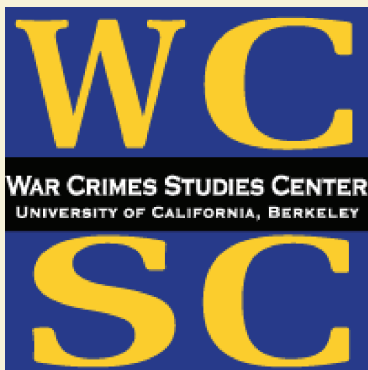


# THE DEFENCE OFFICE AT THE SPECIAL COURT FOR SIERRA LEONE: A CRITICAL PERSPECTIVE



BY  
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APRIL 2007



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**By Alison Thompson and Michelle Staggs**

**26 April 2007**

## **FOREWORD**

We would like to acknowledge the invaluable assistance of our colleagues in the production of this report: Yvonne Koberg and Kyra Sanin generously shared numerous interview notes as well as personal insights with respect to the role and impact of the Defence Office. We would also like to thank all of those who offered their time to be interviewed for this report.

Due to Registry policy we were denied access to the detainees, who have unique insight into their relationship with both Assigned Counsel and Duty Counsel. While a variety of views were solicited on the role and impact of the Defence Office, this report in no way represents the perspective of all Defence Counsel at the SCSL. Rather, where individual interviews are cited they represent the views of the person in question. Therefore, this report does not pretend to be a fully comprehensive picture of the Defence Office. Rather, it attempts to offer some critical insights into the structure, role and impact of the Defence Office at the Special Court for Sierra Leone.

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## 1. EXECUTIVE SUMMARY

### 1.1 Introduction

The Special Court for Sierra Leone (the 'Special Court' or the 'SCSL'), a third generation international criminal tribunal, represents an attempt at a more streamlined and efficient form of justice. The SCSL has become known for several of its innovative institutional features.<sup>1</sup> Perhaps one of the most notable of these features is the creation of a permanent Defence Office, specifically mandated to ensure the rights of suspects and accused persons tried at the Special Court.<sup>2</sup> In many respects, the Defence Office at the SCSL represents a tremendous achievement. In particular, it can be seen to provide a much needed supervisory mechanism to keep the defence budget in check and to ensure the welfare of the being accused held in detention.

Generally speaking, the Defence Office is lauded in both the media and academic literature as 'novel', 'innovative' and 'unique'.<sup>3</sup> In many respects, this praise seems justified. Given some of the complaints associated with the cost and quality of the defence at both the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'), and the failure of other forms of UN-administered justice to deliver adequate defence representation (such as in the case of the Special Panel for Serious Crimes in East Timor), the Defence Office at the Special Court is, by all indications, a success story.<sup>4</sup> The Office has managed to survive on a shoe-string budget and is generally perceived to be efficient as well as economical. The perceived inadequacies associated with other attempts at providing a satisfactory defence and the success associated with the Defence Office mean that the Office is likely to influence the structure of the models used to implement the defence at future international, internationalized and UN-administered tribunals. The Office already seems

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<sup>1</sup> The SCSL is one of a discrete number of hybrid or 'internationalized' tribunals that has been established, the others being: the Special Panels for Serious Crimes in East Timor (the 'Special Panels'), the 'Regulation 64' Panels in the courts of Kosovo (the 'Regulation 64' Panels) and the Extraordinary Chambers in the Courts of Cambodia (the 'ECCC'). Like these other courts, the SCSL operates under a time-limited mandate and is located within the country where the conflict occurred. The SCSL can be distinguished from these other tribunals in that it is currently the only internationalized court established by agreement between the United Nations and a sovereign state that is currently trying indictees solely under international law. (Although the SCSL was mandated to try indictees both under national and international law, the Prosecutor determined only to prosecute under international law). See Romano et al (2004).

<sup>2</sup> Rule 45 of the Special Courts Rules of Evidence and Procedure (the 'Rules') states that 'The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and accused'.

<sup>3</sup> See International Center for Transitional Justice (2004), Human Rights Watch (2005) as well as scholarly articles such as those by Skilbeck (2004) and Jones *et al* (2004).

<sup>4</sup> For commentary that is critical of the defence at the ICTR and the ICTY, while still noting its improvements since establishment, see Ellis (2005) and for critique regarding the costs, see Dougherty (2004). For analysis regarding the failure of the United Nations to ensure the provision of adequate defence representation (amongst other things) at the Special Panels for Serious Crimes in East Timor, see Cohen (2006). This is not to detract from the efforts of those defence counsels at the international tribunals and at the Special Panels who have made a considerable, consistent and concerted effort towards ensuring the rights of suspects and accused, often under difficult circumstances.

to have impacted on the model chosen for the International Criminal Court (the 'ICC'), where a variation on the SCSL Defence Office structure has been instituted.<sup>5</sup>

Yet as the defence phase of the trials continues, it has become apparent that the Defence Office faces a number of significant challenges. Some commentators, observers, and defence counsels argue that there are certain key deficiencies in the model offered by the Defence Office that hamper the effectiveness of its work. They argue that whether it should be considered a model for future tribunals in its current form needs to be reconsidered. The following characteristics of the Defence Office can be seen as problematic:

- (1) A lack of adequate resources for the Defence Office and subsequently, the defence teams, amounting to an inequality of arms between the Prosecution and the Defence at the Special Court for Sierra Leone;<sup>6</sup>
- (2) A lack of control by the Principal Defender of the Defence budget, hence meaning he/she is consistently having to lobby the Registry for funds for the Defence, making the Defence budget extremely insecure and subject to changes often beyond the Principal Defender's immediate control;<sup>7</sup>
- (3) A lack of clarity regarding how the relationship between members of the Defence Office and the accused should be characterized, and in particular how it should be viewed in light of the relationship between the accused and his assigned counsel;
- (4) A breakdown in communication between the Defence Office staff and defence counsels regarding the work of the Office generally (including lack of communication by the Office of the work it does to benefit counsels), which has led to certain points of antagonism regarding the Office's work; and
- (5) A lack adequate provision of key legal research facilities during the trial phase that counsels require to ensure they have 'adequate facilities in the preparation of the defence' as provided under Rule 45(B)(iii) of the Special Court's Rules of Evidence and Procedure (the 'Rules').

It should be acknowledged from the outset that the views of the Defence Office are varied: several defence counsels at the Special Court have praised the Office in interviews and have stated that the Defence Office has been helpful in fulfilling their needs. Some have also stated that the Office has provided them with adequate resources and assistance to present their cases.<sup>8</sup> It will therefore be the task of this report: (i) first, to look closely at the formation of the Defence Office as an institution; (ii) next, to

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<sup>5</sup> Written response to questions for the Chief of Prosecution, OTP, February 2006.

<sup>6</sup> See in particular, *infra*, Section 3.6 of this report.

<sup>7</sup> Throughout this report, 'Defence' refers to the defence teams, the Defence Office and the accused persons.

<sup>8</sup> Interviews of defence counsels conducted in February and November 2005.



look at the history of the Defence Office and some of the financial and structural constraints placed upon it; and (iii) finally, to explore the claims made by the Defence Office's critics.

## **1.2 Overview of Report Sections**

This report is divided into five sections. A brief overview of each section of this report follows:

### ***Introduction***

The introduction establishes the key bases upon which the authors will analyse and develop their findings. A key criticism highlighted in the report is raised in this section: that is, that the parameters of the role played by the Defence Office and its staff have not been clearly established in the Rules. The relationship between the Defence Office and the Defence teams (on the one hand) and the Defence Office and the Registry (on the other) needs to be more clearly defined. The absence of a clear definition regarding these relationships has led to confusion over the Defence Office's mandated role. While the Defence Office itself has wanted to attain the status of an independent 'fourth pillar' at the Special Court, this independence has no statutory basis, nor is it clearly outlined in the Rules. This has meant the basis for its independence stands on somewhat shaky ground. Despite having accomplished considerable achievements throughout its lifetime, the Office continues to face a number of significant challenges that will be discussed and critiqued in this report.

### ***The Rights of the Accused in the Context of International Tribunals***

This section begins by canvassing some of the human rights instruments created in the aftermath of World War II which show a near universal acceptance of fair trial rights. Next, it discusses the complexity of the charges faced by the accused at the Special Court and the need for a credible defence. Finally, it discusses the defence at the Special Court in the context of other international tribunals. The need for a Defence Office to ensure the credibility of the defence throughout the trial process, keep defence budgets in check and ensure the rights of the accused becomes apparent in this section.

### ***The Structure of the Defence Office***

This section gives the reader an overview of the structure of the Defence Office, as well as describing duties undertaken by the Defence Office's staff. It looks at the 'legal aid' model of defence under which the Office operates, the role played by the Principal Defender and Duty Counsel, as well as new defence support positions that have been recently introduced by the Office.

Next, this section looks at the principle of 'equality of arms' and the funding structure of the Defence Office. In particular, it assesses the use of funding for the Defence as outlined in the 2005-06 Budget for the Special Court, and compares the amounts received by the Defence Office to that of the OTP. While there was a fifteen per cent increase in the defence budget for 'staffing costs' when comparing the 2005-06 period with the previous year, this was accompanied by a seventy per cent decrease in



‘operating costs’ and ‘contractual services’, costs and services which include the payment of counsels (who are independent contractors, not staff) experts and investigators. As a result, although the Defence Office was able to employ further full-time staff during this period, the amounts received by individual defence teams to cater to the needs of their individual cases were significantly reduced. This has meant that much needed resources for experts and international investigators have, as yet, been largely unavailable to the teams.

Unfortunately, the authors of this report have been unable to analyze any improvements that have been made to budgeting for the Defence Office over the 2006-07 period, because, as of yet, no budget is available.

### ***The Role of the Defence Office***

Like any office that forms part of an institution, ensuring the Defence Office has a clearly defined role and function at the Special Court is fundamental to ensuring the Office operates effectively and efficiently. As was noted in the Introduction, however, ambiguity has persisted regarding the proper role of the Defence Office, largely due to a lack of clarity in the Rules regarding the Office’s function and duties.

This section traces the history of the conception of a Defence Office at the Special Court. It begins by looking at Justice Robertson’s initial suggestion that the court adopt a ‘public defender’ model that would have allowed the Defence Office to act as an independent ‘fourth pillar’ of the Special Court. It ends at recent pronouncements of both the Trial and Appeals Chambers that the Defence Office should really perform an administrative function and act as a sub-Office of the Registry. It also looks at certain key instances where the role of the Defence Office and its relationship to both the defence teams and the Registry has been called into question, as a result of conflicting opinions regarding the extent of the Office’s independence as well as its mandated role under Rule 45. Ultimately, it concludes, this independence now seems unlikely ever to be realized.

### ***The Impact of the Defence Office***

The report then looks at what role the Defence Office is playing in accordance with its current stated mandate. Having determined that the Defence Office has been operating under some significant budgeting constraints and that its role is largely considered to be administrative, this section then turns to look at how the Office is managing that Budget and administrative role within the Defence. It looks at how the Defence Office has allocated funds to staffing positions, how it oversees the quantitative and qualitative aspects of counsel’s work, and the relationship between Duty Counsels and Assigned Counsels. Finally, it looks at the important role the Defence Office has played in the Special Court’s Outreach activities. Ultimately, it concludes that the Defence Office is best placed to play a largely administrative role within the context of the trial of each individual accused, but that it has an important advocacy role to play within Sierra Leone in the domestic legal sector.

### **Conclusion**

Finally, this report concludes by making the following recommendations. To improve upon the current model for a Defence Office as has been established at the Special Court it recommends the United Nations:

(i) ***Include the establishment of an Independent Defence Office in the Statute of the Tribunal.*** While the Defence Office is a step in the right direction, establishing an office for the defence that does not act independently of the Registry merely acts as paying ‘lip service’ to the needs of the defence. This is particularly the case in relation to the financial constraints placed on the Defence when the Defence Office is considered a sub-Office of the Registry. While it is important to ensure the Defence Office can act in a supervisory role over the defence budget, the Defence Office itself should act as the final authority for that budget. The United Nations needs to ensure that it shows a clear commitment to the Defence from the inception of the tribunal, rather than assuming that the rights of the accused can be equally the responsibility of the Registry, Chambers and the Prosecution. Although this may be the model adopted in domestic legal aid systems, the complexity of charges faced by the accused at international criminal trials cannot be compared to criminal defendants in domestic jurisdictions.

(ii) ***Ensure the Rules of Evidence and Procedure make the responsibilities of the Defence Office and the Principal Defender clear. In particular, ensure that there can be no conflict of interest between the relationship between the Defence Office and the accused and the accused and his Assigned Counsel.*** As has been shown throughout the findings of this report, differing interpretations of Rule 45 have been the main source of conflict over the proper role the Principal Defender and the Defence Office should play at the Special Court. In particular, the extent to which the Principal Defender and the Defence Office should safeguard the interests of the accused, and how this interacts with the relationship between the accused and Assigned Counsel needs to be made more explicit. Furthermore, if the Office continues to act as a sub-Office of the Registry, then the extent to which the Office must comply with the Registry’s orders, if the Defence does not agree with those orders, should also be made explicit.

(iii) ***Budget for a Defence Office from the beginning.*** The fact that the Defence Office at the Special Court was somewhat of an afterthought in the Special Court’s establishment has meant that funding for the Office has been tenuous and insecure. Further acknowledgement from the United Nations of the importance of the defence, and the significant amount of resources required to ensure that the principle of ‘equality of arms’ is meaningfully adhered to, is the only way to ensure a Defence Office can significantly and considerably improve the quality of the defence at international tribunals.

(iv) ***Delineate between the Administrative and Legal Research Functions Undertaken by the Office, placing paramount importance on the Legal Research Function*** An instructive example of the potential impact of a

permanent Defence Office can be identified at the War Crimes Chamber ('WCC') in Bosnia. The Criminal Defence Support Section of the WCC has divided up the administration and the advocacy work of the defence into two distinct sections, which seems to have contributed to the diffusion of conflicts within the defence section over funding issues and the payment of professional fees. The body conducts regular trainings for counsel and employs highly specialized legal staff with expertise in areas such as international humanitarian law, who can provide high-quality advice and research to counsel who require it.<sup>9</sup> As legal researchers, these lawyers do not get involved with privileged counsel-client relationships: rather they act as critical support for assigned counsel.

The clarity of the permanent structure's mandate and division of functions, as well as the employment of highly qualified, specialized staff who work according to the needs of counsel seems to have engendered a more utilized institution which is thus better able to contribute to the protection of the rights of the accused, including their right to a fair trial.<sup>10</sup>

### 1.3 Conclusion

Ultimately, it is hoped that the example of the Defence Office will have a positive impact on the domestic legal sector. In particular, it is hoped that the legacy of the office will include a heightened respect for the rights of the accused and the principle of 'equality of arms' in Sierra Leone. The Defence Office is currently in the process of setting out, in conjunction with the Registry, its proposed contribution to the court's legacy. Currently, this plan involves training and capacity building within the legal community as well as the possible establishment of a public defender's office in Sierra Leone.<sup>11</sup> Such a structure in the domestic system could greatly contribute to urgently needed legal sector reform in the country, affording all defendants the right to legal representation and ensuring that justice is implemented not just in international tribunals but in all cases brought before the Sierra Leonean judiciary.

Perhaps during this advanced phase of the trial, the Defence Office should indeed engage in advocacy, but rather than within the Special Court trial chambers where Assigned Counsel have taken responsibility for the welfare of the accused, the Office should focus its efforts on the pushing an agenda of reform within the domestic judicial sector. While the Defence Office has never realized its own aspirations as a 'fourth pillar' of the Special Court, it has the opportunity to create a far more lasting impact in the realm of human rights in the country where the that court so proudly sits.

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<sup>9</sup> The training programme focuses on areas such as advocacy and written legal argument, HRW (2006).

<sup>10</sup> Interview with Defence Counsel, June 2006, and HRW (2006).

<sup>11</sup> Currently, only those accused persons charged with capital offences are entitled to state-funded defence representation in the domestic court system in Sierra Leone.

## 2. INTRODUCTION

The Special Court for Sierra Leone ('SCSL' or the 'Special Court') was established with the mandate to try "those who bear the greatest responsibility" for serious violations of international humanitarian law and Sierra Leonean law committed during the latter half of a decade long conflict in Sierra Leone.<sup>12</sup> The civil war resulted in the death of over 75,000 people and the forced displacement of over a third of the population.<sup>13</sup> The Special Court, as an institution, was designed to contribute to ending impunity and bringing justice to the country's citizens. It was also designed to exemplify international fair trial standards and to reinstate conceptions of fair trial rights in a country where those standards and conceptions continue to be the exception rather than the norm.<sup>14</sup>

It is therefore pivotal to the legitimacy of the trials at the Special Court that the Defence acts to protect the rights of the accused and to ensure fairness throughout the trial process. This need is given added impetus in the context of the accused's indictment, which took place in an emotionally-charged environment in the aftermath of civil war.<sup>15</sup> Perhaps mindful of the significance of ensuring that the rights of the accused were protected, especially given the *in situ* status of the trials, the first Registrar and President of the Special Court together inaugurated a Defence Office within the institution. The Defence Office, which represents an unprecedented step towards further ensuring that the accused's rights are protected, was established as a permanent body within the Court's Registry. It was mandated specifically to protect the rights of suspects

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<sup>12</sup> Article 1(1) of the Statute of the Special Court for Sierra Leone (the 'Statute') states that the SCSL shall have the power to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996... The civil war in Sierra Leone is generally agreed to have begun in 1991, when rebel militia crossed the border from Liberia and attempted to take control of Sierra Leone's diamond rich areas.

<sup>13</sup> ICTJ (2004), page 1.

<sup>14</sup> Significant problems that are both endemic and systemic in Sierra Leone's governance and legal sectors have been articulated well in reports released by international organizations such as the International Center for Transitional Justice and International Crisis Group. The latter has described the problem of rampant and tacitly accepted corruption in the political sector as follows: "Today, people of Sierra Leone describe the political evolution since 1991 as "same car, different driver". A diplomat in Freetown commented that since the war, "all our resources have gone toward recreating the conditions that caused the conflict"... "the overarching difficulty appears to be that the government lacks the will to address the problem, and the donor community lacks the will to apply pressure" (International Crisis Group, (2004), page 8). Sierra Leone's criminal law and legal system are both in desperate need of reform, with the country still relying primarily on archaic statutes from a previous colonial era under which to try defendants. Added to this, it is evident from many of the trials currently underway at the domestic courts that defendants are too often at the mercy of the partial and politically-motivated agendas of those hearing their cases. While such examples are plentiful, the most notorious current case of such politically-skewed prosecution in the domestic system is the Omrie Golley treason trial. Golley is the former RUF spokesperson and is currently being held in Pademba Road Prison awaiting trial with two others for an alleged plan to overthrow the Kabbah government. If found guilty, Golley will be subject to the death penalty. (Interviews by the author (Thompson) with local lawyers and attendance at local hearings, 2006).

