OKO War Crimes Reporter

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OKO
Одсјек Кривичне Одбране
Odsjek Krivične Odbrane
CRIMINAL DEFENCE SECTION

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Introduction

The OKO War Crimes Reporter is intended to ensure that all lawyers working on war crimes cases in BiH have access to the latest information that they need from around the country, the region and the world. The Reporter will focus on developments in the Courts of BiH as well as Serbia and Montenegro and Croatia, as well as international tribunals. We will cover issues of International Humanitarian Law and also Human Rights law as it applies to war crimes trials in BiH.

In this edition the Reporter contains some important recent decisions as well as articles on the 11*bis* transfer process from the Hague, the problem of ensuring equality of arms in war crimes trials and human rights issues arising from pre-trial custody.

I hope that you find this edition of the Reporter useful and we look forward to receiving your suggestions for the future.

Chris Engels

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Submissions

The OKO War Crimes Reporter welcomes articles on current issues and international developments in war crimes law. Please contact the editor.

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An Introduction to OKO

The work of the criminal defence section of the Registry of the Court of BiH

Odsjek Krivične Odbrane (OKO) is the criminal defence section of the Registry of the Court of BiH and is designed to offer professional support to defence advocates in order to ensure equality of arms. During 2005, OKO has achieved a number of key objectives, including setting up a new office separate from the Court, staffing it with local and foreign lawyers, training 75 advocates from BiH in the relevant law for war crimes trials, creating a system for the licensing of advocates, agreeing the 'Additional Rules of Procedure' that apply to the defence, providing detailed legal advice in all the war crimes cases currently before the Court and in building a website.

The OKO Office at Skenderija 15

The 'Additional Rules of Procedure for Defence Advocates' outline the role and structure of OKO, as well as providing guidance on a number of legal issues such as the appointment of additional advocates and the admission of foreign advocates. OKO provides legal and administrative support to individual advocates defending cases before the Court of BiH, as well as a detailed training programme for lawyers and those involved in the trial process. OKO also conducts other activities in the legal community in order to ensure widespread dissemination of information about war crimes in the region and also support for the legal profession.

During the initial transitional period OKO is part of the administrative and management structure of the Registry of the Court. During 2006, OKO will become an independent institution within BiH, an essential fourth element in war crimes trials together with the Judiciary, the Prosecution and the Registry.

OKO Premises

OKO is based in a building independent from the Court of BiH, at Skenderija in the centre of Sarajevo. There is a team of lawyers working for OKO, made up of the Director and four lawyers from BiH, the Legal Advisor, 5 prepravnik lawyers from BiH and 5 OKO fellows who are young lawyers from abroad. They are assisted by a legal administrative assistant and a language assistant, as well as consultants.

Legal Support

OKO provides legal support within five 'Tim za Podrsku Odrani' (TPOs) or defence support teams for five geographical regions in BiH. Within each TPO, lawyers have specialist knowledge on the conflict and the legal issues in specific cases, in order to provide advice to advocates assigned to new cases.

OKO also conducts detailed legal research so as to be able to provide advocates from BiH with all the information that they need to be able to defend individual cases, and assists with the preparation and presentation of legal arguments in different areas of law.

OKO Consultants

OKO has a limited budget to be able to employ foreign experts in international criminal law and other legal fields in order to attempt to match the expertise of the international prosecutors employed at the Court of BiH. Consultants are employed on short term contracts to deal with specific legal issues, or to assist on specific cases, or for a particular purpose.

Administrative Support

The OKO office can provide facilities for advocates to undertake legal research, and also provide access to computers and other research tools that are essential to the efficient and effective representation of clients in war crimes trials. OKO is the conduit for communications on behalf of the defence with the Registry of the ICTY. OKO also administers the application process by which lawyers are admitted to the list of advocates licensed to practice before the Court of BiH.

Training

There is a detailed training programme organised by OKO, for admission of licensed advocates, for continuing professional training obligations and also to provide specialist training on other areas of law and trial procedure. OKO also provides training for junior lawyers.

During the course of 2005, OKO has delivered training in both Sarajevo and Banja Luka on the new elements of the criminal law and the law of armed conflict. OKO has worked with the International Committee of the Red Cross and ABA-CEELI to develop a training course that is modern in approach and that is sustainable. 75 lawyers have received this training which consists of approximately 40 hours teaching.

During the course of 2006 and 2007 the training will be increased to 100 hours, and will be delivered to at least 300 lawyers in multiple locations. This will mean that there are more practising lawyers trained in war crimes law in BiH than in any other country in the world.

In 2006 OKO will also introduce continuing professional training for lawyers who are already included on the list.

Outreach

An important role for OKO is to ensure that defence issues are properly understood. During 2005 OKO staff members have spoken widely throughout the country at public events, and have also spoken to the National Association of Criminal Defense Lawyers in New York and to the Bar Conference in London.

Next challenges

During the next six months OKO will continue with improving the training programme, adding additional elements including advocacy, written legal argument, legal research, investigations and ethics. We will also be publishing the 'OKO War Crimes Reporter' which will contain legal information on domestic war crimes in the region in order to ensure that the information is properly disseminated. We will be organising the OKO Conference, promoting public discussion of key issues, and a mock trial competition involving the junior bar.

As the cases begin, OKO expects to play a key role in arguing the significant legal issues tat need to be decided in order to ensure fair trials.

Training in war crimes law

In the past few months, OKO has delivered training in Sarajevo and Banja Luka on the new Criminal Procedure Code and on International Humanitarian Law.

OKO has teamed with international experts to develop a substantial training programme which is available for advocates who wish to defend cases before the Court of BiH.

Our programme is sponsored by the United Nations Development Program. A series of pilot courses have taken place in order to develop a high-quality and sustainable programme for the next 2 to 3 years. The pilot courses were in two segments: a three-day seminar on "New Elements of the Criminal Procedure Code" and a three-day workshop and lecture series on international humanitarian law. Both courses were presented twice in Sarajevo and once in Banja Luka.

The Criminal Procedure Code of BiH (CPC) introduced a number of new elements to the criminal justice system of BiH, not least the adversarial system of justice utilized in common law countries. The CPC abolishes the investigating judge, and puts his powers in the hands of the prosecution. Despite a long drafting process, there are a number of areas where the CPC does not appear to come up to international standards, and where substantial challenges will have to be mounted before the Court of BiH.

Lecturers on the CPC courses included Professor Cazim Sadiković of the University of Sarajevo on the applicability of the ECHR to the CPC of BiH. The professor's many accomplishments include service as a member of the Venice Commission and as a representative of the Federation of BiH in the Brcko Arbitration. Judge Miodrag Simovic, a judge of the BiH Constitutional Court, also addressed the group. Judge Simovic also serves as a professor of Criminal Law at the University of Banja Luka and has published numerous books and articles on international criminal law. Other featured speakers included Branko Perić of the HJPC, Judges of the Court of BiH and experienced criminal defence lawyers such as Fahrija Karkin and Krstan Simić. Carlo Obligato of the criminal law project of ABA-CEELI gave the benefit of his many years of experience working as a public defender in the USA in order to explain the purpose and tactics of the adversarial system of advocacy. There were also lectures from key personnel within the Registry including those with responsibility for court management and witness protection.

For lawyers wishing to defend in war crimes cases, OKO presented a course on 'International Humanitarian Law' together with the International Committee of the Red Cross, the first time that the organization has been involved in the training of defence lawyers. The course covered definitions of war crimes, crimes against humanity and genocide, looking in general and also at the specific way in which individual criminal responsibility arises. There were lectures on defences, command responsibility and the mental element in war crimes cases. Speakers included Robert Young, the Regional Legal Advisor for Central Europe and South-Eastern Europe, and Neda Dojčinović, a legal advisor within ICRC in BiH. There were a number of international experts with significant experience before the ICTY and other tribunals who also delivered training. These included John Jones, author of 'International Criminal Law: Practice and Procedure', Rod Dixon, author of 'Archbold International Criminal Law' as well as Eugene O'Sullivan, author of another leading text book on international criminal law. Lawyers from BiH with experience before the ICTY such as Branko Lukić, Nermin Mulalić and Edina Residović. Matias Hellman, liaison officer for the ICTY in Sarajevo, also spoke on the key legal issue of the transfer of cases pursuant to Rule 11bis of the ICTY Rules of Evidence and Procedure. In addition, OKO lawyers gave presentations on various areas.

Evaluation of the training showed that all participants thought the courses were either 'very good' or 'excellent'. The training courses recommence in the new year, with the addition of a number of new courses in advocacy, written legal argument, ethics, investigations and legal research.

Prior to the delivery of the courses in 2006, a complete revision of the programme is being undertaken in order to reflect comments and suggestions made in the evaluation process, together with the production of training manuals for each of the courses. We will also work to broaden the range of speakers involved in delivering the training, in order to ensure that the project is sustainable for several years.

OKO Work Experience Programme

Dragana Babic, law student from Banja Luka University, describes undertaking 2 weeks work experience at OKO.

The two weeks from 18 July – 29 July 2005 were very important for five students of the Law Faculty in Banja Luka who were selected to participate in the Work Experience Acquisition Programme in the criminal defence section of the Registry of the Court of BiH.

To begin with, an opportunity was given to students from Banja Luka to get familiar with the Court of BiH as an institution, its organization, method of work and activities for which the Court has been established.

It was also an opportunity for students to attend trials or processes and to see themselves the methods of work, to see how the cases they had researched and studied in theory actually worked in practice by following processes that would be explored in more details in meetings with the staff of OKO.

In the OKO office the students had the opportunity to get familiar with administrative matters, the method of work of the OKO, local and foreign laws related to war crimes, organized crime and corruption, translation and research of foreign cases and comparison with the specific cases, filing of important facts within certain cases.

If we also mention an excellent cooperation and socializing with all employees, associates and students from several parts of the world, we can be proud of the huge and useful experience that we gained and which would certainly help in our practicing of the law in the near and distant future.

OKO has showed new dimensions and interests to us related to the Criminal Process Law, war crimes, organized crime and corruption.

OKO Library

Resources available to war crimes lawyers

At the offices of OKO at Skenderija 15 there are numerous resources which are available to be consulted by lawyers dealing with war crimes cases. In addition, OKO lawyers are able to undertake legal research on behalf of a lawyer who is unable to visit the office.

In local language, OKO has the leading text books dealing with criminal law and war crimes law. In addition, we have numerous resources in English that our bilingual staff are able to assist with. We are grateful for donations from numerous bodies, significantly the International Committee of the Red Cross.

OKO has collections of case law available in electronic and paper format from the ICTY. We also have databases with human rights caselaw, and experienced junior lawyers able to use the internet to access other resources. In particular, OKO will collect decisions from the lower courts and other war crimes courts in the region and around the world that will be of substantial assistance to defence advocates before the Court of BiH.

