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## The Special Tribunal for Lebanon: A Defense Perspective

Charles C. Jalloh

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# The Special Tribunal for Lebanon: A Defense Perspective

Charles Chernor Jalloh\*

## ABSTRACT

*This Article analyzes the absence of organs tasked with guaranteeing the rights of the defense in international criminal law. It explains the historical origins of the problem, tracing it back to the genesis of modern prosecutions at the Nuremberg International Military Tribunal. It then explains how the organizational charts of the UN courts for the former Yugoslavia, Rwanda, and Sierra Leone omitted the defense and essentially treated it as a second class citizen before the eyes of the law. This sets the stage for the author to show why the creation of the first full-fledged defense organ in international criminal law by the UN-backed Special Tribunal for Lebanon is a welcome advance in the maturing of international penal tribunals from primitive to more civilized institutions. The Article argues that if the legal provision contained in the Lebanon Tribunal statute is matched with the independence and resources needed to help realize defendant rights, it will likely become one of the statute's biggest legacies to international law.*

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## I. INTRODUCTION

As the most recent UN-sponsored ad hoc criminal tribunal, the Special Tribunal for Lebanon (STL or Tribunal) has attracted the attention of the international community. Though it has yet to conclude its first case, the STL has already been lauded (and also criticized) for various features in its founding instruments.<sup>1</sup> The positive reviews of the STL stem from several factors.<sup>2</sup>

First, it was established following a request by the government of Lebanon for international community assistance to address a situation that the national authorities could not, for various reasons, resolve under the domestic legal system. Lebanon's appeal for UN support to establish a tribunal of "international character"<sup>3</sup> to bring to justice those responsible for terrorism, much like the requests for international support from the governments of Cambodia in 1997 and Sierra Leone in 2000, is a noteworthy departure from the traditional foot dragging of states in prosecuting individuals for egregious international crimes that essentially became the norm between the creation of the International Military Tribunal at Nuremberg in 1945

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1. See, e.g., Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107, 1108 (2007) (introducing various features of the STL); Paola Gaeta, *To Be (Present) or Not To Be (Present): Trials in Absentia Before the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1165, 1166 (2007) (discussing the STL's "remarkable" feature of trials in absentia); Gillian Higgins, *Fair and Expeditious Pre-Trial Proceedings: The Future of International Criminal Tribunals*, 5 J. INT'L CRIM. JUST. 394, 397 (2007) (comparing and contrasting the STL with other international criminal tribunals); Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1125, 1138 (2007) (noting positive aspects of the Lebanese definition of terrorism); Choucri Sader, *A Lebanese Perspective on the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1083, 1088 (2007) (describing innovations of the STL); Bert Swart, *Cooperation Challenges for the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1153, 1155 (2007) (describing the addition of the Office of Defense as a "highly remarkable and welcome" development); Marieke Wierda, Habib Nassar & Lynn Maalouf, *Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1065, 1078–80 (2007) (noting in particular the positive legacy the STL may leave in Lebanon and also the addition of the Office of Defense).

2. Two leading journals have published special issues on the Lebanon Tribunal offering generally positive commentary on its possibilities and likely challenges (volumes 5 and 7 of the JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE and volume 21 of the LEIDEN JOURNAL OF INTERNATIONAL LAW).

3. Letter from Ibrahim Assaf, Chargé d'affaires ad iterum of the Permanent Mission of Lebanon to the United Nations, to the Secretary-General (Dec. 13, 2005) [hereinafter Assaf Letter Dec. 13]; S.C. Res. 1644, ¶ 6, U.N. Doc. S/RES/1644 (Dec. 15, 2005). Cf. William A. Schabas, *The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' Equivalent to an 'International Criminal Court'?*, 21 LEIDEN J. INT'L L. 513 (2008) (discussing whether the STL must observe sovereign immunity in the same manner as the other three UN criminal tribunals).

and the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) in the early 1990s.<sup>4</sup>

Second, the legal basis of the Tribunal is a consensual treaty between the United Nations and Lebanon.<sup>5</sup> This arrangement enabled the national authorities to help shape the legal nature and structure of the STL. Save the fact that the country ultimately sought Security Council Chapter VII action to bring the bilateral treaty with the United Nations into force, which has led to the argument that the Tribunal's basis has changed from a consensual treaty to a forceful Chapter VII imposition,<sup>6</sup> Lebanon played a significant role by initially requesting the STL's establishment and subsequently engaging in negotiations with the United Nations to conclude the Tribunal's constitutive instrument.<sup>7</sup> The end product, which provides for strong national participation, reflects this involvement. For example, Lebanon has the power to appoint or nominate key officials,

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4. The cooperation between the Lebanese and the United Nations is particularly noteworthy with regard to the early investigations and information sharing between the UN and Lebanese authorities. See Swart, *supra* note 1, at 1155–56.

5. See Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, U.N.-Leb., art. 3(3), Jan. 29, 2007, 2461 U.N.T.S. 280, U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter Agreement] (establishing the STL), S.C. Res. 1757, U.N. Doc. S/RES/1757, at 12–22 (May 30, 2007) [hereinafter STL Statute] (providing that the Agreement shall enter into force).

6. Although Resolution 1757 overrode Lebanese Constitutional procedures, “in so doing it has provided a solution for an impossible political situation and laid a claim for the rule of law to prevail over violence.” Nadim Shehadi & Elizabeth Wilmshurt, *The Special Tribunal for Lebanon: The UN on Trial?*, CHATHAM HOUSE 2 (July 2007), <http://www.chathamhouse.org/sites/default/files/public/Research/Middle%20East/bp0707lebanon.pdf> [<http://perma.cc/54MJ-MRPJ>] (archived Feb. 25, 2014). For discussion of the treaty-based nature of the STL, see Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1091, 1098 (2007). *But see* Sader, *supra* note 1, at 1084 (arguing that the Tribunal is constitutional because it was formed in “compliance with the law” which includes foreign law and international law).

7. See Letter from Nawaf Salam, Permanent Representative of Lebanon to the United Nations, to the Secretary-General (Dec. 4, 2008) (expressing hope that an international tribunal will be formed); Assaf Letter Dec. 13, *supra* note 3 (requesting the creation of an international tribunal); Letter from Ibrahim Assaf, Chargé d'affaires ad interim of the Permanent Mission of Lebanon to the United Nations, to the Secretary-General (Dec. 5, 2005) (calling for an extension of the investigation in to the assassination of Prime Minister Al-Hariri); Letter from Ibrahim Assaf, Chargé d'affaires ad interim of the Permanent Mission of Lebanon to the United Nations, to the Secretary-General (Oct. 14, 2005); Letter from Ibrahim Assaf, Chargé d'affaires ad interim of the Permanent Mission of Lebanon to the United Nations, to the Secretary-General (Mar. 29, 2005) (requesting an investigation into the assassination of Prime Minister Al-Hariri).

such as judges and the deputy prosecutor.<sup>8</sup> This same spirit of cooperation influenced a similar governmental role in a close sibling, the Special Court for Sierra Leone (SCSL), although it is less involved than the high degree of national control that Phnom Penh successfully negotiated with New York in relation to the Extraordinary Chambers in the Courts of Cambodia (ECCC).<sup>9</sup>

Third, although since the end of the Cold War there have been various types of “hybrid”<sup>10</sup> courts which incorporated aspects of national law into their constitutive instruments, the STL is the first internationalized criminal tribunal<sup>11</sup> with an exclusive subject matter jurisdiction over domestic—instead of international—crimes.<sup>12</sup> In this way, the establishment of the Tribunal symbolically completes the anti-impunity circle, which now consists of limited national prosecutions within domestic courts using international law (for example, in Belgium and France); purely international prosecutions using only international law (ICTY, ICTR, and International Criminal Court (ICC)); ‘mixed’ or ‘hybrid’ court prosecutions based on a cocktail of international and national law (East Timor, Sierra Leone, Cambodia, and Kosovo/Bosnia); and internationalized

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8. See Agreement, *supra* note 5, at arts. 3(3), 2(5) (giving the Lebanese government the power to consult with the secretary-general on the appointment of judges and a deputy prosecutor).

9. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006 (Oct. 27, 2004), available at [http://www.eccc.gov.kh/english/cabinet/law/4/Kr\\_law\\_as\\_amended\\_27\\_oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/Kr_law_as_amended_27_oct_2004_Eng.pdf) [<http://perma.cc/5QYU-53WZ>] (archived Mar. 6, 2014).

10. Hybrid refers to a “thing made by combining two different elements”; national is an adjective meaning “of, relating to, or characteristic of a nation; owned, controlled, or financially supported by the state” and international an adjective meaning “existing or occurring between nations; agreed on by all or many nations; used by people of many nations.” 10 CONCISE OXFORD DICTIONARY (Judy Pearsall ed., 1999). Hybrid tribunals have been set up for East Timor, Kosovo, Sierra Leone, and Cambodia. See Schabas, *supra* note 3, at 523 (distinguishing between international and internationalized tribunals); Swart, *supra* note 1, at 1155–56 (noting that the STL has primacy over domestic courts on crimes within its jurisdiction).

11. While the Iraqi Tribunal was described as an internationalized domestic tribunal, I consider that to be a product of a domestic process.

12. See, e.g., Jurdi, *supra* note 1, at 1126–27 (noting the absence of reference to international crimes); see also STL Statute, *supra* note 5, at art. 2, which limits *Applicable Criminal Law* as follows:

The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute: (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on “Increasing the penalties for sedition, civil war and interfaith struggle.”

prosecutions using purely municipal law within an internationally supported or international court (Lebanon).<sup>13</sup>

Fourth, the Tribunal seems set to help reduce the common law bias of international criminal courts. It does so by importing important civil law elements<sup>14</sup> that may have the effect of obviating some of the undesirable side effects of the common law based adversarial system predominant in most international penal courts. These elements include specific procedural laws and an augmented role for judges from the passive “cymbal”<sup>15</sup> role of the common law tradition toward a more active, inquisitorial role familiar to civil law legal systems. In the latter, judges are generally given greater control over the proceedings. And, in the search for the truth, they take priority in the examination of witnesses, have *proprio motu* powers to call additional witnesses, and enjoy entrenched authority to issue orders for production of additional evidence.<sup>16</sup> Some of these

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13. See STL Statute, *supra* note 5, at art. 2 (referring to only Lebanese law as applicable law).

