Building the Fourth Pillar:
Defence Rights at the Special Court for Sierra Leone

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Abstract

The author considers the conflict in Sierra Leone and the creation of the Special Court for Sierra Leone to bring to trial those who bear the greatest responsibility for the conflict. The provision of defence rights in post-war international proceedings is examined, in the International Military Tribunals, the International Criminal Tribunals and the more recent 'hybrid' tribunals in Kosovo, East Timor and Cambodia. Difficulties are identified with these structures. The considerations relevant to the creation of the Defence Office are discussed, together with its mandate, structure and operation. The delay in ensuring a fully operating office at the earliest stage due to budgetary restraints is identified as the key problem not to be repeated.

1. Introduction

The Special Court for Sierra Leone has been lauded as a unique experiment in international criminal justice for a number of reasons: It is a tribunal that was created at the request of the government of a country devastated by a ten year war; it was set up by a treaty between the United Nations and the Government of Sierra Leone, without the need for the use of additional Security Council powers; it is based in the country where the criminal offences are alleged to have occurred; the Statute relies upon a mixture of offences in international and domestic law, and the staff is made up of the same mix of foreign and national workers.

More significantly for the operation of the Court, it has a massively limited budget, initially funded by voluntary contributions from member states of the United Nations, a limited three-year period of operation and a statutory jurisdiction that means that only those who bear the greatest responsibility can be tried.

The Court has also attempted to create a strong and independent structure to ensure that the defence is properly represented, in contrast to previous experience at international criminal tribunals. The experiment of the Defence Office of the Special Court will be closely observed, as its success or otherwise may well lead to the adoption of the structure in other tribunals and at the International Criminal Court.

1.1 The War in Sierra Leone

Sierra Leone gained independence from the United Kingdom in 1961. Initially democratic, it soon fell victim to a number of military coups and then became a one-party state. A country rich in natural resources, most notably diamonds, it has seen its position as a relatively

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prosperous country plummet to the stage where in 2002 it was the poorest country in the world, with literacy at 36 per cent and life expectancy at birth standing at just under 39 years.[1]

In March 1991, the Revolutionary United Front (RUF), led by Foday Sankoh, invaded Sierra Leone from neighbouring Liberia. This was the start of a ten-year civil war that would leave approximately 60,000 killed, 2 million people displaced, 20,000 abducted and at least 4,000 people subjected to amputation, the shocking symbol of this particular conflict.

Elections were held in 1996, and a peace accord signed in Abidjan on 30 November 1996 was expected to end the war, granting amnesties to all. However, a military coup in April 1997 removed President Kabbah from power and replaced the government with a *junta* in the form of the Armed Forces Revolutionary Council (AFRC), led by Johnny Paul Koroma, who subsequently joined forces with the RUF.

Those loyal to the previous government marshalled traditional hunters from around the country to create a civilian militia to fight the RUF, known as the Civil Defence Force (CDF), which at its height had 200,000 members, lead by Sam Hinga Norman. At the request of the exiled government, the Monitoring Group of the Economic Community of West African States (ECOMOG) imposed an absolute blockade on the country, and forcibly removed the *junta* from power in February 1998, allowing President Kabbah to return to Freetown in March 1998.

Much of the country remained under rebel control, and on 6 January 1999 the rebels made a final, desperate attack on Freetown. They entered at the eastern end of the city, terrorising the population and forcing them out of their homes as they went, essentially using the civilian population as a human shield between them and the Nigerian forces. Witnesses describe whole families being summarily executed, and rebels using machetes to mutilate the limbs of children. Women were abducted and sexually abused. It took the ECOMOG force over three weeks to expel the rebels from the capital. The attack left thousands of people killed, and whole swathes of the city burnt to the ground.[2] Human rights were apparently abused by both sides.

A further ceasefire was agreed in May 1999, which lead to the Lomé Peace Agreement, signed on 7 July 1999, between the government of President Kabbah and the RUF. This was an attempt to turn the RUF into a political party and to begin the process of disarming the combatants. Sankoh was to be the Vice President. There was to be a Truth and Reconciliation Commission to determine what had happened since 1991. UN peacekeepers were to assist in the disarmament process.

The ceasefire broke down in May 2000, with the RUF attacking UN peacekeepers, seizing their weapons and taking them hostage. Foreign nationals were again evacuated, and the RUF leaders, including Sankoh, arrested. In August 2000, a group called the West Side

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[1] Sierra Leone comes 175th out of 175 countries in the 2003 survey of Human Development Indicators published by the United Nations Development Programme. See http//www.undp.org/hdr2003/indicator/cty_f_SLE.html and UNDP Human Development Report 2003, 'Millennium Development Goals: A compact among nations to end human poverty', 237-338.

[2] For further information on human rights violations committed during the January 1999 attack, see Corinne Dufka, *Getting Away with Murder, Mutilation and Rape: New Testimony from Sierra Leone*, Human Rights Watch, Vol. 11, No. 3(A), June 1999. The award winning documentary film by Sorious Samura, *Cry Freetown*, shows the shocking nature of the atrocities committed.

Boys took hostage 11 members of the Royal Irish Regiment and a Sierra Leonean liaison officer, who were rescued in a dramatic operation in September 2000 by UK special forces.

A further peace accord signed in Abuja on 10 November 2000 brought the rebels back to the peace process. The United Nations Assistance Mission in Sierra Leone (UNAMSIL) was deployed in 2001, the largest ever UN mission with over 17,000 personnel. As part of the disarmament process, UNAMSIL disarmed a total of 6,904 child soldiers.[3] In January 2002, President Kabbah declared the war to be over.

In June 2000, President Kabbah had written to the United Nations asking them to assist with the creation of a war crimes court. In January 2002 the Government of Sierra Leone and the United Nations signed an agreement to create the Special Court for Sierra Leone, mandated to prosecute those who bear the greatest responsibility for the crimes committed during the war.

Foday Sankoh, Johnny Paul Koroma and Sam Hinga Norman have all been indicted by the Special Court.

1.2 The Special Court for Sierra Leone

The initial request for assistance in the setting up of a war crimes tribunal came in from Tejan Kabbah, president of Sierra Leone, to his old colleague from his days as a UN civil servant, Kofi Annan. In the letter of 12 June 2000 he asked for the setting up of a court in order to 'try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages'.[4] Kabbah proposed an international tribunal on the lines of the International Criminal Tribunals (ICTs) for Rwanda and Former Yugoslavia, to be created by the Security Council, with the jurisdiction to try senior political and military leaders. The court would have a trial chamber with West African and other international judges and would utilise the Appeals Chamber for the ICTs in The Hague. The Attorney General would be a co-prosecutor, together with an international prosecutor. The proposal from Kabbah also stressed the need for there to be a strong defence with qualified lawyers and investigators.