Within each geographical trial unit within OKO, lawyers will be gathering key legal and factual documents with which to be able to advice lawyers assigned to cases within that area.

The Electronic Disclosure System (EDS) of the Office of the Prosecutor of the ICTY contains nearly 4 million pages of evidence collected by ICTY investigators over the years. OKO is able to do research on behalf of defence advocates on the EDS, and can assist lawyers wishing to do their own research at the OKO office.

OKO has a budget for translation of texts into local language. During the next 12 months, we will be beginning a programme of publications on war crimes, criminal law and human rights law, which will of direct assistance in the trials before the Court of BiH.

Pre-trial Detention and Article 5 of the ECHR

Amanda Wetzel, OKO Fellow

One of the first legal issues that a War Crimes defence advocate pursues in representing their client should be a procedural challenge to detention. For this reason, it is important to understand the provisions of the European Convention on Human Rights (hereinafter: ECHR) which confer on suspects procedural rights relating to detentions. After all, the ECHR is a fundamental part of the Constitution of BiH and supreme over all BiH state and entity laws.

This article will highlight just one set of procedural guarantees provided by Article 5 of the ECHR: the suspect's right to a hearing examining the lawfulness of his detention.

Under Article 5(1)(c) ECHR detentions (as a 'deprivation of liberty') are only permissible for the purpose of bringing the suspect before 'a competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.' This piece will consider the procedural rights which supplement these substantive protections.

Rights Relating to Initial Detention Hearings

Article 5(3) ECHR states that:

> Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by this law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear before trial.

Upon his arrest, Article 5(3) gives the suspect a right to a hearing 'before a judge or other officer authorized by this law to exercise judicial power'. At this hearing, the judge or officer must review the circumstances for and against detention to decide whether or not it is lawful (*Shiesser v. Switzerland* (European Court of Human Rights, Judgment of 4 December 1979)) (detention might, for example, be unlawful in not satisfying Article 5(1)(c).). *Shiesser* also confirmed that the detainee has the right to be physically present at this hearing (perhaps implicit in the requirement to appear 'before' a judge.)

Article 5(3) also requires that this hearing occur 'promptly'. In *Brogan v. United Kingdom* (European Court of Human Rights, Judgment of 29 November 1988) it was held that the 'promptness' requirement confirms both that: (i) judicial control must occur within a definite time period; (ii) provided an arrested person is released within the period of 'promptness' a failure to exercise judicial overview will not constitute a violation of Article 5(3). Indeed, a judicial hearing might not have been feasible during the short time that the suspect was detained (although the initial arrest or detention might certainly be unlawful under, for example, Article 5(1).)

In clarifying, in Brogan, what might constitute 'promptness', the ECtHR held that a hearing who took place after an individual suspected of terrorism had been detained for four days and six hours was not sufficiently prompt. The court believed that any weakening of the promptness criteria would create consequences impairing the very essence of the rights protected by article 5(3). The Human Rights Chamber of BiH, in *Šljivo v. Republika Srpska* (Case No. CH/97/34, decision of 10 September 1998, para. 103) has held that, 'a delay of nearly two days after the time limits… [for a detention hearing] expired was not in accordance with the requirement of promptness laid out in Article 5(3) of the ECHR.'

As the BiH Constitutional Court confirmed in its judgment on case no. AP-921/04 (Decision of 19 November 2004), any breach of Article 5(3) 'may not be justified by the arguments of the Court of BiH that the Criminal Procedure Code does not explicitly provide such procedural rights. Article II.1 of the Constitution of Bosnia and Herzegovina provides that the provisions of the European Convention shall have priority over any other law.' Detainees through out Bosnia and Herzegovina have a right to appear in person at a prompt hearing before a judge or other officer authorized by this law to exercise judicial power, during which the factors for or against their initial detention are reviewed.

Extension of Detention Hearings

The CPC of BIH does confer some procedural guarantees for extensions of pre-trial detention periods. However, these protections are also supplemented by ECHR jurisprudence.

According to CPC Article 134(1), pre-trial custody can only be ordered by the Court of BiH and on a motion of the prosecutor. Article 134(4) requires that if the judge present at these preliminary proceedings decides not to accept the motion for custody, he must request that a panel decide the issue. The preliminary decision on cus-

tody can also be appealed by the accused to a panel within 24 hours of receipt of the decision. Under article 134(5) of the CPC, a decision of the panel (whether initiated by the accused or the preliminary judge) may be appealed to the appellate division. However, for none of these hearings, whether preliminary proceedings, panel or appellate are procedural guarantees explicit in the CPC. Article 134 must therefore be supplemented by Article 5(4) of the ECHR.

It is perhaps worth noting that Article 5(4) overlaps with Article 134. Article 5(4) requires that the accused be able to challenge the lawfulness of his detention in a court of law and for extensions of detention in Bosnia and Herzegovina, this requirement is probably satisfied by the requirement of a court order issued under Article 134(1) and the subsequent appeals.

However, Article 5(4) also contains further procedural guarantees which might apply to Article 134 proceedings. Article 5(4) contains the same 'equality of arms' principle that has been inferred into Article 6, including a requirement of 'truly adversarial' proceedings (*Toth v. Austria* (Judgment of 12 December 1991)) and generally requires the detained person to be permitted to participate in an oral hearing (Keus v Netherlands) (1991) 13 EHRR 700)). The Human Rights Chamber of BiH confirmed that Bosnian proceedings require an oral hearing in *Ilijasevic v. BiH and Federation of BiH* (Case No. CH/02/12427, decision of 10 October 2003), in expounding the belief that 'truly adversarial' proceedings necessarily include the right to be heard in person (Para 143).

It is clear that these procedural rights must apply as much to the panel and appellate proceedings under Article 134(4) and (5) as to the initial extension of detention hearing under Article 134(1). It is well established that appellate decisions must accord the same guarantees as applied at first instance, (see for example, *Toth v. Austria* (Judgment of 12 December 1991)). In *E.M.K. v. Bulgaria* (Judgment of 18 January 2005), for example, the applicant's appeal over continued detention was heard in the presence of a prosecutor with no representation for the defendant. In expanding on the importance of the principle of equality of arms in Article 5(4) ECHR, the court held:

A court examining an appeal against detention must provide guarantees of a judicial procedure. Thus, the proceedings must be adversarial and must adequately ensure 'equality of arms' between the parties, the prosecutor and the detained.

Ilijasevic also referred to an Appeal from a decision extending custody, rather to the original court order.

However, the opposite might not be true. Defense lawyers should be aware that the presence of an appeal from an extension of detention order might satisfy the procedural guarantees in Article 5(4) ECHR, removing the need for the initial extension of detention order to fulfill Article 5(4). Nevertheless, where the domestic law requires a court to make the initial order (as under Article 134(1)), it is likely that this court must follow the procedural guarantees implicit in Article 5(4). For that reason, at all stage in extension of detention hearings, BiH war crimes suspects have the right to be present at speedy court proceedings of an adversarial nature and equality of arms which determine the lawfulness of their detention.

Regulating the Defence

Rupert Skilbeck, Director of OKO, gives an interpretation of the Additional Rules

The 'Additional Rules of Procedure for Defence Advocates' were approved by the Plenum of Judges of the Court of BiH on 30th June 2005. They apply to all cases before Section I for War Crimes and Section II for Organised Crime that start after the date of commencement, 7th July 2005. The Additional Rules introduce a number of important procedural issues for war crimes trials, including the List of Authorised Advocates, the work of OKO, the procedure for the appointment of additional advocates, and the special admission of lawyers not licensed in BiH.

Odsjek Krivične Odbrane

Chapter 2 of the Rules creates the criminal defence section, to be known by its acronym in local language of OKO. The Chapter deals with the appointment of the Director and staff by the Registrar, and then the functions of OKO. In general, the duty of OKO is to provide assistance to those brought before the Court. This is done by providing representation, training and administrative support to defence advocates. OKO is also nominated as the licensing authority under the Law of the Court required to administer a list of advocates who are admitted to appear before the Court. Significantly, the Rules specifically state that the duty of OKO is to act in the best interests of the client, and not of the Registry. There is always a potential conflict where a defence support office is within the Registry, but the rule makes it clear how such a conflict should be resolved.

List of Authorised Advocates

Chapter 3 deals with admission to the List of authorized advocates. OKO is required to maintain a public announcement, which will be done via the website and by advertisements in the Official Gazette, and also to determine applications. OKO provides the President with a copy of the list. This will be done on a monthly basis, and then distributed to the Judiciary and also the Court Management section of the Registry.

The qualifications required for admission to the list are outlined in Article 3.2. Candidates have to be a current and valid member of either of the Bar Associations in BiH. This means that disciplinary matters are left entirely with the Bar Associations, and the only way in which an advocate would no longer be eligible to remain on the list is if they were suspended or disbarred by their own Bar Association. There is a requirement for 7 years experience in order to be the only or the primary advocate. Other tribunals have set criteria with regard to the years experience required. The ICTY requires 7 years, whereas the ICTR requires 10 years experience. This is designed to ensure that only experienced lawyers defend war crimes cases, which are extremely complex and difficult.

The Rules also require the candidate to have knowledge and expertise in relevant areas of law, in accordance with criteria published by OKO. The purpose of this rule is to ensure that all advocates defending in war crimes cases have knowledge of the new criminal procedure that applies before the Court of BiH, and also have experience or knowledge of war crimes law. OKO sets the criteria, whilst at the same time providing a training course by which individual lawyers can acquire the knowledge if they do not already possess it. As additional training courses are made available, so that area of law will become a requirement for admission to the list.

In addition, the Rules introduce the idea of continuing professional training, a requirement in most countries for lawyers in order to ensure that they are up to date with developments in the constantly changing field of war crimes law. This will be introduced during the course of 2006.

Special admission

The Law of the Court of BiH has provision for advocates to be 'specially admitted' where they do not fulfil the normal criteria for appearing before the Court. This will have two uses before the Court of BiH: Judges will be able to specially admit lawyers from BiH who are not on the list of authorized advocates where it is in the interests of justice to do so, and Judges can also specially admit foreign lawyers, where their expertise and fair trial rights demand it.

Criteria for 'special admission' are outlined in Article 3.4(4). The first criteria allows for the admission of experts in war crimes law and human rights law, who would be able to appear and argue before the court on specific points. The law of BiH does not allow for 'amicus curiae' to assist the court on complicated areas of law, and this form of special admission would deal with that problem.

The second criteria deals with 11bis cases. The rule suggests that where a case is transferred from the ICTY, and a foreign lawyer has already prepared the case, the Court should specially admit the lawyer if another advocate would not have 'adequate time for the preparation of the defence', referring to the test in Article 6(3)(b) of the European Convention on Human Rights. This will cover the situation where a case is transferred and the existing lawyer has already spent 3 or 4 years preparing the case.