<sup>15</sup> For further information regarding the local reaction to indictments at the Special Court, see International Crisis Group (2003), particularly pages 6 - 10.

and the accused as a whole and represents a pioneering experiment in the structure and operation of the defence in international tribunals.<sup>16</sup>

Generally speaking, the Defence Office is lauded in both the media and academic literature as ‘novel’, ‘innovative’ and ‘unique’.<sup>17</sup> In many respects, this praise seems justified. Given some of the complaints associated with the cost and quality of the defence at both the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’), and the failure of other forms of UN-administered justice to deliver adequate defence representation (such as in the case of the Special Panel for Serious Crimes in East Timor) the Defence Office at the Special Court is, by all indications, a success story.<sup>18</sup> The Office has managed to survive on a shoe-string budget and is generally perceived to be efficient as well as economical. The perceived inadequacies associated with other attempts at providing a satisfactory defence and the success associated with the Defence Office mean that the Office is likely to influence the structure of the models used to implement the defence at future international, internationalized and UN-administered tribunals. The Office already seems to have impacted on the model chosen for the International Criminal Court (‘ICC’), where a variation on the SCSL Defence Office structure has been instituted.<sup>19</sup>

However, despite the considerable achievements noted above, the Defence Office at the Special Court continues to confront a variety of significant challenges. While these challenges have largely been subsumed in public discourse by general praise for the idea behind the Defence Office, some of those who have worked with the Office or who have observed its practices first-hand allege that they hamper the effectiveness of Office and question its usefulness as a ‘model’ for future tribunals. This secondary group – comprising of both certain defence counsels at the Special Court and independent observers<sup>20</sup> – further question the Office’s ability to live up to its mandated role ‘to ensure the rights and interests of suspects and the accused’ as enshrined under Article 17 of the Special Court’s Statute.<sup>21</sup> Based on the interviews conducted with these counsels as well as written and verbal comments of these observers and commentators, the following characteristics of the Defence Office can be seen as problematic:

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<sup>16</sup>Human Rights Watch called the inauguration of the Defence Office ‘One of the most significant innovations in international justice at the Special Court, and one that can provide a major contribution to ensuring the rights of the accused are upheld’. (Human Rights Watch (2004), on-line version at ‘Defense’).

<sup>17</sup> See International Center for Transitional Justice (‘ICTJ’) (2004), Human Rights Watch (2005), Skilbeck (2004) and Jones *et al.* (2004).

<sup>18</sup> *Supra*, note 4.

<sup>19</sup> *Supra*, note 5.

<sup>20</sup> Interviews with Defence Counsel, March and April 2006, discussions with academic observer, February 2006, and discussions with former trial monitor for the UC Berkeley War Crimes Studies Center’s Special Court for Sierra Leone Trial Monitoring Program, February 2006, Africa Confidential (2006). For academic commentary critiquing the limitations associated with the Defence Office, see also Cockayne (2005) at pages 672 – 674 and Knowles (2006) at pages 413 – 416. While both authors acknowledge the importance of the Office as a novel institution and the significant strides the Office has made for defence at international tribunals, they are somewhat skeptical of the extent to which the current model is effective.

<sup>21</sup> Rule 45 of the Special Court’s Rules states that: ‘The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and the accused.’

- (1) A lack of adequate resources for the Defence Office and subsequently, the defence teams, amounting to an inequality of arms between the Prosecution and the Defence at the Special Court for Sierra Leone;
- (2) A lack of control by the Principal Defender of the Defence budget, hence meaning he/she is consistently having to lobby the Registry for funds for the Defence, making the Defence budget extremely insecure and subject to changes often beyond the Principal Defender's immediate control;
- (3) A lack of clarity regarding how the relationship between members of the Defence Office and the accused should be characterised, and in particular how it should be viewed in light of the relationship between the accused and his assigned counsel;
- (4) A breakdown in communication between the Defence Office and these defence counsels regarding the work of the Office generally (including lack of communication by the Office of the work it does to benefit counsels), which has led to certain points of antagonism regarding the Office's work; and
- (5) A lack of adequate provision for key legal research facilities that counsels require to ensure they have 'adequate facilities in the preparation of the defence' under Rule 45(B)(iii) of the Special Court's Rules.

It should be acknowledged from the outset that the views of the Defence Office are varied: several defence counsels at the Special Court praised the Office in interviews, stating that the Defence Office has been helpful in fulfilling their needs and providing them with adequate resources and assistance to present their cases.<sup>22</sup> The disjuncture between the comments made by these lawyers and those who criticise the Defence Office is stark. It will therefore be the task of this report: (i) first, to look closely at the formation of the Defence Office as an institution; (ii) next, to look at the history of the Defence Office and some of the financial and structural constraints placed upon it; and (iii) finally, to explore the claims made by the Defence Office's critics. In doing so, this report endeavours to provide the reader with evidence and objective analysis so that s/he can determine for him or herself whether the institution, in its current form, is living up to its mandated role.

This report is divided into five main sections: Section 3 shall look generally at both the defence and the rights of the accused in the international criminal trial context. Section 4 will then look at the structure of the Defence Office. The extent to which the principle of 'equality of arms' is being meaningfully upheld at the Special Court will also be discussed in this section. Section 5 looks at the functions of the Defence Office and the relationship of these functions to the work of individual defence counsels. The initial conception for its dual advocacy and administrative roles, and the on-going struggle the Office faces in defining the parameters of these roles will also be discussed in this section. Section 6 looks at the impact the Office has had (and is having) on upholding the

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<sup>22</sup>Interviews of defence counsels conducted in February and November 2005.



rights of the accused in accordance with its mandate. The Conclusion focuses on providing a summary of the findings of this report and suggesting some possible ways to move beyond the current problems and challenges faced by the Office.

What emerges from a close analysis of the Defence Office at the Special Court is that while the Office itself is structurally innovative and initially held great promise for stream-lining Defence procedures throughout the trial process, the benefits underlying its dual administrative and advocacy roles have, at points, been overshadowed by the lack of clarity regarding how its role best fits with that of individual defence counsel (as advocates, on the one hand) and the Registry (as the Court's administrative organ and controller of the defence budget, on the other). Debates (both in and outside the Courtroom) about the proper function of the Office and the role of the Principal Defender, miscommunication or misunderstandings in certain key instances about the relationship between the Defence Office and defence counsels, and confusion regarding the extent to which the Office looks after the rights of the accused, have all emerged as key issues throughout its development. These issues should have been determined before the Office's establishment, or should have been able to have been dealt with efficiently in the Office's early years, in order for it to achieve the considerable improvement in the quality of the defence that was sought by its creation.<sup>23</sup>

As will be shown in this report, the 'lesson learned' from the establishment of the Defence Office is that the role and function of the Office needed to be clearly defined from the outset of its establishment. Preferably, the establishment of the Defence Office and the appointment of the Principal Defender should have been included in the inaugurating documents of the Special Court. Furthermore, the relationship between the Defence Office and the defence teams (on the one hand) and the Defence Office and the Registry (on the other) needs to be more explicitly set out in the Rules of Evidence and Procedure. In relation to the latter, if the United Nations is to show a firm commitment to upholding the principle of equality of arms, then there are good grounds for arguing that the Defence Office and defence sections at future tribunals should be independent from the Registry.

### **3. THE RIGHTS OF THE ACCUSED IN THE CONTEXT OF INTERNATIONAL TRIBUNALS**

#### **3.1 Defence Rights and the Complexity of Offences at the Special Court**

The post-World War II era has seen near universal acceptance of the idea that individuals are entitled to basic civil and political rights at all times. In this regard, the rights of the accused, enshrined in Article 14 of the International Covenant on Civil and Political Rights<sup>24</sup>, and in Article 7 of the African Charter of Human and Peoples' Rights<sup>25</sup>, exist

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<sup>23</sup>As has been noted by Knowles "mechanisms to ensure greater interaction and ensure flexibility of policy decisions, which are often made at inception and not in the relevant jurisdiction, may improve the model's effectiveness." Knowles (2006), page 416.

<sup>24</sup>The Government of the Republic of Sierra Leone ratified the ICCPR on 23 November 1996.

<sup>25</sup>The Government of the Republic of Sierra Leone ratified the ACHPR on 21 September 1983.



alongside other such fundamental rights as freedom of expression, freedom of religion and the right to vote as key components in any functioning democracy.<sup>26</sup>

In the context of international criminal justice, where fair trial rights are assigned to persons accused of committing the gravest of crimes, adherence to these international covenants is crucial. This is because they explicitly recognize the notion that meaningful justice requires ensuring trials are conducted with the strictest adherence to due process, fairness and equality. Adhering to these principles is made even more imperative when trials are conducted in societies struggling to address the difficult questions of impunity, accountability and the adherence to human rights norms in the aftermath of war.

The political and moral limitations of the justice meted out at the first generation of international tribunals in Nuremberg and Tokyo are now readily acknowledged. The Statutes of these tribunals stated the crimes within their jurisdiction and established a prosecution and judicial system. Yet “except for guaranteeing a right to counsel...they paid very little attention to the rights of the accused”.<sup>27</sup> As will be discussed later in this section, although the defence was still somewhat of an afterthought upon the creation of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), the cases tried at that tribunal and at the International Criminal Tribunal for Rwanda (‘ICTR’) over the past decade have heightened the significant need for a credible defence. While the international tribunals have, in many instances, attained this, instances of fee-splitting and corruption have to some extent marred the defence’s reputation.<sup>28</sup> The internationalized tribunal in Timor has also been criticised, largely for its under-resourced defence section and the resultant poor quality of defence.<sup>29</sup>

As has been noted recently by one commentator, “To maintain respect in the international community and to adhere to the principles of justice and the rule of law, international tribunals cannot be created merely to convict.”<sup>30</sup> The same is true of internationalized tribunals, whose *in situ* status makes the need for exemplary standards of fair trial evermore pressing. The Special Court, whose presence is justified by its ability to bring justice and secure lasting peace in Sierra Leone,<sup>31</sup> has been established in

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<sup>26</sup>As was noted by the UN Human Rights Committee in General Comment Number 29, fundamental principles of fair trial, such as the presumption of innocence, are intrinsic democratic rights that should be afforded to all persons. UN Doc CCPR/C/21/Rev.1/Add.11 (2001). Paragraph 11 of General Comment No.29, regarding non-derogable rights, states: “State parties may in no circumstances invoke article 4 [the emergency powers provision] of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence” [emphasis added].

<sup>27</sup>Gallant (2003) at page 2.

<sup>28</sup>For further discussion regarding fee-splitting at the international tribunals, see *infra*, Section 3.3.

<sup>29</sup>For a discussion on the lack of resources afforded the Defence Section of the Special Panels for Serious Crimes in East Timor, see Cohen (2006), pages 16-17 and 25.

<sup>30</sup>Ellis (2005), at page 507.

<sup>31</sup>Security Council Resolution 1315, S/RES/1315 (2000), paragraph 9, 14 August 2000.

the recognition that a fair and public trial necessarily requires all parties to be mindful of the rights of the accused.<sup>32</sup>

A quick glance at any of the four indictments<sup>33</sup> of the accused currently being tried is all that is required to recognize the complexity of the charges being brought. This in turn highlights the need, as a result, to ensure that the Defence is adequately resourced to conduct investigations and mount its case. Not only do the charges cover an expansive time period and include crimes alleged to have been committed over a considerable amount of territory, they also incorporate some of the gravest offences in existence, which consequently means that they are likely to carry some of the heaviest possible sentences.<sup>34</sup>

Moreover, certain counts contain novel charges that have been determined to form part of the customary international law of international criminal law. In particular, all of the accused face charges regarding the alleged use of child soldiers, which, although not criminalized under international treaty obligations until the adoption of the 1998 Rome Statute, was determined by the Special Court's Appeals Chamber to have crystallised as a customary international law norm by 1996, the time for which the accused have been charged with this offence.<sup>35</sup> They also face charges regarding their alleged participation in a joint criminal enterprise, in which each accused is held liable for his participation in crimes committed as part of a common plan, purpose or design agreed by the militia group (or groups) to which they belonged. In addition, the accused alleged to form part of the high command of the Revolutionary United Front ("RUF") and the Armed Forces Revolutionary Council ("AFRC") face the unprecedented charge

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<sup>32</sup> Hence, following in the footsteps of the ICTY and the ICTR, the Court has enshrined the rights of the accused under Article 17 of the Special Court's Statute. Article 17 of the Statute mirrors the wording of Article 21 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993, by Security Council Resolution 827, and as amended) and Article 20 of the Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994 by Security Council Resolution 955, and as amended).

<sup>33</sup> Please refer to the CDF, RUF, AFRC and Taylor Indictments, available on the SCSL's website at [www.sc-sl.org](http://www.sc-sl.org).

<sup>34</sup> The defence team for Issa Sesay has argued that the Indictment issued against the accused is such that any crime committed by any rebel during the Indictment period could be construed as falling within the ambit of its charges. They have submitted that "neither the Indictment nor the Pre-trial Brief issued by the Prosecution provides notice of the majority of factual allegations and only tangentially provides generalised notice of the remaining allegations" which they argue have subsequently been submitted in the form of supplemental statements and proofing notes. See *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15-T) "Defence Motion Requesting the Exclusion of Evidence (as Indicated in Annex A) Arising from the Additional Information Provided by TF1-168 (14<sup>th</sup>, 21<sup>st</sup> January and 4<sup>th</sup> February 2006) TF1-165 (6<sup>th</sup>/7<sup>th</sup> February 2006) and TF1-041 (9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> February 2006)", 23 February 2006, at paragraph 10. The prosecution has argued in response that any objections to defects in the Indictment should have been filed as a preliminary motion under Rule 72 of the Special Court's Rules of Evidence and Procedure and that it is entitled to conduct proofing sessions which, if conveying new information, must be disclosed to the defence. The Chamber has ruled in favour of the prosecution. See *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15-T) "Decision on Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 and TF1-141" (20 March 2006).

<sup>35</sup> See *The Prosecutor v Samuel Hinga Norman (Moinina Fofana intervening)* (SCSL-2003-14-AR72) "Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)", 31 May 2004.

of forced marriage, a charge distinct from sexual slavery which is being charged for the first time at the SCSL.<sup>36</sup> Extensive investigations, sophisticated legal research and argumentation as well as a massive degree of expertise and resources are thus needed to be able to mount a competent defence in such cases.

### 3.2 Perceptions of the Accused at Trial and the Need for a Credible Defence

As has been noted by members of various international tribunals that preceded the Special Court, the accused are often presumed guilty by the public at large before the trial even begins.<sup>37</sup> In the context of Sierra Leone, this assumption of guilt has even been acknowledged by the United Nations itself in one instance: Charles Taylor was recently pronounced to be a warlord and criminal, responsible for the destruction of the country of Sierra Leone, in statements made by the former Secretary General, Kofi Annan.<sup>38</sup>

From the domestic perspective, the converse is sometimes the case: rather than being presumed guilty, the defendants may be considered to have been wrongly accused. In the context of the Sierra Leone conflict, several of the indictees were leading political figures in the country during the war. Chief Samuel Hinga Norman, the first accused in the CDF trial, held the position of Minister of Internal Affairs in the democratically elected government of President Kabbah until his arrest in 2003.<sup>39</sup> The RUF also continues to enjoy political support in discrete areas of the country, particularly in the Kailahun district, located in the Eastern province.

The need for a capable and credible defence cannot be overemphasized in this context. Clearly, the dichotomy between perceptions at the national and international level – with members of the public and the media often divisively referring to the accused as either “national heroes” or “war criminals” – make the trials themselves highly controversial, and heighten the need for balanced legal arguments both for and against the accused’s conviction.<sup>40</sup>

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<sup>36</sup> According to the prosecution, the unilateral imposition of the status of ‘wife’ upon a captured girl is characteristic of a particular kind of sexual violence perpetrated by rebel groups throughout the conflict in Sierra Leone. (Interviews with members of the prosecution in 2005 and notes with the author). In order to accurately reflect specific harms suffered by women and girls in this region of armed conflict, members of the RUF and AFRC forces were therefore charged with ‘...abducting hundreds of women and girls and using them as sex slaves or forcing them into ‘marriages’...during which the ‘wives’ were forced to perform a number of conjugal duties for their husbands’. (See *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (SCSL-2004-15-PT), Amended and Consolidated Indictment, 2 August 2006, paragraphs 54-60).

<sup>37</sup> Personal communication with OTP staff, April 2006.

<sup>38</sup> Speech by Kofi Annan, Special Court for Sierra Leone, Freetown, 3 July 2006. Chief Hinga Norman recently died while seeking medical attention in a hospital in Dakar, Senegal. See Press Release ‘Special Court Indictee Dies In Dakar’ (22 February 2007), available on the SCSL website. See also the Special Report on Hinga Norman’s death on the War Crimes Studies Center’s website.

<sup>39</sup> International Crisis Group (2003), page 1.

<sup>40</sup> The former British High Commissioner for Sierra Leone, Peter Penfold, referred to Norman as such during his testimony as a defence witness. SCSL Transcript, Trial Chamber I, 8 February 2006. As has been noted, the former Secretary General of the United Nations, Kofi Annan, has referred to Charles Taylor as a ‘war lord and criminal’.

### 3.3 The Defence at the international tribunals and the Special Court

The defence at the international criminal tribunals that have preceded the Special Court has faced significant challenges. In particular, balancing the need to adequately remunerate defence counsels whilst still keeping the defence budget in check has been a cause of major concern.