14. See Aptel, *supra* note 1, at 1116 (explaining how “the adoption of several characteristics of the Romano Germanic criminal systems . . . the merging of aspects of both the civil and common law procedures goes further when compared with any of the other international or hybrid criminal jurisdictions”); James Cockayne, *The Special Tribunal for Lebanon – A Cripple from Birth?*, 5 J. INT’L CRIM. JUST. 1161, 1064 (2007) (describing how the STL could contribute to international criminal law “by demonstrating the feasibility of a more streamlined, perhaps more inquisitorial international criminal procedure”); Sader, *supra* note 1, at 1088 (noting how the merging of the two traditions will drastically improve efficiency of international criminal procedure); see also Guenaël Mettraux, *The Internationalization of Domestic Jurisdictions by International Tribunals; The Special Tribunal for Lebanon Renders Its First Decisions*, 7 J. INT’L CRIM. JUST. 911, 921 (2009) (describing how in one of the STL’s first decisions, the pre-trial judge took a posture consistent with the civil law tradition). For insight into how the ECCC have injected civil law elements into international criminal prosecutions, see Guido Acquaviva, *New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers*, 6 J. INT’L CRIM. JUST. 129 (2008).

15. See Sir Francis Bacon, *Of Judicature*, in THE WORKS OF FRANCIS BACON, LORD CHANCELLOR OF ENGLAND 58 (1844) (“[A]n over-speaking judge is no well-tuned cymbal”).

16. This represents a return to Nuremberg. See Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT’L L. 725, 727–29 (1999). One key difference between adversarial and inquisitorial systems is that in the latter, especially in criminal cases, judges play a more active role in structuring cases, calling evidence, and so on. In common law systems, the judges play the reverse role and are expected to be passive while the parties marshal and present evidence to convince the judges to rule one way or another. Another key difference is the role of precedent. See generally STL Statute, *supra* note 5, at art. 20(2)–(3) (giving the judge the power to question witnesses and motion for additional witnesses); Kai Ambos, *International Criminal Procedure: “Adversarial,” “Inquisitorial” or Mixed?*, 3 INT’L CRIM. L. REV. 1, 34 (2003) (discussing how some civil courts can decline to apply precedent). For discussions of the judge’s uniquely inquisitorial role in examining evidence, see Aptel, *supra* note 1, at 1118–20; Kate Gibson & Daniella Rudy, *A New Model of International Criminal Procedure? The Progress of the Duch Trial at the ECCC*, 7 J. INT’L CRIM. JUST. 1005, 1009 (2009). While the Rules of Procedure and Evidence provide that witnesses will be

functions, although also theoretically available in a common law courtroom, are typically exercised by the adversarial parties instead of by the judges.<sup>17</sup>

These changes to the neutral arbiter role are further enhanced by a provision for a standing pretrial judge.<sup>18</sup> The pretrial judge is tasked with reviewing and approving indictments when the prosecution presents evidence of a prima facie case that someone appears to have committed a crime that is within the Tribunal's jurisdiction.<sup>19</sup> The pretrial judge can also issue any other orders that would facilitate prosecutorial investigations.<sup>20</sup> Thus, he or she plays an important role in ensuring the efficient conduct of proceedings without the additional responsibilities that would accrue from formal membership in a particular trial chamber—as is the case in other ad hoc international criminal courts. Overall, this appears to represent a shift in the occupancy of the driver's seat. The move pushes the adversarial parties (i.e., the prosecution and the defense) to the side in favor of putting the judges at the center of the justice-seeking process. The practical consequence could be significant. The trial, instead of being shaped to reflect the position most favorable to the parties' particular interests, becomes primarily concerned with discerning the truth and dispensing evenhanded justice.<sup>21</sup>

Other notable features of the STL include the fact that it is empowered to hold trials in absentia (albeit under strict conditions) and that it provides for greater victim participation in proceedings

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questioned first by the presiding judge, seemingly a more inquisitorial order, the presentation of evidence follows the adversarial model. That is, evidence will be provided first by the prosecutor, then by the trial chamber unless the trial chamber directs otherwise. See Special Tribunal for Lebanon Rules of Procedure and Evidence, r. 145, 146(B), amended Oct. 30, 2009, available at [http://www.stl-tsl.org/images/RPE/STL\\_Rules\\_of\\_Procedure\\_and\\_Evidence\\_En\\_Rev2.pdf](http://www.stl-tsl.org/images/RPE/STL_Rules_of_Procedure_and_Evidence_En_Rev2.pdf) [<http://perma.cc/GG5J-KUMT>] (archived Mar. 6, 2014) [hereinafter RPE].

17. As we shall see later, notions such as the admission of written evidence; the prospect of an accused to make a statement during trial; the use of in absentia trials; and the employment of a single trial to establish both the guilt or innocence of an accused and any sentence that may be imposed are some of the core elements bringing the Tribunal closer to the inquisitorial system. See Special Tribunal of Lebanon, *Explanatory Memorandum from the President of the Special Tribunal for Lebanon on Rules of Procedure and Evidence*, SPECIAL TRIBUNAL FOR LEBANON, ¶¶ 3–4 (Apr. 12, 2012), [http://www.stl-tsl.org/index.php?option=com\\_k2&Itemid=287&id=1210\\_d4590de8b8d6fbd42dbe2f6e3a60c2d5&lang=en&task=download&view=item](http://www.stl-tsl.org/index.php?option=com_k2&Itemid=287&id=1210_d4590de8b8d6fbd42dbe2f6e3a60c2d5&lang=en&task=download&view=item) [<http://perma.cc/R4RC-K2G6>] (archived Mar. 6, 2014).

18. See STL Statute, *supra* note 5, at art. 18 (providing that the pre-trial judge will review the indictment).

19. *Id.*

20. *Id.*

21. See Aptel, *supra* note 1, at 1123 (noting that the inclusion of civil law elements “probably results from the intention to create a legal mechanism duly inspired by and respectful of the legal tradition of the country directly concerned—Lebanon—as well as by the participation in the negotiation leading to the adoption of the Statute of many protagonists experienced in this tradition”); see also Ambos, *supra* note 16, at 4 (discussing the inquisitorial system's truth-seeking nature).

vis-à-vis the current UN-sponsored ad hoc courts (though not as great as in the regime applicable in the ICC).<sup>22</sup> It is comprised of a mixed Lebanese and international staff (including judges and prosecutors), and it is expected to apply the highest due process standards.<sup>23</sup> This overrides harsher punishments such as the death penalty and forced labor. Both of the latter are known to apply to anyone convicted of similar crimes under Lebanese law.

But, despite all these positive elements, already less discussed in the nascent literature is another significant feature of the Lebanon Tribunal.<sup>24</sup> This was its creation of the first autonomous defense organ with the principal responsibility of protecting the rights of the accused and the defense in the history of international criminal courts. The establishment of the Defense Office as a full-fledged organ in the Statute of the STL builds a superstructure onto the skeletal foundation first laid by the semiautonomous Office of the Principal Defender (OPD) in the SCSL, where this author had the honor to serve as a legal advisor.<sup>25</sup> The STL's provision of an independent Defense Office is unique and confers on it, in the true spirit of "equality of arms," a legal status coequal to that of the prosecution. Though the lawyers for the suspects and defendants will come from the private bar, instead of the office as such, this unprecedented step of a full fledged mechanism for protection of the defense rights in international criminal law contrasts favorably with the routine second—or perhaps even third—class treatment that the

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22. At the ICC, victims do not only enjoy formal standing to participate in the proceedings, including the right to representation by counsel, there is also a Trust Fund for Victims and an entitlement to reparations. *See, e.g.*, Rome Statute of the International Criminal Court arts. 68, 75, 79, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

23. The Security Council resolution authorizing the creation of the Court, the preamble to the Agreement between the United Nations and the Lebanese Republic, and the Statute of the Tribunal all affirmed that the Tribunal shall operate with the "highest international standards of justice."

24. There appears to be a growing body of literature on the STL. *See supra* text accompanying note 2. For a noteworthy discussion of the innovation of the Defense Office, see Aptel, *supra* note 1; *see also* Jarinde Temminck Tuinstra, *Defending the Defenders: The Role of Defence Counsel in International Criminal Trials*, 8 J. INT'L CRIM. JUST. 463, 483–86 (2010); Matthew Gillett & Matthias Schuster, *The Special Tribunal for Lebanon Kicks Off: The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence*, 7 J. INT'L CRIM. JUST. 885 (2009) (discussing the general mechanisms and procedures under the STL Statute); Mettraux, *supra* note 14; Richard J. Wilson, *'Emaciated' Defense Or a Trend to Independence and Equality of Arms in Internationalized Criminal Tribunals*, 15 HUM. RTS. BRIEF 6 (2008); Wierda, *supra* note 1, at 1080.

25. The use of the name "Defense Office" rather than OPD, which would have mirrored the prosecutorial institution's names in this and other tribunals, is more accurate. Francois Roux is the current head of the office, but he, unlike the prosecutor, is not principal counsel. *See* Part VI.A, *infra*, including the discussion of the distinctions between the defense and prosecution at the STL.

defense has received in other international or internationalized criminal courts.

This Article seeks to highlight the uniqueness of the Defense Office in the STL and its potential significance for the development of international criminal justice institutions. Part II begins with an overview of the origins of the STL. Part III will then examine the evolution and status of the defense in international criminal courts that preceded the Tribunal, focusing on the innovations of the SCSL's OPD, which inspired the Defense Office in the Lebanon Tribunal. Part IV will then compare the mandate of the new office with its predecessor in the Sierra Leone Court to highlight its important promise. The Article argues that, provided certain important conditions are fulfilled, the Defense Office of the STL appears set to catapult the rights of the accused and the defense in international criminal proceedings to a new and unprecedented level. This will ultimately benefit not only the accused and the defense in that particular international court, but also the fledgling international criminal justice system as a whole.

Drawing upon the experiences of the SCSL, the Article anticipates some of the key challenges for the STL Defense Office and suggests that there have already been some good practical approaches toward their resolution. This is important because, much like its predecessor, the new office will be watched closely. Thus, its success would likely reinforce, while correspondingly its failure would likely undermine, the case for the routine inclusion of an independent defense organ in the constitutive instruments of future international criminal tribunals set up by the United Nations and its Member States.

Finally, the Conclusion underscores the need for the STL's principled commitment to a greater equality of arms between prosecution and defense reflected in the founding instruments to be put in practice. This, at a minimum, will entail endowing the office with the functional independence and resources necessary to enable it to provide proper financial, administrative, logistical, legal (including investigative and witness tracking), and other support for the defense. These will be crucial for the Defense Office envisaged in the Statute of the STL to realize its full potential for Lebanon as well as the international community.

