

## ENSURING EFFECTIVE DEFENCE IN HYBRID TRIBUNALS

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The future of international justice is in the hands of not just the International Criminal Court (ICC) in the Hague, but also the numerous domestic courts that it is envisaged will conduct trials for crimes against humanity and war crimes under the principle of complementarity. These domestic trials will almost always take place in countries that have been in conflict, where the rule of law may not exist and where the legal profession will have suffered. A number of models for providing international assistance to such domestic trials have been tested, and it is expected that the successful models will be repeated in the future, not least for the defence.

Conflicting demands arise when ensuring that there is an effective defence in such domestic or hybrid trials, and there is no 'one size' that fits all. There must be a full analysis of the domestic legal order and of the comparative strengths and weaknesses of the system. Local traditions must be taken into account, and full consultations undertaken with all the relevant actors. There will be the competing demands of providing an effective defence whilst also building the capacity of local lawyers and leaving a lasting legacy in the country concerned, all of which must be done on time and in budget.

There must be effective legal support for the defendants. This means ensuring that there are teams of lawyers appropriate to the complexity of the case, who are selected in an open and fair process, giving the client as much choice as possible. Where foreign prosecutors are involved there must be foreign defence lawyers to assist their local counterparts. The lawyers must have the support of junior lawyers and case managers where necessary, and the entire team will need to be able to have access to legal research on a wide variety of issues.

The defence teams must have the administrative support that is necessary to get cases ready for trial. This includes, at a minimum, offices for them to work in, computers available for their use, library access and space for documents. There must be support staff, interpreters and researchers. They may need access to the networks of experts and academics with specific knowledge of the law and the conflict, and the NGOs who can support many of the arguments that will be made. The lawyers need to be paid in a transparent system that prohibits over-billing or other forms of corruption.

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Local lawyers may not have had the opportunity to study international criminal law before, and almost certainly will not have appeared before any war crimes tribunals. A substantial program of training is normally required in order to build the knowledge and confidence of the lawyers in order to place them on an equal footing with the prosecution, and in order to educate the judges as to the law that should be applied.

All of these tasks can be done by having an efficient and effective office to support the defence lawyers assigned to cases. Over the last 10 years the role of the defence office has changed substantially from merely paying the fees to providing a full range of services to ensure an effective defence. There are many different models that have been tried, but for each new court it will be necessary to look to the individual needs of the country in order to design the most appropriate model.

## **I. Legal Support**

### **A. Defence Teams**

In the design phase of a new hybrid tribunal there will have to be agreement on the level of legal representation that the clients will receive. A number of factors will be relevant to this question, including the complexity of the trial, the extent to which international law will be used, any complicated legal questions, the quantity of documentary evidence, the size of the prosecution team and the available resources. What is clear is that defending crimes against humanity cases, where a widespread or systematic element to the charges is a necessary component of the allegations, is never a simple business. Clients charged with such offences are often highly educated and may have firm views on the way in which the defence should be run.

In many of the international tribunals there is a 'lead lawyer' with the responsibility for putting the team together and running the trial. In hybrid tribunals this is not always the case. There may be no rights of audience for foreign lawyers, who may only be able to assist, or two co-lawyers may be required to run the team, as is the case in Cambodia.

If there are to be foreign prosecutors, then it is essential that there are also foreign defence lawyers in order for there to be a fair trial. This means that there may have to be detailed negotiations with the professional bodies in the country concerned in order to allow for the temporary or limited admission of the foreign lawyers to appear before the Court, which is often a delicate and complicated process. Legislative changes may also be required to allow for such rights of audience, although these can often be achieved using the Rules of Procedure of the Court.

It has become established practice that in order to defend war crimes cases adequately it is necessary for there to be a defence team consisting of junior lawyers and investigators. In a hybrid tribunal the defence team may need the assistance of a lawyer to provide specific advice on international criminal law. In a small scale case it may be possible to provide this assistance by way of lawyers employed within the

defence office with such specific experience. In more complicated cases it will be necessary to have a junior lawyer permanently assigned to the team in order to ensure the case is properly prepared. In cases with large amounts of documentary evidence or numerous witnesses, a case manager who is fluent in the local language may be indispensable. In a hybrid tribunal it is important that the lawyers are seen as equals, and that there is an appropriate balance on the team between local lawyers and foreign lawyers.