Selection of an advocate

Chapter 4 deals with the procedure by which someone arrested will be given the list of authorized advocates from which a lawyer can be selected. If the suspect or accused wants to choose a lawyer who is not on the list, then either an application to be admitted to the list will be prioritized, or in circumstances where the lawyer is not likely to meet the criteria, an application for special admission can be made. Where the accused fails or refuses to choose a lawyer, the Judge can appoint one pursuant to the requirements of the CPC.

Defence Teams

There is no provision in the law of BiH for 'defence teams' as they are understood in most international criminal tribunals. Advocates are normally individually appointed, although they may use junior lawyers and other staff within their office to assist them. War Crimes cases can rarely be adequately prepared by a single lawyer, and so the Rules in Article 4.2 make some provision for criteria to be applied in deciding whether to appoint an additional advocate. The Court considers factors such as the strength of the prosecution team and the quantity of evidence, as well as difficult areas of law that need to be dealt with. It is expected that the Court will issue a practice direction in order to give further guidance on the procedures that should be followed.

Amendments

The Rules can be amended by putting a proposal to the Plenum of Judges. It is expected that as OKO becomes independent during the course of 2006 it will necessitate a change in the Rules in order to give effect to any such transition.

Criteria for Admission to the List

September 2005, valid until 30th November 2005

In accordance with Rule 3.3 of the 'Additional Rules of Procedure for Defence Advocates' please complete the "OKO Application Form" for September 2005 in order to apply to be admitted to the list of authorized advocates.

Knowledge Criteria

In accordance with Article 3.2 of the 'Additional Rules of Procedure for Defence Advocates', candidates wishing to be admitted to the list of authorized advocates must fulfil the following criteria in order to show knowledge and expertise in relevant areas of law, or complete an alternative training course run by OKO:

Element	Qualification by Experience	Training alternative
New Criminal legislation in BiH	Completion of 1 trial as an advocate before Court of BiH, *or* Completion of 2 serious trials as an advocate before lower courts using the new CC/CPC, *or* Completion of a training course approved by OKO	3 day training course on CPC and CC provided by OKO
War Crimes Law (*only required for those wishing to do war crimes cases*)	Post graduate study of IHL, *or* Substantial work on a defence team in the trial phase at ICTY, *or* Completion of 2 domestic war crimes trials as an advocate in any civilian Court, *or* Completion of a training course approved by OKO	3 day training course on IHL provided by OKO

Continuing Professional Training Criteria

There is no requirement for continuing professional training in 2005. It will become a requirement in 2006.

Period of Validity

These criteria will apply to applications received by OKO before 30th November 2005 when the criteria will be revised and new criteria will be published.

Additional Rules of Procedure

Adopted by the Plenum of the Court on 1st July 2005.

Upon proposal by the Registry for Section I for war crimes and Section II for organized crime, economic crime and corruption of the Criminal and Appellate Divisions of the Court of BiH, in accordance with article 12 Paragraph 5 of the Law on the Court, the Court of BiH, pursuant to article 22(2)(b) of the Law on Court of BiH, at the plenary session held on 30 June 2005 adopted the following:

ADDITIONAL RULES OF PROCEDURE FOR DEFENCE ADVOCATES APPEARING BEFORE SECTION I AND SECTION II OF THE CRIMINAL DIVISION AND SECTION I AND SECTION II OF THE APPELLATE DIVISION OF THE COURT OF BOSNIA AND HERZEGOVINA

PART I - GENERAL PROVISIONS

Chapter 1 – Basic Principles

Article 1.1 – Scope of Application

These Rules establish the Criminal Defence Section of the Registry of the Court, and set forth the conditions and procedures for admitting advocates to the list of advocates licensed to practice before Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina, and assignment of advocates appearing for the defence of any suspect, accused or detained person.

Article 1.2 – Entry into Force

These Rules shall enter into force seven days after their adoption by the Plenum of the Court, and shall become an integral part of the Rules of Procedure of the Court, and shall apply to cases commenced after the date of entry into force.

Article 1.3 – Amendments

1. Any proposals for amendment to these Rules shall be submitted to the Plenum of the Court. Proposals for amendments shall be accompanied with a reasoned proposal and any explanatory material.

2. T he application of amendments to the Rules agreed by the Plenum shall not operate to prejudice the rights of the suspect or the accused in any pending case before the Court.

Article 1.4 – Conflict

Where there is any inconsistency between these Rules and any other Book of Rules, Code of Conduct, Rules of Professional Ethics, Regulation or Directive, the terms of these Rules shall prevail in respect of the licensing and assignment of advocates in respect of proceedings before Sections I and II of the Court.

Article 1.5 – Definitions

In these Rules, unless the context otherwise requires, the following terms shall mean:

Rules	Rules of Procedure for Defence Advocates appearing before Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions
Court	Court of Bosnia and Herzegovina
Sections I and II	Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina
Registry	Registry for Sections I and II
Registrar	Registrar for Sections I and II
List	List of advocates authorised to appear before Sections I and II of the Court of BiH
Criminal defence section	The criminal defence section of the Registry, Odsjek Krivične Odbrane (OKO)
Authorised Advocate	Advocate who has been admitted to the list of advocates authorised to appear before the Court in accordance with these Rules.
ICTY	The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Security Council resolution 827 of 25 May 1993
Bar Associations	Bar Association of the Federation of Bosnia and Herzegovina and Bar Association of the Republika Srpska
Law on Court	Law on Court of Bosnia and Herzegovina
CPC	Criminal Procedure Code of Bosnia and Herzegovina

2. Any term not defined in these Rules shall have the same meaning given to it by the Laws of Bosnia and Herzegovina in force.

Chapter 2 – Odsjek Krivične Odbrane

Article 2.1 – Establishment of the criminal defence section

1. There shall be a criminal defence section of the Registry for the purpose of giving legal assistance to suspects and accused, which shall be known as Odsjek Krivične Odbrane, or OKO.

2. OKO shall consist of the Director, professional staff and administrative staff recruited by OKO in accordance with the internal rules of the Registry.

3. The Registrar, in consultation with the President of the Court, shall appoint the Director of OKO.

Article 2.2 – Responsibilities

1. OKO shall provide assistance to any suspect or accused being investigated for or charged with an offence, or detained under the authority of the Court or brought to appear before the Court.

2. OKO is authorised pursuant to Art.12 of the Law on Court as the authorising authority for Sections I and II, and is authorized to prepare and maintain the list

3. OKO shall fulfil its functions, *inter alia*, by:

   a. Assisting in the protection of the rights of suspects, accused, detainees or other persons.

   b. Providing and maintaining representation for suspects, accused, detainees or other persons.

   c. Helping to ensure respect for the highest standards of criminal justice.

   d. Administering applications to be admitted to the list in accordance with the criteria in these Rules.

   e. Maintaining an accurate and up to date list.

   f. Providing all suspects and accused with information on how to select an advocate from the list.

   g. Providing administrative and other support for assigned advocates.

   h. Providing training courses to allow advocates to fulfil the criteria for admission to the list together with continuing professional training.

4. Advocates employed by the OKO who provide legal advice or representation to suspects, detainees or accused or other persons shall act in the best interests of those persons and shall be independent from the Registry. Legal advice given by OKO to suspects, detainees, accused or other persons or to any advocate shall be regarded as legally privileged.

5. Any decision of the Director of OKO may be reviewed by the President of the Court.

Part II – ADMISSION AND ASSIGNMENT OF ADVOCATES

Chapter 3 – Admission to the List

Article 3.1 – List of Authorised Advocates

1. OKO shall maintain a public and open announcement inviting advocates to apply to be admitted to the list.

2. OKO shall determine if the prerequisites set by the Rules are satisfied and admit successful candidates to the list.

3. OKO shall maintain the list and shall make the list available to the President of the Court.

Article 3.2 – Qualifications of Advocates

In order to be admitted to the list an advocate must fulfil each of the following requirements:

1. To be a current and valid member of either of the Bar Associations;

2. To possess as an advocate, judge or prosecutor at least seven years of relevant working experience on legal matters in order to be appointed as the only advocate or the primary advocate;

3. To possess knowledge and expertise in relevant areas of law in accordance with the criteria published by OKO; and

4. To have completed sufficient continuing professional training hours, in accordance with the criteria published by OKO.

Article 3.3 – Application Process

1. Applicants shall complete an application form prepared by OKO and shall submit any other relevant document necessary in accordance with the criteria referred to in Art.3.2(4) of these Rules.

2. Any advocate who has been denied admission to the list may seek review of the decision before the President of the Court within fifteen days of receiving notification of the decision.

Article 3.4 – Special Admission

1. Pursuant to Article 12(2) of the Law on Court, Judges of Sections I and II may at any time specially admit an advocate who is not on the list to appear or practise before the Court.

2. The definition of 'advocate' in subparagraph 1 above shall include but not be limited to an advocate who has a current and valid license for performing the practice of law from a recognised association of lawyers of a foreign state or from a State body.

3. The advocate shall apply to the preliminary proceedings judge, preliminary hearings judge, the judge or the Presiding judge depending on the phase of proceedings.

4. The Judge may take the following factors into account when considering applications under this Article:

   a. Whether the advocate has specific competence in criminal law, international criminal law, international human rights law, or any other area of law, such as to significantly assist in the proceedings.

   b. If the advocate has already appeared before the ICTY in a case that has been transferred to the Court under Rule 11bis of the Rules of Procedure of the ICTY, whether any other advocate would have adequate time for the preparation of the defence.

   c. Any previous applications to be admitted to the list that have been refused.

   d. Any other factor relevant to the rights of the suspect or accused.

5. The Judge shall inform OKO of any decision to admit an advocate not on the list.

6. OKO shall keep a list of specially admitted advocates.

7. The advocate shall forward the relevant documentation to OKO in accordance with Article 3.3 of these Rules.

Article 3.5 – Removal from the List

1. An advocate who has been admitted to the list shall be removed where the advocate:

   a. requests removal from the list and is not currently assigned to a case;

   b. no longer satisfies the qualifications as outlined in these Rules; or

   c. has been disqualified in terms of Article 42 of the CPC, or has been repeatedly removed from the courtroom or prevented from further representation in terms of Article 242 of the CPC.

Chapter 4 – Assignment of Advocates

Article 4.1 – Selection of Advocate from List

1. The suspect or the accused may select an advocate from the list who is willing and available to be assigned to the suspect or accused.

2. Where the suspect or accused proposes an advocate not on the list, OKO shall prioritise an application from that advocate for admission to the list in accordance with these Rules, or the advocate may make an application for special admission pursuant to Article 3.4 of these Rules.