## II. THE ESTABLISHMENT OF THE SPECIAL TRIBUNAL FOR LEBANON

### *A. Lebanon Wants a Court but Needs International Help to Create It*

On December 13, 2005, Fuad Siniora, the Lebanese prime minister, wrote to UN Secretary-General Kofi Annan requesting

international support “to establish a tribunal of an international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated against Prime Minister [Rafiq] Hariri.”<sup>26</sup> The then premier, along with twenty-one others, was assassinated in Beirut, the Lebanese capital, on February 14, 2005.<sup>27</sup>

The Security Council, invoking Chapter VII of the Charter of the United Nations (Charter), adopted Resolution 1644. That instrument requested the secretary-general to advise on “the nature and scope of the international assistance needed” to establish the Tribunal.<sup>28</sup> After initial consultations with Lebanese authorities and additional meetings of legal experts representing the parties in New York and The Hague, the secretary-general presented a report to the Council on November 15, 2006.<sup>29</sup> Annexed to the report was a draft *Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon* and a proposed Statute of the Special Tribunal for Lebanon.<sup>30</sup>

The Council subsequently adopted Resolution 1664.<sup>31</sup> That resolution, which was not rooted in Chapter VII, which furnishes the Charter’s most decisive authority, welcomed among other things “the common understanding reached between the [UN] Secretariat and the Lebanese authorities on the key issues regarding the establishment and the main features of a possible tribunal;” reiterated the Council’s determination “to assist Lebanon in the search for the truth and in holding all those involved in [the] terrorist attack accountable;” and requested that the secretary-general negotiate an agreement with the Lebanese Government “aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice.”<sup>32</sup>

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26. Assaf Letter Dec. 13, *supra* note 3.

27. The UN Report listed all twenty-one victims: Zahi Abou-Rjeyleh, Yehya Al-Arab, Mohammed Al-Ghalayini, Abdul Hamid Al-Ghalayini, Mahmoud Saleh Al-Khalaf, Sobhi Al-Khodr, Omar Al-Masri, Mahmoud Hamad Al-Mohammad, Joseph Aoun, Alaa Asfour, Rima Bazzi, Abdu Bou-Farah, Mazen Dahabi, Yamama Damen, Mohammed Darweesh, Bassel Fouleyhan, Rawad Haydar, Farhan Issa, Talal Nasser, Haytham Ousman, and Ziad Tarraf. The report also noted that an unidentified body was found. *Third Rep. of the Int’l Indep. Investigation Comm’n Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)*, transmitted by letter dated Mar. 14, 2006 from the Secretary-General addressed to the President of the Security Council, ¶ 14, U.N. Doc. S/2006/161 (Mar. 14, 2006).

28. S.C. Res. 1644, *supra* note 3.

29. U.N. Secretary-General, *Report on the Establishment of a Special Tribunal for Lebanon*, U.N. Doc. S/2006/893 (Nov. 15, 2006) [hereinafter U.N. Secretary-General, *Report*].

30. See *id.* at 15–33 (containing the draft).

31. S.C. Res. 1664, U.N. Doc. S/RES/1664 (Mar. 29, 2006).

32. *Id.*

Jorge Voto-Bernales, then president of the Council, next wrote to the secretary-general on November 24, 2006, supporting the report.<sup>33</sup> He requested finalization of the negotiated agreement with Lebanon in a manner consistent with the country's constitution.<sup>34</sup> Importantly, President Voto-Bernales also notified the secretary-general that the Council wished for the Tribunal to be funded through voluntary contributions from interested states (at 51 percent) with Lebanon to bear the remainder (49 percent) of the expenses.<sup>35</sup> The Council had acceded to the secretary-general's recommendation that the Tribunal begin operations once funding for its formal establishment and the first year of operations had been secured and additional funds pledged by donors for the second and third years of its work.<sup>36</sup> This recommendation arose from the secretary-general's direct experience with the Sierra Leone Court.<sup>37</sup> The latter was the first ad hoc international penal court to be funded solely by donations from other countries. The effort to be sure that there is money in the bank before the work begins has since become the secretary-general's practice to ensure that these voluntarily funded courts, including the STL, will only begin to operate once there is sufficient funds to do so. Despite this policy, it is common knowledge that the Sierra Leone Tribunal suffered from a lack of money throughout its existence. At various points, it even had to rely on subvention grants from the UN budget to ensure continuity with its operations. This fate may be avoided by the STL because of the simple reason that Lebanon, unlike Sierra Leone, appears to be willing and able to cover some of the expenses associated with this ad hoc court. This may partly be a result of the different situations that they each address: the former in respect of a single incident involving some killings (where the state remains intact) and the latter in respect of a conflict that lasted for several years (where the state was tethering on the brink of collapse).

The constitutive treaty, to which the statute was an annexure, was subsequently signed by Lebanon on January 22, 2007, and by the United Nations on February 6, 2007.<sup>38</sup> It envisaged entry into force, pursuant to Article 19(1), a day after the date the Lebanese

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33. Letter from Jorge Voto-Bernales, President of the Security Council, to the Secretary-General (Nov. 21, 2006), U.N. Doc. S/2006/911 (Nov. 24, 2006).

34. See *id.* (requesting finalization of the Agreement and setting out the funding for the tribunal).

35. *Id.*

36. *Id.*

37. See U.N. Secretary-General, *Report on the Establishment of a Special Court for Sierra Leone*, ¶ 70, U.N. Doc. S/2000/915 (Oct. 4, 2000) (noting that relying solely on voluntary contributions would not provide adequate funding); see also *id.* ¶ 45 (discussing the merits of assessed contributions).

38. See UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/Pages/showDetails.aspx?objid=080000028005e0e7> [<http://perma.cc/3SCV-PY63>] (archived Feb. 26, 2014) (displaying the dates and locations of signings).

authorities notified the United Nations that the legal requirements for entry into force under its domestic law had been fulfilled.<sup>39</sup>

*B. Lebanese Politics Gets in the Way, UN Imposes the  
Tribunal as a Matter of International Law*

Despite the apparent prior agreement or understanding, in an interesting twist, the four months that followed the signature of the bilateral treaty between the United Nations and Lebanon were characterized by negotiation, controversy, and, ultimately, deadlock as political parties and other opposition groups contested the establishment of the STL.<sup>40</sup> The Lebanese government thereafter notified the United Nations that it could not ratify the agreement or domesticate the Statute creating the Tribunal, as required under the constitution, though it apparently had the parliamentary majority to do so.<sup>41</sup> This was a result of the speaker of parliament's refusal to convene a session of the relevant legislative body to formally vote on the two draft-ratifying instruments.<sup>42</sup> As a result of this procedural block, Prime Minister Siniora advised the secretary-general on the impasse with two key observations.

First, in the Lebanese government's view, the fact that there was little prospect of a parliamentary session to complete formal ratification meant that "the domestic route to ratification had reached a dead end." Second, "despite their stated support for the establishment of a Tribunal, the opposition [had] declined to discuss" their reservations on the agreed statutes with UN legal adviser Nicolas Michel.<sup>43</sup> The UN legal counsel had visited Beirut in April 2007 in a last-minute attempt to end the stalemate. Consequently, Lebanon requested that the Council adopt a "binding decision" that would make the STL a "reality."<sup>44</sup>

In his forwarding cover note of that request, Secretary-General Ban Ki-moon concurred that "domestic options" for ratification had been "exhausted."<sup>45</sup> He thereby, at least implicitly, endorsed the

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39. Article 19(1) of the Agreement provides: "This Agreement shall enter into force on the day after the Government has notified the United Nations in writing that the legal requirements for entry into force have been complied with." Agreement, *supra* note 5, at art. 19(1).

40. See Sader, *supra* note 1, at 1083-84 (highlighting the debate over the constitutionality of the tribunal).

41. See Letter from Fouad Siniora, Prime Minister of Lebanon, to the Secretary-General, U.N. Doc. S/2007/281, Annex (May 14, 2007) (discussing the refusal by the speaker of parliament to convene a session to ratify the tribunal).

42. *Id.*

43. *Id.*

44. *Id.*

45. U.N. Secretary-General, Letter from the U.N. Secretary-General dated May 15, 2007 addressed to the President of the Security Council (May 16, 2007), available at [http://www.stl-tsl.org/index.php?option=com\\_k2&Itemid=350&id=1342\\_0370e4708e72f](http://www.stl-tsl.org/index.php?option=com_k2&Itemid=350&id=1342_0370e4708e72f)

government's request for the Council to adopt a Chapter VII decision. There was no public discussion by either the Lebanese authorities or the secretary-general of the possible legal and political ramifications of such a request for Lebanon and or other UN Member States. This may be for several reasons. The most plausible would appear to be the presence of the consent of the government of the concerned state. After all, the Siniora government had sought the UN support for the court to be created in the first place. Furthermore, it was now explicitly requesting use of Chapter VII. In such circumstances, it seems hard to worry about the possible impact on Lebanese sovereignty of imposing the court as an enforcement measure. The party most likely to protest that had essentially conceded the point. And, in any event, such an approach might engender a change in the legal nature of the Tribunal, making it an *international court* as opposed to one that is merely bearing an *international character*.

The Council's response was swift. On May 25, 2007, it adopted Resolution 1757 promulgating a condition that purported to bring into force by June 10, 2007, (within ten working days) the bilateral treaty establishing the STL, *unless* the Lebanese Government notified its compliance with Article 19(1) of the UN-Lebanon Agreement.<sup>46</sup> One might have thought that this would strengthen the government's hand with the opposition parties to remove the procedural obstacles and pass the laws incorporating the treaty, consistent with the country's basic law. This would after all have given greater symbolic power to the national authorities. It was not to be. As seemed more likely in light of the Siniora government's reading of the political controversies associated with the Tribunal within the country, notification was not provided by June 10, 2007. Thus, by operation of the condition contained in the resolution, the agreement and its annexed statute were deemed to have entered into force as of that date.

This approach, which was roundly criticized by five of fifteen Council members that abstained from voting on Resolution 1757, is unprecedented in the history of the United Nations.<sup>47</sup> Although

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08b04fe653bd9c367ac&lang=fr&task=download&view=item [http://perma.cc/4NJM-YX89] (archived Mar. 6, 2014) (“[A]ll domestic options for the ratification of the Special Tribunal now appear to be exhausted . . .”).