## **B. Lawyers' List**

All of the international tribunals operate on the basis of a list of pre-approved lawyers from which the client selects legal representation. The qualifications in order to be included in this list have become fairly standard, requiring 10 years experience as a lawyer and specific competence in criminal law at a domestic or international level. This is good employment practice, creating a pool of qualified candidates from which the selection will be made, but also allows for the client to exercise his right to select his legal representation as long as there is a sufficiently broad choice on the list. In a hybrid tribunal it is often inappropriate to apply the same standards to local lawyers as to foreign lawyers. In many conflicts the legal profession is destroyed as a result of killings and people escaping the conflict who do not return. In Cambodia the Bar had only existed for 10 years, meaning that it was difficult to apply the same standards. In those circumstances alternative criteria must be used.

As the process for being included in the list potentially impacts upon the right to practice as a lawyer it is important that the administrative procedures concerned follow clear and public criteria, and that the office dealing with the applications is able to process them swiftly and efficiently. There will normally have to be a form of quasi-judicial appeal against any refusals. In the international tribunals this is done by either a Registrar or a panel of judges. However, in a domestic or hybrid court there may not be a Registrar and it may not be appropriate to subject such decisions to review by local judges who may not be fully independent. In such circumstances it is necessary to design a system that protects the rights of the lawyer to a judicial review that is fair and transparent whilst preserving the established legal order in the country concerned.

## **C. Casework**

The defence office can have a role to assist on individual cases. The best way for this to occur is on the request of the individual defence teams. This is particularly effective where there are not sufficient resources to provide for junior lawyers on each case, which allows the defence office lawyers to act in this role. This system was adopted at the Court of Bosnia and Herzegovina (BiH) in Sarajevo. Defence office lawyers can assist by attending court, taking notes and preparing documents; by undertaking legal research and preparing draft applications for submission to the Court; and by analyzing evidence and summarizing lengthy documents.

It is important to make a distinction between a secondary support role and the concept of an in-house public defender system, whereby the accused are provided with counsel from within a defence office, as occurred in the latter stages of the Special Panels in East Timor. However, with both roles there is a risk of conflicts of interest, and so the defence office must be alert to recognise any such conflicts. It may be appropriate to divide the cases between different administrative divisions within the defence office, particularly when dealing with an internal armed conflict where the lawyers can be shared by different sides, as occurred in the Defence Office of the Special Court for Sierra Leone (SCSL). It may also be appropriate to place controls on the work that the defence office staff will do, for example, allowing for the analysis of the prosecution evidence, but not becoming involved in taking instructions from the client or in developing the defence case, or even limiting their role to a legal one and avoiding facts altogether. Conflicts of interest are primarily a matter for the ethics of the lawyer concerned, although the prosecution will likely point out any conflicts they may perceive.

#### **D. Research network**

Most war crimes tribunals raise complicated legal issues that will have to be argued at some stage. Undertaking detailed legal research without the resources of a modern law library can be difficult. The defence office has a key role to provide this type of research to the defence teams. Staff of the defence office must have sufficient legal expertise to be able to undertake this work to a level that will inspire the confidence of the assigned lawyers. It may also be possible to utilize expert consultants to undertake drafting on particularly complex questions, such as jurisdictional challenges, which is a cheaper and faster method than having all defence teams undertaking the same legal research. The defence office staff normally arrives in the country at least one year before assigned defence lawyers and so are able to identify the legal issues at an earlier stage. With a litigation strategy and a plan to have the legal research completed on an on-going basis, the defence office can provide the defence teams with ready-made memos or even draft applications on some of the legal questions, and is able to brief the lawyers on the matters that need to be raised at the point when they are appointed.

The defence office may also benefit from the many volunteer lawyers that are available who wish to do legal research on a pro-bono basis, or as part of a university-run legal clinic focusing on international criminal law. This can be an extremely useful resource and one that has been used by the prosecution for many years. Individual defence teams do not normally have the time to assign the work and review it, but where this is managed through the defence office it is not only more effective but further enhances the experience of the law students concerned. This also allows the defence office to limit the amount of interns that are needed in the office full time, which can often cause problems in terms of space.