In the first case before the ICTY, the *Tadic* trial, the assigned defence counsel was paid a fixed rate of \$800 for the entire trial.<sup>41</sup> As has been noted by one commentator:

‘When assessing the time spent on the *Tadic* case, the assigned counsel spent 12-14 hours a day, six days a week working on the trial...Based on this calculation, the lead counsel was paid \$26 per hour, which also had to cover his administrative costs.’<sup>42</sup>

Since that time, however, the ICTY has endeavoured to adequately compensate defence counsel, amending its Directive on the Assignment of Counsel several times to deal specifically with compensation.<sup>43</sup> Counsels are now generally paid between \$80 and \$110, depending on their years of experience and whether they are acting as assigned counsel or co-counsel on the case.<sup>44</sup> For attorneys from developed countries, these rates are remarkably low. However, for attorneys from developing countries, these rates are remarkably high. According to Ellis, higher defense counsel fees at the ICTY, ‘particularly in relation to attorneys from developing countries, have brought corruption through fee-splitting arrangements between defendants and attorneys’.<sup>45</sup> Counsels have either (1) regularly apportioned a percentage of their fees to detainees; or (2) provided ‘gifts’ or support to the detainees and their relatives.<sup>46</sup> Ellis notes:

‘In one of the most sinister acts of fee splitting, Zoran Zigic, a defendant before the ICTY, was declared indigent and assigned counsel. Fees to his counsel exceeded \$1.4 million over a 4-year period. His lawyers directed \$175,000 to Zigic’s family to purchase various properties and costly merchandise.’<sup>47</sup>

Added to this is the fact that increased defense fees, for better or for worse, were not initially budgeted to be as high as they have become. The budget for the ICTY defence program in 2004-05 was \$29.5 million, approximately ten per cent of the entire budget for the tribunal, and far greater than originally anticipated.<sup>48</sup> These escalating costs have become a major financial issue for the ICTY and ICTR, and has led to a movement away from an open-ended payment of defence counsel toward a lump-sum payment system, with monthly ceilings on working hours.<sup>49</sup>

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<sup>41</sup> Ellis (2005), page 493.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, page 496.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, page 507 (at footnote 7). See also Bertodano (2004).

<sup>49</sup> *Ibid.*, page 494.

As a result, the fact that defence contractors had historically operated without any supervisory mechanism to ensure the quality of their representation was cause for concern.<sup>50</sup> To their credit, the international tribunals promulgated a Code of Professional Conduct to counteract these issues. Nevertheless, these initial problems to some extent marred the public perception of the credibility of the defence and have become part of the ‘lessons learned’ from the international tribunals for future courts including the International Criminal Court.<sup>51</sup>

In light of the difficulties faced by these tribunals, the need for a Defence Office to streamline the administrative burdens related to the defence budgets, provide oversight of the individual defence teams and to manage the Defence as a whole seemed almost too apparent. This became even more explicit when at the UN-administered tribunal in East Timor, fourteen of the first cases held before the Special Panels for Serious Crimes had gotten underway without *any* defence witnesses.<sup>52</sup> In order to ensure the credibility of the trial process, to keep budgets in check and to ensure that the rights of the accused take paramount importance at the Special Court, there seems to have been good reason to establish a Defence Office and to champion it as intrinsic to assuring the fairness of the trials. It was perhaps with this in mind that the Defence Office was established.

#### **4. THE STRUCTURE OF THE DEFENCE OFFICE**

##### **4.1 The Creation of the Defence Office**

As discussed in Section 2 of this Report, by the time the Special Court was established in 2002, the need to place an increased emphasis on ensuring a credible defence at international and internationalized tribunals had been clearly identified. The experience of the second generation international tribunals highlighted the importance of streamlining the defence budget and ensuring a supervisory mechanism was implemented over individual defence teams to prevent corrupt practices. They had further highlighted the need to balance ensuring defence counsels are adequately remunerated with implementing a system to cap spiralling defence costs.<sup>53</sup>

Yet despite the evident need for an overarching supervisory mechanism to be established like that of a defence office, there was no mention of the Defence Office in the Agreement between the Government of Sierra Leone and the United Nations establishing the Special Court, nor in the Special Court’s Statute.<sup>54</sup>

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<sup>50</sup> As has been noted by Ellis, “The issues of ethics and discipline for defense counsel became a serious problem for both ICTY and the ICTR in the very early days of the tribunals’ work...In domestic jurisdictions, ethical issues are handled by professional bar associations or regulatory bodies. However, there is not a natural comparable body for international tribunals.” Ellis (2005), page 504.

<sup>51</sup> Ellis (2005), pages 505 – 507.

<sup>52</sup> For an in-depth overview of the problems facing the East Timorese tribunal, see Cohen (2006).

<sup>53</sup> Dougherty (2004).

<sup>54</sup> While Article 17 of the Statute enshrines the human rights provisions relating to the rights of the accused, other than providing that the accused will be provided with a defence, it fails to explain how these rights will be realized.

The decision to include a permanent Defence Office in the structure of the court only began to take shape in 2003. Hence, despite early support from the Court's then President, Justice Robertson, and the non-governmental organisation, "No Peace Without Justice", the Defence Office only became fully functional just one month before five out of the thirteen indictees were arrested in Freetown during the OTP's "Operation Justice".<sup>55</sup> The Court initially appointed a legal consultant to the Defence Office for three months, followed by an Acting Principal Defender for several months. The first Principal Defender, Simone Monasebian, was appointed in March 2004, a year after the first indictees were arrested and approximately nineteen months after the Prosecutor began investigations.<sup>56</sup> As a result, the instrument governing its status and management is the SCSL's Rules.<sup>57</sup>

The former Registrar of the Special Court, Robin Vincent, has stated that in an ideal scenario, the Principal Defender would have been appointed towards the end of 2003, but the Court had been forced to adopt a "just in time" policy, given the constraints of its budget.<sup>58</sup> The late proposal for a Defence Office and the subsequent late appointment of the Principal Defender meant that from the beginning, a sense of insecurity surrounded the Office's ability to obtain adequate funds for the Defence from the Registry. In some instances, this has significantly called into question its ability to perform its mandated function 'to ensure the rights of suspects and the accused', as a lack of adequate funding has meant that either: (i) there is not always room in the defence budget for the defence teams to employ individuals whose expertise they require for their case, such as international investigators; or (ii) counsels' fees have to be cut, hence meaning that they are left with the difficult choice of spending less time on the case (hence, potentially jeopardising their client's chances of avoiding conviction) or working several hours for which they may not be remunerated.

Before discussing this issue in greater detail, however, it is important to look more closely at the model of Office that has been established at the SCSL, and the functions that it currently serves.

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<sup>55</sup> See Kendall, S. and Staggs, M. (2005) pages 15-16.

<sup>56</sup> Ibid.

<sup>57</sup> For the full Rules of Procedure and Evidence please see <<http://www.sc-sl.org/documents.html>> Rule 45 establishes the Defence Office's existence and mandate. Sections (A) and (B) of Rule 45 provide that: The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and the accused. The Defence Office shall be headed by the Special Court Principal Defender.

- (A) The Defence Office shall, in accordance with the Statute and Rules, provide advice, assistance and representation to:
  - (i) suspects being questioned by the Special Court or its agents under Rule 42, including non-custodial questioning;
  - (ii) accused persons before the Special Court
- (B) The Defence Office shall fulfil its functions by providing, *inter alia*:
  - (i) initial legal advice and assistance by Duty Counsel who shall be situated within a reasonable proximity to the Detention Facility and the seat of the Special Court and shall be available as far as practicable to attend the Detention Facility in the event of being summoned;
  - (ii) legal assistance as ordered by the Special Court in accordance with Rule 61, if the accused does not have sufficient means to pay for it, as the interests of justice may so require;
  - (iii) adequate facilities for counsel in the preparation of the defence.

<sup>58</sup> Kendall and Staggs (2005), page 17.



## 4.2 The Defence Office and Its Mandate

According to Rule 45 of the Rules, the Defence Office sits under the umbrella of the Registry, the principal administrative organ of the Special Court. While the Appeals Chamber has stated that the Defence Office must be able to retain some independence from other organs of the Court “in the interests of justice”<sup>59</sup>, in keeping with the Rules the Office formally operates under the Registrar’s authority. As such, for the most part, the Defence Office is delegated “certain aspects of the Registrar’s responsibility for ensuring the rights of the accused under the Statute, namely the administrative aspect of the task”.<sup>60</sup> These administrative tasks, as outlined in Rule 45, include ensuring the proper legal representation of the accused: that is, handling the assignment, payment, withdrawal and replacement of counsel.

The Defence Office does, however, have the mandate to represent the accused at trial during the initial appearances stage of proceedings.<sup>61</sup> In relation to the nine accused currently on trial at the Special Court, the Defence Office has since signed legal services contracts with qualified counsel who will represent the accused for the duration of the proceedings. Counsel for the former President of Liberia, Charles Taylor, was recently assigned, with that trial provisionally slated to commence in June 2007.<sup>62</sup> As will be discussed later in this report, members of the Defence Office have also represented all the accused in joint motions, and may represent individual accused where s/he has been given instructions from assigned counsels to do so.<sup>63</sup> Furthermore, in instances where the Special Court deals with disciplinary or contempt of court proceedings, the Office may have an important role to play in facilitating the process.<sup>64</sup>

## 4.3 The ‘Legal Aid’ Model of Defence

The Defence Office employs counsel by means of a ‘list’ system. Therefore, much like the legal aid systems in these domestic jurisdictions, the Defence Office maintains and updates a list of qualified national and international trial counsel who can then be assigned to defend the indigent accused as and when they are indicted.<sup>65</sup> This contrasts with a ‘public defender’ model, in which a permanent public defender represents all the

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<sup>59</sup>See *The Prosecutor v Alex Tamba Brima, Brima ‘Bazzy’ Kamara and Santigie Borbor Kanu* (SCSL-04-16-AR73) ‘Separate and Concurring opinion of Hon. Justice Gelaga King on the Decision on Brima Kamara Defence Appeal Motion against Trial Chamber II majority Decision on Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara’, Separate and Concurring opinion of Hon. Justice Gelaga King’, 8 December 2005, at paragraph 49.

<sup>60</sup> *Ibid.* paragraph 84

<sup>61</sup> Rule 45 (A)(ii) of the Special Court’s Rules. The Defence Office has done so successfully on behalf of all the ten accused currently facing trial at the SCSL.

<sup>62</sup>*The Prosecutor v. Charles Ghankay Taylor*, Trial Chamber II, Status Conference, SCSL Transcript, 22 September 2006.

<sup>63</sup> As will be discussed in Section 5.4 of this report, the Principal Defender recently defended the rights of all accused in a motion contesting the Registrar’s decision to install surveillance cameras in the Detention Facility.

<sup>64</sup>For example, the Defence Office and the Principal Defender were able to assist the Registrar in organising the contempt of court proceedings held at the Special Court last year. For further information regarding the proceedings See Special Court Monitoring Program, Update No. 54.

<sup>65</sup> Rules of Procedure and Evidence, Rule 45.



accused from the onset of the trials.<sup>66</sup> Once this independent counsel is assigned to an accused, he/she can only withdraw from trial in the most exceptional circumstances.<sup>67</sup>

The list system employed is similar to that used at the ICTR. At the Special Court the Principal Defender maintains primary control over the addition and removal of counsel from the roster, although the Registrar is still the ultimate authority over the assignment of counsel and can amend the list as he deems appropriate.<sup>68</sup> The criteria utilized to determine eligibility for addition to the list, which includes seven years of trial experience, is meant to warrant only the recruitment of competent and honest attorneys.<sup>69</sup> The accused are eligible for representation by counsel from this list once they have been determined to be either partially or fully indigent.<sup>70</sup>

#### 4.4 The Principal Defender and Duty Counsel

The Principal Defender sits at the helm of the Defence Office, which currently employs a total of 13 full-time staff members and a fluctuating but sizeable number of independent contractors, which includes counsel, legal assistants and investigators.<sup>71</sup> The Principal Defender functions as the main intermediary between the independent defence counsel, employed as contractors by the Court, and the institution of the Court and its organs. The position thus requires the Principal Defender to advocate on behalf of Defence within the court's administration. She/he also advocates for the accused before the Trial Chamber, on issues that pertain to all of the detainees, such as legal representation and detention matters related to their welfare. The position of Principal Defender is generally perceived to differ from that of the Prosecutor, who has historically taken on a very public role as well as a legal one, regularly giving statements both in the international and local media as well as appearing as counsel before the Trial Chamber.<sup>72</sup> Nevertheless, the Court's Outreach activities have included regular events and functions that seek to explain the role and significance of the Defence at trial (as well as that of the prosecution) and the Principal Defender has been actively involved in these events.

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<sup>66</sup> The 'public defender' model was originally proposed for the Special Court and will be discussed in detail later on in this report. See *infra*, Section 5.2.

<sup>67</sup> Rules of Evidence and Procedure, Rule 45(E).

<sup>68</sup> *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (SCSL-04-16-AR73) 'Decision on Brima-Kamara Defence appeal motion against Trial Chamber II majority decision on extremely urgent confidential joint motion for the re-appointment of Kevin Metzger and Wilbert Harris as lead counsel for Alex Tamba Brima and Brima Bazzy Kamara', 8 December 2005.

<sup>69</sup> Interview with Duty Counsel, May 2006.

<sup>70</sup> Special Court for Sierra Leone Directive on the Assignment of Counsel, adopted 1 October 2003, (the 'Directive') available at <<http://scsl-server/sc-sl/new/assignmentofcounsel.html>>

<sup>71</sup> The term 'independent contractors' refers to employees at the Special Court who are considered to have been contracted for a specific purpose and whose benefits packages have different terms and conditions to those staff members employed on a full-time basis as staff of the Court. In the case of international assigned counsel for the defence, for example, counsels are assigned to represent the accused for the duration of the case, but are not required to be based at the Special Court the entire time, nor are they precluded from taking on other cases in their home jurisdiction. Counsel are paid fees on an hourly basis (in accordance with the terms and conditions of the Legal Services Contract entered into by the Principal Defender and the Assigned (or 'Contracting') Counsel and the Directive).

<sup>72</sup> The Court is formally composed of three independent organs: that of the Registry, the Chamber and the Office of the Prosecutor.

The Defence Office employs a group of permanent in-house lawyers - Duty Counsel - who manage the initial appearances for the detainees and focus more on matters related to detainee welfare once assigned counsel take over the legal aspects of the individual cases.<sup>73</sup> Due to the fact that many defence counsels are international staff and thus are not always present in Freetown, Duty Counsel are able to ensure an ongoing defence presence for the detainees, who often feel distanced from assigned counsel.<sup>74</sup> Like the Principal Defender, they also play a significant role in Outreach activities.

The idea of employing several full-time lawyers in a permanent office is designed to offer a measure of institutional support to the independent defence teams, a feature that has been absent in other international tribunals. This institutional support is meant to parallel, albeit on a much smaller scale, the support available to senior prosecuting attorneys, who are able to draw upon a pool of staff at the OTP. It offers the Defence so-called “repeat player” benefits, such as institutional knowledge on the conflict and patterns of atrocities, legal expertise on motions and other cross-cutting issues.<sup>75</sup> In terms of their administrative functions, Duty Counsel are also tasked with assisting the defence teams in arranging the logistics of up-country investigative trips, facilitating international travel arrangements, ensuring proper access to office space and liaising with the different sections of the court on behalf of counsel.<sup>76</sup> There are in total, four Duty Counsels: three have been assigned the CDF, RUF and AFRC trials and a further Duty Counsel position for the Taylor case has been approved by the Registry.<sup>77</sup>

In addition to the administrative tasks associated with ensuring the accused’s welfare during the trial phase at the Court, Duty Counsel play a role in the ongoing monitoring of the performance of defence counsel throughout the proceedings.<sup>78</sup> In relation to this task, Duty Counsel monitor the proceedings and supervise the work of defence counsel inside the trial chamber.<sup>79</sup> Despite the general relinquishment of their advocacy role, Duty Counsel are infrequently required to stand-in for acting counsel and to represent defendants when counsel are absent or in specific circumstances – for example, if they unexpectedly withdraw from the case.

#### **4.5 New Defence Support Positions**

The Defence Office has also more recently employed a Defence Witness Support Liaison and an Assistant for Defence Outreach. While the former acts as an intermediary between the Witness and Victims Support Unit (“WVS”) and the ten defence teams, the latter is designed to link the defence teams to Outreach activities and the communities that section is working within. The creation of a specific position to undertake a support

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<sup>73</sup> *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (SCSL-04-14-T) ‘Reply to the Interim Registrar’s Response to the Principal Defender’s Motion for a Review of the Registrar’s decision to install surveillance cameras in the detention facility of the Special Court for Sierra Leone’, 14 February 2006, paragraph 16 (password protected website).

<sup>74</sup> Interview with Duty Counsel, May 2006.

<sup>75</sup> ICTJ Report (2006).

<sup>76</sup> Interview with Duty Counsel, May 2006.

<sup>77</sup> Written Comment of Defence Office, September 2006.

<sup>78</sup> Interview with Duty Counsel, May 2006.

<sup>79</sup> *Ibid.*

role in the Outreach activities conducted by (and with) the Defence highlights the Office's commitment to promoting a more public role for the Defence at the Court. It also highlights the Office's attempts to act as a countervailing force that balances the efforts of the OTP, which has actively engaged in outreach activities around the country since the Court's inception.<sup>80</sup>

A further position of Legal Advisor has also been recently instituted and is designed to offer legal research expertise to the Defence Office as well as to the teams. These positions indicate the commitment of the Registrar to ensuring that the Defence is adequately resourced. The Defence Office has stated that, generally speaking, defence counsels have found these support services to be useful.<sup>81</sup> However, as will be discussed in greater detail in Section 6, certain Defence teams, who have prioritized funding for investigators, consultants, experts and interns, question the utility of these support roles.<sup>82</sup>

#### 4.6 Funding and "Equality of Arms"

To return then, to the issue of funding. Article 17(4)(b) of the Special Court's Statute guarantees that each accused should have "adequate time and facilities for the preparation of his or her defence".<sup>83</sup> What constitutes 'adequate' in these circumstances is generally determined with reference to the principle of 'equality of arms'. This principle, inherent to fair trial rights, establishes that both the Prosecution and the Defence must have 'reasonable equivalence in ability and resources' and that neither should suffer significant disadvantage in the preparation and presentation of their case. This position was reiterated in the case of *Prosecutor v Milutinovic et al*, in which the Appeals Chamber stated the requirement is violated 'only if either party is put at a disadvantage when presenting its case'.<sup>84</sup>

While it is generally agreed that the Prosecution, who bears the burden of proof, is likely to have a more costly case than that of the Defence, the 'equality of arms' principle is meant to ensure that the resources afforded to the Defence allow it to present its case in a manner that is procedurally equal to the Prosecution. In this regard, both the administrative and the judicial sections of the Court should act to counterbalance any advantage the Prosecution may obtain from its access to greater resources and to ensure that the Defence are not disproportionately disadvantaged.<sup>85</sup>

As the Principal Defender has emphasized, the extent to which the Office receives the funding it requests is absolutely crucial to the proper functioning of his Office.<sup>86</sup> The

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<sup>80</sup> Interview with the Principal Defender, November 2005.

<sup>81</sup> Written comments of Principal Defender, September 2006.

<sup>82</sup> Interview with Defence Counsel and Legal Assistant, March 2006. See also Section 6.4.

<sup>83</sup> The Statute, Article 17(4)(b).