3. If the suspect or accused fails to select or propose an advocate of his choice, then, in accordance with Article 45 and 46 of the CPC, the preliminary proceedings judge, preliminary hearings judge, the judge or the Presiding judge may:

   a. assign an available advocate from the list; or

   b. temporarily assign an available advocate from the list; or

   c. assign any other advocate for a period not exceeding thirty days.

Article 4.2 – Assignment of Additional Advocates

1. Where more than one advocate is necessary for the adequate preparation of the defence, the Court may assign additional advocates.

2. The Court may consider the following criteria in deciding whether to assign additional advocates in a specific case:

   a. The complexity of the case;

   b. The number of members of the prosecution;

   c. The quantity of prosecution evidence;

   d. Any complex issues of fact or law;

   e. The estimated length of the trial;

   f. Any other factor relevant to the rights of the suspect or the accused.

3. Where more than one advocate is assigned, the suspect or accused shall decide which is the primary advocate.

Building the Fourth Pillar

__Rupert Skilbeck__ considers Defence Rights and the Special Court for Sierra Leone

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.

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 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.

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. 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 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. 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.

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'. 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. 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. The resolution requires the Secretary General to 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. 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. 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 viable nor sustainable' and that assessed contributions was the only proper way to provide funding.

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.

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.

The original budget of the Special Court was set at $114.6 million over three years, 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.

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.

After the Second World War

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. 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.

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.

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'. 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 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.

The International Criminal Tribunals

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 Tadiæ, was prepared to waive his normal fees and work under these conditions. 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.

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.

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 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.

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.

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.

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 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.

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

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.

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. 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.

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.

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 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. 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 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.

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.

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:

(a) Legal research and advice; and

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

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'. However, the Budget Committee appeared to think that there should be a further report before they could make any recommendations.

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?

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.

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. 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. 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. 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. 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.

Functions of the Defence Office

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.

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.

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.

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 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.

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.

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.

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 Universityon 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.

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.

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.

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'. Commentators have suggested that 'the funding arrangements for the SCSL are nothing short of scandalous' and that the court is not lean and mean, but anorexic.

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.

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.

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Case Reports

Court of Bosnia and Herzegovina

Perišić Risto

Decison on the Motion of the Prosecutor's Office of BiH for takeover of the case

Section I, 4 July, 2005

Facts

Case file against Perišić Risto pending before the Goražde Cantonal Prosecutor's Office. On 25 May 2005, the Court of BiH received a Proposal for Takeover of the case against Perišić Risto from the Prosecutor's Office of BiH (filed by Prosecutor Ibro Bulić.) This motion was made pursuant to Article 449 of the CPC BiH.

Law Provisions

Article 449 CPC BiH – Ceding of Cases Falling under the Competence of the Court

Also relevant: Article 20 CPC BiH – Definition of terms; Article 13 of the Law on Court of BiH – Jurisdiction of the Court; Articles 2, 12 and 18 of the Law on Prosecutor's Office of BiH – Independence of Office and Jurisdiction of the Prosecutor's Office

Decision of the Court

Under Article 449(2), the Court may decide, ex officio or upon the reasoned proposal of the parties or defense attorneys, to takeover a case that is within its jurisdiction but which is pending before other courts or prosecutor's offices when the indictment is not legally effective or confirmed.

The court has found that, according to the Article 13 (1) of the Law on the Court, it has jurisdiction over (inter alia) the alleged acts in this case as they constitute criminal offences under the Criminal Code of BiH (as war crimes).

The court stated that confirmation of this indictment would be assesed pursuant to the CPC of Brčko District from 2000, CPC of FBiH from 2003 and CPC RS from 2003 and its legal effect according to *both* the CPC of SFRY and the CPC FBiH of 1998. However, in this case, no indictment exists.

The court believes that the same takeover procedure described in Article 449(2) applies when no indictment for a given suspect has been issued. For the takeover procedure to be applicable, it is only necessary that a case against a suspect exist. This requires some investigation activities to have been carried out with some results. A file containing only notice of an action or omission that might consitute a crime, even with some initial investigation, cannot be considered a case for the purposes of takeover. The Panel concluded that, in this case, the Prosecutor did not suceed in proving that a case exists to be taken over and therefore refused the motion.

Finally, the Panel noted that the Court of BiH Prosecutor's Office might use its autonomous competence in relation to the Cantonal Prosecutor's Office in Goražde to initiate their own criminal proceedings against Perišić Risto.

Vjestica Miroslav

Custody Decision—Article 5 ECHR

Section 1, 15 June 2005

Relevant Legal Provisions

Article 5 ECHR

- Article 5(1) – defines conditions of lawful arrest or detention of a person – must be brought before competent legal authority – must be reasonable suspicion of having committed an offense or must be considered necessary to prevent an offence or to prevent the suspect from fleeing
- Article 5(3) – everyone arrested or detained shall under 5(1)(c) shall be brought promptly before a judge and is entitled to trial within a reasonable time or to release pending trial.
- Article 5(4) – everyone deprived of liberty by arrest or detention shall be entitled to proceedings by which the lawfulness of his detention shall be decided speedily and his release ordered if it is unlawful

Criminal Procedure Code of BiH

- Article 20(m) – defines "grounded suspicion" as a high degree based on collected evidence leading to the conclusion that a criminal offense may have been committed.
- Article 131 – custody may be ordered only under the provisions prescribed by the code – duration must be the shortest time necessary – custody shall be terminated as soon as the grounds for which it was ordered cease to exist
- Article 132 – criteria for grounded suspicion – detention may be ordered if there is a grounded suspicion that a person has committed a criminal offense

Facts

Miroslav Vještica is a citizen of Bosnia and Herzegovina (hereinafter: BiH) who was placed in custody pending trail on December 24, 2004 by a Cantonal Court decision. The same court extended his detention on January 19, 2005. On March 21, 2005, the Court of BiH again extended his detention. His defense advocate petitioned for his release and argued that his arrest was in contravention of Article

5, paragraph 1 of the ECHR.

Holding

The continued detention of Mr. Vještica was terminated. The suspect was prohibited from leaving Banja Luka without prior permission of the court unless for the purpose of an appearance before the Court. Before his release, the suspect was ordered to turn over all valid travel documents from both Serbia and Montenegro and BiH to the court. In the case of an urgently needed absence, the suspect may make a special request to the Court.

Fair Trial Rights in pre-trial hearings

It was not in dispute that there was a defect in procedure regarding the defendant's detention. He was not examined before being placed in custody as required by ECHR Article 5(1). The Court held that the defendant was being held in violation of Article 5 (3) and 5(4) of the ECHR: "The suspect is not currently detained in accordance with a procedure prescribed by law."

When adjudicating a breach of Article 5 of the ECHR, the Court observed that article 13 of the Convention only requires that the original hearing be *de facto* reheard and a decision reached on the merits of pre-trial detention in accordance with "a procedure prescribed by law" – Article 132 of the CPC. On June 1 and 9, 2005, the breach of article 5 was remedied by allowing both sides to give oral arguments in the presence of the defendant.

Merits of arguments

The court held that pre-trial detention was permissible under the CPC of BiH only if the pre-requisite conditions are met under Article 131(1). When these conditions cease to exist, the detention should be terminated. The court observed that article 20(m) of the BiH CPC defines the requirement of 'grounded suspicion' to justify detention. The court also noted that the BiH CPC Article 132(1) provided that other aggravating factors may also justify pre-trial detention.

The Chamber found that the prosecution did not carry its burden of proof to justify pre-trial detention at the first instance and throughout the detention period. The BiH War Crimes Chamber is an independent organization and is not bound by ICTY procedural determinations. This case had indeed been examined by the ICTY Prosecutor's office and classified with a standard mark "A" under the Rules of the Road procedure. Under Article 15 of the Rules of the Road, "the Prosecutor of the ICTY acts in the advisory capacity only and does not take decisions." The prosecutor in this case may not rely solely on the ICTY rules of the road classification and must prove that there was grounded suspicion under one of the categories outlined in Article 132 of CPC.

The Court does not rely on evidence for grounded suspicion in the case file that may indicate a criminal finding against Vještica because it was collected during the investigation phase of the inquisitorial process. Even more importantly, the suspect did not have the opportunity to comment on the allegations at that early point in the investigation. The Court of BiH held that it "is not in the business of rubber stamping vague assertions of the prosecution that are not grounded in article 132 of the CPC." The Court found that the prosecution has not satisfied its article 132 burden and canceled custody of Vjestica.

The Court accepted the prosecution's assessment of the risk that the suspect may contact a witness and decided to impose measures in accordance with article 126 and connection with article 123(4) of the CPC of BiH. The court also accepted the prosecution's arguments that the suspect might flee and applies the necessary measures under article 5 (3) of the ECHR. Accordingly, the suspect was ordered to hand over his valid personal identity cards issues by Bosnia and Herzegovina or Serbia and Montenegro or any other country or government before his release. The suspect was also ordered to report personally to a public authority every day to ensure that he does not abscond and not to contact witnesses.

Commentary

The *Vjestica* case is significant because it reinforces the right of the accused under article 5(1) of the ECHR and provides one of example of circumstances which do not meet the requirement of "reasonable suspicion" to hold an accused in custody under article 5(4).

The court quickly established that Mr. Vjestica was held in contravention of Article 5(1) of the ECHR. This decision is in line with the best practice and extensive case law of the ECHR, the Constitutional Court of Bosnia and Herzegovina, and the Human Rights Chamber. The key cases concerning the right to be heard at first instance include the ECHR case of *Shiesser v. Switzerland* (1979, 2 EHRR 417), the BiH Human Rights Chamber decision of *Šljivo v. Republika Srpska* (Case no. CH/97/34, Human Rights Chamber of BiH, decision of 10 September 1998, para. 103), and case number AP-921/04 of the BiH Constitutional Court. Each judgment provides that the detained person must be brought promptly and personally before a judge for an initial detention hearing. Thus, although important, the War Crimes Chamber's determination that Mr. Vjestica was being held in contravention of Article 5(1) of the ECHR simply confirms existing ECHR case law.

The most important outcome of the *Vjestica* case was the determination that the prosecution did not carry its burden of proof to justify pre-trial detention at the first instance. The court's interpretation of article 131 and article 20(m) of the CPC of BiH is of critical importance for defense attorneys. Article 131 (2) of the BiH CPC provides that detention is legal only for the *shortest time necessary*. In addition, article 131(3) provides that "custody should be ordered as soon as the grounds for which it was ordered cease to exist". Article 132(1) and (2) enumerates five conditions under which detention

may be ordered if there is a grounded suspicion that an individual has committed a crime including: the possibility of flight, the possibility of destruction of evidence or hindrance of witnesses, the fear or threat that an individual will repeat a criminal offense that carries a sentence of five years or more, and, in the case of a crime punishable by ten years or more, the need to order custody for public safety. Article 135(2) of the CPC addresses orders to extend custody and holds that following a "substantiated motion" of the prosecutor, an appeal against the decision of a panel shall be allowed. The operative word for defense attorneys in article 135(2) is the requirement of a *substantiated motion*.