### **E. Advocacy**

More recently, some international tribunals have developed a role for the defence office to appear in court. This was first used in Sierra Leone, where it was often difficult for foreign lawyers to travel to Freetown at short notice, causing particular problems when clients were first arrested and needed to be brought before a judge without delay. If the defence office has lawyers with rights of audience then they are able to represent the clients for these preliminary hearings. There will also be short legal arguments during the course of the process which may raise international law issues which a local lawyer cannot confidently deal with. It is expensive to fly in a lawyer to deliver a one hour argument on a short point, and using the defence office as referred advocates in such circumstances is a great cost saving. In hybrid tribunals this can be complicated to achieve, and the model was consequently rejected in Cambodia at substantial cost to the already tightly stretched budget. However, it has been used in the ICC, the SCSL, the Court of BiH and will also be used for the Lebanon tribunal.

## **II. Administrative Support**

### **A. An independent role**

At the first international tribunals the role of the defence was relegated to a small administrative unit, the concept being that providing for an effective defence was the same thing as providing paper for the photocopiers and making sure the telephones worked. The unit was under the control of UN administrators meaning that decisions were made in the best interests of the United Nations rather than in the best interests of the defence. With time it has come to be realised that the defence should be independent in the same way that the prosecution is independent. This has led to the creation of the Office of Public Counsel for the Defence at the ICC which is semi-independent from the Registry, and the Defence Office of the Lebanon Tribunal which is created in the Statute as an independent organ of the Court identical to the Office of the Prosecutor.

In a hybrid or domestic court the considerations are likely to be different. It is important that any defence support office is fully independent from the administration of the tribunal. Consideration should be made for building local capacity, for example, by connecting the defence office to the bar association, but only if that bar association is fully independent from government pressure. It may be that the office should be established as an independent NGO. There must be a clear legal basis for the work of the defence office which may have to be done through the internal rules of the court. It is important that the office is recognised by the legal bodies of the court and given the authority to act that it requires. There may be local administrative procedures that are necessary, for example, registering the office with the government. In one hybrid tribunal there was an argument over the fact that a rubber stamp had not been registered with the Ministry of the Interior.

Particular care must be taken in naming the office, as it is important that the defence office complements existing organizations rather than appearing to usurp them. There may be complications in translation, as in Cambodia where the title 'Principal Defender' was translated as 'Lead Defence Lawyer, causing significant problems. Whilst it may be appropriate for the 'Office of the Prosecutor' to be named after the head of the office with his or her specific role, the same is not appropriate for the defence. Each individual client will have a lead lawyer, or maybe two co-lawyers, and once they are selected it is inappropriate for the focus to be on the head of the administrative office. Some form of the words 'defence office' or 'defence support section' is more suitable. In Sarajevo the office was named the 'Criminal Defence Section' which had the advantage, when translated, of having an acronym ('OKO') that was the same in the Cyrillic alphabet as in the Latin alphabet, thus avoiding one of the controversies that is peculiar to Bosnia and Herzegovina.

## **B. Staff**

The defence office in a smaller hybrid tribunal will almost certainly have to combine both legal and administrative functions, and so it is essential that the staff have sufficient qualifications to deal with both. The head of the defence office must have significant experience in international criminal law, as the prime role of this individual is to act as a sounding board for lawyers defending cases, mentoring them in areas of law in which they are unfamiliar. The wide range of functions of the defence office means that this individual will also need to have experience working with the media, in delivering training, office management, and if fees are to be paid, in handling a multi-million dollar budget. Legal staff must also have detailed knowledge of international criminal law and sufficient court room experience to be able to appear in court if the system allows for that. Local lawyers should also be recruited onto the staff, so long as the process is one that allows for the recruitment of staff in an independent way: it is not possible to have government appointees in an office that supports the defence. The recruitment of local staff also allows for a more in-depth factual knowledge of the conflict, which needs to be transmitted to international staff as much as possible. Developing the skills of local staff will also leave a cadre of lawyers with significant international law skills as a legacy of the court.

The office will also need significant administrative capabilities, and junior staff with previous experience in a law office are essential. If at all possible, in-house translators and interpreters should be part of the team, so that the defence teams can be provided with effective language assistance on a more confidential basis than using any central pool of translators provided by the court. In creating the office structure it is important to consider potential conflicts of interests within cases, creating 'Chinese walls' within the office by assigning lawyers to specific groups of cases. It is important to foster a defence oriented attitude within the office, particularly with younger staff who may not have worked in criminal defence before, and who may have some initial difficulty coming to terms with their role in assisting the defence of those accused of causing devastation to their own country. Having an office which is

physically separate from the remainder of the court is one way of doing this, as well as creating the office in a way that resembles as much as possible a usual lawyers office. OKO in Sarajevo is housed in a separate office building in the centre of the city close to the offices of other lawyers, whilst the court is a 15 minute drive outside the city.

