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ARTICLES

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The Banality of Justice:
Reflections on Sierra Leone’s Special Court

INTRODUCTION

On March 13, 2004, the Special Court for Sierra Leone handed down a decision on the matter of perceived bias in

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its then President, Geoffrey Robertson QC. Defense counsel for Issa Sesay, head of the Revolutionary United Front, had argued that passages regarding the Sierra Leone conflict in Robertson’s 2002 book, *Crimes Against Humanity: The Struggle for Global Justice*, indicated the pre-judging of the culpability of several defendants at the Court. The Special Court agreed, against Robertson’s protests,² that the requirement that justice be seen to be done admits of no exceptions: the author of specific allegations of culpability should not sit in judgment over those against whom he had made those allegations. Robertson was stood down from cases involving Revolutionary United Front (RUF) members and subsequently his tenure of the Presidency was determined to have run its course.³

The example is salutary, while embarrassing or at least frustrating for Robertson in view of the enormity of the criminal acts that are to be on trial and the probable accuracy of his published account. Orthodox guidelines for the administration of criminal justice retain their relevance in the extraordinary circumstances of the international criminal tribunal. In such circumstances, rules for procedural fairness are of equal, if not greater, significance than they are in the municipal setting.⁴ The Robertson affair exem-

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² Sesay, Case No. SCSL-2004-15-AR15, ¶ 11 (presenting Robertson’s argument against stepping aside, which focused on judicial independence).
⁴ Prosecutor v. Brima, Kamara, and Kanu, Case No. SCSL-04-16-PT, Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion of Abuse of Process Due to Infringement of Principles of *Nul-
The Banality of Justice

plifies the issue addressed in this paper: extraordinary and horrifying international crimes, if subjected at all to a criminal process, should be subjected to an ordinary criminal process.

The overall thrust of the claims set out here may thus be indicated by the following proposal. If evil is banal (as Arendt suggested) then the prosecution of the evil-doer must also be banal. That is to say, international criminal justice even (or rather, especially) in cases of the most heinous abuse of fellow humans, needs to be mundane, routine, even boring. Like the mills of God, the international system of justice grinds both slow and exceeding small. This proposal will be investigated in the context of Sierra Leone’s Special Court.

The effort to find an institutional formula for international criminal justice has been an honorable one, even if none of the models has been entirely successful. From Nuremberg to the recent International Criminal Tribunals for the Former Yugoslavia and for Rwanda, and the International Criminal Court, the international community has sought a generic framework for its response to the massive human rights abuses that have darkened the contemporary era.

It may be that there is no formula, but a plurality of local solutions to be informed by internationally recognized principles. The Special Court for Sierra Leone is the most

*olum Crimen Sine Lege and Non-Retroactivity as to Several Counts, (Mar. 31, 2004).

5 HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 288 (Viking Press, 1964) (1963). No attempt is made here to evaluate Arendt’s approach, or to co-opt it to the present argument. Arendt distinguishes the “banal” from the “commonplace,” whereas the present argument would treat those terms as synonymous.

recent of the ad hoc judicial institutions established under the aegis of the United Nations in order to prosecute war crimes and crimes against humanity in particular states or regions. The Special Court is the first treaty-based ad hoc criminal court. It represents the most recent legal response of the international community to horrifying incidents of systematic violence perpetrated on civilians or on non-combatants in time of war. The establishment of the Special Court provides the occasion for critical reflection on the international criminal justice system in relation to massive human rights abuses.