<sup>84</sup> *The Prosecutor v Milan Milutinovic et al.*, (ICTY Case No. IT-99-37-AR73) 'Decision on Interlocutory Appeal Motion for Additional Funds', 13 November 2003, paragraph 24. As quoted in Negri (2005), page 556. Note also the departure from the earlier decision in *Prosecutor v Tadic* discussed on this point at pages 552-554.

<sup>85</sup> (SCSL-2004-14-T) 'Urgent Joint Defence Motion Regarding the Propriety of Contacting Defence Witnesses', 11 May 2006, paragraph 10.

<sup>86</sup> Interview with the Principal Defender, November 2005.

Defence Office is allocated a budget by the Registry for the financial year based on anticipated amounts of expenditure by the defence teams and the Office itself. The Office is then responsible for the vetting of all bills submitted by the defence teams, which include assigned counsel, legal assistants and investigators. The system of bill vetting employed is one based on the Very High Costs Cases model, as utilized in the United Kingdom in an attempt to reduce the costs of major criminal trials.<sup>87</sup> Accordingly, all teams have been required to submit case and stage plans to the Principal Defender, indicating the anticipated amount of funding they require for the particular phases of their case. The number of hours necessary for the tasks outlined is established and caps are then placed on the amount the teams can bill during the various stages of preparing and presenting their cases. Bill vetting then occurs in accordance with these estimates, the intention being that the Office will be able to exercise greater budgetary control over the teams than at previous tribunals.<sup>88</sup>

The structural realities of funding at the Special Court have meant the Court has had to operate on a shoestring budget, compared to that of the international tribunals.<sup>89</sup> The voluntary contributions system through which the Court secures its funding is seemingly insecure: the Court is almost completely reliant on the good will of the international community to sustain its efforts.<sup>90</sup> The Court has thus faced on-going financial crises throughout its lifetime. As the former Registrar, Robin Vincent, has lamented, the Court's budget is not so much 'lean and mean' as it is 'downright anorexic'.<sup>91</sup> While the UN General Assembly has assisted the Special Court financially in the past, and the Secretary General has shown a commitment to ensuring funding for the court until its end, the Court's budget remains ultimately out of its control.<sup>92</sup> While this is an issue faced by all sections of the SCSL, at this stage of the trials, funding is a particularly urgent concern for the Defence. Given that the Defence is presenting its cases during this period, as well as launching any appeals, the extent to which the Defence is adequately funded, and the trial process is perceived to be fair to the accused, is of increased importance. Unless international donors evince a commitment to fairness by continuing to pledge funds to ensure the proper functioning of the trial, the legitimacy of the trials themselves is likely to be undermined.

A secondary, related issue with funding for the Defence stems from the fact that (as already noted) the Defence Office technically falls within the Registry. This means the Principal Defender is appointed by (and is directly answerable to) the Registrar. This translates into a lesser degree of flexibility and control for the Defence Office than that of the OTP, as it must have all requests for financing and allotment approved by the Registry.<sup>93</sup> It also places the Defence Office in a difficult position as the intermediary

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<sup>87</sup> Interview with Duty Counsel, May 2006.

<sup>88</sup> See Section 2.3 of this report.

<sup>89</sup> Dougherty (2004).

<sup>90</sup> Cockayne (2005).

<sup>91</sup> Robin Vincent, former Registrar of the SCSL, as cited in Dougherty (2004), page 326.

<sup>92</sup> The UN General Assembly granted the Court 33 million dollars to help with funding through to end of 2005, as cited in HRW (2005).

<sup>93</sup> While the OTP's overall budget must also be approved by the Registrar, once funds have been allocated to the OTP, the OTP is able to administer those funds largely independently of the Registry.

between the defence teams and the Registrar. As will be discussed, this has, on occasion, created tension between the Defence Office and particular defence teams, as the teams tend to blame the Office, rightly or wrongly, for frustrated attempts at receiving much needed financial support. Funding for the defence teams is largely subject to the terms and conditions of legal services contracts entered into between Assigned or 'lead' counsel for each case and the Principal Defender. However, the discretionary aspect of funding means that the Principal Defence and Assigned Counsel agree upon amounts to be spent beyond their legal services contract once the trial is in progress. Yet despite the Defence Office's successful lobbying efforts to procure additional funding from the Registry<sup>94</sup>, some Defence counsel perceive the Office to obstruct their efforts to receive requested additional funding.<sup>95</sup> One counsel stated that his team had had to resort to threatening action in front of the Trial Chamber before they perceived any movement on the part of the Office to lobby the Registry for increased financial allotments.<sup>96</sup>

Both of these structural constraints appear to be the result of the Defence Office's late institution within the Court's system and the concomitant lack of initial financial planning for this body. Much like the implementation of its structure as an Office, allocation of resources to the Defence Office came as an afterthought to the budgetary allocations of the OTP. As has been argued by Jones *et al.* as well as by Akin, the actual ability of the Defence Office to perform its functions - namely, to protect the rights of the accused - has been largely hampered by the fact that it does not receive sufficient financial support.<sup>97</sup> They note that adequate funding for defence teams is essential to ensure fair trials at the Special Court and that it speaks to the 'quality of justice' realized by the process.

These structural constraints mean that it is questionable whether the Defence Office is providing defence counsels with 'adequate facilities' for the preparation and presentation of the defence cases.<sup>98</sup> Counsels have noted a dearth of basic resources, including office space, photocopying facilities, and vehicles, all of which will have an impact on the extent to which the Defence is capable of producing relevant evidence to support its case. In addition, each defence team is allocated one computer, despite the fact that the teams are often composed of upwards of four members. Defence counsel have also continuously noted the difficulty in accessing their much needed resources, such as transportation for up-country investigations.<sup>99</sup> The necessary international travel

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<sup>94</sup> Written Comment of Defence Office, September 2006. The Office has, however, successfully lobbied for discretionary funding from the Registrar in the tens of thousands.

<sup>95</sup> This discretion has served to keep budgets in check while allowing for some flexibility but has also seemingly fuelled perceptions of differential treatment amongst teams.

<sup>96</sup> Interview with Defence Counsel, March 2006.

<sup>97</sup> Jones *et al.* (2004) and Akin (2005).

<sup>98</sup> Rules of Procedure and Evidence, Rule 45(B) (iii). See Cockayne (2005) for a more detailed discussion of the budgetary imbalances between the OTP and the Defence at the SCSL.

<sup>99</sup> Defence teams have access to a limited number of court vehicles which must be shared amongst the nine teams, unlike the Prosecution who have their own specific vehicles. The ability to conduct up-country investigations is thus often significantly hampered or delayed due to the need to wait for available vehicles. Local transportation in Sierra Leone is a time-consuming and often arduous option given the condition of the country's roads. Interview with Legal Assistant, February 2006.

costs of counsel not based in Freetown further erode the already diminutive budgets of the teams.

The comments and complaints made by counsel are difficult to prove when looking at the SCSL's budgets. This is because funding for office space, furniture, equipment and supplies, services (including transport) and information technology, all fall under the general headings of 'Communications and Information Technology' and 'Common Services and Overheads' which are administered to the SCSL as a whole.<sup>100</sup> As a result, it is not possible to make comparisons between the resources afforded under these headings to the OTP as opposed to that of the Defence Office, based on the budgetary allocations to those sections of the Special Court.<sup>101</sup>

Yet what the SCSL's most recent budget *does* evidence, is recent financial constraints placed on the Defence Office that directly affect defence counsel's fees, despite the shift towards the defence phase at trial. The Special Court's 2005-06 Budget details both the permanent staffing and operational costs anticipated for both the OTP and the Defence Office during the 2005-06 financial year.<sup>102</sup> According to the Budget, the OTP experienced an overall decrease to its staffing costs of 3 per cent over the 2005-06 period compared to the previous financial year. This compared to an overall increase of fifteen per cent for the Defence Office's permanent staffing costs for the same period.<sup>103</sup>

The increase in the Defence Office's budget for staffing helps to account for the Office's choice to employ a Defence Witness Support Liaison, an Assistant for Defence Outreach and a Legal Advisor. However, significantly for the Defence as a whole, an increase in 'staffing costs' does not reflect an increase in the amount allocated in the budget to the contractual services of independent contractors. Therefore, the fifteen per cent increase in 'staffing costs' did not amount to an increase in the amount allocated to individual defence teams for work undertaken by counsels, investigators or experts on the cases: these costs are instead reflected as 'operating costs' and 'contractual services' in the Budget.

According to the 2005-06 Budget, the Defence Office received an overall *decrease* in its allocation for 'contractual services' of *seventy-four per cent* compared to the previous financial year.<sup>104</sup> This decrease comes at a time when defence counsel

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<sup>100</sup>SCSL 2005-06 Budget, page 34, comment C11.

<sup>101</sup>The SCSL 2005-06 Budget shows that as whole, the Court experienced an increase in its 'Communications and Information Technology' Budget (increased by 18 per cent) and a decrease in its 'Common Services and Overheads' Budget (decreased by 12 per cent) over the 2005-06 period. See SCSL Budget 2005-06, pages 40 – 43.

<sup>102</sup> The SCSL's budgets are based on a financial year period of 1 July to 30 June.

<sup>103</sup> According to the 2005-06 Budget, the total amount allocated to staffing costs for the prosecution fell from US\$4.34 million (in 2004-05) to US\$4.21 million (in 2005-06). Comparatively, the Defence Office staffing costs allocation rose from US\$561,611 (in 2004-05) to US\$647,116 (in 2005-06). See SCSL Budget 2005-06, page 26.

<sup>104</sup>According to the 2005-06 Budget, the total amount allocated to 'contractual services' for the Defence Office decreased significantly, from US\$3.8 million in 2004-05 to US\$999,200 in 2005-06. See SCSL Budget 2005-06, pages 31 - 34. This provision covers fees charged by independent pre-approved Defence



would seemingly anticipate an increase in budget, given their cases began in two out of the four trials in the latter half of 2006, and a third is scheduled to begin in May 2007.<sup>105</sup> Although the OTP experienced a fifty-four per cent decrease to the amount allocated to 'contractual services' during the same period, this cannot be seen as an analogous comparison, because the work of contractors amounts to a significantly smaller component of work undertaken by the prosecution. Contractual services undertaken for the prosecution include the work of national police investigators as well as forensic analysis services and maps and models: it does not include the cost of its legal staff, or the majority of its investigations team.<sup>106</sup> Given the extent to which the Defence Office relies on employing independent contractors to undertake the bulk of the work for each case, this decrease is more significant than that of the OTP's budget in the same category.

To add further cause for concern, the Defence Office's allocations for consultants and experts has decreased by *seventy per cent* over the same period. This compares with a significantly smaller decrease of 3 per cent for the OTP.<sup>107</sup>

Unfortunately, the authors of this report have been unable to analyze any improvements that have been made to budgeting for the Defence Office over the 2006-07 period, because, as of yet, no budget is available. According to an article written in the International Justice Tribune, the Special Court's Registrar, Mr Lovemore Munlo, was recently dismissed by the SCSL's Management Committee 'because they were dissatisfied with his management abilities'.<sup>108</sup> Under Mr Munlo's management, the SCSL has been functioning since July 2006 without an annual budget approved by that Committee.<sup>109</sup>

The Principal Defender has indicated that he would be content with half of the resources available to the prosecution. However, he also noted that the former Registrar, Robin Vincent, disagreed with this kind of budgetary comparison with respect to

Counsels, Expert Defence and Defence Office Investigators who are required by the Defence Office to support the defence teams.

<sup>105</sup>The RUF Defence case is currently scheduled to begin on 2 May 2007.

<sup>106</sup> Ibid. at page 33.

<sup>107</sup> Ibid. page 34. This may, however, have to do with the role assigned to consultants and experts by each unit. According to the Budget, consultants and experts for the Prosecution included consultants for 'forensic anthropology, financial tracking, and specialist legal advice'.<sup>107</sup> Comparatively, Defence Office consultants were employed 'in the management of the Legal Assistance Programme' and 'experts to participate in disciplinary procedures resulting from violations [by defence counsel] to the Code of Conduct', hence reflecting the use of experts in this category in relation to the administrative functions of the Defence Office, rather than the legal work of the individual defence teams.

<sup>108</sup> As a result, this report was only able to comment on defence budgets up until June 30, 2006. Reporters for the International Justice Tribune cite this as an example of the 'total lack of direction' under which the SCSL had been operating since Mr Munlo was appointed to the posting. (International Justice Tribune, April 2, 2007, page 3)(Subscription-only publication).

<sup>109</sup> As the article acknowledges, this information was not released by the Special Court in the press release relating to the Registrar's departure. According to Mr Munlo, however, in a Press Release issued by the Special Court regarding his departure, "'After one and a half years at the Special Court, the time has come to move on'". Mr Munlo numbered among his accomplishments 'a more focused completion strategy which meets projected milestones, and improved working conditions for local staff.' Press Release, 'Registrar Lovemore Munlo, SC, Announces His Departure from the Special Court', 19 March 2007.



'equality of arms'. The Principal Defender has subsequently argued that perhaps it wasn't the exact amount the Office was allocated in meeting the standard of 'equality of arms' so much as it was the ability to exert control over its own budget, as the OTP is able to do.<sup>110</sup> Certainly, the budgetary allocations for 2005-06 show that a direct increase in resources to the Defence Office did not amount to an increase to resources for the individual defence teams, though the positions funded would assist the operation of the Defence as a whole. Evidently, issues such as access to sufficient resources to conduct up-country investigations, the prompt payment of professional fees, as well as access to administrative resources and vehicles, all greatly contribute to the quality of the defence mounted at the Special Court. Unfortunately, the realization of these critical elements remains contingent, despite the Defence Office's permanent presence. Unless attempts are made to redress this imbalance during the defence phase of trial, the extent to which the principle of equality of arms has been meaningfully upheld in the Special Court context seems questionable.

#### **4.7 Experts and International Investigators**

Defence Counsel at the Court identified two particular areas of concern with respect to the allocated defence budget for the 2005-2006 period: experts and international investigators.<sup>111</sup> Echoing defence counsel, these two areas were also explicitly mentioned by Human Rights Watch in their 2005 report as particularly invaluable to building the defence cases at the SCSL.<sup>112</sup> The fact that the allotments for defence investigators and experts are far below what has been requested by some defence teams, and subsequently, the Defence Office, is cause for serious concern. As can be seen from a review of the SCSL's most recent Budget, the amounts allotted for 'investigators and experts' falls significantly below the 2004-05 period at a time when investigations and expertise have likely become more required than ever. The allotted amount for consultants and experts is approximately three times less than the requested amount and the allotted amount for international investigators is half of the requested amount.<sup>113</sup> This issue was recently highlighted in Trial Chamber II both prior to and at the opening of the AFRC defence case, with defence counsel citing the lack of secure funding for consultants and expert witnesses as a hindrance to the effective and timely planning of their case.<sup>114</sup>

The Principal Defender has noted that the Registry at the SCSL has often been able to come up with needed funding for the Defence.<sup>115</sup> However, both the Defence Office and the defence teams still spend a significant amount of time lobbying for sufficient funding in areas such as these. This means that valuable Defence time is spent petitioning for the resources they require to employ qualified people to fulfil essential roles and to obtain basic items instrumental to case preparation. While the former Registrar, Robin Vincent, noted that many of the problems faced by the Defence are

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<sup>110</sup> Interview with the Principal Defender, November 2005.

<sup>111</sup> Interview with Defence Counsel, March and April 2006.

<sup>112</sup> HRW (2005).

<sup>113</sup> *Ibid.*

<sup>114</sup> See SCSL Transcript, Trial Chamber II, 17 May 2006 and Special Court Monitoring Programme, Update No. 77 (9 June 2006).

<sup>115</sup> Interview with the Principal Defender, November 2005.

universal to the Court, the Defence points to a clear discrepancy between the way the prosecution and defence are treated at the Special Court, which seems to be borne out, to some extent, in the SCSL's Budget. While achieving an end to impunity is clearly a laudable goal, sustaining international tribunals with the purpose solely to convict is likely to tarnish both the international justice process and the reputation of the United Nations.

The Registry's commitment to adequate Defence funding resulted in several new permanent positions in the Defence Office (see Section 4.5). Yet the utility of these new permanent positions, at a time when defence counsels require specific expertise for their individual cases, can be questioned. Although some teams, such as the Sesay defence team (in the RUF trial), have recently received funding for additional international investigators and interns, this has only come after several on-going requests, and other teams are still awaiting the allocation of funds for this purpose.<sup>116</sup> The availability of financial resources for the Defence during 2005-06 has thus been somewhat mixed: on the one hand, the Defence Office did receive an increase in one part of its budget, yet on the other, significant decreases were made to other sectors of importance to the defence phase of the trial. Furthermore, the fact that the Defence Office and defence teams have to continue to plead with the Registry for resources of this nature is at best problematic and at worst, a violation of the accused's right to a fair trial when crucial resources are not forthcoming.<sup>117</sup>

## **5. THE ROLE OF THE DEFENCE OFFICE**

### **5.1 The Role of the Defence Office**

Like any office that forms part of an institution, ensuring that the Defence Office has a clearly defined role and function at the Special Court is fundamental to ensuring that the Office operates properly and efficiently. It is also important to ensure that, where disputes arise about this role and function, they are able to be resolved in an objective, fair and timely manner.<sup>118</sup> According to Rule 45, the Defence Office is to fulfil the following functions:<sup>119</sup>

- (i) in accordance with the Statute and the Rules, provide advice, assistance and representation to suspects questioned by the Special Court and accused persons before the Special Court;

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<sup>116</sup> Again, at least so far as any request for interns is concerned, the choice is largely out of the Defence Office's hands: according to the Principal Defender, the Registry allocates interns to the Defence Office, who then administers the internship program 'in accordance with the Registry's internship policy'. This may be further evidence of the bureaucracy that Knowles has noted: rather than having the flexibility to determine for itself how best to utilise interns, the Defence Office has to comply with Registry policy.

<sup>117</sup> The situation has been recently exacerbated by a lack of leadership in the Registry which means to date, the SCSL does not have a 2007 Annual Report or a 2006-07 Budget (International Justice Tribune, April 2, 2007, page 3).

<sup>118</sup> The Directive on Assignment of Counsel, Article 22, provides for a settlement of disputes arising out of interpretations or applications of the Legal Services Contract entered into between Assigned Counsel (or lead counsel) and the Principal Defender.

<sup>119</sup> Rules of Evidence and Procedure, Rule 45.

- (ii) provide initial legal advice and assistance, as well as legal assistance ordered by the Special Court to the accused persons;
- (iii) provide adequate facilities for counsel in the preparation of the defence; and
- (iv) maintain a list of highly qualified criminal defence counsel and manage the assignment, withdrawal and replacement of counsel acting for accused persons.