46. Agreement, *supra* note 5, ¶ 1(a).

47. Qatar's representative at the Security Council criticized that the resolution “entail[ed] legal encroachments known to all.” South Africa's representative noted that such a measure could “politicize international criminal law, thereby undermining the very foundations of international law.” In addition to Qatar and South Africa, Indonesia, China, and Russia abstained. See U.N. SCOR, 62d Sess., 5685th mtg. at 4, U.N. Doc. S/PV.5685 (May 30, 2007) (containing minutes for Security Council meeting on Resolution 1757); Press Release, United Nations Security Council, Security Council Authorizes Establishment of Special Tribunal to Try Suspects in Assassination of Rafiq Hariri (May 30, 2007) (reporting the reaction of Member States on the passing of Resolution 1757); see also Frédéric Mégret, *A Special Tribunal for Lebanon: The UN*

apparently triggered by a request from the Lebanese government, the actual entry into force of the bilateral treaty profoundly implicates the interests of many UN Member States if it is seen as a precedent for imposition of an international instrument on an unwilling state, a sort of legislative act on the part of the Council, with the effect of overriding national sovereignty. A key concern is that the Council can now seemingly invoke its most robust power to help a government circumvent its own national constitutional requirements. Yet the collective security regime envisaged by the Charter and the Westphalian sovereignty-based international law system assumes consent to be a *sine qua non*, with only limited exceptions, for the assumption of international treaty obligations. Ratification processes, in systems where they exist, are integral parts of consent and often require popularly elected legislators to endorse the treaty instrument signed by the executive. Ironically, even the Council is only able to impose its decisions on a state by fiat with the prior consent of the state to the Charter regime.<sup>48</sup> That includes consent to Articles 24 and 25. Under those provisions, UN Member States, in order to ensure prompt and effective action, agree to accept and implement Council decisions made in the exercise of the Council's primary responsibility to ensure the maintenance of international peace and security.

Interestingly, besides the objections entered into the record by those states present and voting, many international lawyers have been generally silent on the implications of the Council's unprecedented action, both for the STL specifically and also for international law more generally. Perhaps the matter has not attracted their attention. Or, if it has, it could be that there has not been much commentary because of the presence of consent from Lebanon in this case. Also, the uniqueness of the situation may well be perceived as necessarily precluding similar actions elsewhere. But the real reason is probably because as, at least one legal commentator has argued, with its adoption of a Chapter VII resolution, the Council brought into effect not a bilateral treaty signed by the United Nations and Lebanon—which power it did not possess—but rather effectively transformed the STL into a binding measure. The resolution, of course, incorporated the Tribunal's founding instruments and formed an integral part thereof. Under this view, the STL cannot purport to be a treaty-based institution, but is rather an “independent

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*Security Council and the Emancipation of International Criminal Justice*, 21 LEIDEN J. INT'L L. 485, 485–86 (2008) (stating that the unifying thread running through Resolution 1757 abstentions was the belief that actors were encroaching on Lebanese sovereignty).

48. Under the Charter of the United Nations, Member States undertake to accept and implement decisions of the Council taken under Chapter VII. See generally U.N. Charter art. 7 (setting out various obligations of the Members of the United Nations to actions taken by the Security Council).

international tribunal under the authority of the United Nations.”<sup>49</sup> This conclusion would appear to be correct as a matter of public international law.

### III. THE JURISDICTION AND NATURE OF THE SPECIAL TRIBUNAL FOR LEBANON

#### A. *The Tribunal's Personal and Subject Matter Jurisdiction*

Article 1 of the STL Statute defines personal and temporal jurisdiction and empowers the STL to prosecute “persons responsible” for the February 14, 2005, bomb attack that killed then-Lebanese Prime Minister Rafiq Hariri and resulted in the deaths of at least twenty-two others.<sup>50</sup> With the use of the phrase “persons responsible,” the United Nations returned to treaty language it initially used in the equivalent personal jurisdiction provisions of the statutes of the ICTY and ICTR in 1993 and 1994 respectively.<sup>51</sup> It had, for the SCSL, departed from that standard in favor of the more curtailed “greatest responsibility” personal jurisdiction.

Indeed, the United Nations, partly because of its experience with its two Chapter VII ad hoc tribunals (ICTY and ICTR), has sought to avoid overburdening subsequent courts by limiting the scope of personal jurisdiction. This is consistent with the view that emerged in the 1990s suggesting that international prosecutions should be a last resort and that a failure to limit jurisdiction would lead to an opening of the prosecutorial floodgates, with a correspondingly high financial burden. In this vein, in the period between the creation of the ICTY and ICTR in 1994 and the Sierra Leone Court in 2002, language limiting personal jurisdiction to those “bearing greatest

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49. Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1091, 1100 (2007). Fassbender's argument is correct, and in fact, proved to be consistent with the decisions that the STL later issued in 2012 when faced with defense challenges to its jurisdiction and legality on, inter alia, grounds including the alleged violation of Lebanese sovereignty. The conclusion was that the Tribunal was solely created by Chapter VII resolution, consistent with the Council's powers to maintain international peace and security.

50. STL Statute, *supra* note 5, at art. 1; see U.N. Secretary-General, *Report*, *supra* note 29, ¶¶ 11, 15, 24, Annex 2 (detailing the intent of the Security Council in adopting Resolution 1664 and listing attacks perpetrated in Lebanon since October 1, 2004).

51. Article 6 of the ICTY statute provides: “The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]. For the equivalent section of the ICTR, see Statute of the International Tribunal for Rwanda, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

responsibility” or those “most responsible” was incorporated into the SCSL and ECCC statutes, respectively.<sup>52</sup> Although the ICC is a permanent court with its own distinctive multilateral treaty basis instead of a creature forming part of the United Nations, similar language has been placed in policy documents interpreting the scope of its personal jurisdiction. This shows the tendency on the part of some states to limit the reach of international criminal tribunals for sovereignty and cost reasons. Where states have not imposed the limitation, tribunal officials have nodded to their concerns, for example, in the prosecutor’s policies under the Rome Statute of the ICC.<sup>53</sup>

In the statute of the Sierra Leone Court, the Council, against the secretary-general’s strong advice that it would make the tribunal’s reach too narrow, limited personal jurisdiction to the top echelon “bearing greatest responsibility” for serious violations of international humanitarian and national law committed in Sierra Leone.<sup>54</sup> This language proved to be extremely controversial. The question that arose, which was extensively litigated before the SCSL, was whether the phrase “circumscribing jurisdiction to those bearing greatest responsibility” established a jurisdictional hurdle that the prosecution must clear before indicting a particular individual or whether it merely served as a guideline for the prosecutor when she is exercising her discretion.<sup>55</sup> The defense argued the former while the prosecution argued the latter. And in the Armed Forces Revolutionary Council (AFRC) case, the Appeals Chamber agreed with the prosecution, concluding that “greatest responsibility” serves not as a distinct jurisdictional threshold but rather as a tool for guiding prosecution strategy.<sup>56</sup> The Chamber reasoned that this would otherwise mean that a guilty person could evade punishment

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52. For an assessment of the practical problems arising from this type of personal jurisdiction for such courts, see Charles Chernor Jalloh, *Prosecuting Those Bearing “Greatest Responsibility”: The Lessons of the Special Court for Sierra Leone*, 96 MARQ. L. REV. 863, 863–911 (2013).

53. Though such language is arguably more apposite in that context given the complementary nature of the ICC’s jurisdiction vis-à-vis States Parties. See Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EURO. J. INT’L L. 857, 862–66 (2000) (discussing the influence of the Rome Statute on features of the SCSL).

54. See Statute of the Special Court for Sierra Leone art. 1(1), U.N. Doc S/2002/246, app. II [hereinafter Sierra Leone Statute] (“The Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility . . .”).

55. See Jalloh, *supra* note 52, at 871 (arguing greatest responsibility was intended to “be both a jurisdictional requirement and a guideline for the exercise of prosecutorial discretion”).

56. See *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-A, Judgment, ¶ 282 (Special Court for Sierra Leone, Feb. 22, 2008) (stating the only workable interpretation of Article 1(1) is as a guide for prosecutors in exercising their discretion).

on the technical grounds that he was not among those bearing greatest responsibility, as the indictment, which formed the basis of the lengthy and costly trial that had already taken place, would be a nullity.<sup>57</sup> It felt that the defendant's argument was a desperate attempt to evade responsibility for the crimes for which he had been convicted.<sup>58</sup> The Appeals Chamber did not address the more difficult defense submissions that such a determination ought to have been made immediately after the accused was arrested. It considered but missed the nuances in the finding of the other trial chamber of the SCSL correctly holding that greatest responsibility was intended to be both a jurisdictional requirement and a form of limitation on the exercise of prosecutorial power. This, in the judicial view espoused in the Civil Defense Forces' Trial, did not preclude the charging and trial of both lower and higher ranking perpetrators.<sup>59</sup>

The good news is that the United Nations appeared to put such controversies to rest in the constitutive instruments of the new STL. Indeed, the *travaux préparatoires* confirmed this reading when it stated that "within the *all-inclusive* definition of the personal jurisdiction of the tribunal, the prosecutor will be free to pursue her or his prosecutorial strategy and to determine the list of potential indictees according to the evidence before him or her."<sup>60</sup> Enormous time and resources were spent litigating the greatest responsibility problem at the SCSL. This ranged from preliminary motions filed before the Trial Chamber in the pretrial phase to the appeals against conviction in the first AFRC and the last Charles Taylor trials.<sup>61</sup> Therefore, the United Nation's return to the ICTY and ICTR jurisdiction formulae over "persons responsible," which itself was based on identical language in the basic instruments of the Nuremberg and Tokyo tribunals, seems to be a much wiser decision.<sup>62</sup>

Turning to temporal jurisdiction, the STL initially was to cover the February 14, 2005, attack. However, the secretary-general expressed fear that such limited jurisdiction would put into "serious

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57. See *id.* ¶ 283 (refusing to strike out the indictment on the grounds that the accused "has not been proved that the accused was not one of those who bore the greatest responsibility").

58. See *id.* ¶ 284 ("Kanu's interpretation of Article I of the Statute is a desperate attempt to avoid responsibility for crimes for which he had been found guilty."). *Contra* Jalloh, *supra* note 52.

59. See Jalloh, *supra* note 52 (noting how Trial Chamber I found that low-ranking perpetrators that committed exceptionally heinous crimes could have the "greatest responsibility").

60. U.N. Secretary-General, *Report*, *supra* note 29, ¶ 20 (emphasis added).

61. See, e.g., *Brima*, Case No. SCSL-04-16-A (stating "greatest responsibility" serves as a guide for prosecutorial discretion).