After protracted negotiations, the Security Council agreed in Resolution 1315 to a modified plan establishing a Special Court for Sierra Leone.[5] Due to general dissatisfaction with the cost and inefficiency of the ICTs, they refused to support a further *ad hoc* tribunal and were wary of accepting the responsibility for running the court, but accepted that Sierra Leone would need considerable support in order to create a court. Whilst the resolution explicitly states in the preamble that the situation in Sierra Leone was 'a threat to international peace and security in the region', the Security Council removed a reference to Chapter VII of the UN Charter in the original draft of the resolution, therefore failing to require states to co-operate with the court.[6] The resolution requires the Secretary General to

[3] Report of the United Nations High Commissioner for Human Rights on the human rights situation in Sierra Leone, UN Doc. A. 57/284, para. 9.

[4] Published as a UN Document on 10 Aug. 2002, UN Doc. S/2000/786. It is worth noting that the initial request made no mention of prosecutions of those involved on the government side, including Kabbah's own Minister of Internal Affairs and National Security, Sam Hinga Norman.

[5] S.C. Res. 1315, UN Doc S/RES/1315 (2000).

negotiate a treaty with the government of Sierra Leone, thus avoiding any direct responsibility for the court. It outlines the subject matter jurisdiction for the proposed court and requires the Secretary General to present a report in 30 days.

The Secretary General's report was submitted on 4 October 2000, together with a draft agreement and statute for the court.[7] It outlines that the court should have jurisdiction for serious violations of international humanitarian law, although without the crime of genocide, which had not occurred in the conflict. It recommends that the Rules of Procedure and Evidence be borrowed lock, stock and barrel from the Rwanda tribunal. The temporal jurisdiction of the court was set at the date of the Abidjan peace accord of 30 November 1996. Later attempts by the Government of Sierra Leone to extend the jurisdiction to crimes committed from 1991 were rejected by the Security Council as imposing an excessive burden on the court.

The report proposes that there be three organs of the court: the judicial chambers, the Office of the Prosecutor, and the Registry. In paragraph 57 it includes detailed suggestions for the staffing requirements of the court, outlining that there will have to be a total of 14 judges with support staff and security staff, a prosecutor, together with a deputy, 20 investigators and 20 other prosecutors, a Registrar, with 27 support staff and 40 security officers, a victims and witnesses unit and the staff for a detention facility. Remarkably, there is no proposal for provision of defence staff or defence lawyers.

The final agreement between the Government of Sierra Leone and the United Nations establishing the Special Court was signed in Freetown on 16 January 2002, with the Statute of the Special Court annexed to it. The agreement maintains the slightly unfortunate language of the ICTs, in that it establishes a tribunal 'to prosecute' individuals, rather than to give them a fair trial. It requires the Secretary General to appoint the Prosecutor, and the Government of Sierra Leone to appoint the Deputy Prosecutor in an attempt to create a balance between nationals and international staff.[8] There was to be a Trial Chamber of three judges and an Appeal Chamber of five judges, with a second trial chamber if required. The judges would be a mixture of Sierra Leoneans and internationals. The Secretary General would also appoint the Registrar. Whilst the rights of the defendants are mentioned within the Statute in terms of the right to a fair trial, there is no mention of any office to provide for those rights.

Under Article 6 of the Agreement, the court is funded by voluntary contributions. This was highly controversial, as in correspondence prior to the agreement the Secretary General and the Government of Sierra Leone had expressed concerns if there was no guarantee that the court would be funded to the conclusion of the trials. The report of the Secretary General stated that a court based on voluntary contributions 'would be neither

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[6] The lack of Chapter VII powers has created specific difficulties for the Court. Nigeria has consistently refused to hand over the indicted former head of state of Liberia, Charles Taylor. The same lack of legal enforcement meant that no country was prepared to receive Foday Sankoh for medical treatment not available in Sierra Leone.

[7] *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915.

[8] In fact, the Government of Sierra Leone appointed a UK barrister, Desmond De Silva QC, as the Deputy Prosecutor.

viable nor sustainable' and that assessed contributions was the only proper way to provide funding.[9]

In order to ensure cost-effectiveness, Article 19 of the Agreement requires that the court be created following a phased-in approach, reflecting the 'chronological order of the legal process'. This would mean that the Prosecutor and his office together with that of the Registrar would be created first, together with Judges sitting on an *ad hoc* basis. Only at a later stage would the full complement of staff be created. Clearly, the defence would be regarded as coming at a later stage.

The statute of the Special Court limits the jurisdiction to prosecuting 'those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone law committed in the territory of Sierra Leone since 30 November 1996'. The offences include crimes against humanity, violations of common article 3 of the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law, and specific crimes under Sierra Leone law, in particular, sexual violence against children under the Prevention of Cruelty to Children Act 1926 and damaging property by fire.

1.3 Constructing the Special Court

The process of creating an international tribunal started in April 2002 with the appointment of David Crane from the USA as the Prosecutor and Robin Vincent from the UK as the Registrar. The latter arrived in Freetown in July 2002 and moved into a three-room building at the Bank of Sierra Leone. The Prosecutor arrived in August and established an office at a private house.

An initial planning mission in January 2002 had concluded that there were no appropriate premises to occupy in Freetown as a court, and that consequently it would be necessary to build a new court building from scratch. A site was donated by the Government of Sierra Leone and clearing commenced in August 2002. The Registry moved into 18 prefabricated container buildings on the site in January 2003, with the Office of the Prosecutor following in July. Construction was begun on a new court building in October 2003 at a cost of $3.4 million, which was opened in March 2004 amid great pomp.[10]

The original budget of the Special Court was set at $114.6 million over three years[11], which was reduced to approximately $56 million after the Security Council decided that this was too expensive. There are approximately 260 staff at the court.[12]

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[9] A pre-trial motion challenging the legality of the court on the basis that without guaranteed funding to the conclusion of the trials it could not be an independent and impartial tribunal was rejected as 'far-fetched' on the basis that the Agreement guarantees the Judges will be paid, even if there is no money left. *Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)*, 13 March 2004, Appeal Chamber, SCSL-2004-14-AR72(E)-568-596.

[10] In fact, Elgar, *Pomp and Circumstance March No.4 in G* for the entry of the Judges, an odd choice in a post-colonial country.

[11] UN Doc on 13 July 2001, S/2001/693.

[12] McDonald, Avril, 'Sierra Leone's Shoestring Special Court', *International Review of the Red Cross 84*, (2002), 138-39.

2. Defence Rights in International Courts

The Defence Office of the Special Court was only introduced at a late stage in the construction of the Court by virtue of Rule 45 of the Rules of Procedure and Evidence, which entered into force in April 2002. The requirement in Article 19 of the Agreement that staff are 'phased in' with the chronological process of justice means that the Defence were the last to arrive, with the head of the Defence Office only arriving a week before the grand opening of the Court. Unfortunately, this reflects an historical trend that has previously caused huge difficulties in providing for effective representation and has led to significant inequalities between the prosecution and the defence.

2.1 After the Second World War[13]

2.1.1 Nuremberg

At the Nuremberg trials at the conclusion of the war in Europe, the defence lawyers found themselves arguing before a victors' tribunal in a system that they did not understand.