The text of the Rule stresses the initial advocacy role to be fulfilled by the Defence Office in its representation of the accused for initial appearances, but leaves much ambiguity over what role the Defence Office should play once counsel has been assigned. Many of the administrative tasks undertaken by the Defence Office are, however, outlined in the Special Court's Directive on Assignment of Counsel (the 'Directive').<sup>120</sup> However, neither the Special Court's Rules nor the Directive give clear guidance on: (i) the extent to which the Defence Office should act independently of the Registry; and (ii) the relationship between the Defence Office and the accused *after* defence counsels have been assigned.

In relation to the latter, the Defence Office has assumed it is entitled to an ongoing, direct relationship with the accused. Given the ambiguity in the Rules, it is not surprising: rather than stipulating that the Defence Office will ensure the rights of the Defence (which would include both the accused *and, as an extension of their client, counsel*), the Rules state that the Defence Office is to ensure the rights of *suspects and the accused*. As will be shown in Section 5.3 of this report, this doctrinal oversight has meant that the Principal Defender's interpretation of the Rules has, at points, pitted him directly against the accused persons Assigned Counsel when determining what is best for their clients.

The uncertainty over the exact role of the Defence Office has meant that a highly varied vision for, and subsequent development of, the Office has emerged over its lifetime. As will be seen in this section, the extent to which the Defence Office should be considered independent from the Registry, the extent to which it should represent the accused persons once counsel has been assigned, and the extent to which it should play an intermediary role between the Registry and the defence teams have all come into question throughout its lifetime. Due to the fact that the Rules and the Directive have not given the Defence Office clear guidance on this issue, determining the parameters of these relationships has been largely left to the Trial and Appeals Chambers at the Special Court.

In this section we will first traverse the history of the Defence Office and then look at how some recent disputes about its mandated role have seemingly resolved, once and for all, that the Defence Office should not act as an independent 'fourth pillar' at the Special Court, nor should it engage in advocacy on behalf of the accused before the Trial Chamber. Rather, it should largely undertake an administrative role as a sub-Office of the Registry.

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<sup>120</sup> See in particular Part III: Payment of Counsel of the Directive.

## 5.2 Evolving Conceptions of the Defence Office

Initially, the Defence Office was envisioned as a ‘fourth pillar’ of the Special Court. In this incarnation, the Defence Office was to be given far more financial control of its destiny, as it would be perceived as akin to the Office of the Prosecutor in the way in which it would function. This novel conception of the Defence Office was particularly promoted by the court’s former President, Justice Geoffrey Robertson and represented an attempt to implement some of the ‘lessons learned’ from the *ad hoc* tribunals.<sup>121</sup>

Justice Robertson outlined this vision in the Special Court’s first Annual Report, in which he stated that the creation of a permanent Defence Office as a ‘fourth pillar’ provided “a counterbalance to the Prosecution”.<sup>122</sup> This early vision of the structure of the Office was fully presented in a document entitled ‘Public Defender Proposal’, submitted to the Management Committee in February 2003, prior to any of the indictments being served.<sup>123</sup> In that document, in order to fulfil the necessary element of an ‘equality of arms’ in such adversarial trials and attract experienced defence counsel, Justice Robertson called for the institution of a ‘public defender’ system.<sup>124</sup> This ‘public defender’ model has been described as enabling the Defence Office to “represent *all accused at all stages*”.<sup>125</sup> Looking historically at the experience of other tribunals, including those of Nuremburg as well as the ICTY and ICTR, he argued that the inequality between the prosecution and the defence was uniformly pronounced. Justice Robertson also stated that the current use of the ‘Registrar’s list system’ to provide counsel in international criminal trials meant there was much mediocrity found in the Defence.<sup>126</sup> His proposal for ensuring the provision of cost-effective and competent legal assistance to indigent defendants was to “establish and build up a defence unit that can take on the prosecutors”.<sup>127</sup> Such a Defence Office would then be headed by a Principal Defender, who had equivalent status to the Prosecutor, and would employ several full-time lawyers to represent the accused.

While Justice Robertson’s proposal was approved ‘in principle’ by the SCSL Management Committee after its submission in 2003, budget constraints meant that the Principal Defender’s salary could not be put at a level that would attract lawyers of equivalent distinction to the Prosecutor.<sup>128</sup> At any rate, although Justice Robertson’s proposal had several merits in principle, employing a public defender to represent all accused would likely result in serious conflicts of interest in practice. As argued by several former and current employees of the Defence Office, the reality that the accused

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<sup>121</sup> Skilbeck (2004).

<sup>122</sup> The First Annual Report of the President of the Special Court for Sierra Leone: For the Period of 2 December 2002 – 1 December 2003.

<sup>123</sup> See *The Prosecutor v Alex Tamba Brima, Brima ‘Bazzy’ Kamara and Santigie Borbor Kanu*, (SCSL-04-16-T-446) ‘Appendix to the Separate and Concurring opinion of Justice Robertson on the Decision on Brima-Kamara Defence appeal motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara’, 14 December 2005.

<sup>124</sup> *Ibid*

<sup>125</sup> Jones *et al.* (2004), page 2 (emphasis added).

<sup>126</sup> *Supra*, note 123, page 4.

<sup>127</sup> *Ibid.*, page 5.

<sup>128</sup> *Supra*, Note 68, paragraph 86.

are charged with many of the same crimes, arising broadly from the same incidents, means that they might consequently implicate each other in the course of their defence.<sup>129</sup> Furthermore, the fact that the accused are being tried in joint trials makes the possibility of cross-incrimination particularly relevant. This clearly precluded a single ‘public defender’ from representing all of the indigent accused.

The Special Court’s first Registrar, Robin Vincent, envisioned a different role for the Defence Office and in particular, the Principal Defender. In interviews with one of the authors, he made it clear that he envisaged the Principal Defender would act:

“more as a behind the scenes administrator, who would mediate between the defence teams, organize and facilitate the drafting of legal research and motions common to the defence, and who would have more of a limited advocacy capacity within the Court’s Outreach Program.”<sup>130</sup>

Despite rejecting the ‘public defender’ model and instead opting to instate the Defence Office as a sub-Office in the Registry, the Special Court’s Annual Report for the 2004 period again described the Defence Office as representing the ‘fourth pillar’ of the Court.<sup>131</sup> This seemed to suggest that, although not mandated to continue to represent all of the accused, the Defence Office was perceived as operating somewhat on an independent basis. Perhaps aware of the in-principle support she had for the Office’s independence, the first Principal Defender, Simone Monasabian, sought to formalize this stated independence by seeking to amend the Statute and other relevant documents. The former Principal Defender actively championed the independence of the Office, and was primarily responsible for drafting proposed amendments to the Statute and the Rules in the hope of ensuring the it was achieved. Ms Monasabien’s draft amendments included: (i) the insertion of an Article 3 *bis* to include that the Principle Defender was appointed by the Secretary General in consultation with the Sierra Leonean government on much the same terms as that of the Prosecutor; (ii) ensuring that the Office – renamed the Office of the Principal Defender – was included as a fourth organ in the relevant Articles of the Statute; and (iii) giving the Principal Defender further leeway to draft Regulations for the Defence consistent with the Agreement, the Statute and the Rules.<sup>132</sup> During her time in Office, Ms Monasabien obtained approval from the Court’s judges, the Sierra Leonean government and the Court’s Management Committee for her proposed changes. Yet while the United Nations Legal Office had “agreed in principle” to the changes, the proposed amendments weren’t signed off by the Legal Office prior to Ms Monasabien’s departure and to this day, approval remains forthcoming.<sup>133</sup>

The idea was more recently revived by the current Principal Defender, Dr Vincent Nmehielle, at the Court’s Management Committee meeting in Sierra Leone in March 2006. He also reiterated this position in front of Trial Chamber I, arguing that the “Court

<sup>129</sup> Jones *et al* (2004).

<sup>130</sup> Kendall and Staggs (2005), page 19.

<sup>131</sup> Second Annual Report of the President of the Special Court: 1 January 2004 – 17 January 2005.

<sup>132</sup> Memorandum issued by the Principal Defender, dated 18 October 2004, emailed to the author (Michelle Staggs) on 23 February 2005.

<sup>133</sup> Email correspondence between Michelle Staggs and Ms Monasabien, 23 February 2005.

prides itself as having set up the Defence Office as the ‘fourth pillar’ in the Court and as an innovation in international criminal justice administration”.<sup>134</sup> In response to the Principal Defender’s comments in this regard, his Honour Justice Boutet, of Trial Chamber I, stated: “I don’t see anything in this rule that says this is a fourth pillar and you should have these kinds of privileges and duties, as such. I don’t see this in Rule 45.”<sup>135</sup> The issue was raised again by the Principal Defender during the judicial plenary meetings in May that year. In the latter forum, the Defence Office prepared a position paper on the independence of the Defence Office and circulated it to the judges.<sup>136</sup>

Regardless of these efforts, there seems to be little remaining support at the Special Court for the Defence Office to achieve its independence. While both the former Registrar and the former Prosecutor had previously stated they supported the Office’s moves towards independence,<sup>137</sup> more recently (i) the Registry has noted that the Defence Office is an administrative body that exists under its purview; and (ii) the prosecution opposes any reference to the Defence Office as a ‘fourth pillar’, indicating that it is unclear what is even implied by the phrase.<sup>138</sup> Both the Appeals Chamber (in December 2005) and Trial Chamber I (in March 2006) have opined that there is nothing in the Special Court’s Rules to support the Defence Office’s contention of independence.<sup>139</sup> As was clearly stated by the majority of the Appeals Chamber:

“It results from the Statute and the Rules that the Defence Office is *not an independent organ of the Special Court*, as Chambers, the Office of the Prosecutor and the Registry are pursuant to Articles 11, 12, 15, and 16 of the Statute. As a creation of the Registrar, the Defence Office and at its head, the Principal Defender, remain under the administrative authority of the Registrar. Although the Defence Office is given main responsibility for ensuring the rights of suspects and the accused...it is supposed to exercise its duty under the administrative authority of the Registrar who, notably, is in charge of recruiting its staff...”<sup>140</sup>

Hence, unless the Defence Office is able to obtain the approval of the United Nations Office of Legal Affairs to amend the Rules and the Statute, it seems unlikely that the independence of the Office will ever be realised.

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<sup>134</sup> SCSL Transcript, Trial Chamber I, 28 March 2006, page 38, lines 2-5.

<sup>135</sup> *Ibid.*, page 39, lines 13-16.

<sup>136</sup> Written comments from the Defence Office, September 2006. However, given the judges had already approved the changes to the Statute effecting the Office’s independence during Ms Monasabien’s time in office, it may be that the Defence Office would be better placed consulting the United Nations Office of Legal Affairs and requesting their approval for the amendments, rather than attempting to raise the issue once more at the Special Court.

<sup>137</sup> Kendall and Staggs (2005), page 17.

<sup>138</sup> Written response to Questions for the Chief of Prosecution, OTP, February 2006.

<sup>139</sup> Interview with Legal Advisor to the Registrar, March 2006.

<sup>140</sup> *Supra*, note 68, paragraph 83.

It is evident that there has been a marked shift in the role envisioned for the Office since the creation of the Court, and consequently that of the Principal Defender as well.<sup>141</sup> As establishing a full ‘public defender’ model became impossible, and a system more akin to a ‘legal aid’ model began to be instituted, the perceived role of the Principal Defender also began to change. Initially it was thought that the Principal Defender would act as an advocate before the Special Court and should thus be a senior trial attorney with extensive litigation experience. However, the role of the Principal Defender has been subsequently defined as primarily having an administrative focus in relation to the trial, largely concerned with the appointment of counsel and budgetary management.

Despite this shifting conception of the role of the Defence Office and the Principal Defender, Dr. Nmehielle has been a constant and outspoken supporter of a more expansive role for the Defence Office. The Principal Defender has continued to label his Office the ‘fourth pillar’ of the Court on the SCSL’s website, in press releases, in front of the Trial Chamber and in individual interviews. As part of this perceived role, the Principal Defender has sought a more public profile for both the Defence Office and for himself. While this is generally welcomed from the perspective of the Court’s Outreach activities, where the Principal Defender’s public profile can contribute to a lasting legacy in Sierra Leone for the defence, at times, his determinations regarding how best to advocate for the rights of the accused within the Court system have placed his Office in direct conflict with the defence teams. It is therefore important to look at how the question of the Office’s independence has played out at trial.

### **5.3 Upholding the Rights of the Accused: Interaction between the Defence Office, Defence Teams and the Registry**

As has been discussed extensively in Section 5.2, the extent to which the Defence Office has been allowed to exercise its functions as an independent ‘fourth pillar’ within the Special Court has waned throughout its existence.

An important secondary issue raised by this lack of independence has been the correct parameters of the relationship between the Defence Office and the Registry, on the one hand and the Defence Office and defence counsels, on the other. A series of instances at trial over the past year have shown that the Defence Office’s role has at points placed the Office in direct conflict with that of Assigned Counsel, the Registry or the Trial Chamber vis-à-vis determinations about how best to serve the interests of the accused persons. These have included instances where the Principal Defender or members of the Defence Office appear to have:

- (i) acted in a manner that was construed by the Trial Chamber as having ‘gone out of [the] way to undermine’ an earlier decision of the Chamber;<sup>142</sup>

<sup>141</sup> While Jones *et al.* remarked on this phenomenon several years ago, the shift has become even more pronounced in recent times.

<sup>142</sup> *The Prosecutor v Alex Tamba Brima, Brima “Bazzy” Kamara and Santigie Borbor Kanu* (SCSL-04-16-T) “Decision on the Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima Bazzy Kamara and Decision on Cross Motion By Deputy Principal Defender to Trial Chamber II for Clarification of Its Order Of 12 May 2005”, 9 June 2005 at paragraph 61.



- (ii) advocated, in one instance to deny a legal assistant the right of audience in front of the Trial Chamber, despite the assistant having achieved the consent of other defence counsels and the Chamber in order to speak;<sup>143</sup>
- (iii) attempted to address the Trial Chamber with opening statements for the accused in the CDF trial, despite not having informed any of the accused's counsels of its intention to do so;<sup>144</sup> and
- (iv) allowed outside counsel to visit an accused person, without the prior knowledge or consent of his Assigned Counsel.<sup>145</sup>

Although these incidences could arguably be seen as isolated events, they illustrate how the ambiguity surrounding the text of Rule 45, the Office's desire for independence (which now seems largely unsupported) and conflicting notions of how the Defence Office should manage its advocacy and administrative roles, has caused tensions to surface in the relationships between the Defence Office and some defence teams. In the most serious of these incidences, the actions of the Office may have contributed towards a total breakdown in communication between the counsel in question and the accused.<sup>146</sup> For the purposes of clarification, these examples will be explained in greater detail.

### 5.3.1 Rights of Audience for Legal Assistants

Due to the contractual nature of defence work, and the fact that many defence barristers at international tribunals maintain a practice in their home country, at least half of the defence teams at the Special Court have relied on the work of legal assistants or junior counsels to assist them in the preparation of their cases.<sup>147</sup> In some of the teams, however, despite their limited years of legal training, the work of these legal assistants (many of whom are themselves qualified lawyers in their home jurisdictions) has been akin to that of a co-counsel on the team.

Up until May 2005, the Special Court's Rules prohibited defence counsels with less than five years experience from representing the accused.<sup>148</sup> Recognising the need for greater flexibility in determining who should appear on behalf of the defence teams, the former Principal Defender, Ms Simone Monasebien, sought to have Rule 45 amended to allow

<sup>143</sup> See SCSL Transcript, Trial Chamber I, 25 November 2005 and Berkeley Trial Monitoring Programme, Report No. 64, 25 November 2005.

<sup>144</sup> See SCSL Transcript, Trial Chamber I, 18 January 2006.

<sup>145</sup> *The Prosecutor v Issa Hasan Sesay, Morris Kallon and Augustine Gbao*, (SCSL-04-15-T) 'Written Reasons For The Decision On Application By Counsel For The Third Accused To Withdraw From The Case', 19 June 2006.

<sup>146</sup> *Ibid.*, at paragraph 7.

<sup>147</sup> These include: For the Norman team (CDF trial) Ms Clare da Silva, for the Fofana team (CDF trial) Mr Andrew Ianuzzi, for the Kanu team, a lawyer from Knoops and Partners Advocaten in the Netherlands and for the Gbao team (RUF trial), a solicitor from TNT solicitors in the United Kingdom. Ms Sareta Ashraph of the Sesay team (RUF trial) was also initially appointed as a legal assistant, but the former Principal Defender, Ms Simone Monaseiban, advocated for the Special Court's Rules to be amended and Ms Ashraph was subsequently appointed as co-counsel.

<sup>148</sup> Rule 44(A) requires that counsel must have been admitted to practice in law in a State and practiced criminal law for a minimum of five years in order to be initially engaged by an accused. Rule 45(C)(iii) states that all lawyers who are on the Principal Defender's list of qualified counsel must have a minimum of 7 years relevant experience.

counsels with less than five years experience to be assigned as co-counsel in ‘exceptional circumstances’. According to Ms Monasabien, while it was clearly generally preferable to have counsel with several years experience appearing before the Special Court, it seemed unfair to apply this test to the defence only: given the prosecution was able to allow members of its team with less than five years experience to appear, the same standard should be applicable to the defence. The amendments were approved by the judges at the Special Court’s plenary meeting in May 2005.<sup>149</sup> Defence counsel with less than five years experience have subsequently been allowed to be granted co-counsel status in exceptional circumstances.<sup>150</sup>

In November of 2005, the issue of rights of audience for legal assistants arose in relation to one of the assistants working on the CDF case – namely, Mr Andrew Ianuzzi (of the Fofana defence team).<sup>151</sup> The Principal Defender sought to alert the Trial Chamber to the fact that Mr Ianuzzi was addressing the Court without the right of audience, despite Mr Ianuzzi having previously informed the Chamber of the fact that he was a legal assistant and the Chamber allowing him to proceed. While the Principal Defender seemed to be taking this measure in an attempt to clarify Mr Ianuzzi’s status to the Chamber and his right to make a secondary comment, his intervention seemed largely unnecessary. As was pointed out by a trial monitor who observed the incident:

“The Principal Defender particularly objected to Mr Ianuzzi addressing the Court on behalf of all three defence teams. However, lead counsel for both the first and third accused were present in Court and none of the defence teams objected to Mr Ianuzzi’s representations. Indeed, it appears there was prior consensus that Mr Ianuzzi speak on their behalf...Notably, the Principal Defender did not object to the content of any of Mr Ianuzzi’s submissions but only his ability to make them.”<sup>152</sup>

Since his appointment in late 2004, Mr Ianuzzi has drafted the majority of motions for the Fofana team’s case (albeit with the oversight of senior counsel) and has attended trial on a more regular basis than Assigned Counsel, who also manages a practice in his domestic jurisdiction.<sup>153</sup> As such, the attempt to silence him in order to conform to procedure in this instance seemed somewhat dubious in its aim. Notably, however, the Trial Chamber subsequently denied the Fofana team’s motion to allow Mr

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<sup>149</sup> Ms Monasebian made the request to the Judges in January 2005, bearing in mind that the former requirement of the Rules may be seen as “fundamentally unfair” if applied to the defence and not the prosecution. (Written email correspondence between Michelle Staggs and Ms Monasebian, 23 February 2005). Rule 45 was subsequently amended to include the following provision:

‘Notwithstanding Rules 44(A) and 45(C)(iii), the Principal Defender may, in exceptional circumstances, assign as co-counsel, individuals with less than five years admission to the bar of any State.’