### **C. Services**

There are basic services which lawyers need in order to be able to prepare cases to the best of their ability. International tribunals have a poor record in providing such services, often neglecting to think of providing offices for defence lawyers, or access to a library. In a hybrid tribunal the lawyers will be working from their home town, and so will normally be able to utilize their existing offices, but sufficient work space may be required for them within the defence office and also at the court. Some lawyers may not live in the capital city and so sufficient space must be provided for them. This is particularly important where conflicts have an ethnic basis. For example, the Court of BiH is located in Sarajevo within the Federation of BiH, which means that there are not many Serb lawyers there as they are mainly based in towns within Republika Srpska (RS). This meant that particular care had to be taken to ensure that the defence office encouraged lawyers from RS to participate and provided the services that they needed when their offices were not in Sarajevo.

It is essential to have a core library of legal texts that can be utilised, including as many as possible in the language of the court. Procurement processes, particularly in the United Nations, are extremely slow, and this is one of the first things that must be organized: a law office without law books is not useful to anyone. Workspace should be provided with access to computers, printers and the internet. Where the court is not easily accessible, i.e. it is out of town, then individual offices probably need to be provided to defence teams. This requires the defence office to be actively and aggressively involved in the fight for office space at the earliest stage of the life of the Court so as not to be left out. In Sierra Leone, defence teams were initially required to share three teams to one office, i.e. 12 people, whereas UN administrators had offices to themselves.

An international lawyer is only as good as their translator, and interpretation of legal language is a difficult task. By having in-house interpreters the defence office can provide a key service to lawyers. The skills of the translators can be built up in the early stages of the life of the court by interpreting at training events, allowing the staff to build up their knowledge of the technical language that is going to be used.

### **D. Outreach**

It is important that the rights of the accused and the reasons for having fair trials are explained to the people of the country concerned from the earliest

opportunity. In Sierra Leone some of the initial outreach was done without the participation of the defence, resulting in presentations with a prosecutorial bias. If a secondary purpose of a hybrid or domestic tribunal is to build an understanding of the rule of law, then it is essential that the presumption of innocence is preserved. The defence office will need to develop speaking notes for local staff so as to enable them to deal with questions arising from outreach events as effectively as possible: there are about 10 questions that always come up.

Care should also be taken to deliver ‘internal outreach’, explaining the role of the defence to the staff of the court. It is very unfortunate if individuals working for the court, particularly junior lawyers for the prosecution and those supporting the judges who may never have practised criminal law before, spend their time in the corridors complaining about the evils of defence counsel who are willing to represent ‘monsters’. The defence office will want to ensure that any posters or leaflets that are produced accurately reflect the rights of the accused, and may want to consider specific publications for the defence. A full and up-to-date website is essential in order to explain the work of the defence office, particularly for an international audience.

#### **E. Media**

In the early stages of a new court before there are any arrests, there are no defence lawyers appointed and therefore potentially there is no one to speak on behalf of the defence to the media. This is a key role for the defence office. The head of the defence office must act as the voice for the defence in order to prepare people for the arguments that will come. People want to know what the defences will be, and whilst specific answers cannot be given it is useful to explain that there have been acquittals at many other tribunals and that there are a number of defences that have been successfully argued. Some speculation as to what are the likely issues to be raised can be helpful to ‘test the water’ as to the likely reaction and to some extent this allows the defence office to take the heat for some of the more controversial arguments. For example, by talking about the possibility of recusing judges at an early stage, when the application is actually filed several months later it is viewed as an entirely proper legal argument as opposed to a scurrilous defence tactic. Consideration should also be given to providing media training to local defence lawyers who may never have been in the international spotlight before. Once arrests have been made and individual teams are appointed, the defence office’s media role is more restricted to commenting in general terms on the rights of the accused in order to avoid any potential conflicts with defence teams.