The London Conference of the Allied Powers in June 1945 called for the creation of an International Military Tribunal (IMT) to try the major Nazi leaders at the conclusion of the war. On 8 August 1945 they promulgated the London Agreement, which contained the Charter of the IMT. Article IV of the Charter gave the defendants the right to a fair trial, including the right to their own defence or the assistance of a lawyer of their choosing. The Rules of Procedure gave a more detailed explanation of that right, and the procedure for assigning lawyers. The defendants were able to choose a specific lawyer, or one would be appointed for them. They were limited to one lawyer each.[14] For more than half of the defendants, that meant that they chose a German lawyer who had previously been a member of the Nazi party.

The Prosecution was formed of prosecutors from the four allied countries, the USA, the UK, France and Russia. They had a staff that assisted them in the investigations, examination of witnesses and the preparation of the indictments. The US had 700 staff assisting, and the next largest country was Britain with 170. There were massive disparities in the pay rates as they were paid by their governments in accordance with national standards. Thus, an American trial attorney was being paid $7,000 whilst the British President of the Court, Sir Geoffrey Lawrence, was limited by a post-war austerity budget to $2,800 per annum.

Huge amounts of evidence were gathered via thirteen Allied document collection centres in Austria and Germany, which between them gathered 1,700 tons of documents, photographs and other objects. This evidence was used both in the trials before the IMT and also for the trials of lower level commanders.

The Defence had none of the resources of the prosecution. The sheer speed of the process must have meant that there could be no real investigations. The trial of the 22 defendants commenced in November 1945. They made preliminary challenges as to the jurisdiction of the tribunal, which were rejected by the Court.

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[13] Historical information on the Nuremberg and Tokyo trials in this section from Howard Ball, *Prosecuting War Crimes and Genocide: the 20th Century Experience*, University Press of Kansas, 1999, chapters 2 and 3.

[14] Rule 2(d) of the Rules of Procedure adopted on 29 Oct. 1945 states: 'Each defendant has the right to conduct his own defense or to have the assistance of counsel. Application for particular counsel shall be filed at one with the General Secretary of the Tribunal at the Palace of Justice, Nuremberg, Germany. The Tribunal will designate counsel for any defendant who fails to apply for particular counsel… only one counsel shall be permitted to appear at the trial for any defendant, unless by special permission of the Tribunal'.

During the trial, there were 33 prosecution witnesses and 61 defence witnesses. The prosecution relied on some 2,500 documents. The Defence case commenced in March 1946, where further arguments on jurisdiction were rejected. The defence raised a number of defences, including the *Führerprinzip* suggesting that they were following the orders of Hitler. They argued that by virtue of military necessity they had been forced to attack; they had only been acting defensively; they had merely been following the customs of war. It was argued that the Hitler Youth were no more than a scout troop. Goering argued that the policy of taking art had been in order to protect it and subsequently to open a public art museum.

The Defence case took from March until July of 1946, when submissions were made to the judges. Following this, the court heard 15-minute speeches from each of the defendants. On 30 September the Court delivered its judgments, with all but two defendants found guilty.

In addition to the main trials at Nuremberg, a number of secondary trials were held around occupied Germany. In the US, UK and French occupied sectors a total of 10,400 individuals were tried, of which 5,025 were convicted and 506 sentenced to hang. The relatively high level of acquittals is a simple indicator of the fact that there was to some extent effective defence in those trials.

2.1.2 Tokyo

In the Far East, the Allied Powers had declared in Article 10 of the Potsdam Proclamation of July 1945 that 'stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners'[15]. At the conclusion of the war in the Far East, many documents had been destroyed and over 1,000 senior officials committed suicide, limiting the extent of any subsequent trials. However, the International Military Tribunal for the Far East (IMTFE) started six months later than its European older brother and took two years and 98 days to complete its work.

The Chief Prosecutor was appointed by US President Truman at the end of November 1945, and he brought Associate Prosecutors from ten other countries involved in the war in the Far East. The International Prosecution Section eventually contained 100 staff, half of which were American. Twenty-eight individuals were indicted before the court, which commenced on 3 May 1946 and continued for 417 days, hearing 419 prosecution and defence witnesses, with 779 affidavits and depositions.

A 'Defence Division' had been created in April 1946, as the trials began, and was staffed by American and Japanese defence lawyers. The defence case took nearly a year, from February 1947 to January 1948. Commentators described the presentation of the defence as extremely weak, frequently causing laughter in the courtroom.

The defence brought challenges to the legality of the tribunal. They argued that MacArthur did not have the power to establish the Court. They argued that 'aggressive war' was not a crime, and that there was no concept of 'individual responsibility' in war. They tried to establish that there was no 'negative criminality' in international law, and that consequently an allegation that they failed to act was not an offence.

The other trials were held by way of courts martial in different countries in the region. A total of 5,600 people were tried in 2,200 trials, with 4,400 convicted. Again, the level of acquittals suggests that the trials were not necessarily foregone conclusions. One of

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[15] The Potsdam Proclamation. A Statement of terms for the unconditional surrender of Japan, July 26, 1945, *Pillars of Peace No.4*, (1946), Book Department, Army Information School.

the most famous of the trials was that of *Yamashita*, where it was found that the failure of an officer to exercise adequately his command responsibility meant that he was guilty for the crimes of his inferiors, even though he was in command without effective control. The case ended up before the US Supreme Court where it failed on the issue of jurisdiction on a 6-2 majority, with a scathing dissent from Justices Rutledge and Murphy suggesting that the defendant had not had a fair trial and that he had been left without any proper legal protection.[16]

2.2 The International Criminal Tribunals

2.2.1 International Criminal Tribunal for the Former Yugoslavia (ICTY)

When the first defendant was to be tried before the ICTY, it is fair to say that there had been hardly any consideration of the rights of the defence. The Tribunal was created by resolution of the Security Council in May 1993. Whilst the Statute of the tribunal contained details as to the rights to be enjoyed by the defendant in terms virtually identical to human rights fair trial provisions, the reality was somewhat different. Suspects were initially limited to one lawyer each, who could only be paid $200 a day. There was no organisation to represent the interests of the defendants, and the Registry of the Court provided the basic functions. It has been commented that it was lucky that defence counsel for the first defendant, Duško Tadić, was prepared to waive his normal fees and work under these conditions.[17] In contrast, the Office of the Prosecutor, with a staff of ultimately 400 individuals, was a massive force to counter.

In the first years of the work of the tribunal, controversy dogged the operation of the defence, which eventually led to an inquiry by the Office of Internal Oversight Services in 2001, which found delays caused by frivolous motions, illegal fee-splitting arrangements between lawyers and clients, and inflated fee claims.[18]

Since the report, the Tribunal has adopted a different system for the payment of fees. There is a Lawyers and Detention Facility Management Section, which essentially provides the basic support for assessing and payment of fees. There is also an independent 'Association of Defence Counsel' which has remedied many of the previous problems by providing for membership criteria, a disciplinary process and also training and education, and is regarded as fulfilling the function of supporting the defence within the Rules of Procedure and Evidence.