I

THE SPECIAL COURT FOR SIERRA LEONE

The establishment of the Special Court results from civil war in Sierra Leone between 1991 and 2001, during which numerous atrocities were committed. Sexual violence, mutilation, and enforced enlistment of minors, as well as murder, were systematically employed by combat-

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8 Atrocities including summary killings were committed by rebel forces as well as by forces supporting the Government. See Abdul Tejan-Cole, Human Rights Under the Armed Forces Revolutionary Council (AFRC) in Sierra Leone – A Catalogue of Abuse, 10 Afr. J. of Int’l and Comp. L. 481, 485 (1998); Abdul Tejan-Cole, Painful Peace: Amnesty Under the Limpe Peace Agreement in Sierra Leone, 3 Law, Democracy and Dev. 239, 240 (1999).
ant groups while subduing civilian populations. The Special Court for Sierra Leone began its operations in July 2002 and it was intended to complete its process by June 2005. At the time of writing, “eleven persons associated with all three of the country's former warring factions stand indicted by the Special Court.” In addition, two indicted persons have died since the indictments were drawn up. Of the eleven indictees, the trial process is proceeding for nine persons who are in custody. Two further indictments are outstanding, pending arrest and detention, including that of the former president of Liberia, Charles Taylor.

The Special Court was designed on the basis of a probably unprecedented degree of collaboration between the United Nations and a host state. Yet it has been de-

9 These atrocities are thoroughly documented by international non-governmental organizations. See e.g., Human Rights Watch website at http://hrw.org/doc/?t=africa&c=sierra (last visited Sept. 15, 2005).
11 As the Court’s website notes, “They are charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law. Specifically, the charges include murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on United Nations peacekeepers and humanitarian workers, among others.” Available at http://www.sc-sl.org/about.html (last visited Feb. 7, 2006). Foday Sankoh, considered the most significant of rebel (RUF) leaders to be indicted, died in custody of natural causes during 2003; he had previously been convicted of treason and sentenced to death by the High Court of Sierra Leone. See Tejan-Cole, supra note 8, at 243.
12 Despite making the initial approach, the Government of Rwanda voted in the Security Council against the setting up of the ICTR, and the relationship has been rocky. José Alvarez, Crimes of States / Crimes of Hate: Lessons from Rwanda, 24 YALE J. OF INT’L L. 365, 387 (1999). The Government of Cambodia has been in protracted discussions with the U.N. a similar process for that nation. Christine
scribed as "under-funded, ill-equipped, and disorganized" and its function as "boutique justice." Even those commentators more favourable in their evaluation express concerns about the Court's jurisdiction and its likely outcomes. Numerous aspects of the structure and procedure of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been influential on the design of the Special Court. However, there are also various innovative features of the Special Court for Sierra Leone. These include its hybrid status with respect to Sierra Leone's municipal legal system, particularly its primacy in a concurrent relationship and the inclusion of Sierra Leone crimes in its Statute; its bilateral treaty basis; and its focus on crimes that, in contrast to the ad hoc International Criminal Tribunals, are largely unconnected with matters of ethnicity or nationalism. The Sierra Leone process has its own, locally situated Appeals Chamber, unlike the two ad hoc Tribunals which share the same Appellate Chamber in The Hague.

While it has been suggested that only 20-24 persons may be prosecuted by the Special Court, its significance


14 Beresford and Muller, *supra* note 7.

15 Further, two Appeals Judges, Judges Jallow of Gambia (ICTY) and Winter of Austria (Kosovo Supreme Court), have worked in the former Yugoslavia. U.N. Doc. SG/A/8/3, *supra* note 10.


may well be considerable.\textsuperscript{18} Of course, to the extent that deterrence (especially the undermining of perceived impunity)\textsuperscript{19} is a significant function of international criminal prosecution, evaluation of the Special Court is an empirical matter.

Jurisdiction for the Special Court is limited both temporally and geographically. The temporal jurisdiction for the Special Court is from 30 November 1996 onwards,\textsuperscript{20} and alleged offences must have taken place within Sierra Leone.\textsuperscript{21} This is somewhat similar to the ad hoc International Criminal Tribunal for Rwanda established under Chapter VII of the United Nations Charter.\textsuperscript{22} In respect of its treaty basis, the Special Court is comparable to the International Criminal Court. However, in contrast to the jurisdiction of the ICC, the bilateral nature of the Sierra Leone agreement between the United Nations and the Gov-

\textsuperscript{18} Mundis, \textit{supra} note 17, at 939 (noting that the Democratic Republic of Congo may ask the UN for an international tribunal, and that proceedings in Cambodia have been in planning for some years).