62. See Charter of the International Military Tribunal arts. 6, 14, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter IMT Charter] (providing for the jurisdiction of the court over "persons" who committed the crimes listed therein; however article 14 refers to the persons investigated as "major" war criminals).

doubt” the objectivity and impartiality of the tribunal.<sup>63</sup> Thus, to avoid the “perception of selective justice,”<sup>64</sup> flexibility was built into the statute to enable prosecution of additional crimes connected to the Hariri assassination if they occurred between October 1, 2004, and December 13, 2005.<sup>65</sup> The United Nations and Lebanon could extend temporal jurisdiction to a later date, with the approval of the Council, provided those attacks were, firstly, connected to the earlier incident, and secondly, of a nature and gravity similar to the February 14, 2005, attack.<sup>66</sup> Proof of the link that would justify extension of temporal jurisdiction could be established in various ways.<sup>67</sup> These would include examination of the motive or criminal intent behind the attack, the manner in which the attack was executed, any discernible patterns arising from it, and the kinds of perpetrators and victims.<sup>68</sup> This understanding has since been further fleshed out in the Rules of Procedure and Evidence (RPE).

With respect to subject matter jurisdiction, there was no evidence of war crimes or genocide. But the secretary-general noted the STL could have been empowered to prosecute crimes against humanity since the acts committed in Lebanon appeared to meet the basic definition of terrorism found in the jurisprudence of the ad hoc criminal tribunals.<sup>69</sup> Ultimately, the offense of terrorism as a crime

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63. See U.N. Secretary-General, *Report*, *supra* note 29, ¶ 18 (expressing concern for singling out the assassination of Hariri).

64. *Id.*; see also Sader, *supra* note 1, at 1085 (referring to this extension of jurisdiction as a “rejection of selective justice”).

65. Article 1(1) of the Agreement states:

If the tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (*modus operandi*) and the perpetrators.

Agreement, *supra* note 5, at art. 1(1). The STL RPE, in Rules 11 and 12, discuss the practical steps that are required on the part of the prosecution to seek an extension of the temporal jurisdiction. For more discussion of the issue of selective justice at the STL, see Wierda, Nassar & Maalouf, *supra* note 1, at 1072–73.

66. See Agreement, *supra* note 5, at art. 1(1) (giving jurisdiction over certain attacks that are connected to the December attack on Hariri).

67. See *id.* (giving a nonexhaustive list for elements of an attack that might lead to jurisdiction).

68. *Id.*

69. Specifically, the secretary-general stated that:

The attacks . . . could reveal a “pattern” or “methodical plan” of attacks against a civilian population, albeit not in its entirety. They could be “collective” in nature, or “a multiple commission of acts”<sup>4</sup> and, as such, exclude a single, isolated or random conduct of an individual acting alone. For the

against humanity was not included in the STL's *ratione materiae* jurisdiction because the secretary-general's proposal did not, for unstated reasons, garner sufficient support within the Council.<sup>70</sup> Perhaps the members of that body were not convinced that the case had been made out for the elements of the more heinous offense of crimes against humanity. As a result, the crimes over which the STL has subject matter competence are only "common crimes under the Lebanese Criminal Code."<sup>71</sup> That is, the court's jurisdiction is only over the crimes of terrorism as defined under Lebanese (national, not international) law.<sup>72</sup> That said, in a significant ruling issued in February 2011, the STL Appeals Chamber ruled that the Tribunal must necessarily construe Lebanese law on terrorism in light of existing international treaty and customary law.<sup>73</sup>

Structurally, besides the Defense Office, the organs of the STL are the chambers, the prosecution; and the registry. These three organs reflect the standard model found in all the other modern ad hoc international courts. They are therefore unremarkable. The

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crime of murder, as part of a systematic attack against a civilian population, to qualify as a "crime against humanity", its massive scale is not an indispensable element.

See U.N. Secretary-General, *Report*, *supra* note 29, ¶¶ 23–24.

70. See *id.* ¶ 25 (plainly noting that insufficient support from the interested members of the Security Council resulted in the limitation of crimes to crimes under the Lebanese Criminal Code).

71. *Id.*; see also Jurdi, *supra* note 1, at 1127–28 (discussing how international crimes should have been included in order to legitimize and strengthen the international character and legitimacy of the STL); Schabas, *supra* note 3, at 519–21 (suggesting that the argument could go either way, numerous political and legal factors could justify the acts being categorized or excluded from the purview of crimes against humanity).

72. See STL Statute, *supra* note 5, at art. 2 (stating that the Lebanese Criminal Code is the criminal law applicable to the STL). The subject matter jurisdiction might have significant implications for the legitimacy of the Tribunal. For instance, one author argues compellingly that the exclusion of crimes against humanity reflects a prudent legal analysis of the acts, but also renders the STL in want of justification for its inclusion of international modes of liability which are broader in certain instances than those of Lebanon. See Marko Milanovic, *An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon* 5 J. INT'L CRIM. JUST. 1139, 1142 (2007) (arguing the Statute of the STL would allow for conviction of individuals who could not be convicted under Lebanese law).

73. See Prosecutor v. Ayyash, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶¶ 45, 62 (Feb. 16, 2011), available at [https://www.stl-tsl.org/index.php?option=com\\_k2&Itemid=299&id=2688\\_af83958ae829e07003ae67e1debb374e&lang=fr&task=download&view=item](https://www.stl-tsl.org/index.php?option=com_k2&Itemid=299&id=2688_af83958ae829e07003ae67e1debb374e&lang=fr&task=download&view=item) [<http://perma.cc/J525-GNWK>] (archived Mar. 9, 2014) (stating that Lebanese provisions may be construed in light of relevant international rules). For commentary on the significance of the decision, see Michael P. Scharf, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation*, 15 ASIL INSIGHTS 6 (Mar. 4, 2011), available at [http://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and#\\_ednref5](http://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and#_ednref5) [<http://perma.cc/5GMA-27GL>] (archived Mar. 6, 2014).

chambers, which consist of a pretrial judge, a trial chamber, and an appeals chamber, have a minimum of eleven judges and could have up to a maximum of fourteen.<sup>74</sup> Two international judges serve with a Lebanese colleague in each trial chamber<sup>75</sup> while five judges sit in the appeals chamber, two of whom must be Lebanese.<sup>76</sup> At both the trial and appellate levels, the international judges constitute a majority much like in the Sierra Leone Tribunal, while the national judges constitute a minority.<sup>77</sup> This design is meant to insulate the court from the local politics. Thus, if the national judges do not act independently, for whatever reason, the international judges may hopefully be trusted to step in and make nonpartisan decisions.

Appointed for a renewable three-year term by the secretary-general, the prosecutor is responsible for investigations and the initiation of prosecutions.<sup>78</sup> The Lebanese government, in consultation with the secretary-general, appoints a Lebanese deputy prosecutor.<sup>79</sup> This replicates the structure that was first seen at the SCSL.

Finally, the registrar is appointed by the secretary-general and is a staff member of the United Nations<sup>80</sup>—again, like his equivalent in the SCSL.<sup>81</sup> As head of the administrative organ of the Tribunal, his primary responsibility is to serve the parties and to develop policies and manage the finances and personnel of the organization.<sup>82</sup>

### B. Practical Arrangements Resulted in Creation of the Court in The Hague

With the legal framework in place by summer 2007, the secretary-general and the Lebanese authorities began resolving the practical arrangements necessary to make the STL a functional court of law. All parties consented to a Headquarters Agreement situating

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74. See Agreement, *supra* note 5, at art. 2(3) (specifying how many judges there will be and how they will be selected).

75. *Id.* at art. 2(3)(b).

76. *Id.* at art. 2(3)(d).

77. See Sierra Leone Statute, *supra* note 54, at art. 12 (requiring two out of three judges to be international judges at trial level and three out of five judges to be international judges at appellate level for the SCSL).

78. See Agreement, *supra* note 5, at art. 3(1)–(2) (laying out the three year term).

79. See *id.* at art. 3(3) (stating that the deputy prosecutor will assist in the investigations and prosecutions).

80. See STL Statute, *supra* note 5, at art. 12(1)–(3) (establishing the Registry, consisting of the registrar and other needed staff, who are responsible for the administration and servicing of the Tribunal).

81. See Sierra Leone Statute, *supra* note 54, at art. 16(1)–(3) (mandating responsibilities and requirements of the registrar for the SCSL).

82. See *id.* (making the Registry responsible for administration and servicing of the Special Court).

the Tribunal in The Hague, Netherlands.<sup>83</sup> With the United Nations' conclusion of a bilateral treaty with the Dutch authorities on behalf of the Tribunal, the parties avoided the complications of Lebanese participation that might have required implementation obligations arising under Lebanese domestic law. This type of legal arrangement seems to confirm the legal character of the Tribunal as a subsidiary body created under Chapter VII of the Charter. The next significant step was the appointment of the senior officials for the STL, starting with the judges, the prosecutor, the registrar, and head of the Defense Office.<sup>84</sup>

Crucially, some of the funding was secured and staffing needs identified within about a year. The Management Committee, which under its terms of reference will oversee the nonjudicial aspects of the STL's operation (similar to its equivalent in the Sierra Leone Tribunal), was constituted. The arrangements were made for a transfer of investigative materials from the International Independent Investigation Commission, which had preceded the Tribunal; and security measures for the Tribunal and its witnesses were worked out, as was a communication and outreach strategy that would target Lebanon and the international community. Significant amounts of evidence were gathered, and even before the STL officially opened its first case, the work of the pretrial judge began and many of the Prosecution, Chambers, and Registry staff were on board by 2010.<sup>85</sup> But it took several years for prosecution lawyers to build a case and to secure approvals of indictments against specific suspects. In December 2013, the Tribunal issued a scheduling order for the opening of its first trials in mid-January 2014.<sup>86</sup> The trial has since

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83. Agreement Between the Kingdom of the Netherlands and the United Nations Concerning the Headquarters of the Special Tribunal for Lebanon, U.N.-Neth., art. 3, Dec. 21, 2007, *Tractatenblad van het Koninkrijk der Nederlanden* [Trb.] 2007 Nr. 228 (Neth.) available at [http://www.stl-tsl.org/index.php?option=com\\_k2&Itemid=286&id=152\\_f9631e0cec9d010477a20eb721f8ba03&lang=en&task=download&view=item](http://www.stl-tsl.org/index.php?option=com_k2&Itemid=286&id=152_f9631e0cec9d010477a20eb721f8ba03&lang=en&task=download&view=item) [<http://perma.cc/P8T5-ESC8>] (archived Mar. 6, 2014).