<sup>150</sup> For example, Sareta Ashraph was granted co-counsel status on the Sesay defence team following the amendment.

<sup>151</sup> SCSL Transcript, Trial Chamber I (CDF trial) 27 November 2005. For the Principal Defender’s comments regarding Mr Ianuzzi’s right of audience, see page 39.

<sup>152</sup> Special Court Monitoring Program, Update No.64.

<sup>153</sup> Observations of the authors of Fofana defence team over the period September 2004 – June 2006.

Ianuzzi to appear on behalf of the accused in his capacity as a legal assistant.<sup>154</sup> The Chamber found that the motion was not properly before the Chamber, as the right of audience is an entitlement “intrinsic to the duty of defence counsel, who are either assigned by the Principal Defender...or appointed by the Chamber”.<sup>155</sup>

### 5.3.2 Opening Statements in the CDF Trial

Confusion over the role of the Principal Defender vis-à-vis the defence teams became apparent at the opening of the CDF defence case in January 2006. During the Status Conference that preceded the first day of the trial session, the Principal Defender requested an audience before the Trial Chamber so that he could make what was initially referred to as an ‘opening statement’ on behalf of the three accused.<sup>156</sup> Dr. Nmehielle had evidently not communicated this intention to any of the Assigned Counsel charged with representing the accused, who only became aware of the proposed intervention as it was being requested.<sup>157</sup> Assigned Counsel for the second accused raised an objection to the proposed actions of the Principal Defender on the grounds that he had no right to speak on behalf of his client’s interests and that this sort of intervention was not provided for in the Rules.<sup>158</sup> Subsequently, the Trial Chamber did not invite the Principal Defender to speak in court on the matter and Counsel withdrew his objection after receiving a copy of the Principal Defender’s Statement. The intended submission was published as a press release by the Defence Office shortly thereafter.<sup>159</sup>

While the Principal Defender’s proposed submissions did not address the specifics of any of the three cases, it seemed evident that Trial Chamber I was of the opinion that he was not in a position to address the Court on behalf of three accused, particularly without the prior knowledge or consent of Assigned Counsel. The Principal Defender, on the other hand, considered that he was carrying out his duties consistent with the Defence Office’s mandate, as established by Rule 45. The Principal Defender interprets this Rule as establishing that he leads the defence of the accused persons in front of the SCSL.<sup>160</sup> In this regard, Dr. Nmehielle appears to see his role as akin to the Prosecutor, who issued opening statements at the start of each of the trials. However, unlike the Prosecutor, whose team’s case is the result of the unified effort of trial attorneys all working under a joint understanding of theories of liability, the defence teams, though operating in a joint trial, are each defending separate accused, with separate theories to negate their client’s culpability. As a result, any attempt to make an opening statement should have, at the very least, been made after extensive consultation with the defence teams.

<sup>154</sup> *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* (SCSL-04-14-T) ‘Application for Right of Audience for Mr Andrew Ianuzzi’, 25 May 2006.

<sup>155</sup> *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* (SCSL-04-14-T) ‘Decision on Application by Court Appointed Counsel for the Second Accused for the Right of Audience for Mr Ianuzzi’, 27 June 2006, paragraph 5 of page 2 (preamble).

<sup>156</sup> SCSL Transcript, Trial Chamber I, 18 January 2006.

<sup>157</sup> Interviews with Defence Counsel, March 2006.

<sup>158</sup> SCSL Trial Monitoring Programme, Report No. 65, 20 January 2006.

<sup>159</sup> SCSL Press Release, ‘Statement Issued by the Principal Defender at the Beginning of the Defence Case in the CDF Trial’, 19 January 2006.

<sup>160</sup> Written Comments from the Defence Office, September 2006.

In this particular instance, the difference in the interpretation of the Rules, and the resulting attempt by the Principal Defender to assert an increasingly advocacy-based public role, similar to that of the Prosecutor, ultimately ended up only aggravating relations with certain defence counsel, who perceived his actions as inappropriate.<sup>161</sup>

The lacuna in Rule 45 seemed prevalent here: the Principal Defender felt he was able to speak on behalf of the accused because, according to the text of the Rule, it is *their* rights that he is to represent and it is *his* responsibility to ensure an effective defence. Yet this narrow interpretation of the Rule seems to undermine the legitimacy of the Defence Office and the role it seems increasingly envisioned to play: that is, to act as a co-ordinating body for the Defence as a whole, in primarily administrative ways.<sup>162</sup>

### 5.3.3 Management of the Ongoing Assignment or Withdrawal of Counsel

Two incidents relating to the on-going assignment of counsel have also occurred that illustrate the difficult position in which Defence Office has been placed vis-à-vis the accused and Assigned Counsel. In both instances, the Trial Chamber determined that the Defence Office's actions were inappropriate.<sup>163</sup>

#### *Appointment of new counsel in the AFRC case*

In the first instance, the Defence Office was placed in a compromising intermediary position, between two counsels who had sought (and attained) the right to withdraw as assigned counsel from the AFRC case, and their clients, who wished to have them reappointed.<sup>164</sup> The Defence Office, who was given the task of managing the reappointment, had to determine whether to comply with the instructions of the Registry and appoint new counsel, or whether they should seek instead to defend the position maintained by the two accused and assist them in having their counsel reappointed. Again, the text of Rule 45, which mandates the Office to 'ensure the rights of suspects and the accused', was interpreted by the Office as making compliance with the Registrar's instructions at least questionable. The Defence Office therefore sought clarification from the Chamber as to whether a counsel who had been *permitted* to withdraw from the case was *obliged* to withdraw. The Deputy Principal Defender, then acting as the Principal Defender, noted that there was no Rule or Directive disqualifying counsel who had previously withdrawn from the case from being re-appointed.<sup>165</sup>

<sup>161</sup> Interview with Defence Counsel, January 2006.

<sup>162</sup> The former Registrar, Mr Robin Vincent, who was primarily responsible for the establishment of the Defence Office, made this clear in interviews conducted with him in March 2005. (See Kendall and Staggs, (2005), page 19).

<sup>163</sup> See *The Prosecutor v Alex Tamba Brima, Brima "Bazzy" Kamara and Santigie Borbor Kanu* (SCSL-04-16-T) 'Decision on the Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima Bazzy Kamara and Decision on Cross Motion By Deputy Principal Defender to Trial Chamber II for Clarification of Its Order Of 12 May 2005', 9 June 2005, paragraph 61 and *The Prosecutor v Issa Hasan Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15-584) 'Written Reasons for the Decision on Application by Counsel for Third Accused to Withdraw from the Case', 19 June 2006, paragraph 36.

<sup>164</sup> The issue was fully and finally settled on appeal last year in December. See *Supra*, note 68.

<sup>165</sup> See *The Prosecutor v Alex Tamba Brima, Brima "Bazzy" Kamara and Santigie Borbor Kanu* (SCSL-04-16-T) "Decision on the Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin

The Trial Chamber considered the Defence Office's action to have been a direct attempt to undermine their decision to allow the withdrawal of counsel. According to the Chamber:

“Looking at the history of this case...it seems to us as though the Deputy Principal Defender has gone out of her way to undermine our decision. Almost a month has gone by and she has made no attempt to appoint new lead counsel. It appears she is unwilling to do her job, and unwilling to follow the directions of the Registrar who has overall authority of...the assignment of counsel...”<sup>166</sup>

When the decision was subsequently the subject of an appeal, the Appeals Chamber did not comment on the impropriety or otherwise of the Deputy Principal Defender's actions, although it did note that Trial Chamber was correct to assert the Registrar had ultimate control over the assignment of counsel.<sup>167</sup>

Again, trial time seems to have been taken up, largely determining the correct parameters of the Defence Office's role under Rule 45 (this time, vis-à-vis the Registry). In a separate and concurring opinion issued by Justice Robertson, Robertson notes that the matter, which largely related to administrative concerns regarding how to implement the Trial Chamber II's decision allowing the withdrawal of counsel, had 'generated over 1000 pages of evidence and argument' and 'had been costly and time consuming for a court which had little time and money to spare'.<sup>168</sup> The majority decision noted that Trial Chamber II had correctly surmised that judicial review of administrative decisions fell under the purview of its Chamber and had proceeded on this basis.<sup>169</sup> The Appeals Chamber's findings, consistent with the findings of the ICTR in the *Ntahobali* case, also further noted that there was a need for the juridical review of decisions affecting the rights of the accused where the matter involves 'a substantive right that should be protected as a matter of human rights jurisprudence or public policy'.<sup>170</sup> Yet given Trial Chamber II had already determined that the counsel in question should be allowed to withdraw, whether there was a need for further deliberation on the matter seems debatable instance.

#### ***Accused visited by non-appointed Counsel in the RUF case***

The second instance relates to the Defence Office's actions in a case where an accused was visited by non-SCSL counsel without his Assigned Counsel's consent. The incident was made public during the course of the RUF trial session in March 2006, after

Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima Bazy Kamara and Decision on Cross Motion By Deputy Principal Defender to Trial Chamber II for Clarification of Its Order Of 12 May 2005”, 9 June 2005, paragraph 11.

<sup>166</sup>Ibid, paragraph 61.

<sup>167</sup> *Supra*, note 68.

<sup>168</sup> *Supra*, note 68, at paragraph 2.

<sup>169</sup> *Supra*, note 68, at paragraph 76.

<sup>170</sup> *The Prosecutor v Ntahobali* (ICTR-97-21-T), 'Decision on the Application by Arsene Shalom Ntahobali for Review of the Registrar's Decisions Pertaining to the Assignment of an Investigator' (President Pillay), 13 November 2002 paragraphs 4 -5.

Professor Andreas O'Shea, counsel for the third accused (Augustine Gbao) sought to withdraw from the case.

During the course of his application to withdraw, with prompting from the Bench, counsel made several allegations regarding the conduct of the Defence Office. O'Shea contended that the declining quality of his relationship with his client was in part due to the inappropriate interference by the Office - interference which had "contributed to a total breakdown in communication with the Accused".<sup>171</sup> According to O'Shea, Duty Counsel had seemingly allowed outside (i.e. non-SCSL) counsel to visit his client without his prior knowledge or consent.<sup>172</sup> According to the Principal Defender and Duty Counsel, they were not aware that the party in question was visiting the accused in his capacity as a lawyer. Gbao subsequently requested that that party represent him, and that his current counsel be asked to withdraw from the case.<sup>173</sup>

Following correspondence and a meeting with the Presiding Judge of Trial Chamber I, the Principal Defender suggested that the lawyer in question might be appointed as Co-lead Counsel.<sup>174</sup> According to the Principal Defender, the idea of having an additional counsel on the Gbao team who was a Sierra Leonean lawyer received support from the Presiding Judge, who agreed that "a local lawyer was necessary as an additional resource...given the local dimensions of the case".<sup>175</sup> While O'Shea indicated that he had not been privy to much of the communication regarding the representation of his client, the Principal Defender clarified that O'Shea had been copied on all relevant correspondence.<sup>176</sup>

O'Shea further alleged that Duty Counsel had communicated a privileged conversation regarding the sensitive matter of fee-splitting back to his client, again without his knowledge or consent.<sup>177</sup> The Principal Defender and Duty Counsel rebutted these allegations: according to Ms Haddijatou Kah-Jallo, Duty Counsel for the RUF case, although the issue of fee-splitting had been raised with the accused, she had not discussed the issue in the context of O'Shea's comments.<sup>178</sup>

Trial Chamber I reiterated its concern over the actions of the Defence Office and Justice Boutet went so far as to indicate that the Defence Office was overstepping its legally mandated, and thus proper, role.<sup>179</sup> The Chamber found that, on an analysis of the

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<sup>171</sup> *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15-T) 'Written Reasons for the Decision on Application by Counsel for the Third Accused to Withdraw from the Case', 19 June 2006, at paragraph 7.

<sup>172</sup> The Defence Office attempted to contact O'Shea but, when unable to reach him, contacted another member of the team.

<sup>173</sup> SCSL Transcript, Trial Chamber I (RUF trial), 28 March 2006 at page 27, lines 18 and 19.

<sup>174</sup> *Ibid.*, at page 8, line 5 to page 9, line 6.

<sup>175</sup> *Ibid.*, at page 8, lines 27-28.

<sup>176</sup> With the exception of direct communications between the Principal Defender and the Presiding Judge. *Ibid.*, at page 9.

<sup>177</sup> This allegedly included communicating to Gbao O'Shea's fear that the issue of fee splitting was the real reason that he wanted O'Shea to withdraw as counsel.

<sup>178</sup> *Ibid.*, at pages 51 and 52.

<sup>179</sup> SCSL Transcript, Trial Chamber I, 28 March 2006.



facts, it could not accept the Defence Office's assertion that it did not know the proposed reasons for the non-SCSL counsel's visit to Mr Gbao. Given the circumstances, the Chamber found that the Defence Office:

“failed to appreciate their role and duties with respect to an Accused they knew was represented by a Counsel assigned to him and finds that they should not have introduced Mr Shears Moses [non-SCSL counsel] to the Accused without the knowledge and consent of the Assigned Counsel, Professor O’Shea.”<sup>180</sup>

The Trial Chamber continued, stating that the Defence Office is not one of the principal organs of the court and that its institutional role should accordingly reflect this.<sup>181</sup> It described the Office as a “major *subordinate* legislative instrument of the court”.<sup>182</sup> From this perspective it is the Registry that ultimately presides over the Defence, and the Defence Office is relegated to the implementation of certain limited aspects of this function.

The Chamber found that the dispute between the Third Accused and his Counsel “arose, in part, out of a legal misconception on the part of the Defence Office as to its proper institutional role with the Special Court.”<sup>183</sup> To be fair, it should be noted that the current Principal Defender effectively inherited a ‘poisoned chalice’, in the sense that from the outset, the Office’s role has been unclear and misconstrued.<sup>184</sup> In fact, the very first head of the Defence Office, John Jones, critiqued the shift in the role of the Office: the constraints he claimed it imposed on the Office’s work as early as 2004 have been echoed more recently.<sup>185</sup> If indeed the Defence Office was meant to serve primarily an administrative function at this stage of the trial, then the Rules could have been clearer on this point: while Trial Chamber I has opined that the language of Rule 45 is “clear, precise and explicit in providing for the creation of the entire machinery of the Defence Office”<sup>186</sup>, given the historical context under which the Office has operated and the leeway the Rule gives to the Office to determine its role, it may be that Rule 45 needs to be amended to clarify further the limited nature of the Office’s role once counsel is assigned. Despite the historical legitimacy of seeing the Defence Office as a ‘fourth pillar’ at the SCSL, Trial Chamber I has now clearly pronounced the role of the Defence Office to be:

“primarily *not* to represent and defend suspects and accused persons in collaboration or conjunction with Assigned Counsel...On the contrary, the *proper interpretation to be given to Rule 45 in terms of the role of the Office...* is that of (i) providing preliminary or tentative legal advice and assistance to suspects and accused persons with a view to their being afforded their right to effective legal representation and defence through the instrumentality of the Assigned Counsel Regime, and (ii) of *continuous administrative supervision, under the direction of*

<sup>180</sup> *Supra*, note 172, at paragraph 36.

<sup>181</sup> *Ibid.*, at paragraph 38.

<sup>182</sup> *Ibid.*, paragraph 39, emphasis in the original.

<sup>183</sup> *Ibid.*, paragraph 37.

<sup>184</sup> Interview with the Legal Advisor to the Registrar, March 2006.

<sup>185</sup> Knowles (2006).

<sup>186</sup> *Supra*, note 172, at paragraph 40.

*the Registrar, of the Assigned Counsel Regime to ensure its effectiveness and efficiency in achieving its objectives... [Emphasis added]*<sup>187</sup>

Given the support for this position, both from Trial Chamber II and at the Appeals Chamber level, any possibility that the Defence Office will achieve independence now seems highly unlikely.

#### **5.4 Representing the Defence: Working with Defence Counsels to Represent the Accused**

It is important to note that not all attempts by the Principal Defender to assert the Defence Office's authority to represent the accused at trial have caused tension within the Defence. The Defence Office recently filed a motion with the Trial Chamber in which the Principal Defender stated his opposition to the Registrar's decision to install surveillance cameras in the detention facility of the Special Court.<sup>188</sup> The Defence Office filed the motion in question at the behest of the nine accused being held in the detention facility, who felt that the installation of surveillance cameras would affect their ability to meet freely with potential witnesses. The Defence Office viewed the installation of the cameras as a potential violation of the rights of the accused, as enshrined in Article 17 of the Statute. It consulted with Assigned Counsel on the motion, Counsel themselves being generally averse to such filings as it falls beyond their payment remit.<sup>189</sup>

While the Principal Defender initially attempted to sort out the matter administratively, due to unavoidable problems related to document filing as well as pressure from the detainees for a quick resolution, the motion was filed directly before both Trial Chambers.<sup>190</sup> It has been suggested that a further intention of the motion was to invoke further judicial debate that would precipitate the Chamber publicly pronouncing the proper role of the Office.<sup>191</sup> Regardless, the motion did indeed spark rigorous argument regarding both "the Principal Defender's power relative to that of the Registrar" as well as "the Principal Defender's power in respect of counsel that he engaged to represent the various accused".<sup>192</sup>

The Registrar contended that only the detainee's counsel had the authority to bring a motion requesting protection of the accused's fair trial rights and that consequently the Principal Defender did not possess the concurrent *locus standi*<sup>193</sup> to bring the motion. In his rebuttal, the Principal Defender stated that the Defence Office

<sup>187</sup> *Supra*, note 172, paragraph 41.

<sup>188</sup> 'Principal Defender's Motion for a Review of the Registrar's Decision to Install Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone', 31 January 2006 (password protected website). While the Defence Office may regularly oppose particular actions undertaken by the Registry that it considers at odds with the interests of accused persons it has been rarely brought in front of the Trial Chamber.