#### **F. Internships**

International tribunals utilize vast armies of interns in order to undertake all the legal research and other work that needs to be done. This can be a fulfilling experience for the young lawyer concerned and also a useful resource for defence



lawyers. To be truly effective, the internship should be organized in a professional fashion, following the best principles of a fair recruitment process and with proper supervision. Such internships become very popular and unless there is an efficient administration process the sheer number of applicants can become overwhelming. Proper criteria must be established in advance and a broad pool of candidates encouraged. It is advisable to undertake short telephone interviews which are a quick way to establish the motivations of the candidate. In Cambodia there is a unified intern program for the entire court which allows candidates to select the office in which they want to work. In such circumstances it is possible to select only those young lawyers who put the defence as their first choice, which greatly reduces the problems that arise with interns who suddenly realise that they don't want to help the "baddies".

Fixed time periods should be established for internships, rather than arrivals occurring on an ad hoc basis. This means that there can be a simple induction course for all new arrivals at certain dates throughout the year. If the application process is well advertised through a website then the administration becomes much simpler. On arrival, a supervisor should be assigned with a clear explanation of the way in which work will be assigned and the way in which the intern will be assessed. As much as possible, the intern should be given a variety of legal, administrative and perhaps some training work, in order to replicate as much as possible the role of a lawyer.

### **G. Liaison**

The defence office should be able to be part of a network of organizations that will be important to the individual defence teams, both local and international. The head of the defence office needs to be able to obtain the guidance and assistance of international professional bodies, to find partners for training projects, to recruit interns, and to be able to brief key NGOs on any problems that have arisen at the Court. With an up-to-date email and mailing list it should be possible to keep the NGO community informed of the concerns of the defence. By developing personal contacts with key individuals the defence office is able to provide detailed explanations on defence issues as part of a litigation strategy. The defence office will normally have contacts with the other tribunals, allowing for the sharing of experiences and legal resources.

## **III. Legal Assistance**

Not all defence offices will be required to organize the payment of lawyers' fees. In some hybrid tribunals such as the Court of BiH the payment of fees was done by the court administration, utilizing the existing domestic budget for fee payment. In many instances where there are a limited number of cases, international lawyers may appear on a pro bono basis, or may be funded by non-governmental and other organizations. Where fees are to be paid, there are a number of issues that must be considered in creating a specific legal assistance scheme.

### **A. Indigence**

Only those suspects without the means to pay for their defence are provided with financial assistance to pay for their lawyers. In the simplest method used to determine indigence, the suspect makes a declaration of their freely available income and assets which could be used to pay for their defence. An estimate of the entire cost of the defence is then made. If they have sufficient money to pay for the whole trial then they must pay privately and select any lawyer they can afford. If they have no spare money, then they are declared indigent and their reasonable legal fees will be paid. If they can pay for part of their defence, then they are partially indigent, which can be dealt with in a number of different ways.

In the international tribunals a complicated calculation is used to ascertain how much money should be paid directly to the lawyers, and how much is to be paid by the tribunal. They also employ financial investigators in order to look into the declarations made by the accused and to find undeclared cash. In hybrid or domestic courts with smaller budgets this is probably a luxury that cannot be afforded. In those circumstances a simpler process can be adopted whereby the suspect makes a sworn statement as to his assets, upon which he can be prosecuted in the instance of a false declaration. In the event of a guilty verdict it is then for the court to make orders to seize any assets of the convicted person and to pay for part of the legal fees from those seized assets. This allows the court to consider whether it is better to order the assets to be used to repay legal fees, or whether consideration might be given to ordering the payment of reparations for the victims. The court may have powers to freeze assets during the trial process and certainly has a greater ability to handle money whose provenance cannot be clearly demonstrated.

### **B. Quality of Lawyers**

Where lawyers are being privately paid, the choice of lawyer is one for the client, subject to any domestic rules and procedures including those for the admission of foreign lawyers. Where the court pays the legal fees there can be set qualifications delineating eligibility for payment under a contract. In this way a certain standard can be required. For example, in order to recruit a lawyer on a UN consultancy contract at the equivalent of a P5 level it is necessary for the lawyer to have 10 years experience. They must also be experts in their field. This allows for contractual conditions to be imposed which also have the advantage of ensuring a high quality of representation.

Within that limitation it is the client's prerogative to choose the representation – it is not for the court or the administration. The simplest way to do this is to produce a list of lawyers who are pre-qualified, and then allow the client to select lawyers from this list.