84. The Chambers is comprised of eleven judges with Judge Sir David Braganawath as president. The second registrar, Mr. Herman von Hebel, was appointed March 1, 2010, to replace the late Robin Vincent, the former registrar of the SCSL. von Hebel has since been replaced by Darryl Mundis who took over after he moved on to the ICC as Registrar. Daniel A. Bellemare, was appointed Prosecutor November 14, 2007. The post of prosecutor is now occupied by Norman Farrell, a Canadian lawyer, whose experience includes domestic prosecutions experience as well as service in the Rwanda and Yugoslav Tribunals. His Lebanese deputy prosecutor is Madame Joyce F. Tabet. The head of the Defense Office is Francois Roux, appointed March 9, 2009. See *About the STL – Biographies*, SPECIAL TRIBUNAL FOR LEBANON, <http://www.stl-tsl.org/en/about-the-stl/biographies> [<http://perma.cc/FF2U-WS3E>] (archived Feb. 26, 2014) (providing biographical information of current and former office holders).

85. See Case No. CH/PTJ/2010/003, Scheduling Order for a Hearing (Special Trib. for Leb. June 25, 2010) (addressing an application by Sayed for evidence that he was arbitrarily detained for over three years).

86. See *Prosecutor v. Salim Jamil Ayyash*, Case No. STL-11-OI/PT/TC, Scheduling Order (Special Trib. for Leb. Dec. 10, 2013) (scheduling the opening of the

opened, albeit in absentia, with the prosecution laying out its case against the four defendants who are all at large (although they are represented by duty counsel).

#### IV. EVOLVING DEFENSE RIGHTS IN INTERNATIONAL CRIMINAL LAW

##### *A. The Problem: Defense Was Forgotten from the Watershed of International Criminal Law in 1945*

Since the first major international cooperative effort to prosecute international crimes was carried out by the United States and its allies after World War II, international criminal law has acknowledged the importance of granting at least a modicum of fair trial rights for accused persons. As chief American prosecutor, Associate Justice Robert Jackson noted before opening the Nuremberg Trials that the procedural guarantees of fair trials aimed to ensure that punishment is meted out only to the “right men and for the right reasons.”<sup>87</sup> To do otherwise, in his view, would have tarnished the legitimacy of the trials and not sit easily on the American conscience. Moreover, since then, fair trials have become sacrosanct as a function of the rise of due process concerns in modern international human rights law. This has led to the adoption of important treaty instruments guaranteeing fundamental fair trial rights that are nonderogable.<sup>88</sup>

But despite strong statutory language obligating fair trials for defendants, a contrary practice has developed, starting with the Nuremberg and Tokyo Tribunals. These courts failed to include within their founding instruments institutional frameworks designed to ensure the fair trial of the accused. This trend of not matching the principled statutory commitment to the right to a fair trial with an

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joint trials of four defendants on January 16, 2014). A second case, involving Hassan Habib Merhi, is also scheduled to start as a trial *in absentia*. See *Prosecutor v. Hassan Habib Merhi*, Case No. STL-13-04/I/TC, Decision to Hold Trial *In Absentia* (Special Trib. for Leb. Dec. 10, 2013) (explaining the Special Tribunal’s decision to try Merhi in absentia).

87. ROBERT JACKSON, DEPT’ OF STATE, PUB. 3080, REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON 1945, § III, ¶ 2 (June 6, 1945), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/jackson-rpt-military-trials.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf) [<http://perma.cc/NFE8-DTGV>] (archived Mar. 9, 2014).

88. See Human Rights Comm., General Comment 29, States of Emergency, art. 4, U.N. Doc CCPR/C/21/Rev.1/Add.11, ¶ 11 (Aug. 31, 2001) (regarding non-derogable rights: “State parties may in no circumstances invoke article 4 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).

office responsible for ensuring that those rights are upheld has regrettably continued with contemporary international criminal courts.<sup>89</sup> In other words, there is a difference between paying lip service to the rights of suspects and accused persons and putting in place the structures that will *ensure the realization* of those rights. The courts accomplished the former but failed to deliver on the latter. As Elise Groulx, president of the International Criminal Defense Lawyers Association aptly notes, “[t]he institutional basis for a truly independent body of defense lawyers is very much lacking in the Statutes of these courts, even though the *rights of the accused* are clearly articulated on paper.”<sup>90</sup> In contrast, those same instruments spell out in great detail the institutional role of the other organs of the tribunals—namely, the Prosecution, Chambers, and the Registry.<sup>91</sup>

This institutional failure—the delayed realization of the “third pillar”<sup>92</sup> of international criminal law—reflects concerns for sovereignty and the reality that states traditionally have primary jurisdiction to enforce criminal law within their territories and over their nationals.<sup>93</sup> In an environment in which international prosecution efforts must be justified, legalized, and legitimated for state consent to be given, concerns for defense rights have largely been overshadowed by prosecution concerns.<sup>94</sup> This is particularly true given that the defense routinely challenges, both within and outside of these trials, the legality and the legitimacy, of the tribunals purporting to assert jurisdiction over the defendants.<sup>95</sup>

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89. Including the ICTY, ICTR, SCSL, and most strikingly the permanent ICC, which did not follow through with proposals to include a separate organ for defense. See Elise Groulx, “*Equality of Arms*”: *Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System*, 3 OXFORD U. COMP. L.F. n.35 and surrounding text (2006), available at <http://ouclfi.uscomp.org/articles/groulx.shtml> [<http://perma.cc/4ZC4-RTJM>] (archived Feb. 23, 2014) (noting that the Rome Statute is completely silent regarding institutional support for defense lawyers).

90. *Id.* n.6 and accompanying text.

91. See *id.* (stressing the inequality of arms that is created); see, e.g., Rome Statute, *supra* note 22, at art. 15 (detailing the duties and powers of the prosecutor).

92. M. Cherif Bassiouni refers to the three main pillars of international criminal law: the “independent judiciary, a prosecuting authority which guards public interests, and *independent and effective defense counsel*.” Groulx, *supra* note 89, at n.16 and accompanying text.

93. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 292–94 (7th ed. 2008) (describing the “reserved” domestic jurisdiction of states).

94. Groulx describes how the international push to end impunity led “to a focus on the prosecution of alleged perpetrators and compensation of victims. The system was built very rapidly without including the legal profession in an organized and continuous manner, in the design of the system – or looking critically at the methods of protecting the rights of individuals accused of committing heinous crimes.” Groulx, *supra* note 89, at n.13 and accompanying text.

95. See, e.g., Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. For the Former

The problem is that this pattern was not only a historical one. In the modern setting, UN-supported international tribunals have adopted elaborate provisions guaranteeing fair trials for the accused. This in one way reflects the advances in, and impact of, modern international human rights law on international criminal law.<sup>96</sup> Thus, Articles 20 and 21 of the Statutes of the ICTY and ICTR, respectively guarantee fundamental fair trial rights for the accused, as do Articles 66 and 67 of the Rome Statute.<sup>97</sup> Those provisions, inspired by, but reaching beyond, Article 14 of the International Covenant on Civil and Political Rights (ICCPR),<sup>98</sup> are often supplemented by the procedural rules applicable before the tribunals, which, taken individually or together, offer much more to the accused than did the basic Articles 16 and 9 of the Charters of the Nuremberg and Tokyo Tribunals, respectively.<sup>99</sup> Indeed, the justice meted out following the Nuremberg and Tokyo trials, which did not give the right of appeal and permitted use of the death penalty under Articles 27 and 16, respectively, may offend modern human rights sensibilities.<sup>100</sup> This sensibility has elevated due process rights even higher. So, for instance, the right to appeal, which was originally denied by the Tokyo and Nuremberg Tribunals, has by now arguably achieved the status of a *jus cogens*, a kind of super international law rule, from which no state is allowed to derogate.<sup>101</sup>

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Yugoslavia Oct. 2, 1995) (deciding that the ICTY since 1991 had jurisdiction over national courts).

96. See Groulx, *supra* note 89, at text immediately following n.36 (“Independence of the legal profession was explicitly recognized (Rule 20(2)) and linked directly to the right to a fair trial.”).

97. Article 66 preserves the presumption of innocence, while Article 67 speaks to the rights and entitlements of the accused. See Rome Statute, *supra* note 22, at arts. 66–67.

98. International Covenant on Civil and Political Rights arts. 9(3), 14, Mar. 23, 1976, 999 U.N.T.S. 171; see also WILLIAM A. SCHABAS, UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 503 (2006); Wolfgang Schomburg, *The Role of the International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. J. INT’L HUM. RTS. 1, 2 (2009) (noting that the fair trial guarantees of Article 14 mirror Article 21 of the ICTY statute and Article 20 of the ICTR statute).

99. IMT Charter, *supra* note 62, at art. 16; Charter of the International Military Tribunal for the Far East art. 9, Annexed to the Special Proclamation of Supreme Commander for the Allied Powers Establishing an International Military Tribunal for the Far East, Case No. 001/18-07-2008/ECCC/OCIJ (1946) [hereinafter IMTFE Charter].

100. The three leaders of the victorious allies apparently flirted with the idea of having executions of former Nazi leaders instead of war crimes trials. See ARIEH J. KOCHAVI, PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT 220–21 (1998) (discussing Stalin’s suggestion to incinerate approximately 25,000 German officers); see also STL Statute, *supra* note 5, at art. 26 (providing for appellate proceedings for the STL).

101. See Vienna Convention on the Law of Treaties art. 55, May 23, 1969, 1155 U.N.T.S. 331 (setting out, in Article 55, that a treaty is void if, at the time of its conclusion, it conflicts with a preemptory norm of general international law; that is, a

Lacking the administrative infrastructure to practically ensure the rights pledged to the accused persons, contemporary international criminal courts have assigned the Registry—the administrative organ of the tribunals that is supposed to neutrally service the Prosecution, Defense, and Chambers—to provide legal aid assistance for indigent accused.<sup>102</sup> A key component of legal aid is the provision of qualified and competent counsel to represent suspects and accused persons before the tribunals. Thus, in the ICTY there is an Office of Legal Aid and Detention Matters; in the ICTR, a Defense Counsel and Detention Management Section; and in the ICC, an Office of Public Counsel for the Defense. These offices have come to play, under generally difficult conditions, a vital role in the justice process. They ensure that the defendants, and in some cases suspects, before those courts are represented by competent counsel in the interest of justice.<sup>103</sup>

*B. The Sierra Leone Tribunal's Solution: Include the Defense,  
Even if Only as a Second Class Citizen*

The SCSL followed in the footsteps of the ICTY and the ICTR. It was therefore the third of the modern ad hocs. In that court, which had experience in defense matters that was crucially brought to bear in the creation of the new STL, Article 17 of the Statute enshrined the fair trial rights of the accused.<sup>104</sup> Similar to other international criminal tribunals, Article 17 and the rest of their founding instruments did not specify how fair trial guarantees will practically be realized by the accused or which of the three formally recognized statutory organs (i.e. the Chambers, Prosecution, or Registry) will be responsible for ensuring them.<sup>105</sup> In fact, the mention of the defense is very limited in the founding documents of the Tribunal.