<sup>189</sup> Written Comments from the OPD, September 2006.

<sup>190</sup> *Ibid.*

<sup>191</sup> Interview with Defence Office contractor, March 2006.

<sup>192</sup> 'Reply to the Interim Registrar's Response to the Principal Defender's Motion for a Review of the Registrar's Decision to Install Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone', SCSL-04-14-558, 14 February 2006, paragraph 5. (Password protected website).

<sup>193</sup> *Locus Standi* refers to the ability to have standing to file a motion before the Trial Chamber.

has the “main responsibility” for ensuring the rights of the accused and was condoned by the Trial Chamber to independently discharge these duties.<sup>194</sup> This position is, however, in contrast to a decision delivered by the Appeals Chamber, which stated that, according to the Statute, all three organs of the Court share, as a common duty, responsibility for ensuring the rights of the Accused.<sup>195</sup> Pursuant to this, the Registrar delegates *partial* responsibility for ensuring the rights of the accused to the Defence Office, and that this responsibility largely entailed the administrative aspects of the accused’s detention.<sup>196</sup>

The Principal Defender further argued that his standing before the Trial Chamber was not affected by the assignment of counsel to the Accused. He stated that this delegation did not mean that the Principal Defender had divested himself of the power to represent the accused either solely, or concurrently with Assigned Counsel.<sup>197</sup>

The motions advanced by the Principal Defender, with respect to ensuring the rights of the accused, illustrate the constructive role the Defence Office can take given the division of functions between Assigned Counsel and the Office in terms of detention issues. With the consent of the nine accused as well as their Assigned Counsel, it seemed appropriate for the Defence Office to step forward to advocate on behalf of the Accused. As has been noted by Justice King, that the Defence Office can exercise independence from the Registry in the interests of justice.<sup>198</sup> This seemed to be an instance where the Defence were in agreeance that the interests of justice called for the Defence Office’s intervention.

Perhaps regrettably for the Defence Office, however, the Trial Chamber eventually dismissed the motion, ruling that the Principal Defender did not have *locus standi* in this instance, given that he was *neither* counsel for the Accused *nor* counsel for the Prosecution.<sup>199</sup>

Clearly, the advocacy role envisaged by Justice Robertson’s initial ‘public defender’ model for the Defence Office has now been subsumed by a vision in which the Office plays a much more administrative role. Despite the recent attempts described in which the Principal Defender and the Defence Office have attempted to assert both (i) the independence of the Office from the Registry and (ii) their ability to advocate for the rights of the accused (with or without the consent of the accused’s counsel) the consensus of both the Trial and the Appeals Chamber at the Special Court has been that the Defence Office should act as a sub-Office of the Registry to assist in the administration of the Defence. As was stated by Trial Chamber I in its recent decision regarding the withdrawal of counsel for the third accused in the RUF trial:

<sup>194</sup> *Supra*, note 194, paragraph 7 and 8.

<sup>195</sup> *Supra*, note 68, paragraph 84.

<sup>196</sup> ‘Interim Registrar’s Response to the Principal Defender’s Motion for a Review of the Registrar’s Decision to Install Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone’, SCSL-04-14-556, 8 February 2006, paragraph 4.

<sup>197</sup> *Supra*, note 194, paragraph 14.

<sup>198</sup> *Supra*, note 68, Separate and Concurring Opinion of Justice King, paragraph 49.

<sup>199</sup> ‘Decision on the Principal Defender’s Motion for a Review of the Registrar’s Decision to Install Surveillance Cameras in the Detention Facility’, SCSL-04-14-586, 6 April 2006.

“It is [also] the Chamber’s view that the institutional role of the Defence Office, once defence counsel have been assigned or appointed to an Accused person, is essentially to provide legal research as well as fiscal, logistical and related support services to Counsel assigned to defend the rights of suspects and of accused persons of crimes falling within the jurisdiction of the Court.”<sup>200</sup>

As a result, it is clear that the primary advocacy role within the Courtroom should fall to the defence teams. However, as will be shown in Section 6 of this report, the Defence Office has an important advocacy role to play outside the Courtroom, in ensuring that the rights of suspects and the accused are given the attention they deserve in the legal reform agenda within Sierra Leone’s domestic judicial sector.

## **6. IMPACT OF THE DEFENCE OFFICE**

As has emerged so far from the findings of this report, while the innovative creation of a permanent Defence Office at the Special Court has seemingly benefited the institution in many respects, both the institutional structure of the Office and the function it performs have become contentious throughout its lifespan.

With regards to the Office’s institutional structure, the fact that the Defence Office’s is tied to the Registry for its funding, rather than being an independent office, has made its budget at times insecure. While the defence budget experienced an increase in its funding for ‘staffing costs’ during the 2005-06 period, this did not amount to any additional funding for the contractual services needed for individual defence teams, who effectively received a seventy per cent cut in their budgets. The Special Court’s most recent Registrar, Mr Lovemore Munlo, seemingly did not issue a 2006-07 budget during his time in office, and therefore, this report has not been able to determine whether the situation has improved for the Defence at the Special Court.

With regards to the function the Defence Office performs, ambiguities in the SCSL’s Rules has led to a significant amount of the Special Court staff’s time being taken up with attempting to define clearly the Office’s mandate. More recently, this has included trial time, which would have seemingly been better spent determining the substantive issues pertaining to the accused persons’ cases.

It is important, however, before drawing any conclusions, to look finally at the impact of the Defence Office at the SCSL. Having determined that the Defence is operating under some significant budgetary constraints and that the role of the Defence Office is largely administrative at this point in trial, this report now looks at how the Defence Office is perceived to be managing the Defence Budget and its administrative duties.

While a complete evaluation of the Defence Office’s accomplishments and shortcomings remains necessary, there are certain areas of concern that directly impact

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<sup>200</sup>*Supra*, note 172.

the quality of the defence at the SCSL that will be discussed in this section. These include: the supervisory role of the Defence Office, the relationship between Duty Counsel and Assigned Counsel, the institutional resources offered by the Defence Office, and the system of payment of professional fees.<sup>201</sup> Finally, the important role the Defence Office continues to play in Defence Outreach will be discussed.

### **6.1 Supervisory Role of the Defence Office**

One of the stated functions of the Defence Office is to oversee the work of the defence teams and to ensure a credible defence.<sup>202</sup> Generally speaking, it is the Duty Counsels that carry out this oversight role, although the Principal Defender also speaks with counsel regarding their performance, in cases where he/she has cause to do so. This supervisory role includes monitoring court proceedings (and as such, defence counsel's performance in court) and the filing of motions.

Interviews with several defence counsel revealed that they generally have limited interaction with Duty Counsel regarding their legal work.<sup>203</sup> Hence, while the Office as a whole is also responsible for "standard-setting" in relation to counsel's performance, it appeared unclear how these standards were being implemented. A Defence Office contractor suggested that the supervisory activities undertaken by the Office in this regard were generally of a quantitative, rather than a qualitative nature.<sup>204</sup> In other words, generally speaking, the Defence Office was more interested in monitoring the number of submissions tendered and whether the teams have met their deadlines regarding the filing of documents, rather than the nature, composition or arguments contained in the submissions themselves. Given the issues surrounding the conflicts of interests the Defence Office may encounter were it to enter into any in-depth qualitative analysis of the individual team's motions, it seems understandable that the Office may resist doing so. Furthermore, independent counsels are likely to be wary of any outside interference with respect to their cases, hence likely making it difficult for the Defence Office to comment.

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<sup>201</sup>Unfortunately, due to an interdiction by the Registry against conducting interviews with detainees held in the detention facility of the Court, the direct impact of the Defence Office's policies and actions on the well-being of the accused could not be fully investigated in this report. (Email correspondence with the Registrar, 6 June 2006).

<sup>202</sup>Neither the Rules nor the Directive state that the Principal Defender or the Defence Office is to supervise the Defence: while it is clear that the Principal Defender must employ qualified counsel, who conform to the criteria listed in Rule 45(C), the extent to which the Office or the Principal Defender should play an oversight role in their performance is left somewhat ambiguous. However, the Court's 2004-05 Annual Report states that:

"After the assignment of counsel to the Accused, members of the Principal Defender's Office engage in oversight of the Defence teams. The Office monitors trials and provides advice and substantive assistance to all teams in the preparation of their cases, from research on legal issues to arguments on matters of common interest, to vetting the provision of expert witnesses, to consultants and investigators, and liaising with various governments and other entities on matters of judicial cooperation." Special Court Annual Report (2004-05), at page 20.

<sup>203</sup> Interviews with Defence Counsel, February and March 2006.

<sup>204</sup> Interview with Defence Office Contractor, March 2006.

Despite the difficult line the Defence Office must walk in terms of its supervisory role, the Office has intervened in relation to some qualitative aspects of counsel's work on a case-by-case basis.<sup>205</sup> However, the Office has maintained that the extent or effectiveness of these interventions should remain confidential, given the sensitivities involved in divulging this aspect of their work.<sup>206</sup>

Some defence teams have stated that the Defence Office has provided valuable assistance regarding structuring draft motions. For example, the Kondewa defence team has indicated that they had received help from the Defence Office in this regard. The Office also offered the team advice on legal argumentation when solicited. However, several other defence counsel were unable to give examples of the Defence Office intervening to assess the quality of their work or to provide assistance with legal drafting.<sup>207</sup> As suggested above, this may stem in part from the reticence of some Assigned Counsel to involve outside counsel with their case. However, some defence counsels also stated that they believed the Office would not be able to provide relevant assistance in a timely manner if its help was solicited.<sup>208</sup>

The Defence Office's supervisory role thus seems to be limited to a more *reactive* approach: rather than offering a continuous check on the quality of representation being afforded to the Accused, it acts to provide qualitative assistance to counsel when it is solicited, or to respond to the reprimands of the Trial Chamber to ensure that counsel is adhering to its orders.

## 6.2 Performance of Defence Teams

While it is difficult to make qualitative assessments of the Defence as a whole prior to the completion of the cases, many defence counsels at the Special Court can be seen to provide the accused with a rigorous defence.<sup>209</sup> However, there have been several instances where both Trial Chambers have shown concern relating to the performance of defence counsels.

In the CDF trial, defence counsel have been cautioned by the Chamber regarding the harassment of victim witnesses, particularly when they allege that the witnesses are not telling the truth about their injuries.<sup>210</sup> The Chamber has also been mindful of repetitive, argumentative and irrelevant cross-examination.<sup>211</sup> In several instances, some counsel have also adopted the technique of alleging that the events that witnesses have

<sup>205</sup> Written Comment from the Defence Office, September 2006.

<sup>206</sup> Written comments of the Principal Defender, September 2006.

<sup>207</sup> Interview with Defence Counsel, March 2006.

<sup>208</sup> Written comments of defence team, October 2006.

<sup>209</sup> See generally Sierra Leone Special Court Monitoring Program for further details as to the extent of cross-examination for each of the individual trials. Although statistical analysis should be approached with caution, given the variances of each case, cross examination in the RUF trial is particularly lengthy, with the Chamber spending approximately 60 per cent more time hearing cross-examination than direct examination in the trial during the period August 2004 to July 2005. (This compares with 30 per cent more time hearing cross-examination than direct examination in the CDF trial). See Staggs (2006), page 7.

<sup>210</sup> See Special Court Monitoring Program, Update No. 21 (page 3), Update No.22 (page 3).

<sup>211</sup> See Special Court Monitoring Program, Update No. 11 (at page 6), Update No.14 (at page 4), Update No. , Update No.67 (page 7).



stated took place are “a figment of their imagination”, without laying any proper foundation for this claim, and often after the witness has clearly reiterated the statements s/he has made in examination in chief.<sup>212</sup> Defence counsels on the CDF case have also been reprimanded for their “major non-compliance” with Court orders in relation to the presentation of the Defence case.<sup>213</sup>

In the Fofana defence team there also appears to be a lack of a continued presence of lead counsel at trial, meaning that co-counsel has had to cross-examine certain key insider witnesses on his own.<sup>214</sup> Furthermore, even when lead counsel does appear, he seems sometimes not to have been fully prepared: for example, during senior counsel’s presentation of the team’s Motion for Judgment of Acquittal, he had to be reminded of the team’s own written submission, after beginning to formulate an argument in direct opposition to the submissions the team had made.<sup>215</sup>

In the RUF trial, defence counsel have been urged by the Chamber, where possible, to limit the extent of their cross-examination, with the Chamber particularly mindful of counsels for different teams asking the witnesses the same questions.<sup>216</sup> In the AFRC trial, defence counsel for the third accused, did, on occasion earlier in the trial, refrain from coming to court without explanation.<sup>217</sup> During the testimony of the first accused in the Defence case, Defence counsel in the AFRC trial were reprimanded for their failure to lay adequate foundations for the first accused’s knowledge of certain events and issues relating to command.<sup>218</sup> Adjournments due to the failure of defence witnesses being ready and able to testify have also been a concern for the Chambers in both the CDF and AFRC defence cases.

Defence counsel for the first accused in the CDF trial has also been heavily criticised by both the Trial and Appeals Chambers in relation to motions he has drafted.<sup>219</sup> The Trial Chamber found the language used in one such motion to be

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<sup>212</sup> See Special Court Monitoring Program, Update No.12 (page 4), Update No.14 (page 4), Update No. 21 (page 8), and Update No. 41 (page 4).

<sup>213</sup> SCSL Transcript, Trial Chamber I, 25 November 2005. The defence teams in the CDF trial were deemed to have failed to comply with the Chamber’s order regarding defence disclosure. See also Special Court Monitoring Program, Update No. 64. The Chamber noted that the defence had: (1) refused to submit the names of the witnesses they intended to call; (2) provided inadequate summaries of witness testimony; (3) refused to submit any exhibits; and (4) refused to submit a required evidence chart.

<sup>214</sup> In general, senior counsel for the Fofana team has attended trial for two to three weeks out of the four to six week sessions. Senior counsel was not present for the cross-examination of Albert Nallo, a key insider witness in the CDF case.

<sup>215</sup> SCSL Transcript, Trial Chamber I, (CDF trial) 20 September 2005, at page 7.

<sup>216</sup> See Special Court Monitoring Program, Update No.48, page 3. The prosecution has also been asked to limit the extent of examination-in-chief.

<sup>217</sup> Special Court Monitoring Program, Update No.34, page 3.

<sup>218</sup> See Special Court Monitoring Program, Update No.78, page 3 and Update No.79. However, the prosecution has also been similarly reprimanded during their cross-examination: see Special Court Monitoring Program, Update No.80.

<sup>219</sup> See: ‘Decision on First Accused’s Motion on Abuse of Process’, SCSL-04-14-385, 28 April 2005. ‘Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber’s Decision on First Accused’s Motion on Abuse of Process’, SCSL-04-14-406, 24 May 2005 and ‘Decision on Norman Counsel’s Request for Leave to Appeal Under Rule 46(H)’, SCSL-04-14-449, 25 July 2005.

‘unprofessional and bordering on contempt’ and the motion itself frivolous and a gross abuse of process.<sup>220</sup> The counsel in question subsequently submitted a motion for leave to appeal. The Chamber subsequently ordered the Principal Defender to withhold counsel’s costs and fees associated with that, and a subsequent motion, submitted by counsel to launch a further appeal.<sup>221</sup> The Appeals Chamber has also reprimanded the same counsel for using language in a motion tantamount to “gibberish”. The paragraph in question reads as follows:

**“B. Modes of Subsistence: Abuses of Process**

Dogged and calculated Prosecution adamancy in the avoidance and evasion of material and/or mandatory rules of procedure, which readily tend to poke one in the eyes as compellingly applicable in the respective circumstances, together with the ulterior reasoning and impulsion thereto, plus the consistent (even unintended) blessing of equally determined judicial endorsements thereof, and a certain congenital constitutive anomaly, have effectuated modes of subsistence or sustension for the current consolidated Indictment which are tantamount to a gross and sustained abuse of process that has, in its own turn, and from the very constituting of the Special Court and the earliest beginnings of the entire Prosecution process right up until the present proceedings, repeatedly violated and egregious prejudiced the due process rights (substantive and procedural alike) of the accused persons, and thereby subverted the interests of justice and the integrity of the international criminal justice process itself.”<sup>222</sup>

Paragraphs such as this one raise serious concerns regarding the effectiveness of this counsel’s representation of the first accused. As has been stated, members of the Defence Office preferred to refrain from commenting on the extent to which they had spoken to counsel regarding the qualitative aspects of their performance. Certainly, it would seem that a qualitative supervisory role is warranted and necessary.

### **6.3 The Relationship with Duty Counsel**

The relationship between Duty Counsel and Assigned Counsel is an extremely important one as they both directly interact with the accused on a regular basis. While in theory there is a separation in the function performed by Duty Counsel and that of Assigned Counsel – the former refraining from discussing legal matters with the accused - in practice there is an overlap between the two.

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<sup>220</sup> ‘Decision on First Accused’s Motion on Abuse of Process’, SCSL-04-14-385, 28 April 2005, paragraph 20.

<sup>221</sup> See: ‘Decision on First Accused’s Motion on Abuse of Process’, SCSL-04-14-406, 24 May 2005 and ‘Decision on Norman Counsel’s Request for Leave to Appeal Under Rule 46(H)’, SCSL-04-14-449, 25 July 2005.

<sup>222</sup> SCSL-2004-14-AR73-397 ‘Decision on Amendment of the Consolidated Indictment’, 16 May 2005, paragraph 48.

Duty Counsel generally focus on detainee welfare and play a particularly important role when Assigned Counsel is out of town, as many international counsel are when trial is not in session. Assigned Counsel at the SCSL noted that they were not regularly informed of the frequency or content of Duty Counsel's visits to their clients. However, the Defence Office maintains that information regarding the frequency of Duty Counsel's visits to Detainees is recorded by the SCSL Detention Facility and is available upon request.<sup>223</sup>

Some counsels have gone so far as to claim that their client has appeared to trust them less due to the interference of Duty Counsel, who they perceive to have undermined the privileged nature of their relationship. One Counsel in question explained that his relationship with the accused was distinctively different than that he experienced with clients at other international tribunals. He attributed this to perceived interference and alleged advice given by Duty Counsel in terms of the direction of the client's case and potential witnesses to be called.<sup>224</sup>

The fact that Duty Counsel are themselves fully qualified lawyers, often with substantial litigation experience, who have likely formed a close relationship with the accused during the initial phases of the trial, may mean that there is a danger for them to become too close or involved with the Accused. Duty Counsel has however emphasized that their primary relationship with the Accused is to ensure their welfare and have stated that they would never act to undermine the position of Assigned Counsel.<sup>225</sup> Nevertheless, Assigned counsel seemed very aware that Duty Counsel are fellow lawyers, not social workers who will strictly address welfare issues. In addition, defence lawyers are generally unaccustomed to any sort of outside interference, given their normal position of independence, and are unfamiliar with this sharing of duties regarding their client, hence meaning that this novel kind of relationship is not always easily negotiated.