The Directive on the Assignment of Defence Counsel now allows for teams of lawyers to be involved in each case, normally with two co-counsel, often one from ex-Yugoslavia and one other, together with legal assistants and investigators.

2.2.2 International Criminal tribunal for Rwanda (ICTR)

Again, the Rwanda Tribunal has not set up a 'defence office' as such, although there is a Defence Counsel Management Section, which was set up in July 1997 in order to ensure that the defendants were represented by effective counsel. The Defence Counsel Management

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[16] *Application of Yamashita*, 327 U.S. 1 (1946). The six military defence lawyers had precisely 3 weeks between being given the 64-count indictment and the commencement of the trial, on the first day of which a further 59 allegations were added. An application for an adjournment was rejected, [which] thus 'deprived the proceeding of any semblance of trial as we know that institution' (at 61).

[17] Sylvia de Bertodano, 'What Price Defence? Resourcing the Defence at the ICTY', (2004) 2 *Journal of International Criminal Justice* 503.

[18] Ibid*,* 506.

Section also has duties with regard to the conditions of detention at the detention facility in Arusha.

The management of potential defence counsel is undertaken by keeping a list of qualified defence lawyers, who can then be called upon to assist. At this tribunal an additional rule was introduced in order to maintain a high quality of representation, requiring those appearing before the tribunal to have had at least ten years practical experience. Once appointments are made, the Defence Counsel Management Section operates as a conduit to the Registry. The Section goes no further in assisting with practical arrangements.

The ICTR famously had key problems with regard to defence counsel, in particular for fee-splitting arrangements. This lead to extravagant claims for fees, which had a dramatic effect on the overall budget of the tribunal. Again, enhanced control has meant that many problems have been reduced.

2.3 The Hybrids

The difficulties of delay and expense associated with the ICTs in Arusha and The Hague left the United Nations reluctant to create any more courts on a similar model. Consequently, when clear violations of international criminal law took place in East Timor in 1999, the UN chose not to create a tribunal but rather to use the domestic legal system to deal with war crimes instead. Again, in Kosovo, the United Nations used the domestic legal system to deal with the post conflict situation in that country.

2.3.1 Kosovo

The United Nations Mission in Kosovo (UNMIK) set up internationalized courts in order to prosecute individuals suspected of war crimes. These courts, known as 'Regulation 64 panels', are within the domestic legal system but with a mixture of local and international judges, and a mixture of local and international prosecutors.

In May 2001, the Organization for Security and Co-operation in Europe (OSCE) was responsible for setting up the Criminal Defence Resource Centre, designed to provide legal assistance to lawyers in Kosovo by working with the Kosovo Chamber of Attorneys. The Criminal Defence Resource Centre is constructed of a programme manager who is in charge of a staff of two international lawyers and two local lawyers. The whole organisation is supervised by a Board of directors with local and international lawyers.

The Criminal Defence Resource Centre works as a resource centre to ensure that the rights of the accused are best protected. They particularly focus on the trials for violations of international criminal law that take place in the Regulation 64 panels. They have developed a library, and also provide training and other technical assistance. They are also involved in advising on potential changes to the criminal law and other procedural issues.

Their assistance will often be at a very specific level, for example, assisting with the preparation of written pleadings, developing a case strategy and legal research. They will also assist in finding lawyers where necessary, and deal with detention issues where they arise. In practice, this meant that in some complicated cases such as terrorism trials the international lawyer would work side by side with the defence lawyer in order to ensure adequate representation.[19]

One of the problems that arose was the fact that the local defence lawyers were only paid under the legal aid rates, in stark comparison to the high UN salaries that were paid to

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[19] Interview with Sylvain Roy, Programme Manager, Criminal Defence Resource Centre, July 2001 to Oct. 2002.

the international prosecutors. Many of the defence lawyers had a great deal of experience in their own system, and were reluctant to realise that they might have needed assistance. Many years of training and practice in a Soviet legal system under a repressive regime was not necessarily the best preparation for arguing a point of international criminal or human rights law before an international judge. Consequently, there was a significant danger of the defence lawyers failing properly to understand the tribunal before which they were appearing, and yet being reluctant to seek assistance.[20]

Funding for the Criminal Defence Resource Centre runs out in 2004, although the Regulation 64 panels are expected to continue under UNMIK's mandate.

2.3.2 East Timor

East Timor was annexed by Indonesia almost immediately following independence in 1975, and its rule was marked initially by atrocities and then by heavy military control of the territory. In August 1999 in a referendum on self-rule, the population voted overwhelmingly for autonomy. The small UN force present was not able to prevent the widespread destruction that occurred as Indonesian troops withdrew from East Timor following the result. Prior to the arrival of an enhanced UN force lead by Australian peacekeeping troops, it is estimated that 600,000 people were forced from their homes and approximately 1,000 civilians were killed.

The United Nations Transitional Authority in East Timor (UNTAET) was tasked with attempting to reconstruct the devastated country. This included trying to piece together a legal system with only about 60 qualified lawyers and no courts or legal resources to speak of. Once the idea of an *ad hoc* tribunal was rejected, UNTAET created the Special Panels for Serious Crimes as an integral part of the local court system, functioning in three 3-judge panels (two international, one domestic), who would use the Rome Statute for the International Criminal Court in order to prosecute those suspected of genocide, crimes against humanity, war crimes and of committing torture.[21]

Initially, 45 indictments were issued covering over 140 individuals. However, no provision had been made for any defence representation. Counsel were to be provided out of the nascent public defender system within the country. However, the few remaining lawyers who had not been appointed to other important jobs were wholly unable to provide proper representation in order to defend such serious allegations. None of them had any previous litigation experience, and were expected to deal with all their ordinary clients at the same time as representing people charged with the most serious crimes possible.

In the 2001 budget allocation of $6.3 million for the tribunals, $6 million was allocated to the office of the prosecutor with the remaining budget funding the judges. In the first 14 cases, no defence witnesses at all were called to testify.[22] The local defenders were up against a prosecution office mainly staffed by experienced international criminal lawyers. Some assistance was provided in the form of international lawyers to provide advice and assistance by the UN Judicial Affairs Office, the non-governmental No Peace Without Justice and the United Nations Development Programme.

[20] Ibid.

[21] Suzanne Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', 16 *Harvard Human Rights Journal* 245, 250-51.

[22] David Cohen, 'Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?', *East-West Center, AsiaPacific Issues,* No. 61, August 2002, cited in Katzenstein, above n. 21, 253.