In addition to studying the Vjestica case, Bosnian defense attorneys would be well advised to consult the case law of the European Court on Human Rights. In particular, the case of *Wemhoff v. Germany* held that the reasonableness of a person's detention must be assessed in each case according to its special features (Judgment of 27 June 1968). The case of *Tomasi v. France* (Application no. 27/1991/279/350, Judgment of 27 August 1992) also states that national judicial authorities must,

> "Examine all the circumstances arguing for or against the existence of a genuine requirement of public interest justifying with due regard to the principle of presumption of innocence, a departure from the rule of respect for individual liberty, and set them out as the basis of their decision."

Consistent with article 135(2) of the BiH CPC and with the ECHR judgments of *Wemhoff and Tomasi*, the prosecutor is required to make a "substantiated motion" and to put forward "relevant" and "sufficient" grounds for extension of detention. In turn, the *Tomasi* judgment also requires the court to use 'special diligence' to consider motions for extensions of detention.

Mr. Vjestica's lawyers won their case with the argument that the public risk posed by the accused did not justify his continued detention under article 20(m) and article 132 of the BiH CPC. The plain text of the judgment itself, however, omitted extensive ECHR case-law. The cases cited in the above commentary may be useful in substantiating similar arguments in future cases that may appear before the Court of BiH.

Prosector v Radovan Stankovic

Case No. IT-96-23/2-AR11bis.1

Chronology	
Apprehended by SFOR	9 July 2002
Transferred to ICTY	10 July 2002
Initial Appearance:	12 July 2002, "not guilty" plea entered for all counts on the Indictment
Further Appearance	6 March 2003, no plea was entered
Further Appearance	4 April 2003, "not guilty" plea entered for all added counts on the amended Indictment
Transfer	On 29 September 2005 transferred from the ICTY to Sarajevo to be tried by the War Crimes Chamber of the Court of Bosnia and Herzegovina
Custody in BiH	On 29 September 2005 the Court of Bosnia and Herzegovina by its Decision ordered that custody ordered by the ICTY remain in force
Defence Advocate	Mr. Milenko Radovic, Foca

Background Information

The Original Indictment

The original indictment was confirmed on 26 June 1996, included seven other accused. Dragan Gagovic and Janko Janjic are deceased. The Prosecutor was subsequently granted leave to withdraw Gagovic from the Indictment on 30 July 1999.

Dragoljub Kunarac was severed from the original Indictment in an amended Indictment, confirmed on 19 August 1998. On 3 September 1999, a Second Amended Indictment was confirmed joining Dragoljub Kunarac and Radomir Kovac (IT-96-23).

Amended Indictment

The amended Indictment was confirmed against Dragan Zelenovic, Gojko Jankovic, Janko Janjic, Zoran Vukovic and Radovan Stankovic on 7 October 1999. Dragan Zelenovic and Gojko Jankovic remain at large, Janko Janjic is deceased, Radovan Stankovic has been arrested on 9 July 2002 and transferred to the Tribunal the next day (see Chronology herein above). Following the detention of Zoran Vukovic, a redacted Indictment was filed on 21 February 2000 containing only the factual allegations and charges against him (IT-96-23/1).

Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic were tried in a joint trial which commenced on 20 March 2000. On 22 February 2001, the Trial Chamber rendered its Judgement, convicting Dragoljub Kunarac to 28 years' imprisonment, Radomir Kovac to 20 years' imprisonment and Zoran Vukovic to 12 years' imprisonment. The Appeals Chamber affirmed these sentences on 12 June 2002.

An amended Indictment against Radovan Stankovic was filed on 5 October 1999. The Prosecution filed a Motion Seeking Leave to Amend the Amended Indictment on 20 November 2002. The Trial Chamber granted leave to amend the Amended Indictment on 28 February 2003.

On 3 March 2003, the Prosecution filed a separate Indictment against Radovan Stankovic and on 8 December 2003, a Third Amended Indictment was filed on 8 December 2003 and confirmed on 24 February 2004.

Second amended Indictment

The Second Amended Indictment against Radovan Stankovic was filed on 3 March 2003 following a Decision by the Trial Chamber of 28 February 2003. The Indictment alleges that on 8 April 1992 Serb forces launched a first military attack against the non-Serb population of the town of Foca. The take-over of the town was complete by 16 or 17 April 1992 and the surrounding villages continued to be under siege until mid-July 1992.

Once towns and villages were securely in their control, Serb military, police, paramilitary and sometimes Serb villagers started ransacking or burning Muslim houses and apartments and rounding up and capturing Muslims. The Indictment goes on to allege that some Muslims were beaten or killed in the process.

The Indictment alleges that Serb forces separated the non-Serb men from the women. The Foca Kazneno-

Popravni Dom ("KP Dom") was the primary detention facility for men in Foca. Muslim women, children and the elderly were detained in houses, apartments and motels in the town of Foca or in surrounding villages. There were also detainees at short and long-term detention centres such as Buk Bijela, Foca High School and Partizan Sports Hall. It is alleged that that the women and girls had to live in intolerably unhygienic conditions and that they were mistreated in many ways including, for many of them, being raped repeatedly.

According to the Indictment, some women and girls were taken out of the larger detention centres to privately owned apartments, such as ulica Osmana Djikica 16, Karaman's house, or the house in Trnovace. They were forced to cook, clean and serve the residents, who were Serb soldiers. These women and girls were also subjected to repeated sexual assaults.

Radovan Stankovic was a soldier in the Miljevina Battalion of the Foca Tactical Brigade. The Miljevina Battalion was commanded by Pero Elez during the times relevant to the Indictment.

Charges

The Indictment charges Radovan Stankovic on the basis of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal) with:

- Four counts of crimes against humanity (Article 5 – enslavement; rape) and
- Four counts of violations of the laws or customs of war (Article 3 – rape; outrages upon personal dignity)

Latest developments

Case transfer

On 21 September 2004, the Prosecutor requested that the case against Stankovic be referred to Bosnia and Herzegovina pursuant to Rule 11*bis*. A hearing was held on 4 March 2005 and the Referral Bench rendered its decision on 17 May 2005 for the case to be referred. The Prosecution filed a notice of appeal on 30 May, seeking that the Decision of the Referral Bench be revised in the parts relating to questions of monitoring and reporting. The Defence appealed the Decision on 16 June, objecting to the referral of the case. On 1 September 2005, the Appeals Chamber issued its Decision, allowing the Prosecution to appeal in part and dismissing the Defence appeal in its entirety, thereby confirming referral of the case to Bosnia and Herzegovina. The appeal of the Prosecution is allowed in part, insofar as it objects to the Referral Bench's order instructing the Prosecutor to continue her efforts to conclude an agreement with an international organization for monitoring purposes and to seek further direction from the Referral Bench if an agreement is not concluded. The remainder of the Prosecution appeal is dismissed.

National jurisdiction

Upon the transfer of the accused, on 29. September 2005 the Court of Bosnia and Herzegovina Decision (X-KRO-05/70) on custody stated that

> "Custody ordered against the accused Radovan Stankovic, [rendered] by the Trial chamber II of the International Tribunal in the case *Janković et. al* (IT-96-23/2) shall remain in force pending the ruling of the Court of Bosnia and Herzegovina on the acceptance of the adjusted Indictment of the Prosecutor's office of Bosnia and Herzegovina".

Case Reports

International Criminal Tribunal for the Former Yugoslavia

The Court of BiH is receiving war crimes cases through two mechanisms. Some suspects are being apprehended and charged from the territory of the former Yugoslavia. Other cases are being transferred to the Court of BiH through a referral process from at the International Criminal Tribunal for the Former Yugoslavia (ICTY). The following two case summaries are procedural decisions of the Referral Bench of the ICTY that ordered the transfer of the defendants concerned to the Court of BiH.

The Referral Bench of the ICTY was established pursuant to the broad strategy of the United Nations Security Council Resolution 1503 pursuant to the ICTY completion strategy for 2008. Rule 11*bis* provides that the ICTY may appoint a Referral Bench to determine whether the case should be transferred to state authorities. In determining whether to transfer a case, and to where a case should be transferred, the court may consider: the territory in which the crime has been committed, the territory where the accused was arrested, and a state with the capacity to adjudicate a war crimes case. Under Rule 11*bis* (B) and (C), the Court must also consider whether the accused will receive a fair trial, the gravity of the crimes, and the level of responsibility of the accused.

Both *Prosecutor v. Željko Mejakić* and *Prosecutor v. Gojko Jakovic* are significant transfer decisions because the Referral Bench gave substantial explanations as to why they rejected the submissions of the defence to keep the case at the ICTY. The conjoined appeals are expected to be heard in the Autumn.

Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, and Duško Knežević

Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11bis

20 July 2005

Procedural History

The ICTY Referral Bench heard submissions of both the prosecution and the defence. The Referral Bench weighed the arguments of the parties in light of six main considerations: the gravity of the crime, the laws of extradition, the proper state of referral of the decision, the applicable substantive law, the requirement of non-imposition of the death penalty, and fair trail considerations. The following case summary briefly outlines the charges against the accused and puts forth the Referral Bench's reasoning to authorize the transfer to the War Crimes Section of the Court of Bosnia and Herzegovina.

Charges Against the Accused

The defendants are charged with crimes connected with the Omarska and Keraterm camps during the period of May 1992 to August 1992 in the Prijedor municipality. Count 1 of the indictment charged persecutions on political racial or religious grounds as Crimes Against Humanity pursuant to Article 5(h) of the ICTY Statute. Count 2 and 3 respectively charged Murder as a Crime Against Humanity under article 5(a) of the ICTY Statute and Murder as a Violation of the Laws and Customs of War under article 3 of the convention. Counts 4 and 5 respectively charged Inhumane Acts as Crimes Against Humanity under article 5(i) of the ICTY Statute and as Violations of the Laws and Customs of War under Article 3 of the ICTY Statute. In reference to each substantive crime listed above, counts 1 through 5 charged Mejakić, Gruban, Fuštar, Banovic, and Knežević with individual criminal responsibility as a participant in a joint criminal enterprise under article 7(1) of the ICTY Statute. Additionally, counts 1 through 5 also charged Mejakić, Gruban, and Fuštar with superior criminal responsibility under article 7(3) of the ICTY Statute.