Assistance for the main lawyers in the form of junior lawyers can be provided by the defence office. If the work load is sufficient that specifically allocated junior lawyers are required they can be directly contracted, although it is administratively simpler for them to be contracted to the defence office and then

assigned to work on a particular defence team. Minimum standards can also be required for junior lawyers, requiring the senior lawyers to select their team from a list.

### **C. Levels of fees**

It can be extremely difficult to set the appropriate fee level for representation in a war crimes case. If there are to be mixed teams of local and international lawyers then it may be necessary to set different levels for each. Under the lump sum system employed in Sierra Leone it was for the lawyers to negotiate between themselves how much each member of the team was paid. This inevitably led to conflicts within the teams and massive differences in pay levels across the different cases. It is perhaps more fair to set the pay levels centrally for all cases. In assessing the correct level for locally employed staff it is important to conduct a detailed survey of average pay levels for lawyers employed from public funds. If levels are set too high then the court will drain all the best lawyers from other organisations who cannot afford to lose them, and so pay levels should be competitive, but not excessive. For foreign lawyers it will almost certainly be impossible to match the fee levels that are paid at the ICC and a compromise will have to be found.

Lawyers are self-employed, and so their financial arrangements differ from that of prosecutors who are employed by the government. They have to pay for their offices, maintain secretarial staff and make contributions to professional organizations and pension funds. A system has been adopted in many tribunals whereby defence lawyers may claim an uplift of up to 40% of their salaries in order to cover these expenses. Whilst this still leads to inequalities, particularly between countries with low levels of taxation and those that are higher, it goes some way to attempting an equality between the two sides in terms of remuneration.

### **D. Anti-corruption**

The payment of fees to lawyers has, in the past, led to problems of corruption, and any fee payment system must have controls to prohibit corrupt practices. Fee-splitting, a practice whereby a client selects a lawyer on the basis that the lawyer agrees to kick back a proportion of his UN-paid fee to either the client or his family, has caused embarrassment to the tribunals. Donor funds are not expected to enrich the family of a man who, in many instances, ends up being a convicted *genocidaire*, when the victims and witnesses that gave evidence receive nothing. Lawyers who are prepared to enter such a deal are rarely the ones that will perform best in the court room or who will undertake proper preparation. Any fee scheme must have measures to prohibit fee splitting and over billing. Pre-agreement of hours and a requirement to demonstrate that the work was reasonable, necessary, and actually performed is a good way to ensure that the fees match the work done. Requiring a list of pre-approved counsel and selection of junior lawyers and investigators from a list of qualified candidates also helps reduce the risk of fee splits.

### **E. Budgets**

In a new war crimes court it is often impossible to predict the costs of the trial process. For example, the ECCC in Cambodia was one of the first war crimes tribunals to utilise the investigative judge system, meaning that it was extremely difficult to accurately estimate how long the trials would last. Delays in the set up of the court led to a much longer trial estimate, doubling from 24 months to nearly 48 months, with a disastrous budgetary effect. The International Tribunals for Rwanda and Former Yugoslavia have been operating for 10 years and they are now able to accurately predict the likely length of cases that are heard before them. For hybrid tribunals, costs should be kept as low as possible, as there is a strong likelihood that they will rise. The Rolls Royce spending of the ICTs (International criminal tribunals) will almost certainly be impossible, and it is also completely inappropriate in countries where the cost of one hybrid court will probably exceed the annual budget of the justice system multiple times. The defence office will often have to come up with creative solutions in order to achieve the same results but for far less expense.

### **F. Payment systems**

Some of the international tribunals have adopted a ‘lump sum’ system, paying a fixed amount to the lead counsel and leaving it for him or her to create a defence team and to pay everyone. The idea is that this leads to budgetary certainty by making it the defence team’s duty to estimate the length of the process and in their interests to maximise their profits by shortening the trial. This puts the lawyer in a difficult professional situation where there is a potential conflict between their need to make a living and the needs of the client, which creates a pressure for work not to be done or for other short cuts. It also leads to inequality in the payment of fees. In many circumstances there are delays in the trial which are wholly unrelated to the defence, causing further unfairness, and often requiring another look at the original contract.

For newly established courts it is very difficult to utilize this system due to the fact that no one really knows how long the process will last. In the preparatory stages it may be necessary to use an hourly rate system, even though this can be an administrative burden for both the lawyers and the defence office. Once the trial itself has started it is normally possible to use a daily rate of payment.