2.3.3 Cambodia

The atrocities committed by the Khmer Rouge in Cambodia in the 1970s have long shocked the world. Much as President Kabbah would do several years later, the Prime Ministers of Cambodia wrote to the Secretary General in June 1997 requesting that the United Nations assist in the setting up of an international tribunal to try the Khmer Rouge. The Security Council and the General Assembly managed to ignore the issue, but a 'Group of Experts' reported back in 1999, suggesting that there be an International Tribunal to try members of the Khmer Rouge for crimes against humanity and genocide committed between April 1975 and January 1997. Much like the Special Court, there would be no Chapter VII powers, the trials would be 'in country', and the 'Extraordinary Chambers' would not be within the UN structure.[23]

There then occurred several years of debate as to the exact nature of the tribunal, with the Prime Minister wanting a national court with international help and the United Nations insisting on a more 'mixed' tribunal. The 2001 Law of Extraordinary Chambers[24] was not acceptable to the Office of Legal Affairs. The logjam was broken in March 2003 with an agreement outlining the structure of the proposed body, adopted by the General Assembly on 13 May 2003. The 'March Agreement' states that the trials will take place in Extraordinary Chambers within the Cambodian judicial system.[25] There is to be a trial chamber with three national judges and two international judges (Article 3). The Supreme Court Chamber will have four national judges and three international judges. Voting is by 'supermajority', whereby one international judge must vote in favour to make any decision (Article 4). There are to be two investigating judges (in marked contrast to the common law structure of the Special Court) and two prosecutors (Article 6), in each case one being national and one being international.

Article 13 states simply that the rights of the accused enshrined in Article 14 of the International Covenant on Civil and Political Rights shall be protected. There is no provision for a defence office, other than to state that the accused has the right to engage counsel of his or her own choosing. There is an 'Office of Administration', which presumably will cover the defence. Article 17 states that the United Nations shall be responsible for the salaries of international personnel, and so it is perhaps to that source that pressure should be applied for sufficient funding for a full capacity defence office. Article 27 has been borrowed from the Special Court Agreement, and also refers to the dangerous 'phased in' approach to funding in order to 'follow the chronological order of the legal process'.

The Cambodian model is currently stalled by another problem common to the Special Court – the budget. Reports in June 2004 suggest that the budget for the Extraordinary Panels is now $60 million, virtually identical to the reduced budget of the

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[23] Gabriele Lechenauer, *A Weak Rather Than No Tribunal – True or False: Analyzing the Extraordinary Chambers for Cambodia in the light of International Criminal Justice*, unpublished paper, Spring 2004.

[24] Cambodian Genocide Program at Yale University, *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, NS/RKM/0801/12, Translation by the Council of Jurists, 6 Sept. 2001, available at http//www.yale.edu/cgp/ KR_Law_trans.06.09.2001.html.

[25] General Assembly Resolution 57/228, 'Khmer Rouge Trials', Annex: *Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodia Law of crimes committed during the period of Democratic Kampuchea*, UN Doc. A/RES/57/228 B.

Special Court. Whilst the United Nations is expected to meet 75 per cent of the costs, only $2.2 million of the remaining budget has so far been promised.[26]

2.4 The International Criminal Court

Throughout the negotiations leading to the creation of the Rome Statute for the International Criminal Court there was significant pressure to avoid the mistakes of the past, and to ensure that the defence was properly represented at an early stage in the proceedings.

As with all the other tribunals, the Rome Statute itself merely contains the basic fair trial rights for the defence outlined in Article 67. There is no provision or requirement for the creation of any body to supervise the defence. The Rules of Procedure and Evidence, adopted in June 2000, merely state in Rule 15 that 'the Regulations shall provide for defence counsel to have access to appropriate and reasonable administrative assistance from the Registry'.

Following the Rome Conference, it fell to the Preparatory Commissions (PrepCom) to clarify certain points that had been left undecided during the earlier sessions. In the third session of the PrepCom, which sat in New York from 29 November to 17 December 1999, a discussion document was considered relating to the role of the Defence. This document proposed delegating to the Registrar the job of organising a unit to manage the defence, and also to prepare a code of conduct for the defence. It was noted that many states parties at the PrepCom were still arguing that there needed to be an independent defence office to represent the rights of the defence. However, that was not included in the recommendations at this stage.[27]

At the conclusion of the negotiations, the final regulations promulgated gave only limited further guidance on the creation of a defence office. The regulations deal with the appropriate qualifications of those who would like to be on the list of qualified counsel, and also with the procedures to be adopted for their assignment. An office for their control is dealt with in Regulation 79, which creates the 'Office of Public Counsel for the defence' (the regulations also create an 'Office of Public Counsel for victims'). Regulation 79 states:

1. The Registrar shall establish and develop an Office of Public Counsel for the defence for the purpose of providing assistance as described in sub-regulations 4 and 5.
2. The Office of Public Counsel for the defence shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office. Counsel and assistants within the Office shall act independently.
3. The Office of Public Counsel for the defence may include a counsel who meets the criteria set out in rule 22 and regulation 67. The Office shall include assistants as referred to in regulation 68.
4. The tasks of the Office of Public Counsel for the defence shall include representing and protecting the rights of the defence during the initial stages of the investigation, in particular for the application of article 56, paragraph 2(d), and rule 47, sub-rule 2.
5. The Office of Public Counsel for the defence shall also provide support and assistance to defence counsel and to the person entitled to legal assistance, including, where appropriate:

[26] 'Costs of Khmer Rouge Tribunal Pass $60 million', *U.N. Wire,* 16 June 2004. Available at http://www.unwire.org/UNWire/20040616/449_24918.asp.

[27] No Peace Without Justice, *The Preparatory Commission (PrepCom) for the International Criminal Court: Third Session*, April 2001, available at http://npwj.org/prepcom/report2.html.

(a) Legal research and advice; and

(b) Appearing before a Chamber in respect of specific issues.[28]

Whilst it is admirable that the stated objective is to create a fully independent Office of Public Counsel for the defence, the ICC has yet to commence the process of creating such an office.

The 2004 budget for the ICC does suggest that the Registrar needs resources 'to ensure appropriate and reasonable administrative assistance from the Registry to defence counsel'.[29] However, the Budget Committee appeared to think that there should be a further report before they could make any recommendations.[30]

There have been some preliminary steps towards the creation of such an office. At a conference in The Hague in October 2003, lawyers from around the world contributed to a debate about the creation of a Code of Conduct for lawyers appearing before the ICC. This was a highly complicated exercise, with suggested drafts from numerous associations around the world, in an attempt to combine a wide variety of traditions into a single document. A further conference in May 2004 dealt with concerns as to the appropriate way to pay for lawyers appearing before the Court, and also the importance of a proper system for recruiting investigators.

The Registry appears to have recruited an individual to work as the 'Coordinator of Defence Counsel Services' and also an Associate Legal Officer who has been assisting in the programmes described above. In January 2004, the ICC advertised for the position of Chief of 'Defence Counsel Services' with the authority to operate a legal aid system and provide initial representation and advice. The individual is required to act on behalf of the Registrar in making contact with lawyers around the world, and is also required to report to the Registrar, which does not appear to be quite the definition of 'independent' that one would have expected. Although the deadline for the application was 14 January 2004, as of July 2004 no short-list had yet been prepared.