Gravity of the Offenses

The defence and the prosecution had conflicting viewpoints on the issue of whether the crimes alleged were too grave to transfer the case to the War Crimes Section of the Court of BiH. The prosecution submitted that the crimes, while grave, did not require an ICTY trial. The prosecution also stated that Željko Mejakić is an intermediate level perpetrator and the remaining accused are considered intermediate or low level accused. In contrast, the defence maintained that the case should not be transferred because the charge of joint criminal enterprise warrants special treatment. The defence also maintained that Željko Mejakić was a commander of a camp and, therefore, held the highest level of responsibility.

The Referral Bench quickly dismissed a suggestion of the defence that the case should remain at the ICTY because it might have implications for other cases. The Referral Bench also determined that, although grave, the crimes alleged must be viewed with a comparative eye to other allegations at the ICTY. The Referral Bench concluded that the crimes alleged did not demand that the case remain at the ICTY. In transfer determinations, the Referral Bench only considers the facts alleged in the indictment. The court stated:

'although the accused were alleged to have been involved in the highest political leadership, it is not the Prosecutor's case that these accused were par-

ticipants at the level described as the 'big picture.'

The lesser allegation put to the accused is that "they participated in the joint criminal enterprise by acts and conduct at the Keraterm and Omarska camp, conduct which was a means of implementing part of the objectives of the joint criminal enterprise." The Referral Bench found that Mejakic was not at the most senior level of leadership at the Omarska camp.

Implication of Laws of Extradition on 11bis Proceedings

The defence argued that the case should not be transferred to BiH without the consent of Serbia and Montenegro because some of the accused were originally transferred from that territory and hold Serbian citizenship. The Referral Bench noted that the individuals involved surrendered themselves to the ICTY. The rule of specialty usually limits the charges before the court of the requesting state and prohibits the requesting state from re-extraditing an individual. However, it is not self-evident that specialty applies to cases of voluntary surrender. Furthermore, the use of the *11bis* rule does not amount to an extradition because a state's obligation to cooperate with the ICTY derives from Chapter VII of the United Nations Charter. The Referral Bench therefore rejected the defence argument and held that a state may not impose the rule of specialty where a transfer is ordered under *11bis.*

Determination of the State of Referral

The prosecution argued that the case should be referred to BiH because the ICTY Statute prioritized transfer to a court in the territory on which the crime was committed over other enumerated considerations. In contrast, the defence argued for transfer to Serbia due to the citizenship of the accused. On the issue of nationality, the court found that three of the four accused were born in the territory of Bosnia and Herzegovina, two of the four obtained Serbian citizenship only after arriving in the Hague, and all of the accused were citizens of Bosnia and Herzegovina at the time of the indictment. The Court also noted that, even if all of the accused had Serbian citizenship, that fact would not have particular relevance to the indictment.

With respect to the prosecution's submission, the court found that the factors for transfer consideration enumerated in Rule 11*bis* are in no order of priority. The nexus between the accused and their alleged crimes on BiH territory is strong. The court emphasized that the crimes took place on BiH territory and that three of the accused were citizens of BiH. The nexus with Serbia and Montenegro is significantly weaker.

The Court noted that the only formal request that it was considering was that of the Prosecutor to refer the case to Bosnia and Herzegovina. The defence and the government of Serbia and Montenegro are not authorized to submit a motion for transfer to Serbia under Rule 11*bis*.

Applicable Substantive Law

The Referral Bench also considered whether the laws applicable in proceedings before the BiH Court would permit the prosecution and trial of the accused. They also considered, in the case of a guilty verdict, whether the laws of BiH would furnish an appropriate punishment. The prosecution argued that the substantive law to the case upon transfer was the 2003 Criminal Code of BiH. The prosecutor relied on Article 4(2) of the BiH CC which provides that, the law applicable at the time of the crime should be applied unless amendments to that law are more lenient. The government of Bosnia and Herzegovina submitted that it agreed with the prosecutor that the 2003 BiH CPC was more lenient.

The Referral Bench recognized that it will be for the Bosnian Court to determine the criteria it will choose to establish which code is more lenient. The referral bench only considered whether there was a significant deficiency that "might impede the prosecution, trial, and if appropriate, the punishment of the accused for the alleged offenses." The Referral Bench concluded that there are indeed appropriate provisions to address most, if not all, of the criminal acts alleged in the present indictment and also an adequate penalty structure.

Fair Trial and Non-imposition of the Death Penalty

The Court observed that the accused may not be transferred to a state where the death penalty will be imposed or carried out. There is no danger that such a penalty will be imposed if the case is transferred to BiH. Bosnia and Herzegovina outlawed the death penalty upon ratification of Protocol 13 of the ECHR on 29 July 2003.

With reference to fair trial requirements, the referral bench enumerated the requirements of a fair trial under article 14 of the International Covenant of Civil and Political Rights and article 6 of the ECHR. The court noted that these guarantees are in the BiH Constitution and in the CPC of BiH. The Referral Bench also stated that 11*bis* provides that, when a referral order is made, the Prosecutor may send observers to monitor the proceedings in the national courts. Therefore, the Referral Bench sought to address only the specific concerns raised by the defence with reference to fair trial issues.

The first issue was the composition of the court. The defence submitted that all citizens of BiH were effected by the war and that the accused could not receive a fair trial in its territory. The Court disagreed and held that the War Crimes Chamber of the Court of BiH of BiH was specifically designed to include both national and international judges for a period of five years. In addition, the laws of BiH disqualify judges who are not able to perform their professional duties.

The defence also contended that unfair practice and delay would arise because the Prosecutor of the Court of BiH "has an unfettered right to amend the

Indictment of the ICTY" by adding charges to the defendant. In fact, the BiH Prosecutor has the right to insure that the "ICTY indictment has been adequately adapted and amended and that the indictment fulfills the formal requirements of the BiH CPC." The Referral Bench held that the procedural requirement allowing an indictment to be amended does not itself lead to an unfair trial. The Court observed this is especially the case because Article 275 of the BiH CPC provides that, after amendment, the defence must have adequate time for preparation.

The defence submitted that the Court of BiH has discretion to admit materials from other cases of the ICTY such as judgments, statements, and depositions that may be detrimental and hinder the ability of the accused to defend themselves. The Referral Bench observed that articles 3, 4, and 5 of 11*bis* provide that the court may exclude evidence when its "probative value is outweighed by its protected value" and that an exercise of discretion by the Court of BiH to accept proven facts is allowed only after the parties have been heard. In particular, Article 4 is essentially the same as Article 94 of the BiH CC and requires both parties to be heard before a decision is made to apply the decision of the Trial Chamber of the ICTY to previously adjudicated facts.

Witness Attendance and Protection Issues

The defence submitted that articles 11, 12, 13, 19, 21, and 22 of the BiH Law on Protection of Vulnerable Witnesses Under Threat ("the Witness Protection Law") would deny the right of the accused to examine the witnesses against him. The defence was especially concerned that, under Article 11, a protected witness will not necessarily be required to appear before a public hearing but may be cross-examined under an *in camera* proceeding. The Referral Bench observed that article 11 of the Vulnerable Witness Protection Law does not violate the defendant's rights. Instead, it provides an alternative avenue of appearance *in camera* that may only be used in specific circumstances when a protected witness cannot appear in a public hearing. With reference to article 12 and 13 of the same law, the Referral Bench observed that they operated to preserve a witness's identity that is similar to ICTY protective provisions and to protect a witness from public identification and consequential risks. Finally, the Referral Bench observed that Articles 19, 21, and 22 of the Witness Protection Law also do not threaten a defendant's right but provide an exceptional procedure where a hearing may conducted in the absence of both parties. Articles 19, 21, and 22 allow the parties to submit and pose additional questions after receiving the initial testimony. The court found this procedure acceptable because follow-up questions are allowed and it is only used when there is a "manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after testimony is given, or is likely to be aggravated by testimony."

The defence also expressed concerns about obtaining the attendance of witnesses from Serbia and Montenegro and Bosnia and Herzegovina. The Referral Bench found it significant that Serbia ratified the Convention on Mutual Assistance in Criminal Matters (ECMACM) in March 2005. ECMACM was observed to be a mechanism to obtain the attendance of witnesses from Serbia to the Court of BiH. In the event the case was transferred to the Court of BiH, witnesses living anywhere in BiH would also be obliged attend trial to give evidence. Finally, the Court did not agree with the defence that witness protection measures in BiH are inadequate. In particular, the court observed that the Witness Protection Law provides for protection outside the courtroom. The Referral Bench was further satisfied that the Registry of the Court of BiH will take responsibility for the administration and provision of support services to the War Crimes Section.

Quality of Detention Facilities

The defence also submitted concerns regarding the quality of detention facilities in Bosnia and Herzegovina. However, the Referral Bench was satisfied that there is a high security detention facility in BiH that is under the operation of international experts. The detainee and prisoner system is also regulated by the state.

Additionally, the defence submitted that all but one of the accused are currently in detention in the Hague. The defence expressed concern that this time already served in detention will not be considered when determining the period of detention prior to trial in BiH. The Court dismissed that assertion as misleading because it is balanced by the fact that the law of BiH provides that detention can not exceed a maximum period of 1.5 years.

Right to Counsel

With reference to the continuation of current ICTY counsel, the defence submits that the case should be heard at the Hague to avoid a change in the defence team. The Referral Bench observed that lawyers qualified in BiH ordinarily have exclusive rights to practice before the Court of BiH. However, the Referral Bench also noted that the BiH Law on the Court of BiH allows special admission of attorneys even if they are not licensed to practice law in Bosnia. Finally, the Referral Bench noted that, in the event that a non-BiH defence lawyer is not admitted to the bar, he or she can pass the case notes to the newly appointed defence counsel to ensure the accused receives a consistent quality of representation.

Transfer as a Violation of Rule 6D

The defence attorney also submitted that transfer to the War Crimes Section of the Court of BiH would prejudice defendants' rights and be contrary to Rule 6(D) of the rules. The purpose of the rule is to ensure that amendments to the rules do not operate so as to prejudice the existing rights of the accused in

the pending case. The right refers to those rules to which the accused has a legal entitlement. In addition, the Referral Bench observed that the accused does not have a 'right' to be tried by the ICTY under its statute. The Referral Bench finally concluded that "it was not persuaded that a referral of this case to Bosnia and Herzegovina or to another competent national jurisdiction pursuant to Rule 11*bis* would prejudice the rights of the Accused within the meaning of Rule 6(D), and is satisfied that Rule 6(D) does not operate to prevent referral in this case."

Concerns About the Accountability of Trial Monitoring

Finally, the defence submitted that trial monitoring provided by Rule 11*bis* (D)(iv) and 11*bis* (F) serve as precautions against failure to diligently prosecute a referred case or to conduct a fair trial. Rule 11*bis* (D) provides for monitoring of referred cases. In addition, Rule 11*bis* (F) enables the Referral Bench to revoke a referral order at any time before an accused is found guilty or acquitted by a national court. The Referral Bench considered that the prosecution was negotiating an independent trial monitoring process in cooperation with the OSCE and found no need to consider the adequacy of monitoring at this stage in the proceedings.

