke assured Gregg that one or a combination of these instruments would push both Taylor and the RUF from power. Judd Gregg agreed and released UN payments. Sierra Leone's TRC had already been established in law in February 2000 and could not be abandoned.

2. Victor's Justice and Selectivity in Prosecution

The SCSL's political underpinnings informed its subsequent politicization, inability to independently pursue those most responsible, and failure to provide a break with the politically informed application of law with which Sierra Leone is very familiar. Article 1(2) and (3) of the SCSL Statute provide *de facto* immunity to peacekeepers and personnel acting under agreement with the Sierra Leone government. This excludes mercenaries acting on behalf of Tony Buckingham and British government forces. Discontent at the *ad hoc* tribunals' cost rendered the SCSL dependent on voluntary contributions and disproportionately dependent on donor governments. As the predominant SCSL financier, the US government held far greater design and staff selection clout than it enjoyed with the ICTY or ICTR. The White House asked Department of Defense ('DoD') JAG lawyer, David Crane, if he would participate in an 'experiment' in West Africa. Prior to going to West Africa, Crane held a 'four corners' idea, based on DoD information, of who he was to prosecute.

President Kabbah was able to affect case selection in a number of ways. Firstly, he selected his former colleague, Desmond de Silva, as deputy prosecutor and seconded police officers to investigate CDF crimes that occurred under his command as Minister of Defence and Head of State. The Court indicted Kabbah's political party rival, CDF field commander, Chief Sam Hinga Norman. It refrained from indicting Kabbah who, according to the TRC's evidence, played a more direct role in commanding, aiding and abetting the CDF than Charles Taylor had with the RUF.

The Court's political underpinnings had significant consequences for orthodox assertions about criminal justice impact on reconciliation. The summary of a debate before the UN General Assembly emphasised the need to "further the cause of international justice, premised on the notion that doing so in the best possible manner requires that it takes place in the context of advancing efforts at achieving reconciliation between former belligerents".[5] In the Sierra Leonean case, the SCSL constituted one part of a strategy that sought to abandon reconciliation between former belligerents in favour of further hostilities to achieve and entrench victory for one party to the conflict. The summary of debate further notes: "Reconciliation will be achieved when all parties to a conflict are ready to speak the truth to each other." One party speaking to another incarcerated party compelled to speak only to their own culpability in a conflict fails to meet this threshold.

Fletcher and Weinstein argue that trials should be integrated with other capacity-development measures to attend to social repair. "If we do not comprehend the processes of civil destruction in a broader, ecological context," they argue, "how can we identify and address the crucial aspects of civic reconstruction?".[6] They note the absence of any systematic empirical data informing international criminal justice contributions to reconciliation and reconstruction.[7] They emphasize the discovery and communica-

[5] Office of the President of the General Assembly, "Role of International Criminal Justice in Reconciliation: President's Summary", UN Headquarters, New York, 10 April 2013, p. 2. The debate and report have been extensively criticised.

[6] Laurel E. Fletcher and Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation", in *Human Rights Quarterly*, vol. 24, 2002, p. 580.

[7] *Ibid.*, p. 585.

tion of 'truth' to the public as necessary for societal healing.[8]

Assertions suggesting that judicial inquiry produces the most authoritative truth[9] are premised upon the assumption that the prosecution is both able and willing to fully investigate all conduct and all culpable persons within a conflict. The SCSL was unable to pursue all culpable persons for a number of reasons that can be traced to the political self-interest of the designing and co-operating actors: the US and UK governments, and Kabbah's supporters within the Sierra Leone People's Party.

The SCSL was constrained to considering persons culpable only for war crimes, crimes against humanity and other international humanitarian law violations within Sierra Leone's borders after 30 November 1996 that were not acting under agreement with the Kabbah government. This prevented the Court from considering the legality of and individual responsibility for attacking the territory of Sierra Leone. Within its limited temporal jurisdiction, the prosecution predominantly prosecuted conduct between 1999 and 2000. When the evidence incriminated Blaise Compaore and Muammar Gaddafi's support for the RUF, the US State Department and Senator Gregg's office told the prosecutor to stop those investigations or Court funding would cease. The Court's location within Sierra Leone caused senior members of the prosecution to determine that pursuing Kabbah risked Court personnel being expelled from the country.[10] When the Court threatened to subpoena Kabbah to testify in the CDF case, it backed down after the Attorney General indicated the subpoena would be ignored.[11] A criminal process demonstrating victor's justice undermines the possibility of an environment in which both parties may freely promote and vet one another's historical claims.

3. Roots of Sierra Leone's Conflict

Sierra Leone's conflict was enabled by structural disempowerment of key groups including youth, rural populations, those outside chieftaincy lineage, as well as the dramatic power imbalance between Sierra Leone and external state and non-state actors. The TRC found that the British Colonial government removed indigenous forms of chieftaincy accountability to ordinary Sierra Leoneans and that this patrimonial structure of power enabled corruption and predatory external engagement.[12] During the 1980s, Sierra Leone's dependence on commodity exports was exposed as commodity prices fell, the state failed to formalize its black market diamond trade, and economic liberalization along with devaluations and then floatation of the Leone were imposed by international donors. These economic conditions caused hyperinflation and banking reluctance to accept Leones. Real estate speculation benefitted elites, capital flight accelerated and the middle class rapidly shrank as real salaries plummeted.[13] By the start of Sierra Leone's conflict in 1991, social spending was just 15 per cent of what it was a decade earlier, inflation had reached three digits, a typical monthly salary was commensurate to the value of a bag of rice, and life expectancy was less than 40 years.[14] Only 150 of Sierra Leone's 250−300 doctors served outside the Freetown peninsula.[15] The economic situation prevented a dangerously high number of young people from asserting economic independence – a prerequisite to emerging from the cultural stigmatized 'youth' status of economic dependency.[16]

Confronting the global, regional and local structural dynamics that pushed Sierra Leone towards armed conflict required confronting the very interests that led the SCSL's design. Local chieftaincy-oriented patrimonial power structures established under British colonialism were perpetuated after independence by Sierra Leonean elites, self-interested British engagement and liberalizing pressure from international financial institutions. The SCSL, as part of a regime change strategy for Liberia, served primarily to entrench the asymmetry of global power dynamics rather than confront or provide a historical truth acknowledging its role.