In the meantime, the Office of the Prosecutor has been building a capacity that will take many years for the Defence to equal. For the 2004 budget, the OTP has 131 staff and a budget of €14,294,400. This includes programmes for legal advice, a separate public relations and mass media programme, an entire appeals division to deal with the interlocutory appeals at a pre-trial stage, an analysis section, a knowledge-base section, investigations and prosecutions. The OTP is selling itself to the world by programmes connecting with academic institutions around the world, consultations with over 120 leading international experts, creating a roster of leading experts, a 'Visiting Professionals Programme', a 'Clerkship Programme', and a programme for guest lecturers. This is all extremely admirable and laudable stuff, but when do the defence get to do the same?

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[28] Regulations of the Court, adopted 26 May 2004, ICC-BC/01-01-04.

[29] Within sub-programme 3100 under the supervision of the Immediate Office of the Registrar, ICC Draft Programme Budget for 2004, Sept. 2003, para. 57, ICC-ASP/2/2, available at http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/370/72/PDF/N0337072.pdf?OpenElement.

[30] Report of the Committee on Budget and Finance, 8 Aug. 2003, ICC-ASP/2/7, para. 52: 'The Committee furthermore welcomed the court's proposed model for defence costs referred to in paragraph 181. However, given the importance of the subject and the potential for high costs to be incurred, the Committee recommended that the Court provide separate report to the Assembly, through the Committee, presenting possible options for ensuring adequate defence counsel for accused persons'.

3. The Defence Office of the Special Court for Sierra Leone.

Given the widespread criticism of the failure to provide for proper defence representation in the East Timor tribunal, it might have been hoped that defence rights would have been at the forefront of the attempts to build a further internationalized tribunal following the conflict in Sierra Leone. However, defence was again neglected in the early stages of the process of building the alternative option of the 'special court' for Sierra Leone. Nevertheless, by the commencement of the trials, the court had succeeded in building a unique structure in international criminal justice in the form of the Defence Office.

3.1 Creating the Defence Office

The role of the Defence had been essentially ignored through all the early stages of the creation of the Court. The 'bare bones' of Article 17 of the Statute, which provides for human rights fair trial guarantees for the defendants, does not say how those rights are to be achieved.

A number of options were available for the method of employing counsel, the structure of the Defence Office, and also the precise role of the Principal Defender. Consideration was given as to whether, with a limited amount of trials expected, it would be possible to directly employ a number of lawyers who would then be responsible for the defence of all those before the Special Court, the so-called 'public defender' system used for ordinary criminal proceedings in various countries around the world and utilised in East Timor.[31] There would be obvious benefits in terms of costs, but potentially serious concerns as to the quality of representation and potential conflicts of interest. The alternative was to employ independent counsel from a list of lawyers approved to undertake the role.

In January 2003, the Management Committee reached the conclusion that the Defence Office should be headed by a Principal Defender, with a Defence Advisor and three Duty Counsel, together with administrative support. In February 2003, the first two Duty Counsel were appointed, both Sierra Leone nationals, with the third arriving in March 2003, just as the initial arrests were made on 10 March.

The system was incorporated into Rule 45 of the Rules of Procedure and Evidence by which a 'defence office' would be charged with ensuring the rights of the defendants.[32]

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[31] See Sylvia de Bertodano, *Report on Defence Provision for the Special Court for Sierra Leone,* No Peace Without Justice, 28 Feb. 2003, available at http//www.specialcourt.org/SLMission/NPWJDocs/DefenceReport SdBFEB03.html.

[32] Rule 45 of the Rules of Procedure and Evidence states that:

'The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and accused. The Defence Office shall be headed by the Special Court Principal Defender.

(A) The Defence Office shall, in accordance with the Statute and Rules, provide advice, assistance and representation to:
   (i) Suspects being questioned by the Special Court or its agents under Rule 42, including non-custodial questioning;
   (ii) accused persons before the Special Court.

(B) The Defence Office shall fulfill its functions by providing, *inter alia*:
   (i) Initial legal advice and assistance by duty counsel who shall be situated within a reasonable proximity to the Detention Facility and the seat of the Special Court and shall be available as far as practicable to attend the Detention Facility in the event of being summoned;
   (ii) legal assistance as ordered by the Special Court in accordance with Rule 61, if the accused does not have sufficient means to pay for it, as the interests of justice may so require;
   (iii) adequate facilities for counsel in the preparation of the defence.

Rule 45 creates the role of the Principal Defender, and requires the Defence Office to deal with pre-trial detention, ensure that counsel are assigned to represent the individual defendants and provide those counsel with adequate facilities in the preparation of the defence.

The Principal Defender was advertised at a Director level within the United Nations structure. One idea was to have a senior expert in international criminal law who would be able to act as a figurehead and also to provide detailed 'brainstorming' sessions with lawyers defending individual clients. This individual could be either a professor of international law or a senior practicing lawyer. However, such an individual may not necessarily have had sufficient management skills to run an office, and may not have been attracted by the inability to actually defend individual clients. Another discussion document suggested that such a person should have extensive experience of high level criminal trials and of management, but that experience of international criminal law 'should not be over-estimated', due to concerns about limiting the pool of available candidates.[33] The report also suggests that there is a key role for the Principal Defender in liaising with the other organs of the Court, not least the Prosecution, where misunderstandings can cause massive complications and delays. There was some discussion as to which of the options should be adopted, which led to delay in the process of making the final appointment.

In early 2003 an acting Chief of the Defence Office was appointed on a three-month contract, with the aim of setting up the office, with a further acting Principal Defender following in post after that.[34] The Principal Defender herself was not appointed until April 2004, a week before the opening ceremony of the Court. Whilst the delay in appointments satisfied the budgetary requirements of only recruiting the defence at the last possible moment, this had inevitable effects on the functioning of an office without a full staff.

(C) The Principal Defender shall, in providing an effective defence, maintain a list of highly qualified criminal defence counsel whom he believes are appropriate to act as duty counsel or to lead the defence or appeal of an accused. Such counsel, who may include member of the Defence Office, shall:

(i) Speak fluent English;

(ii) be admitted to practice law in any State;

(iii) have at least seven years relevant experience; and

(iv) have indicated their willingness and full-time availability to be assigned by the Special Court to suspects or accused.

(D) Any request for replacement of an assigned counsel shall be made to the Principal Defender. Under exceptional circumstances, the request may be made to a chamber upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.

(E) Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances. In the event of such withdrawal the Principal Defender shall assign another Counsel, who may be a member of the Defence Office, to the indigent accused.

[33] See de Bertodano, above n. 31.

[34] In a decision of 6 May 2004, the Court held that as there was no provision within the rules for someone to exercise the power of the Principal Defender in an 'Acting' capacity, any such decisions were therefore *ultra vires*, which would appear to be a blow to the concept of the staged implementation of the court structures. *Brima – Decision on Applicant's Motion Against Denial By the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel*, SCSL-2004-16-PT-5276-5326, available from the Special Court Press and Public Affairs Office.