Prosecutor v. Gojko Jankovic, Decision on Referral of Case Under Rule 11bis, ICTY

22 July 2005

Facts

In July 1996, the Office of the Prosecutor of the ICTY ("OTP") filed an indictment against Gojko Janković, together with seven other persons. The indictment alleges that Janković, an ethnic Serb, found by the Court to be a citizen of Bosnia and Herzegovina, participated in a persecutorial campaign against the non-Serb civilian population of Foča and its surroundings. In October 1999, the Trial Chamber of the ICTY confirmed an amended indictment against the accused and four of the original indictees. On 29 November 2004, while the accused was still at large, the Prosecutor filed a Motion for Referral of Case Under Rule 11*bis* to Bosnia and Herzegovina. Following the accused's arrest and transfer to the ICTY, on 15 April 2005, the Referral Bench ordered the parties and the Government of BiH to submit responses to specific questions. On 6 May 2005, the Government of Serbia and Montenegro requested transfer of the case under its jurisdiction and to participate in oral hearings.

Charges Against the Accused

The indictment alleges that the Mr. Janković was individually criminally responsible under article 7(1) of the ICTY Statute for seven counts of crimes against humanity (three counts of torture under Article 5(f) and four counts of rape under Article 5(g)) and seven counts of violations of laws or customs of war (three counts of torture and four counts of rape under Article 3). In addition, he was charged on the basis of superior commander responsiblity under Article 7(3) with two counts of crimes against humanity (torture under Article 5(f) and rape under Article 5(g) and two counts of violations of the laws or customs of war (torture and rape under Article 3). The indictment specified that on 3 July 1992, the accused, while a sub-commander of military police and one of the paramilitary leaders in Foča, was in charge of a group of soldiers who arrested a group of women, and subjected them to interrogation and rape. Janković is accused of personally participating in the interrogations and rapes; as well as of knowing or having reason to know that his subordinates sexually assaulted the women during or immediately after the interrogations. It is also alleged that subsequently, the women were detained in the Foča High School and the Partizan Sports Hall untill 30 October 1992, where the accused and his subordinates repeatedly sexually assaulted the women. It is also alleged that on 30 October 1992, the accused raped four young girls and women in an apartment near Foča fish restaurant. Overall, the accused is charged in the indictment with incidents involving 16 females.

Holding

Compatibility of the case with the 11bis transfer procedure

The parties disputed whether the gravity of the crimes charged and the level of responsibility of the accused are compatible with the transfer of the case in accordance with the Rule 11*bis* procedure. The Prosecutor claimed that the accused falls within the category of intermediate level perpetrators. His alleged crimes, though serious, are not of such gravity as to demand trial at the ICTY. The Defence argued that the level of responsibility of the accused is not compatible with referral of the case to the authorities of BiH under Rule 11*bis.*

The Referral Bench found that the factual basis for the crimes alleged in the indictment is limited in geographical and temporal scope and the number of the victims affected. The Referral Bench also acknowledged the fact that the accused was one of the main paramilitary leaders in Foča and a sub-commander of the military post. However, these positions were held as insufficient to establish that the level of responsibility of the accused, *ipso facto,* is incompatible with the conditions laid out in Rule 11*bis* for the transfer of the case to the national authorities.

State of Referral

The Prosecutor submitted that the case should be referred to the authorities of BiH and not Serbia and Montenegro. This assertion was based on the Prosecutor's interpretation of Rule 11*bis* that preference should be given to the State in whose territory the crime was committed, in this case, BiH. The Prosecutor also submitted, that the accused was neither arrested in Serbia and Montenegro and was not a national of that state. The defence argued that the accused voluntarily surrendered to the authorities of

Serbia and Montenegro, and was transferred to the ICTY from BiH as a part of a joint effort of authorities of Serbia and Montenegro and Republika Srpska of BiH. Secondly, the defence maintains that the accused meets all the requirements which would enable him to obtain citizenship of Serbia and Montenegro, as in 1990 he permanently resided in Montenegro and his residence was never revoked.

The Referral Bench noted that both at the time when the alleged offences took place and at present, the accused was a citizen of BiH, the alleged crimes occurred in the territory of BiH and against persons residing in BiH. Consequently, it found that BiH has a considerably greater nexus with the accused and the offences alleged against him than Serbia and Montenegro. The Referral Bench stressed that only if there are significant problems with referral of the case to BiH it will consider whether it should *proprio motu* refer the case to Serbia and Montenegro.

Substantive Law Applicable

The Referral Bench emphasized that in order for the case to be referred to BiH, it has to be satisfied that there is an adequate legal framework for the prosecution, trial and, where appropriate, punishment of the accused. The Prosecutor submitted that the Court of BiH could apply the Criminal Code of BiH (hereinafter: BiH CC), enacted in 2003, after the alleged conduct. Alternatively, the Prosecutor acknowledged that the Criminal Code of Socialist Federal Republic of Yugoslavia (SFRY CC) could be applied. The SFRY CC was enacted in 1977 and was applicable at the time of the alleged conduct. The defence asserted that the SFRY CC should apply because it is the law most lenient to the accused. In this respect the government of BiH, resubmitted its arguments from *Prosecutor v. Stanković*, and maintained argued that the BiH CC favors the accused and is a mere codification of crimes that were recognized by the general principles of international law at the time of the alleged crimes.

The Referral Bench did not deem it necessary to decide which code should apply. Instead, the Referral Bench concluded that regardless whether the SFRY CC or BiH CC are applied to the case, both legislations contain appropriate provisions dealing with most, if not all, criminal offences the accused is charged with and there is an adequate penalty structure.

Fair trial and non-imposition of death penalty

The Court noted that Rule 11*bis* prohibits transfer to a jurisdiction where the death penalty might be imposed or carried out. With regard to the death penalty, the Referral Bench was satisfied that no such danger exists. The Referral Bench observed that the death penalty was abolished in BiH upon the ratification of Protocol 13 to the ECHR on 29 July 2003.

The Referral Bench also considered whether the accused would receive fair trial right in the Court of BiH. The Referral Bench noted that such rights are enshrined in Article 21 of the ICTY Statute, Article 14 of the International Covenant on Civil and Political Rights, and Article 6 of the ECHR and stressed that similar guarantees are contained in the BiH Constitution and the CPC of BiH. The court further noted that Rule 11*bis* provides for a monitoring mechanism. After a referral order is made, the Prosecutor may send observers to monitor the proceedings in the national court. Furthermore, the transfer order can be revoked by the Referral Bench at any time after its issuance but before the accused is found guilty or acquitted.

Adequate time and facilities

The first issue raised by the defence related to adequate time and facilities in preparation of a defence. The defence alleged that Article 229(4) of the BiH CPC does not provide adequate time to prepare for the defence, as it only allows for 60 and exceptionally 90 days to prepare for the trial. The court held that Article 229(4) concerns the referral of a case from the preliminary hearing judge to a Panel assigned to try the case and that a defence counsel need not wait until the day the plea is entered in order to start preparing for the trial. The court has also noted that the timelines of Article 229 should be considered in conjunction with Article 7 of BiH CPC which envisages the right of an accuse to be given sufficient time to prepare his defence.

Right to counsel

The defence expressed concern that the present defence counsel was only licensed to practice in Serbia and Montenegro. Because he is not licenced in one of the BiH jurisdictions, he is likely to be disallowed from representing his client before the court of BiH. The defence further argued that the Court of BiH of BiH does not have in place a system for remuneration of counsel, which would deny the accused his right to effective assistance of counsel. The Referral Bench noted that the BiH Law on the Court of BiH and Court's rules of procedure allow for a special admission of attorneys not licensed in BiH to appear before it, especially if they had previously represented accused before the ICTY and the case has been transferred to BiH in accordance to Rule 11*bis* procedure. Hence, the Referral Bench rejected the argument of the defence and stated that there is an avenue for the present counsel to continue representation of the accused and receive remuneration for their efforts. The Referral Bench further noted that nothing prevents the current defence counsel from passing to the new attorney all the case related information and the work product of the case, even if they were no longer to represent the accused.

Right to attend trial and examine the witnesses

The defence submitted that the BiH Law on Protection of Vulnerable Witnesses under Threat (hereinafter: Witness Protection Law) limits the accused's right to attend his trial and examine witnesses against him. The Referral Bench rejected this argument, noting that the Witness Protection Law does not infringe the rights of the Accused to exam-

ine the witness. Instead, the law provides for an alternative mechanism of testimony of a protected witness in through a video link, as an exception only. The Referral Bench further noted that when a testimony of a protected witness is given in the absence of the parties, the parties are allowed thereafter to ask the witness further questions, upon the *ex officio* motion by the Court. The Referral Bench further emphasized, citing from Article 14 of BiH Witness Protection Law that such a hearing will only be held in exceptional and limited circumstances. Such instances include when there is a risk to the personal security of the witness or his family and "and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony".

The court concluded that the articles in question are not infringing the rights of the accused so as to prevent a referral of the case.

Availability and Protection of Witnesses

The defence expressed its concern that a significant number of its witnesses reside outside BiH, mainly in Serbia and Montenegro and that the authorities in Serbia and Montenegro have no means of compelling the resident witness to cooperate with BiH Court of BiH. In addition, the defence also claimed a need for safe conduct of these witnesses. The Referral Bench noted that both Bosnia and Serbia and Montenegro are parties to the European Convention on Mutual Assistance in Criminal Matters.

The Referral Bench therefore concluded that the legal means exist to facilitate the appearance and safe conduct of witnesses residing in Serbia and Montenegro.

As for the witnesses living in Republica Sprska, attendance to give trial testimony when summoned is obligatory, based on Article 81(5) of the BiH CC and Article 5(1) of the Law of Judicial Police of BiH. The Referral Bench found that the defence submissions wrongly presumed the applicability of safe conduct mechanisms in the context of witnesses protection within the state. The Referral Bench stressed that a witness residing within the jurisdiction of the state, is subject to domestic law which provides for both compulsory witness production and apprehension for failure to appear. Finally, the Referral Bench concluded that the right of an accused to call witnesses on his or her behalf is given effect.

Regarding witness protection, the Referral Bench noted that unlike witness availability, this issue does not arise directly within the context of an accused's right to a fair trial. The defence has yet to specifically identify its witnesses. However, the Referral Bench found that the defence raised the question of protection of the witnesses prematurely and on a conjectural basis.