In certain instances, due to both perceived and actual impropriety, the utility of having a Duty Counsel assigned to each case has been undermined by the lack of trust between the Duty counsel and the Assigned Counsels on that case. However, there are also instances where Duty Counsels have crucially assisted with the re-establishment of a cooperative relationship between Counsel and client.<sup>226</sup> Unfortunately the accused persons' own perspective on the presence of Duty Counsel and their impact remains unknown as permission to conduct interviews with the accused on the matter was denied.<sup>227</sup>

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<sup>223</sup> Written Comment from Defence Office, September 2006.

<sup>224</sup> Interviews with Defence Counsel, March 2006 and September 2006.

<sup>225</sup> Interview with Duty Counsel, May 2006.

<sup>226</sup> SCSL Transcript, Trial Chamber I, 28 March 2006. Duty Counsel in the RUF case stated that she facilitated the resumption of communication between Counsel and the Accused following the Accused's refusal to attend court proceedings or cooperate with Counsel for several months.

<sup>227</sup> Email correspondence with the Registrar, 6 June 2006.

#### 6.4 Staff Assistance and Institutional Resources

The Defence Office was designed to offer the independent defence teams institutional resources that would facilitate their work and ultimately better ensure that fair trials standards, and the underlying model of ‘equality of arms’, are realized. Part of the role of the Defence Office is thus to provide specialized legal research as well as administrative support to the teams. However, there seems to exist a disconnection between some of the resources offered by the Office and the needs of the defence teams. Consequently, certain resources that are in place often go either under-used or completely unused, while the needs of the teams go unaddressed.

As described in Section 3.5, the Defence Office has recently created several new positions and employed new members of staff in an attempt to assist the defence teams. According to the Principal Defender, the majority of the defence teams at the Special Court have fully utilised the assistance of these support staff.<sup>228</sup> In particular, the Defence Witness Liaison has assisted with the tracing of certain witnesses and facilitated various testimonies through confidence-building efforts.<sup>229</sup> However, members of some defence teams have indicated that they would have preferred to have been consulted about the extent to which these positions were actually needed by their team prior to being hired:

“While this was done to assist the teams, there was no discussion with teams beforehand as to neither what support the teams required nor why specialist members of the [Defence Office] needed to be hired as opposed to the Duty Counsel liaising with the established Outreach and Witnesses Sections of the Court. That is not to say that the Counsel would necessarily have opposed such hirings in the event of a discussion, but rather the lack of communication added to a generally tense relationship.”<sup>230</sup>

Given the budgetary allocations to ‘contractual services’ were significantly reduced at around the same time funding for these positions became available, such tensions seem understandable. Further, as one of the Defence Office’s key roles is to provide counsel with adequate facilities for the preparation of the Defence, further consultation with regard to the extent to which hiring these staff would assist them with their work seems warranted. It also may have further enhanced the extent to which the services provided by these staff members were utilised by the Defence.

The Defence Office is also provided with several interns by the Registry. However, Registry policy has meant that those assigned to the Defence Office itself are often restricted from working for the individual defence teams, despite the needs of counsel for additional assistance.<sup>231</sup>

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<sup>228</sup> Written comment from the Defence Office, September 2006.

<sup>229</sup> Written Comment from the Defence Office, September 2006.

<sup>230</sup> Written response from defence team, 28 October 2006.

<sup>231</sup> Interview with Legal Assistant, March 2006.

## 6.5 Legal Research Work

The Defence Office is also tasked with providing legal research and argumentation on matters of common interest to the teams, a particularly important role given the pool of legal resources available to the Prosecution as well as the complexity of the criminal charges faced by the Accused (as discussed in Section 3 of this Report). Conducting the extensive research needed can prove to be an onerous task, given that many of the defence teams already faced massive amounts of work keeping up with drafting motions for the day-to-day exigencies of the trial.

However, several defence lawyers noted that the legal research the Office has periodically produced has not been of particular relevance to their cases and has thus represented limited assistance.<sup>232</sup> Furthermore, various counsel stated that, as the research prepared is often insufficient, they must engage in their own reading. Yet the inability to bill for additional time spent researching such issues meant they were placed at a disadvantage if they choose to conduct further research on the matter. Given that the envisioned research support provided by the Office was cited as a key justification for the strict control over team budgets, the reality that such substantial support has generally not been forthcoming has meant that the teams are often either (i) not carrying out the research or (i) relying on underpaid interns or pro-bono services to undertake it for them.<sup>233</sup>

In terms of legal research, one controversial resource offered through the Defence Office was that of an expert on international humanitarian law. Dr. Andreas Von Block Schlesier worked for the Defence Office from July to December 2005, provided *gratis* by the German government. Several teams stated that they were unaware of his presence and of those interviewed for this report, only one legal assistant indicated that he had had contact with Dr. Schlesier, which resulted in an unsatisfactory response to his query. In an interview with Professor David Cohen of the War Crimes Studies Center, Dr. Schlesier appeared to be generally uninvolved and unconcerned with issues pertaining to the Defence and instead to be focused largely on his own research and publications, largely on unrelated issues.<sup>234</sup> He was eventually transferred within the Defence Office and assigned to work on legacy issues, subsequently producing documents directed both at the public as well as the government of Sierra Leone. The Principal Defender noted that it was up to the teams, who were informed of Dr. Schlesier's presence, to make use of his expertise in international humanitarian law. He further stated that it was likely counsel's concern about disclosing sensitive details of their cases that prevented them from consulting an outsider.<sup>235</sup>

The Defence Office has stated that it only engages in research work when specifically asked, as the main responsibility for this falls on the teams themselves and the Office does not wish to be perceived as interfering.<sup>236</sup> While this may be true with

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<sup>232</sup> Interviews with Defence Counsel, February and March 2006.

<sup>233</sup> Cockayne (2005).

<sup>234</sup> Telephone interview with Professor Cohen, September 2006.

<sup>235</sup> Interview with the Principal Defender, November 2005.

<sup>236</sup> Written Comment of Defence Office, September 2006.

regards to the specific motions drafted for each of the cases, the Office could do a lot more legal research to facilitate the work of the teams without directly impacting on the conflict of interest issues surrounding them. Some examples of services that the Office could provide which it currently does not include:

- (i) summarizing the law being created in all the cases at the Special Court (particularly oral applications and decisions which are not recorded in the Court Management system);
- (ii) creating a library of the Special Court's transcripts;
- (iii) creating a library of relevant case law of the ICTY, ICTR etc divided by subject matter (amnesty, child soldiers, defects in the indictment, 92bis etc) which could be used by all teams;
- (iv) running introductory seminars on the nature of the conflict, the law relating to the bases of liability and the crimes charged for all new legal assistants and interns employed by the teams; and
- (v) preparing 'update papers' for Counsel on new decisions handed down in other tribunals relating to crimes charged at the Special Court or that affect the evolution of international law doctrines such as joint criminal enterprise or command responsibility.<sup>237</sup>

These services would likely greatly benefit the defence teams, though undoubtedly would require the staff of the Defence Office to devote a considerably larger amount of time to assisting the teams with legal research than they do currently.

## **6.6 Budgets and Bill Vetting**

The Defence Office was also created to supervise team budgets and vet their bills. This sort of 'in-house' accounting system, with the Office itself handling the fee payments of counsel, has led to a substantial degree of antagonism between some counsel and the Office.

However, some counsels have stated that there appear to be inconsistencies as to how bills are vetted and paid. For example, one counsel complained that his team's bills are consistently cut by half by the Office, regardless of the hours billed.<sup>238</sup> Others have alleged favouritism on the part of the Defence Office for certain counsel, whom they believe have had their bills consistently paid in full and on time.<sup>239</sup> The Principal Defender has denied any favouritism in relation to bill payment and noted that bills are assessed on a first come, first serve, basis. Although bills are to be submitted monthly, some teams submit belated bills and sometimes they are incomplete, hence delaying payment further. Furthermore, he noted that the Court's 'legal aid' system means that the Office is guided by established rules and practice as to how to determine payments for counsel. Bills are therefore regulated not by billed hours but by earned hours in

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<sup>237</sup> Suggestions made by defence team, written comments, October 2006.

<sup>238</sup> Interview with Defence Counsel, January 2006.

<sup>239</sup> Interview with Defence Counsel, January and March 2006.



accordance with established practice.<sup>240</sup> Factors related to the nature and quality of the work undertaken are also considered by the Office in their assessment.<sup>241</sup>

Counsel noted that they have not been provided with the criteria utilized and up until recently were not provided with justifications for bill assessments. A more transparent and accountable billing system would likely improve relationships between the Defence Office and those defence teams. In this regard, the Defence Office has recently begun to give some justification as to why certain amounts and items billed for by counsel have been cut, which will hopefully ameliorate the situation.

## **6.7 Outreach Activities**

Since the first Principal Defender, Simone Monasebian was hired, until today, the Defence Office has continued to maintain a high profile in Outreach activities conducted by the Special Court. As has been discussed, the Office has recently hired an employee dedicated to Outreach to facilitate the involvement of the defence teams (as well as the Defence Office) in Outreach activities organised by the Special Court.

The Defence Office's contribution to raising awareness about the role of the defence and fair trial standards trial has been significant: this has included conducting activities throughout schools nationally as well as at Parliament. In this sense, members of the Defence Office have been able to promote the rights of the accused in the international tribunal context as well as advocating for domestic reform relating to these rights. As has been noted by Kendall and Staggs, "in a country where the death penalty is still an acceptable form of punishment, this role can form a pivotal part of the Court's legal reform agenda."<sup>242</sup>

Clearly, Outreach is a key area in which the Defence Office can continue to make a major contribution to the work of the SCSL in Sierra Leone. In Sierra Leone, where the rights of the accused are often neglected, if not completely abused or ignored, raising awareness and drawing attention to issues that pertain to the detainees' human rights is imperative. Undoubtedly, the role played by the Defence Office in Outreach has been and will continue to be one of the major achievements of the Office – one that it should continue to foster as the trials come to a close.

## **7. CONCLUSION**

The idea behind establishing a Defence Office at the Special Court for Sierra Leone has undoubtedly amounted to a step in the right direction for the defence at international criminal tribunals. As a novel institution, housed on the premises of the Court itself, the Office has been able to increase the exposure of the rights of the accused and international fair trial standards within Sierra Leone. Members of the Defence Office

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<sup>240</sup> Written Comment from Defence Office, September 2006. The Defence Office utilizes standards established by the UK Very High Cost Cases system as well as the ICTY and ICTR Guide in all vetting of bills.

<sup>241</sup> Written Comment from Defence Office, September 2006.

<sup>242</sup> Kendall and Staggs (2005), page 17.

have played an important pedagogical role in schools and communities throughout the country and have fostered understanding about the work of the defence at the Special Court and the importance of the rule of law and independent and impartial trial proceedings.

The Defence Office itself has assisted in relieving some of the Registry's administrative burden, by primarily being in charge of assigning qualified counsel to the accused and acting as the principal liaison between the Defence and the Registrar with regards to budgeting, bill-vetting and the payment of counsel's fees. Similarly, it has assisted the Defence as a whole, by acting as counsel for the accused in their initial appearances, providing ongoing support services to ensure the welfare of detainees in counsel's absence, and attempting to ensure coordination between the independent teams, as well as within them. Many of the defence teams at the Special Court stated that they found the assistance of the Defence Office important to their cases.

Yet the Defence Office's late inception within the Special Court's system has marred the work of the Office from the beginning. As a result, rather than functioning as an independent 'fourth pillar' within the institution, it has been relegated to being a sub-Office within the Registry. This has meant that valuable time is spent by members of the Office lobbying the Registrar for funds for the defence teams – time that could be better spent ensuring that the Defence Office is able to be responsive to the needs of the Defence. Furthermore, the lacuna in Rule 45 that creates a gap between the relationship between the accused and the Defence Office and the accused and his Assigned Counsel has caused tensions to surface between members of the Office and some defence counsels. These tensions primarily revolve around determining the appropriate parameters for these relationships. While Trial Chamber I has recently sought to clarify these parameters, the clarification comes as too little, too late for the Defence Office: the Rules should have been more precise from the outset in defining whose interests the Defence Office serves – and preferably, should have characterised this as those of 'the Defence' as a whole.

This report has attempted to trace the history of the Defence Office, from its establishment under the interim Principal Defender to its current incarnation. In doing so, it has sought to show that in order to adhere to the principal of 'equality of arms' the Office would have benefited greatly from achieving independent status. Instead, the fact that the Defence Office continued to be reliant on the Registrar to secure defence funds, and the fact that it was confronted by a significant decrease in its budget at a time when the Defence cases were on the precipice of beginning, has severely hampered the effectiveness of the Office. Rather than being able to concentrate on administering the defence cases, it was saddled instead with determining how best to find ways to cut costs at a crucial time for the Defence as a whole.

Based on the findings of this report, the following recommendations can be made when looking at ways to improve on the Defence Office model as established by the Special Court:

(i) ***Include the establishment of an Independent Defence Office in the Statute of the Tribunal.*** While the Defence Office is a step in the right direction, establishing an office for the defence that does not act independently of the Registry merely acts as paying ‘lip service’ to the needs of the defence. This is particularly the case in relation to the financial constraints placed on the Defence when the Defence Office is considered a sub-Office of the Registry. While it is important to ensure the Defence Office can act in a supervisory role over the defence budget, the Defence Office itself should act as the final authority for that budget. The United Nations needs to ensure that it shows a clear commitment to the Defence from the inception of the tribunal, rather than assuming that the rights of the accused can be equally the responsibility of the Registry, Chambers and the Prosecution. Although this may be the model adopted in domestic legal aid systems, the complexity of charges faced by the accused at international criminal trials cannot be compared to criminal defendants in domestic jurisdictions.

(ii) ***Ensure the Rules of Evidence and Procedure make the responsibilities of the Defence Office and the Principal Defender clear. In particular, ensure that there can be no conflict of interest between the relationship between the Defence Office and the accused and the accused and his Assigned Counsel.*** As has been shown throughout the findings of this report, differing interpretations of Rule 45 have been the main source of conflict over the proper role that the Principal Defender and the Defence Office should play at the Special Court. In particular, the extent to which the Principal Defender and the Defence Office should safeguard the interests of the accused, and how this interacts with the relationship between the accused and Assigned Counsel, needs to be made more explicit. Furthermore, if the Office continues to act as a sub-Office of the Registry, then the extent to which the Office must comply with the Registry’s orders, if the Defence does not agree with those orders, should also be made explicit.

(iii) ***Budget for a Defence Office from the beginning.*** The fact that the Defence Office at the Special Court was somewhat of an afterthought in the Special Court’s establishment has meant that from the beginning, funding for the Office has been tenuous and insecure. Further acknowledgement from the United Nations of the importance of the defence, and the significant amount of resources required to ensure that the principle of ‘equality of arms’ is meaningfully adhered to, is the only way to ensure a Defence Office can significantly and considerably improve the quality of the defence at international tribunals.

(iv) ***Delineate between the Administrative and Legal Research Functions Undertaken by the Office, placing increased significance on the Legal Research Function*** An instructive example of the potential impact of a permanent Defence Office can be identified at the War Crimes Chamber (‘WCC’) in Bosnia. The Criminal Defence Support Section of the WCC has divided up the administration and the advocacy work of the defence into two distinct sections, which seems to have contributed to the diffusion of conflicts within the defence section over

funding issues and the payment of professional fees. The body conducts regular trainings for counsel and employs highly specialized legal staff with expertise in areas such as international humanitarian law, who can provide high-quality advice and research to counsel who require it.<sup>243</sup> As legal researchers, these lawyers do not get involved with privileged counsel-client relationships: rather they act as critical support for assigned counsel.

The clarity of the permanent structure's mandate and division of functions, as well as the employment of highly qualified, specialized staff who work according to the needs of counsel seems to have engendered a more utilized institution which is thus better able to contribute to the protection of the rights of the accused, including their right to a fair trial.<sup>244</sup>

Despite the challenges it faces, the Defence Office at the Special Court has an important role to play during the current defence phase of the trials. While the advocacy-based role required during the initial phases is of much less relevance now that the defence teams are fully formed and staffed, the Defence Office has the opportunity to tailor its work to the current context of the trials and work according to the needs of the defence teams. The Trial Chamber at the Special Court has made it explicit that the Defence Office should be fulfilling this role. It is through this cooperative assistance, which includes facilitating administrative processes, ensuring the prompt payment of professional fees, consistently lobbying for adequate funding, instituting a cooperative management scheme for the teams, providing pertinent research on areas of collective interest, according to the demands of assigned counsel, that the Defence Office has a meaningful opportunity to assist in the realization of a fair trial for the accused.

Not only does the Defence Office have the opportunity to impact positively on the rights of the accused, through support to the accused as well as their legal teams, during the current trials at the Special Court, it also has the opportunity to contribute to the court's legacy and the country's domestic judicial sector. As the presence and impact of the Defence Office at the Special Court could potentially remain long after the trials are finished, it should seek to work in accordance with the peace-building ethic that mandated the creation of the court itself.

Ultimately, it is hoped that the example of the Defence Office will have a positive effect on the domestic judicial sector and that the legacy of the office will include a heightened respect for the rights of the accused and the principle of equality of arms in Sierra Leone. The Defence Office is currently in the process of setting out, in conjunction with the Registry, its proposed contribution to the court's legacy. Currently, this plan involves training and capacity building within the legal community as well as the possible establishment of a public defender's office in Sierra Leone.<sup>245</sup> Such a structure in the domestic system could greatly contribute to urgently needed justice sector

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<sup>243</sup> The training programme focuses on areas such as advocacy and written legal argument, HRW (2006).

<sup>244</sup> Interview with Defence Counsel, June 2006, and HRW (2006).

<sup>245</sup> Currently, only those accused persons charged with capital offences are entitled to state-funded defence representation in the domestic court system in Sierra Leone.

reform in the country, affording all defendants the right to legal representation and ensuring that justice is implemented not just in international tribunals but in all cases brought before the Sierra Leonean judiciary.

Perhaps during this advanced phase of the trial, the Defence Office should indeed engage in advocacy, but rather than within the Special Court trial chambers where Assigned Counsel have taken responsibility for the welfare of the accused, the Office should focus its efforts on the pushing an agenda of reform within the domestic judicial sector. While the Defence Office has never realized its own aspirations as a 'fourth pillar' of the Special Court, it has the opportunity to create a far more lasting impact in the realm of human rights in the country where the that court so proudly sits.

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