3.2 Functions of the Defence Office

3.2.1 Selection and Payment of Defence Counsel

One of the early decisions that had to be taken by the Defence Office was the method by which they would recruit and pay for individual lawyers to defend the detainees. With regard to recruitment of lawyers, the Defence Office chose to create a list of those counsel interested in appearing before the court who fulfilled the requirements of excellence in either domestic criminal law or international criminal law. A decision was made at an early stage that each defendant should be represented by a team of lawyers, who would include both a Sierra Leonean lawyer and also an international lawyer. They would be joined by a legal assistant and an investigator. This would also assist in creating a legacy from the Special Court, by providing local lawyers with knowledge of international criminal law that they had not previously possessed.[35]

For the payment of the lawyers, in response to the limited funding provided to the Court, the Defence Office adopted a system based upon the somewhat controversial Very High Costs Cases (VHCC) contract designed by the British government to substantially reduce the costs in high profile UK criminal trials. Under this system, defence counsel are required to agree with the Defence Office the number of hours that will be required to work on particular stages of the preparation and presentation of the case, in pre-trial, trial and post-trial phases. The lawyers have to produce a detailed task list, identifying which of them will achieve which individual task and by what date. Negotiations are then conducted as to the amount of hours that should be necessary and the hourly payment that will be made.

Whilst the system has the advantage that the discussions are with an experienced lawyer, rather than a junior civil servant, designing and operating an entirely new legal aid system was a difficult and time-consuming task that took considerable effort at a stage early in the life of the Court when the Defence Office was significantly understaffed. It is expected that the system will provide proper budgetary control, limiting the excessive costs that have plagued the other tribunals.

3.2.2 Representation

The appointment of three Duty Counsel to act in the initial representation of the accused means that the Defence Office has an important role to play at an early stage. Duty Counsel were therefore involved in substantial challenges to the operation of the procedural rules, in particular to the operation of the rules on bail to the extent that they differed from the previous rules at the ICTY and ICTR, and a very novel application that suggested that a writ of *habeas corpus* was one that could be considered by the Court.[36]

The Defence Office also has a role to represent the defendants at stages where, for whatever reason, they are without representation. Thus, where a defence team either withdraws due to professional difficulties or their services are no longer required, the Defence Office is able to stand in.

Due to the extent of the papers involved in the case and also concerns as to potential conflicts of interest, Duty Counsel often have only a limited knowledge of the factual

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[35] For a discussion of some of the early activities of the Defence Office see Jones, Carlton-Hanciles, Kah-Jallow, Scratch, and Yillah, 'The Special Court for Sierra Leone: A Defence Perspective' (2004) 2 *Journal of International Criminal Justice* 211-230.

[36] *Ruling on the Application for the Issue of a Writ of* Habeas Corpus *by the Applicant,* 22 July 2003, SCSL-06-PT-05-1152-1168.

matters of the case. However, there have been various occasions when assigned counsel has been unavailable to attend court, where the Defence Office have been able to step in, preventing unnecessary adjournments, or have played a larger role in proceedings, even when assigned counsel is also present in court.

One of the key problems with an international criminal trial, particularly during the pre-trial phase but also during the inevitable delays, is that the defendants can often feel extremely distanced from their lawyers, particularly those that are abroad. At the Special Court, the Detention Facility is on the same site as the court, which means that it is easy for Duty Counsel to visit the detainees on a daily basis, and to report back to the lawyers on any difficulties. This has been extremely beneficial in maintaining confidence during difficult periods.

The Defence Office is also mandated to advise on detention issues. Again, the proximity of the detention facility and the continuity of representation mean that the Defence Office can play an active role in negotiating with the detention staff in order to ensure that no problems arise in the treatment of the prisoners.

3.2.3 Court Procedures and the Code of Conduct

The Defence Office has a role in presenting arguments before the Plenary Session of the Court as to any amendments to official documents that are to be produced, such as the Rules of Procedure and Evidence (RPE).

The first session to amend the RPE into a new Special Court version occurred at a plenary session of the Judges held at the Middle Temple in London in March 2003. At that time there was pressure to simplify the Rules that had been adopted from the Rwanda tribunal in an attempt to make the proceedings at the Special Court more efficient, particularly considering the limited budget and lifespan of the Court.

This lead to some amendments to rules which were simply disastrous in terms of adequate defence rights. For example, with regard to Rule 118 on Judgments on Appeal, the Special Court adopted the ability of the Rwanda tribunal to reverse an acquittal, but in the interests of expedition decided that there was no need for there to be a retrial, allowing the appeal chamber to declare the individual guilty and to move to sentence. At a later plenary session, the Defence Office presented arguments as to the unfairness of the rule.

The Defence Office has also drafted a Code of Conduct for the Guidance of Counsel appearing before the Court. For the first time this code, when completed, is expected to be a single document governing all lawyers before the Court, whether they appear for the prosecution, the defence or on behalf of an *amicus curiae* or other interested party.

3.2.4 Adequate Facilities for the Preparation of the Defence

Rule 45 requires the Defence Office to ensure that there are adequate facilities for the preparation of the defence. In basic terms this means that the Office provides litigation support for the defence teams. This means the provision of office space, computing facilities and the assistance that can be given by Duty Counsel and other staff in the office. However, the late arrival of the Defence Office in the creation of the Special Court has lead to some startling inequalities between the Defence Office and the Office of the Prosecutor (OTP).

For example, in terms of office space, at the commencement of the trials the Defence Office had only been provided with one block of six offices. In contrast, the OTP has a total of six blocks. This has meant that the offices have to be shared by three defence teams, with up to twelve people sharing a room at any one time. This is clearly not an

acceptable way in which to prepare for a trial involving such serious charges. Lawyers do have access to full computer facilities and there is also a library on the site of the Special Court with a substantial collection of texts on international humanitarian law.

There are a number of petty but frustrating inequalities. As an example, transport in Freetown is extremely difficult, meaning that vehicles were provided for use by staff of the Special Court. However, by the time the defence arrived the vehicles had all been allocated, and there was simply no money for any more. This leads to the rather unedifying spectacle of the prosecutors sweeping out of the court compound in their individual Land Cruisers whilst defence lawyers stand by the side of the road in the monsoon rains, trying not to lose their papers whilst negotiating with the driver of a taxi that has not seen the attention of a mechanic in a few years. As the judges have decided to timetable the trials to have hearings only every other month, there are huge difficulties in travel arrangements, housing and other practical details.

The Defence Office has been able to assist to a limited extent in the recruitment and training of investigators. Whilst the choice of individuals who can undertake investigations for each team is clearly a choice of the defendant and the lawyers involved, under the contract system the candidates are required to have certain qualifications before they will be approved for payment, giving the Defence Office the chance to prevent some of the difficulties that have occurred in previous tribunals whereby family members are often recruited to investigate. The Defence Office has also commenced a training programme for investigators, in order to explain the legal process and enhance skills that are necessary for adequate investigations, and the provision of office facilities helps meet security concerns. Again, the main problem has been one of timing, with some investigators only recruited at an extremely late stage in the trial process. There is clearly a massive inequality between the investigative power of the prosecution and that of the defence, although an inequality that is generally reflected in domestic criminal justice systems. At least with the Special Court being located in the country of conflict, it is much easier for investigations to be conducted at short notice, and for defence witnesses to be brought to the court.