## **IV. Training**

There are a great number of legal training courses offered in countries in transition. Some of them are very good and some of them are very bad. There is often no coordination or plan for the courses that are provided, and no central body with the

‘master plan’ for training. This means that resources are often wasted by repetition of courses or by delivering the wrong programs to the wrong people.

It is important that there is central coordination of such training with a plan for the entire lifetime of the court. The defence office is often in the best position to do this. The local bar association may have a training committee who should be involved as much as possible, but they will often have little experience in delivering effective training courses and will probably lack sufficient staff to be able to administer frequent training courses.

Defence office staff should have the knowledge and the contacts to be able to deliver effective training courses. Running training through the defence office also builds the legal knowledge of the locally recruited defence office staff in international criminal law.

A complete survey needs to be undertaken of the existing training that occurs in the country, and any courses that have been administered before. There may be a centre for training judges and lawyers and such bodies should be used if at all possible in order to build further local capacity.

#### **A. Types of courses**

With a plan for training it should be possible to move from large scale basic courses on international criminal law or human rights law to smaller scale workshops with a more focused approach on specific legal areas. In BiH, OKO started by offering 5-day courses on international human rights law and 5 day courses on specific skills for complex criminal cases which were repeated on multiple occasions in different places around the country, allowing approximately 300 lawyers to undertake the courses. Once trials began, workshops were held on more specific legal issues such as the crime of genocide, with specific invitations extended to lawyers involved in the cases.

#### **B. Speakers**

In hybrid tribunals it is extremely important to choose presenters and facilitators who are able to communicate effectively with their audience. Presentations which only deal with international law or which presume high levels of knowledge for the participants will fail. The speakers need to have some knowledge of the domestic legal system in which the court operates. Where this is not possible it may be helpful for the chairing facilitator to put the international law into context. Comparisons with foreign domestic law are normally only useful if the legal system is a similar one. The speakers need to be experienced at speaking in translation, and at explaining complex concepts in a direct way. Those who may have excellent courtroom advocacy skills may not necessarily be the best trainers. Defence office staff should be fully utilized as they will often have a much better understanding of

the domestic legal situation and it is also an excellent opportunity for them to identify the most effective local lawyers.

Care should be taken to identify local experts who can be involved in the training courses. By repeating the training that was offered, OKO was able to move from having foreign staff and visiting experts delivering the training to a situation where the local staff was able to run it completely. Having observed the same lectures a number of times they were confident to deliver them autonomously. Listening to lectures through simultaneous interpretation can be a very painful experience, and using local staff avoided this problem; the training was much faster, and resources were saved. It also built the confidence and knowledge of the local staff.

### **C. Practicalities**

Care should be taken as to how the training courses are delivered. In many countries a tradition has developed whereby courses are exclusively delivered at five star hotels with three-course lunches. Whilst there is a place for such 'headline' training courses, they are expensive and normally not sustainable. Countries with young legal professions may not have any requirements for continuing professional development, and the defence office should take the opportunity to develop this habit by offering courses which fit around the professional obligations of the lawyers and are seen as a way to improve professional skills to the advantage of the lawyer rather than just an opportunity to enjoy a luxurious hotel. If possible, a local training should be used. University law schools can likely provide a lecture theatre, or even the court building itself. Providing sandwiches over a short lunch break saves costs, time and makes it clear that the focus is on the training. At the later stage of the training plan, consideration could even be given to charging a small amount to the lawyers for attending the training. This works as a commitment test, ensuring that only the lawyers who are really interested attend, and means that the training can become sustainable through self-funding.

### **D. Organization**

Training courses are easy to run as long as they are planned well in advance. This is a simple area of administration that can easily be delegated from the international to the local staff. It is normally possible to recruit local administrative staff that has previous experience in training courses, and once templates have been set up for the initial courses they can be easily replicated. A checklist approach means that it is easy to delegate tasks to new staff and interns. In Bosnia Herzegovina the training courses were ultimately run by a single administrator, amongst many other tasks. This makes it easier to transition the work to a national institution once the international element of the court has left, making the training sustainable in the long-term.

## **E. Curriculum**

A number of areas of law must be considered when designing a long-term curriculum for lawyers who may take cases before a local war crimes court.