The SCSL's historical truth obfuscates these drivers of conflict. It also diminishes the predatory role of external actors, including the often competing French, British and American governments, played in supporting parties to conflict in order to maintain or displace one another's preferential commercial and security access. Some data has been solicited during the trials as to the role of external actors. However, the Court's focus on local actors' conduct and culpability promotes a disingenuous narrative of purely local responsibility for the crimes during the conflict. At the Abidjan peace negotiations in 1996, President Kabbah noted that were he a youth at the time of the conflict, he too

8 *Ibid.*, p. 586.

9 Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", in *Yale Law Journal*, vol. 100, 1991, p. 2537.

10 Mahony, 2015 (forthcoming), *supra* note 1.

11 SCSL, *Prosecutor v. Norman, Fofana and Kondewa*, Transcript, 14 February 2006, SCSL-2004-14-T, p. 74.

12 See 'The Historical Antecedents to the Conflict' chapter, TRC Report, Vol. 2, 2004, *supra* note 2.

13 Quirk *et al.*, *Floating Exchange rates in Developing Countries: Experience with Auction and Interbank Markets*, International Monetary Fund, Washington, D.C., May 1987; John Weeks, *Development Strategy and the Economy of Sierra Leone*, St. Martin's Press, New York, 1992, p. 133; and Keen, 2005, p. 26, *supra* note 4.

14 *Ibid.*, Keen, 2005, p. 27, *supra* note 4; TRC Report, Vol. 3A, p. 79, *supra* note 2.

15 *Ibid.*, p. 80.

16 Keen, 2005, p. 35, *supra* note 4.

would likely have joined the rebels.

4. Failed Societal Reconciliation

In his rigorous examination of Rwanda, Mahmood Mamdani identifies a contextualized truth, political reform, and reorganization of power as essential prerequisites to broader societal reconciliation – reconciliation that international justice can obstruct by excluding a conflict's losers from the process.

The change in external approach to Sierra Leone and the Court's existence had a further detrimental impact on truth-seeking and Sierra Leonean societal reconciliation: the SCSL disproportionately absorbed transitional justice funding. As a consequence of revised US priorities, the TRC was only able to access total funding of between USD 6 and 8 million. The SCSL received USD 250 million while South Africa's TRC enjoyed an annual budget of USD 18 million between 1996 and 2002.[17] The TRC's diminished capacity constrained the establishment of a historical truth of sufficient empirical basis to facilitate broad societal reconciliation. Without adequate resources, the TRC employed an intern to draft its recommendations on governance and combating corruption and to co-author the TRC chapter on 'The Historical Antecedents to the Conflict'.[18] The TRC report was hesitant in making recommendations on the deepest source of discontent felt among many combatants: the arbitrary power British colonial authorities bestowed on pliant chiefs to pass judgment on critical issues. The TRC identifies the particular direction of violence by youth against chiefs and authority figures wielding the arbitrary discretion of Sierra Leone's patrimonial power structure. It did not have the capacity or the will to recommend structural change.

The response to the Ebola outbreak illuminates the consequences of transitional justice failure to prompt reorganization of power and prioritize provision of basic services like healthcare and education. Instead, the overwhelming force of a unified US and UK Sierra Leone policy brought short-to-medium-term peace, a peace well-clothed in the rhetoric of 'justice', 'truth' and 'reconciliation'. It was commonly promoted as a new model enabling a TRC and tribunal side-by-side.

Yet the Sierra Leonean case demonstrates the non-binary role of truth-seeking or criminal justice responses in advancing or impeding reconciliation. Upon scrutiny, Sierra Leone demonstrates a 'Justice v. Reconciliation Archetype', not because of the processes selected, but because of the interests the processes were used to advance – interests that sought to entrench a defeat of, rather than reconcile with, one party to the conflict.

The RUF's legitimacy to represent Sierra Leonean grievances is questionable. However, its exclusion from the political space was also symptomatic of an externally-imposed approach to transitional justice, born of an externally-imposed conclusion to the conflict. Both failed to address reconciliation of historical grievances and structural inequities that led Sierra Leoneans to resort to violence.

The Sierra Leonean case helps us to direct the question of 'justice v. reconciliation' not just to what happened during a conflict, but to why the conflict started and how repetition might be prevented. It demonstrates that international relations have probably not yet matured to a point where an impartial pursuit of those most responsible for core international crimes can independently occur, let alone where a process might take place without diminishing possibilities for societal reconciliation.

Chris Mahony *is Research Fellow at the Centre for International Law Research and Policy, Citizen Security and Criminal Justice Consultant at the World Bank, and Visiting Research Fellow at Georgetown University Law Center. He holds a D.Phil. in Politics and an M.Sc. in African Studies from Oxford University, and a B.Com. and an LL.B. from Otago University. He worked at both the SCSL and Sierra Leone TRC, and focuses on case selection independence in international criminal justice.*

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[17] See Chris Mahony and Yasmin Sooka, "The Truth about the Truth: Insider Reflections on the TRC", in Kirsten *et al.*, 2015, *supra* note 1.

[18] The present author was the 22 year-old intern and then consultant in 2003.

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