The Defence Office is also able to assist with legal research in detailed areas of law and procedure, both through the staff and also by the provision of legal research teams in universities around the world. Indeed, the defence teams are required to make use of this service and will not be paid for hours that are spent on doing research that has already been done for other defence teams.

3.2.5 Legacy

The Special Court is only in Sierra Leone for three years, and is keen to leave a lasting legacy for the people of the country. The Defence Office has been able to be instrumental in developing programmes in order to ensure that this is effective, mainly in the field of education and training for lawyers, law students and civil society.

The Defence Office has organised training programmes together with other agencies such as the Bar Human Rights Committee of England and Wales. These have included detailed courses on international humanitarian law early on in the life of the court, which enabled members of the Sierra Leone bar to enhance their knowledge of this area of law. The Defence Office has also undertaken advocacy training with law college students and members of the junior bar. There have been programmes at the University on human rights, and also the provision of training on ethics.

Other programmes that are relevant to the legacy of the Special Court include explaining to the people of Sierra Leone why it is that the Special Court cannot impose the death penalty for 'those who bear the greatest responsibility', whilst it still exists within the domestic legal system. The Office has regular meetings with human rights groups and members of civil society to ensure an understanding of the work of the court and to participate in individual programmes.

The Defence Office is developing a programme of work experience placements and short internships for Sierra Leonean students. All the tribunals have internship programmes, but these are by their very nature reserved for students with sufficient private means to work for free for six months. This means that the profile of interns becomes overwhelmingly European and North American. For many students in the region, such an internship is simply not an option. Therefore, a programme of shorter placements will go some way to ensuring that more local students are able to get a more detailed understanding of both the work of the court and also the operation of international humanitarian law.

3.2.6 Outreach

One of the criticisms of the tribunals for Rwanda and the Former Yugoslavia is that, by virtue of the fact that they are not based in the country of conflict, the people of the country feel very distanced from the justice that is being done in their name. Reports of the hearings are limited to key events. In Sierra Leone the situation is very different. Because the Court is based in country, it is the main news story and everyone has an opinion. The Registry of the Court has created an Outreach Unit, which has been able to design a programme of sensitisation to the work of the court. This has involved producing a booklet in the local languages explaining the work of the court, using local radio stations to have discussions about the court and also having meetings in the local communities.

Again, the delay in the creation of the Defence Office has meant that there has been a huge disparity in the focus of initial outreach materials and events. The glossy brochures explaining the work of the court focus on the activities and personality of the Prosecutor, but mention the Defence Office only in passing. The Prosecutor made a great effort to go around the country in the early days of the court explaining what it was that he was planning to do, in somewhat blunt terms. In an attempt to balance the scales a programme of Defence Outreach trips was undertaken, explaining to the people of Sierra Leone the important concepts such as the burden and standard of proof, the protection that is available to defence witnesses and the way in which defence lawyers are independent from the Court, although without the resources available to the Prosecutor. Security issues and enhanced resources for the OTP meant that the majority of these trips were made by helicopter, unlike defence outreach events, which are somewhat more arduous and time consuming. At the commencement of the trials the Defence profile is much less significant than that of the Prosecution.

4. Conclusion

The trials conducted after the Second World War appeared to establish a benchmark in efficiency, with the development of the procedures, establishment of the tribunals, trials and sentences all conducted in a very short space of time. However, there were clear concerns as to whether there was effective defence in the way that we know it. At the ICTs, despite large inequalities between the power of the prosecution and the defence, there has been effective

defence. But they have become leviathans, which the international community is no longer prepared to support.

The Special Court is an attempt to control the costs and reach of international criminal courts. It is perhaps not surprising that the United States has chosen to provide so much financial support to a tribunal where it can have substantial influence and control in the creation process, in contrast to their attitude to the International Criminal Court.[37]

But is it possible to run an international court on the cheap? The limited budget will undoubtedly constrain the remit of the prosecution, and also the ability to pay for the defence of further detainees. In June 2004, the Court had nine men in custody awaiting trial, with two other indictees as fugitives. However, there is simply not enough money for any other trials to occur unless the budget is substantially increased. As Antonio Cassese told the UN General Assembly, 'if the United Nations wants to hear the voice of justice speak loudly and clearly, then the Member States must be willing to pay the price'.[38] Commentators have suggested that 'the funding arrangements for the SCSL are nothing short of scandalous'[39] and that the court is not lean and mean, but anorexic.[40]

For the defence, this has caused particular problems. Always the late arrival at the party, for the Defence Office the invitation was virtually lost in the post. The requirement in Article 19 of the Agreement that the court follows the judicial chronological process in the allocation of the budget mandated this approach, meaning that the Principal Defender arrived in Freetown a week before the official opening of the new court building. Even within the staff of the Court itself, there has been a fundamental lack of understanding of the role of the defence.

The model, however, is one that works, and is a vast improvement on that which has gone before. As domestic internationalized tribunals in the Balkans are proposed to take over the workload of the International Criminal Tribunal for the Former Yugoslavia as it comes to the end of its mandate, it is essential that the previous mistakes are not repeated, by making proper provision for an equally strong defence office. The Extraordinary Panels for Cambodia look as if they are taking shape in a very similar way to the Special Court, but in an internationalized national court, rather than a domesticated international tribunal, although again no provision has been made for the defence and budgetary constraints could dramatically restrict its ability to produce fair trials.

Now that the Office of the Prosecutor of the ICC has announced the commencement of the first investigation in Democratic Republic of Congo, it is essential that the first steps towards the development of a true defence office are rapidly progressed. The defence will require experts in the history and politics of the region, and will need to establish links with legal groups and to make contacts with centres of knowledge around the world.

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[37] In April 2003 US citizens represented 25 per cent of the staff of the OTP. See 'The Special Court for Sierra Leone: The First Eighteen Months', *International Center for Transitional Justice*, March 2004, available at http://www.ictj.org/africa/sierra.asp, at page 7.

[38] Cited in Beth K. Dougherty, 'Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone' (2004) 80:2 *International Affairs* 311-328, 324.

[39] Ibid. 324.

[40] The Registrar of the Court, cited in Dougherty, above n. 38 at 326. See also 'Letter to Kofi Annan on Financial Contributions to the SCSL', Human Rights Watch, 21 May 2003, available at http//www.hrw.org/press/2003/05/sl052103ltr.html.

If the Special Court is judged a success, it is likely to be a structure that is repeated in other countries. If that is the case, then the unique model of the Defence Office is clearly one that should be adopted. It has to be acknowledged that it is absolutely essential for the defence to be considered on an equal basis to the prosecution from the very start, in terms of legal capacity, administrative support, investigations, public relations, media coverage and outreach. Without this, there cannot be a fair trial.