\textsuperscript{19} In the 1930s, Hitler could boast with impunity, "Who now remembers the Armenians?" \textit{I VIRGINIA MORRIS AND MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, xiv} (1995).

\textsuperscript{20} In August 2001, the Sierra Leone Government asked the U.N. to establish jurisdiction from March 1991, but without success. Fritz & Smith, \textit{supra} note 13, at 411.


ernment of Sierra Leone provides very limited powers to the Special Court with respect to third states.23 Unlike the International Criminal Tribunals, the Special Court for Sierra Leone has jurisdiction over both international crimes (excluding genocide) and municipal offences, and is physically located in the state concerned.24 The Court’s status with respect to Sierra Leone’s national court system is concurrent but with primacy.25

Four categories of crime are specified, three of which are internationally-defined: crimes against humanity (Article 2); violations of Common Article 3 of the Geneva Conventions of 1949 and of Additional Protocol II of 1977 (Article 3); and other serious violations of international humanitarian law (Article 4). Notably, and in contrast with the ICTY and ICTR, genocide is not included.

Under crimes against humanity, nine crimes are included when committed “as part of a widespread or systematic attack against any civilian population.” The list is almost identical to the list in Article 3 of the Statute to the ICTR.26 However, the Sierra Leone rubric is wider in that it lacks the motivation clause found in the ICTR Statute, which refers to “widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”

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23 Beresford and Muller, supra note 7 at 641. This limitation presents difficulties in addressing Liberia’s role in the conflict.
24 A further practical difference between the Special Court and the International Criminal Tribunals is that funding for the former is to be raised by voluntary international contribution while the latter are supported by U.N. subvention at a rate of between $80 - $100 million (U.S.) per annum. Diane Amann, Message as Medium in Sierra Leone, 7 ILSA J. OF INT’L AND COMP. L. 237, n33 (2001).
25 Statute of the Special Court, art. 8, § 2; see Beresford & Muller, supra note 7 at 640.
26 MORRIS & SCHARF, supra note 19 at 186.
Violations of Common Article 3 and of Additional Protocol II, protecting non-combatants in internal armed conflicts, include specific reference to mutilation, collective punishment, humiliation and degrading treatment. Certain offences under Sierra Leonean law are also specified in Article 5, this last category representing an innovation in incorporating municipal offences into an international instrument. The specific municipal offences included relate to cruelty to children - specifically the abuse and abduction of girls, and to malicious damage.  

II

THE SPECIAL COURT AND

THE TRUTH AND RECONCILIATION COMMISSION

Sierra Leone's Truth and Reconciliation Commission [TRC] was established by the Truth and Reconciliation Commission Act of 2000. The temporal scope is "from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement (i.e., July of 1999)," a period

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28 Elizabeth Evenson, Truth and Justice in Sierra Leone: Coordination Between Commission and Court, 104 COLUM. L. REV. 730 (2004). The purpose of the Commission is "to create an impartial historical record of violations and abuses of human rights and international humanitarian law . . . to address impunity; to respond to the needs of victims; to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered." Truth and Reconciliation Act 2000, § 6(1) (Sierra Leone).
29 The Lomé Peace Agreement of 1999 included reference to an amnesty for participants. Some commentators feel the Lomé amnesty provisions impede the proposed judicial process. See generally Beresford and Muller, supra note 7; Daniel Macaluso, Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace
commencing some five years before the commencement of jurisdiction for the Special Court. The TRC has completed its hearings.

The TRC is the latest in a series of similarly-named Truth and Reconciliation Commissions, established to make enquiry into alleged atrocities or other abuses of power within a state. Such commissions, in recent times, have been established to enquire into, among other things, actions of the police and of the military under a previous regime, and the actions of insurgent para-military forces in internal conflicts. The most significant model for Sierra Leone’s process was that developed in South Africa.

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32 MARGARET POPKIN, PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR (2000); RUTI TEITEL, TRANSITIONAL JUSTICE (2000) (Discussing Chile, Argentina, El Salvador, and South Africa as examples).

33 Id. (Describing specifically El Salvador and South Africa).