Trial without undue delay

The defence expressed its concern that the case would be delayed if referred to BiH. In particular, the defence expressed concern that voluminous material from *Prosecutor v. Kunarac* would have to be evaluated. This task would be time consuming due to the fact that the material is in English, a language that the accused does not speak. The Referral Bench rejected the argument of the defence. In direct rebuttal, the Referral Bench stated that in either venue, the ICTY or the Court of BiH, the defence will be required to review the extensive materials of *Kunarac.* With specific reference to translation difficulties, the Referral Bench noted that almost identical time for translation support and would be necessary in a BiH venue as would be required if the case continued at the Hague. The Referral Bench also cited Article 4 of the BiH Law on Transfer of Cases, which provides the court with discretionary means to expedite the form of evidence. Upon transfer, the BiH Court may either accept facts which were established by the ICTY or accept relevant documentary evidence from the ICTY. To rebut any fear that the case will start afresh, the Referral Bench also reminded the defence that article 2(1) of the BiH Law on the Transfer of Cases allows the Court of BiH of BiH to continue the proceedings from their current stage, subject only to the potential delay as the indictment is adapted. The Referral Bench concluded that it has not been shown by the defence that any possible delay as a consequence of the referral would be of such nature as to outweigh the benefits of referral. It further noted that the referral might result in the case being brought to trial before the national court sooner than would have been possible if the case were to remain with at the ICTY.

In addition to addressing the defence concerns about a delay of the case, the Referral Bench noted that there are several statutory safeguards that exist within BiH legislation to protect the accused's right to a fair trial. Article 13 of the BiH CC provides for the right to be brought before the Court in the shortest time possible; article 135 of the BiH CPC concerns release from custody if the indictment has not been confirmed or brought in 6 months after the beginning of the custody; and article 137(2) provides for the termination of custody if the judgment is not delivered in one year after the beginning of custody. These safeguards further enhanced the resolve of the Referral Bench to put aside the defence concerns about the availability of a fair trial and to transfer the case to BiH.

Monitoring of the Proceedings

The final defence argument contended that Prosecution observers would not be an appropriate and sufficient mechanism to monitor the fairness of the proceedings before the Court of BiH of BiH. Rule 11*bis* (D) provides for monitoring of the cases transferred to national authorities. In addition, Rule 11*bis*(F) permits the Referral Bench, at the request of the Prosecutor, to revoke a referral order at any time before the accused is found guilty or acquitted by a national court. Rule 11*bis* also allows for a re-transfer of an

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Case Reports

Special Court for Sierra Leone

Samuel Hinga Norman et al

Procedural decision: Special Court for Sierra Leone, Appeals Chamber

May 16, 2005

Facts

On October 28, 2004, Moinina Fofana, one of the three accused, filed an appeal pursuant to Rule 73 of the Rules of Procedure and Evidence of the Special Court (the "Rules" or individually "Rule") against the Trial Chamber's Decision on Prosecution Motion for Judicial Notice and Admission of Evidence. The appellant claims that **(i)** the Trial Chamber wrongly applied the legal criteria for determining facts of common knowledge under Article 94 of the Rules; and **(ii)** that it also failed to take into consideration the oral response to the Prosecution Motion for Judicial Notice on behalf of Mr. Fofana.

Law Provisions

Rule 89 establishes the general rules of evidence;

Rule 92b the Chambers has the power to admit evidence in lieu of oral testimony as alternative proof of facts; and

Rule 94 grants the Chambers the power to take judicial notice of facts of common knowledge and adjudicated facts or documentary evidence from other proceedings of the Special Court.

Holding

As a preliminary issue, the Appeals Chamber decided that an oral response must be accepted in the same way as a written one. Therefore, in the Appeals Chamber's view, the oral response of the defence was valid and directly relevant to the issue at stake and the Trial Chamber failed to give it proper consideration.

As to the issue of judicial notice, the Appeals Chamber noted that it limited its analysis to the issue of facts of common knowledge. This situation was due to the early stage of proceedings at the Special Court and the reality that no adjudicated facts or documentary evidence from other proceedings existed before the Court.

The Court began its analysis and relied on the definition of 'facts of common knowledge' provided in the Semanza Decision. According to this judgment, this expression refers to "those facts which are not subject to reasonable dispute including, common or universally known facts, such as general facts of history, generally known geographical facts and the law of nature."

The Appeals Chamber also noted that in the Semanza Decision, it was stated that judicially noticed facts serve as conclusive proof of those facts and that the taking of judicial notice "ends the evidentiary inquiry."

The Appeals Chamber pointed out that other international criminal tribunals, have not always applied this criterion. It recalled that in some cases the ICTY trial chamber have adopted the position that judicial notice of a fact means that the moving party does not have to present formal proof of that fact at trial, and shifts the burden of proof to the opposing party to disprove the fact. The Appeals Chamber disagreed with the ICTY interpretation.

The Appeal Chamber recognized that the Trial Chamber correctly identified the criteria for facts of common knowledge. According to the Trial Chamber these criteria are: **(i)** the facts are relevant to the case of the accused person; **(ii)** the facts are not subject to reasonable dispute; **(iii)** the facts do not include legal findings; and **(iv)** the facts do not attest to the criminal responsibility of the accused. The Appeals Chamber highlighted that the central discussion in this case was whether the Trial Chamber erred in the application and interpretation of these criteria.

The Appeal Chamber proceeded to analyze each one of the facts which judicial notice was disputed. In the first place, the Chamber determined that the fact there was an armed conflict in Sierra Leone is both subject to reasonable dispute and amounts to a legal finding that directly concerns the criminal responsibility of the Accused, as it is an element of the crimes. However, the Chamber considered that the fact that there was an armed conflict in Sierra Leone is a notorious fact of history and that to contest it was entirely frivolous. Moreover, the Chamber stated that a judge may rely on his own local knowledge. Therefore, the existence of an armed conflict is a fact that the Special Court may take as proved, since it is located precisely in this country.

In the Appeal Chamber's view the Trial Chamber was in error in taking judicial notice of the accused and all members of the organized armed factions engaged in fighting within Sierra Leone were required to comply with International Humanitarian Law and the laws and customs governing the conduct of armed conflicts. The Chamber considered that this is not a proposition of fact but of law.

The Trial Chamber also erred in taking judicial notice of the fact that in or about November and/or December 1997, the CDF, including Kamajors, launched an operation called Black December. The Appeals Chamber concluded that these are disputable facts

that need to be proved at trial.

In relation to the judicial notice of several Security Council resolutions the Chamber concluded that it might be possible that some factual assertions in such resolutions can be judicially noticed and others cannot. It added however, that this cannot be achieved by noticing the contents of the whole resolution or report, which may contain hundreds of factual assertions.

Based on this reasoning, the Chamber partially allowed the appeal and dismissed it in all other aspects. The decision includes two separate opinions by Justices Robertson and Ayoola concurring with the decision.

Commentary

This decision confirmed the criteria for facts of common knowledge and brought some light to an area of evidentiary law where the rules of the Special Court are silent. This decision also usefully distinguished between evidence submitted under Rule 94 (facts of common knowledge) from that submitted under Rule 92bis (information in lieu of oral testimony). This is particularly relevant for the ICTY proceedings, where identical rules are applied. The identification of the two approaches adopted by the ICTY in relation to the legal effects of judicial notice is also relevant. The decision summarized the work of the ICTY on this issue into two identifiable approaches and explained its reasons why one should be preferred over the other. Moreover, this decision raises an interesting question: if “a judge may rely on his local knowledge,” then do the courts located in the country where the crimes allegedly took place (such as the Court of BiH) enjoy greater liberties in taking judicial notice of facts than the courts located in different countries (such as the ICTY)?

(Continued from page 36)

accused to face trial before the ICTY. The Referral Bench noted that, following the hearing in this case, the Prosecutor entered an agreement with OSCE that will monitor and report on the trial proceedings of a referred case. Hence, the court was assured that the reports provided by OSCE, a neutral international organization, would adequately reflect the quality of proceedings before the Court of BiH.

Training Programme 2006

OKO will be presenting a substantial course of training on different areas of law during the course of next year

In addition to the courses previously presented by OKO on the new elements of the Criminal Procedure Code together with International Humanitarian Law, OKO will be developing a number of new courses during 2006.

Advocacy

This course is being developed with international experts experienced in training in the techniques of adversarial advocacy in war crimes cases. It will allow participants to develop those skills through practical exercises.

War Crimes Investigations

This course will be invaluable for the junior staff of Advocates assigned to war crimes case, to enable them to understand the law and practice relevant for effective investigations on behalf of the defence.

Written Legal Argument

The Court of BiH is beginning to develop a practice with regard to written submission, both before and during the trial. Prosecutors experienced in the written styles of international tribunals are likely to be influential. The seminar will look at different styles and explore best practice.

War Crimes Research

A practical session, looking at available information and law on war crimes cases both in English and in Bosnian-Serbian-Croatian. The seminar will also introduce electronic methods of research using the Electronic Disclosure System (EDS) of the ICTY.

Ethics

Case studies and exercises focusing on the particular ethical problems that arise in war crimes cases.

The following table gives the provisional dates for the OKO training courses during 2006. A final version will be published in the next edition of the OKO War Crimes Reporter.

Course	*Location*	*Duration*	*Winter*	*Summer*	*Autumn*
CPC	Sarajevo	4 days	23-26 January	8-11 May	18-21 Sept
CPC	Banja Luka	4 days	6-9 February	22-25 May	2-5 October
IHL	Sarajevo	4 days	20-23 February	5-8 June	16-19 October
IHL	Banja Luka	4 days	6-9 March	19-22 June	30 Oct to 2 Nov
Advocacy	Sarajevo	4 days	20-23 March	3-6 July	20-23 November
Advocacy	Banja Luka	4 days	3-6 April	17-20 July	4-7 December
War Crimes Investigations	Sarajevo and Banja Luka	5 days	Dates to be fixed		
Written Legal Argument	Sarajevo, Banja Luka, Mostar, Tuzla	½ day	Dates to be fixed		
Legal Research	Sarajevo, Banja Luka, Mostar, Tuzla	½ day	Dates to be fixed		
Ethics	Sarajevo, Banja Luka, Mostar, Tuzla	½ day	Dates to be fixed		

Odsjek Krivične Odbrane (OKO) is the criminal defence section of the Registry of the Court of BiH, with responsibility for maintaining the highest standards of defence in war crimes cases before the Court.

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Одсјек Кривичне Одбране
Odsjek Krivične Odbrane
CRIMINAL DEFENCE SECTION

OKO War Crimes Reporter

The OKO War Crimes Reporter is published four times a year, and is intended to provide information on war crimes trials in south eastern Europe, primarily dealing with the Court of Bosnia and Herzegovina.

Published in both English and Bosnian-Croatian-Serbian, the War Crimes Reporter will be a source of information on legal developments in domestic trials, as well as articles dealing with specific problems that arise in practice.

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