### **1. INTERNATIONAL CRIMINAL LAW**

An initial large scale introductory course should begin with a revision of key concepts – such as the use of case law, elements of offences, or the sources of law – that are important to an understanding of international criminal law but are not necessarily considered significant in the domestic legal order. Examples must be given wherever possible. We are all taught criminal law through the stories of the cases, which is what makes the topic much more fun than, say, trusts. But in international criminal law presenters often attempt to explain complicated concepts such as command responsibility without telling the participants what an order looks like or how a Brigadier might command his troops. Participants are not likely to know the finer details of the Yugoslav conflicts and so the background to the cases must be carefully explained, demonstrating how to pronounce difficult names so that the lawyers can make legal arguments with confidence. Acronyms must be avoided at all costs unless deciphered, or there will be a room full of blank faces. Sessions on the offences may better be grouped into patterns of conduct, such as ill-treatment in camps, disappearances or targeted killings, rather than a more traditional march through the elements of war crimes, crimes against humanity and genocide.

### **2. CRIMINAL PROCEDURE**

It is likely that the cases that will be heard before the war crimes court will be the most complicated criminal cases that have ever been heard in that country. In Cambodia the longest criminal trial in living memory was only 3 days long, while the ECCC is likely to have trials taking months. This means that lawyers have not necessarily developed the organizational skills required to prepare massive cases. Training on case theory, case management, drafting and legal research is essential. Specific courses can also be targeted at junior lawyers who will have a different role in the case.

### **3. ADVOCACY**

One of the popular areas for training is in advocacy skills. Caution should be exercised when designing any training in this area. Whilst local lawyers may not have had the opportunity to study international criminal law, they will have spent many years making arguments in court. Advocacy styles and traditions around the world vary immensely, and there is no uniform approach or formula. Workshops stressing the need for leading questions in cross examination may be useful for litigation in

some countries, but in others judges do not allow this practice. Instead, the focus should be on the presentation of legal arguments –something that is often not well developed in criminal courts – and in honing existing skills to give the lawyers the confidence to represent their clients more effectively.

#### 4. ETHICS

There are specific difficulties that arise when defending clients charged with massive atrocity crimes, and in such cases complex ethical issues frequently arise. Workshops that deal with the problems that have arisen at other war crimes tribunals can be extremely useful. However, there must be close coordination with local experts for such an event to properly contend with the particular local rules. In addition, ethical matters often involve a role for the bar association and other bodies.

#### 5. SPECIALIST WORKSHOPS

Once the type of allegations are known, and once a few lawyers have been assigned to cases it is possible to hold much smaller workshops with a detailed discussion of the actual allegations with only the lawyers who are assigned to the cases. It is often useful to bring in one expert who has dealt with a similar case at another court or tribunal. Studies can be undertaken of the case law from the international tribunals in the area under discussion. For example, if genocide has been charged at the local court then there needs to be a specialist workshop on the relevant law on genocide, with examination of the ICTY and ICTR jurisprudence. This is a complicated area of law, and rather than have one long training course it is better to have shorter workshops which are spread out, allowing the lawyers to slowly build their knowledge.

#### 6. METHOD

Whilst lectures can be useful for communicating basic information in a fast and effective way, a training course that is entirely lecture-based can become tedious, particularly if it is delivered in translation. It is essential that a clear structure is given to such lectures, and the use of bilingual PowerPoint slides normally assists with the translation of difficult legal words and phrases enabling participants to follow the arguments more easily. Hypothetical cases discussed in small groups allow participants to work in their own language and encourage greater participation. Pre-reading should also be encouraged, although its execution may take some determination. Case studies of some key cases from international tribunals are a good way to build the confidence of the participants in speaking about a new area of law.



**V. Lessons for the future**

As the Charles Taylor trial comes to an end, and completion strategies start to draw proceedings to a close in the Hague and in Arusha, a number of lessons can be learned from what has gone before. As the ICC struggles to complete the first trial and the Lebanon tribunal moves towards arrests it is an ideal opportunity to take stock of the ways in which such international courts assist the lawyers that appear before them. With calls for trials for crimes against humanity within the High Court of Uganda, ongoing domestic trials in Rwanda and Congo, and talk of the need to deal with impunity in Nepal, the models that can be used in domestic courts will be under the greatest scrutiny.

Each new tribunal appears to make many of the same mistakes that have been made before, although they are becoming quicker at recognizing and rectifying them. There is now a body of experience and expertise in supporting domestic war crimes trials, and if that is fully utilized then it should be possible to provide effective support to international criminal defence lawyers, wherever in the world they may be.