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norm accepted by the entire international community from which no derogation is permitted and can only be modified by a subsequent general international law norm having the same character).

102. See, e.g., *infra* notes 126–29 (discussing the role of the Registry at the Sierra Leone Court).

103. See Rupert Skilbeck, *Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone*, 1 ESSEX HUM. RTS. REV. 66, 71–77 (2004) (describing roles of defense offices in the ICTY, ICTR, and ICC).

104. The rights articulated in Article 17 of the Sierra Leone Statute, Article 21 of the ICTY, Article 20 of the ICTR, and Articles 66 and 67 of the Rome Statute are supplemented by those rights that the accused enjoy under general conventional and customary international law, in particular, Article 14 of the ICCPR. See, e.g., Charles Chernor Jalloh, *Does Living by the Sword Mean Dying by the Sword?*, 117 PENN ST. L. REV. 707 (2013) (discussing the right of self-representation in international criminal tribunals and the challenges of giving effect to it without sacrificing principle).

105. Article 17 of the Sierra Leone Statute guarantees a fair and public hearing, a presumption of innocence, minimum guarantees, etc. It refers to each of the rights using some variation of the phrase “The accused shall” without specifying duties of any organs of the Court to protect these rights. See *Prosecutor v. Brima et al.*, Case No.

For instance, Article 14 of the UN–Sierra Leone Agreement accords to counsel of suspects and accused immunity from personal arrest and from criminal and civil process, and protects the inviolability of all documents relating to the exercise of their functions as counsel.<sup>106</sup> However, the rest of the treaty does not provide for the collective structural arm of defense within the Tribunal as compared to the organs for the Prosecution, Chambers, or Registry. It does not even claim to create a lesser organ to uphold rights of the accused or provide modalities for the hiring of the defense lawyers who play an indispensable role in ensuring the fairness of trials before the SCSL.<sup>107</sup> It seems as if the defense was simply forgotten. This omission from the statute should appear significant in that it implies that it is possible to have a fair trial without creating an explicit mechanism for protecting defendant rights. Or, at least, assumes that other offices within the existing organs, notably the Registry, could fulfill that role.

Similarly, in the so-called residual mechanisms created to continue the work of these ad hoc courts, almost no reference is made to the defense.<sup>108</sup> While perhaps the omission of the defense might

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SCSL–2004–16–AR73, Decision on Brima-Kamara Defense 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, ¶¶ 82, 84 (Special Court for Sierra Leone, Dec. 8, 2005) (inferring that according to the Statute, no organ carries the responsibility for ensuring the rights of the Accused, but rather it must be “a common duty shared by the three organs”); *see also* Skilbeck, *supra* note 103, at 79 (describing the creation of the Defense Office through the rules of procedure even though the office was ignored in the SCSL’s Statute).

106. Article 14, relating to Counsel, provides:

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions. 2. In particular, the counsel shall be accorded: (1) Immunity from personal arrest or detention and from seizure of personal baggage; (b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused; (c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as counsel of a suspect or accused. (d) Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Court and back.

Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 14, Jan. 16, 2002, 2178 U.N.T.S. 138 [hereinafter UN-Sierra Leone Agreement].

107. *See supra* note 84. Similarly, little reference has been made to the defense in the closing legal instrument of the tribunal.

108. *See, e.g.*, Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone and Statute of the Residual Special Court for Sierra Leone, Feb. 1, 2012, [hereinafter Sierra Leone Residual Special Court Agreement] available at <http://www.rscsl.org/Documents/RSCSL%20Agreement%20and%20Statute.pdf> [<http://perma.cc/9CT6-ZUEV>]

have initially been understandable, in light of the paucity of international experience with such trials at the time the ICTY and the ICTR were created in 1993 and 1994, it is puzzling that the defense was also left out in the statutes of the residual courts. One might have thought that the lesson of the various ad hoc courts that the UN secretary-general had midwived into existence would henceforth include such a framework in the next set of institutions charged with finishing their mandates. Interestingly, in the *Report on the Establishment of the Lebanon Tribunal*, he had rightly noted that creation of a defense office as an organ is now integral to the institutional fabric of these courts.<sup>109</sup> It is hard to explain the omission, especially in the face of the position that had been taken on some of those courts. This might lead to the cynical conclusion that these mechanisms are still biased toward efforts at justifying and legitimating prosecutions. Conversely, that the apparent concern about defense rights continue to be lip service at best and after thoughts at best.

In any case, returning to the SCSL, the judges of the Sierra Leone Court sought to address the lacuna regarding the defense in the UN–Sierra Leone Agreement and the Statute of the SCSL by adopting Rule 45 of the RPE.<sup>110</sup> While that is not the same as having the defense included in the primary documents, as was the case at the STL, it was, to their credit, better than doing nothing. Thus, in Rule 45(A), they directed the registrar of the SCSL to “develop, establish and maintain” a Defense Office (otherwise known as the OPD) with the view “to ensuring the rights of suspects and accused persons.”<sup>111</sup> The OPD, headed by a principal defender, was to fulfill its functions primarily by offering duty counsel situated reasonably close to the detention facility to provide initial legal advice and assistance for accused; legal assistance for indigent accused as may be ordered by the judges in the interests of justice; and adequate support and facilities for counsel to defend the accused.<sup>112</sup> The broad nature of Rule 45 necessarily meant that it later had to be supplemented by various other provisions and policies developed by the OPD and the Registry; for example, the *Directive on the Assignment of Counsel* and the *Indigence Guidelines*.<sup>113</sup>

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(archived Feb. 23, 2014) (providing for the establishment of a Chambers, prosecutor, and registrar in Article 2 and envisaging a roster of judges, prosecutors, and registrars in Articles 11, 14, and 15, but strikingly omitting the inclusion of a Defense Office).

109. U.N. Secretary-General, *Report*, *supra* note 29, ¶ 30.

110. See ALISON THOMPSON & MICHELLE STAGGS, *THE DEFENCE OFFICE AT THE SPECIAL COURT FOR SIERRA LEONE: A CRITICAL PERSPECTIVE* 18–20 (2007) (describing the delayed establishment of the Defense Office at the Sierra Leone Court).

111. SPEC. CT. FOR SIERRA LEONE R. P. & EVID. 45(A) [hereinafter SIERRA LEONE COURT RPE].

112. *Id.* at r. 45(B).

113. See Charles Chernor Jalloh, *The Contribution of the Special Court for Sierra Leone to the Development of International Law*, 15 AFR. J. INT'L & COMP. L. 165,

The Sierra Leone Court's creation of an OPD with a mandate to ensure the rights of suspects and accused persons has been widely acknowledged in the international criminal justice community. The late Italian jurist, Antonio Cassese, described it as "a groundbreaking innovation,"<sup>114</sup> and William Schabas, a leading authority, spoke of it as one of the "more significant innovations in this area."<sup>115</sup> Respected human rights nongovernmental organizations (NGOs), such as the International Center for Transitional Justice and Human Rights Watch, have also lauded the Sierra Leone Court for the new course it charted in this area.<sup>116</sup> Even the OPD's fiercest critics could not begrudge it the conclusion that, in many respects, it "represents a tremendous achievement."<sup>117</sup> Given the relative youth of international criminal courts, the establishment of a semi-autonomous public defender's office within the Registry—one that contracts private defense counsel to represent the accused while working with its own in-house lawyers (duty counsel) to provide backup support for counsel—advanced an unprecedented approach to ensuring greater equality of arms between the prosecution and defense in international criminal justice administration.

But the conceptual promise of the OPD was thwarted in practice by various factors. For one thing, disputes between the office and defense counsel, with whom it largely had a frosty relationship, undermined the authority of the office. There are, of course, several reasons that have been offered for the various troubles faced by the office, including an unclear mandate, poor staffing, and alleged disinterest in its success on the part of its parent body: the Registry.<sup>118</sup> Yet ultimately, foremost among even these issues, was a fundamental structural problem: its lack of operational independence

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180 (2007) (citing to the Directive on the Assignment of Counsel and Indigence Guidelines).

114. ANTONIO CASSESE, REPORT ON THE SPECIAL COURT FOR SIERRA LEONE ¶ 10 (2006).

115. SCHABAS, *supra* note 98, at 615.

116. See THIERRY CRUVELLIER & MARIEKE WIERDA, INTERNATIONAL CENTER FOR JUSTICE, CASE STUDY SERIES: THE SPECIAL COURT FOR SIERRA LEONE: THE FIRST EIGHTEEN MONTHS 3 (2004) (discussing the new innovated defense structure in the SCSL); Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone Accomplishments, Shortcomings, and Needed Support*, HUM. RTS. WATCH, Sept. 27, 2004, at 22, available at <http://www.hrw.org/reports/2004/09/07/bringing-justice-special-court-sierra-leone> [<http://perma.cc/W7HS-3NFL>] (archived Mar. 9, 2014) ("We believe that the Defense Office represents a deepening of practical experience drawn from the work of the ad hoc tribunals.")

117. THOMPSON & STAGGS, *supra* note 110, at 4.

118. See Sareta Ashraph, *The Naked Defense Office: How an Unclear Mandate, Poor Staffing, and Registry Disinterest Stripped the Office of the Principal Defender, in THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* 550, 555–70 (Charles Chernor Jalloh ed., 2013) (discussing the unclear role of the Defense Office and the conflicting views between the registrar and the Defense Office).

from the registrar.<sup>119</sup> The office's dependence on that organ proved unhealthy in various important respects. For one thing, its subjugation to the registrar's oversight gave a measure of control to that body in interpreting and narrowing down its mandate, especially given the ambiguous language of Rule 45.

Similarly, the registrar had ultimate oversight over its staff and could determine the personnel needs of the office, in both a direct sense in terms of assessing staff performance and the numbers and professional classification of those working in the sub-unit. Furthermore, the office relied on the budgetary largesse of the same organ which in turn affected its discharge of an independent legal aid and logistical support functions for the defense counsel, especially in instances where a different view was held vis-à-vis that of the Registry legal advisers. Thus, even at its stillborn birth, the SCSL's Defense Office lacked the necessary administrative independence from the Registry to act only in the interests of the accused and justice. Why?

The registrar, as chief purser of a shoe-strong budget, was typically tied to so-called "zero-growth" budgets imposed by the states that constituted the court's Management Committee.<sup>120</sup> Yet in the world of legal aid and complex international criminal cases, substantial funds, often unbudgeted, must be disbursed to hire competent defense counsel or to otherwise meet the investigative and other unanticipated needs of defense teams.<sup>121</sup> In this general environment of austerity, where absorbing unplanned expenditures was seen to hardly be an option, this essentially put the registrar in a conflict of interest vis-à-vis his duty to ensure the practical realization of the rights of the accused and his desire to ensure that only minimal resources were expended by the tribunal.

To his credit, (the now late) Robin Vincent, the first registrar of the Sierra Leone Court (who incidentally was appointed to the same position in the STL), appreciated this dilemma and apparently supported Simone Monasebian, the first principal defender, in her efforts to seek a revised statute-based mandate for the OPD to build some distance and become a more effective institutional counterweight to the Prosecution.<sup>122</sup> Despite the best efforts of the first principal defender, proposals to remove the OPD from the

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119. See Jalloh, *supra* note 113, at 180 (noting that rule 45(A) gave the registrar the responsibility of establishing, developing, and maintaining the Defense Office).

120. See *id.* at 181 (stating that the limited funding imposed limitations on the model ultimately chosen for the defense).

121. See THOMPSON & STAGGS, *supra* note 110, at 23–24 (referencing the limitations imposed as a result of the shoestring budget).

122. Vincent O. Nmehielle, *Position Paper on the Independence of the Office of the Principal Defender at the Special Court for Sierra Leone 2* [hereinafter *OPD Position Paper*] (on file with the author) (submitted to the Management Committee of the SCSL by Vincent O. Nmehielle, Principal Defender).

manacles of the Registry by making it a full-fledged organ did not appear to garner the requisite support within the Management Committee of the court and from the UN Office of Legal Affairs.<sup>123</sup> Ultimately, it seems that the OPD's proposals for amendments to the Sierra Leone Court's constitutive documents were found to have been insufficiently motivated. The proposals were not forwarded to the secretary-general or the Council for their consideration and decision.<sup>124</sup> It was also unclear whether the proposed amendments secured the support of the Sierra Leonean authorities, whose position as bilateral founding partner in the work of the tribunal appears to slowly erode over time.<sup>125</sup> After the second principal defender, Vincent Nmehielle, assumed duty in mid-2005, he continued the struggle for the OPD's autonomy. As part of this, he resuscitated the proposal to amend the relevant founding instruments of the Sierra Leone Court.<sup>126</sup> Independence was felt to be necessary for three main reasons.

Firstly, autonomy for the OPD would translate into immediate practical benefits for the accused in the SCSL. It was hoped that the administrative decisions relating to defense teams would be based less on budgetary constraints and more on assessments of the merits of the issues before the office.<sup>127</sup> And that if there was a difference of view with the registrar, the principal defender's position would trump on interests of justice concerns since he had direct operational experience with the defense matters and was expected to play a supportive role by the accused persons.

Secondly, autonomy would translate into immediate budgetary independence for the Defense Office vis-à-vis the Registry—similar to the position enjoyed by the Office of the Prosecutor.<sup>128</sup> This does not mean that the office would not be subject to any oversight. Rather, what it would have meant is that it would be up to the principal defender to identify the budgetary needs and to make the case for

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123. See *id.* at 13 (stating as part of the Plan of Action, that the present plan needs to be sent and approved by the UN Office of Legal Affairs).

124. *Id.* at 1.

125. See, e.g., Permanent Rep. of Sierra Leone to the U.N., Letter dated Aug. 9, 2000 from the Permanent Rep. of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2000) (requesting assistance from the Security Council in establishing a court in Sierra Leone).

126. See THOMPSON & STAGGS, *supra* note 110, at 32 (discussing Nmehielle's argument to the tribunal that the Defense Office was a fourth pillar of the tribunal).

127. See, e.g., *id.* at 26–27 (noting how Defense was left, on the eve of beginning two cases, with a seventy four percent smaller budget for the much needed “contractual services” of individual defense teams’ work, including the staffing costs for counsel, investigators, and experts).

128. Rather than spending time lobbying the court to pressure the registrar, such independence would allow the Defense Office to focus more on the issues at hand. See *id.* at 25, 44 (noting that being tied to the Registry for funding results in budgetary insecurities).

them rather than having his yearly forecasts be gutted by the registrar as a first check before they are even formally submitted for consideration by the court's Management Committee comprised of more independent third states. While those countries, chaired by Canada, did exercise oversight, they had more distance from the issues and could perhaps support such proposals if they are deemed sufficiently justified in light of operational needs.

Last but not least, in the embattled and divisive environment of the Sierra Leone Court wherein the OPD was at once touted as the fourth pillar of the court but at the same time struggled daily to fulfill its basic mandate, it was felt that a measure of administrative distance from the registrar would help establish an important precedent for the defense in future international criminal tribunals. In other words, the final imperative was a deeply ideological one, under which it was felt that autonomy would give primacy to the fair trial rights of accused persons by creating an organ responsible for ensuring them. The office saw itself as a trail blazer whose example could be followed in other courts that the international community might establish in the future.<sup>129</sup> It is interesting that the later experience, with the STL's creation of a defense arm, bore this out to some extent.

As part of the OPD strategy to achieve autonomy from the registrar, the office attempted to secure broader support that would be reflected in the statute. It thus turned to the president of the Sierra Leone Court, the majority of the judges sitting in plenary (who had initially created it under the RPE) and the court's Management Committee (which ultimately controlled the purse strings) for a package of changes to the constitutive instruments of the court.<sup>130</sup> These changes were essentially the same as those the first principal defender had proposed. However, because of internal tribunal politics, Nmehielle's resuscitated proposals were also opposed by two successive registrars of the Sierra Leone Court. Perhaps the registrar perceived the OPD's call for liberation as a threat to or an erosion of powers.<sup>131</sup> For the judges, there might have been concern that the office's own vision of itself proved to be contradictory with the way the judges saw it as being required to act, especially since there were independent defense lawyers providing the representational needs for the accused persons. Interestingly, although this might appear to contradict a traditional perception that the Prosecution should act as a minister of justice, the proposal was also opposed by prosecutors

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129. See *id.* at 28 (noting the principal defender's key argument for reform: it is not so much about equality between prosecution and defense, but rather the principle that defense should control its own budget).

130. *OPD Position Paper*, *supra* note 122.

131. See THOMPSON & STAGGS, *supra* note 110, at 32 (noting the registrar's insistence that the defense be within its purview).

who took exception to having a stronger OPD mandate in the constitutive statute of the tribunal in a strange alliance with one dissenting but rather vocal defense team.<sup>132</sup> In the end, the second attempt also failed at the plenary and Management Committee stages, wherein various officials paid lip service to the importance of fair trial rights but failed to engage the substantive concerns underpinning the idea or to offer viable alternatives to the restructuring of the Defense Office.<sup>133</sup>

Today, as the SCSL has completed its last trial of former-Liberian President Charles Taylor in September 2013 and shut down its doors and transformed into a residual mechanism in December 2014, the chances of creating a fourth defense pillar at the SCSL have virtually disappeared. Interestingly, in the Agreement of the Residual SCSL, which was envisaged to take over after completion of the judicial activities of the court, the Defense was also not represented.<sup>134</sup> And even before the closure, the Registry—evidently compelled by the completion strategy—has downsized the relatively small staff of the OPD, reducing it to a mere shadow of its former self.<sup>135</sup>

### B. *The Significance of the Lebanon Tribunal's Creation of an Independent Defense Office Organ*

Against the above backdrop, the significance of the Defense Office in the STL as the first full-fledged independent organ in an internationalized criminal court cannot be overemphasized. Indeed, as has been observed elsewhere, this marks a first in the history of international criminal law.<sup>136</sup> The OPD of the Sierra Leone Court has undoubtedly influenced this development, likely an enduring part of its wider legacy, through its unsuccessful efforts for statutory and operational autonomy from the registrar. As will be argued more fully below, if the level of commitment signaled in the STL Statute is matched by a similar level of funding and operational distance for the defense, it will likely be celebrated by practitioners and academics

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132. See *id.* at 33 (noting that the Prosecution opposed any use of the phrase “fourth pillar” to describe the defense).

133. Personal observation of the author (who worked as the last Legal Adviser to the Office of the Principal Defender).

134. See Sierra Leone Residual Special Court Agreement, *supra* note 108, at art. 2 (providing for Prosecution, Chambers, and Registry, but no Defense organ).

135. See Human Rights Watch, *supra* note 116, at 24 (urging the registrar and the Management Committee to improve funding to the defense at the Sierra Leone Court).

136. Jalloh, *supra* note 104, at 182; see also Vincent O. Nmehielle, *The Defense Office at the Special Court*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* 527, 535 (Charles Chernor Jalloh ed., 2013).

alike as a strong contribution to the maturation of international criminal justice institutions.

## V. THE DEFENSE IN THE SPECIAL TRIBUNAL FOR LEBANON

### *A. Remembering the Defense for the First Time in International Criminal Law: Better Late Than Never*

The founding instruments of the STL address the role of the defense in various provisions. Article 2(1) of the UN-Lebanon Agreement mirrors Article 7 of the STL Statute and provides for the Tribunal to have four organs: “the Chambers, the Prosecutor, the Registry and the *Defense Office*.”<sup>137</sup> [Emphasis added].

Pursuant to Article 11 of the UN-Lebanon Agreement, the head of the Defense Office enjoys, during his time in Lebanon, the same privileges, immunities, exemptions, and facilities accorded to the prosecutor and his deputy, the registrar, and the judges.<sup>138</sup> As with other international criminal courts, the privileges and immunities conferred on the principals of the STL are the same as those accorded to diplomats under the Vienna Convention on Diplomatic Relations.<sup>139</sup> Those privileges accrue to the benefit of the organization, which can waive them as appropriate, not to the personal benefit of the individuals working in the organization.<sup>140</sup>

Importantly, through Article 13 the Lebanese government guarantees that defense counsel, who usually practice before such tribunals as private contractors instead of staff members, will also enjoy various kinds of immunities during their time in Lebanon.<sup>141</sup> These functional immunities provide defense counsel what must by now be standard protections from personal arrest, detention, or seizure of their personal effects; inviolability of documents relating to

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137. See Agreement, *supra* note 5, at art. 2(1); Statute, *supra* note 5, at art. 7 (stating that “The Special Tribunal shall possess the juridical capacity necessary: (a) To contract; (b) To acquire and dispose of movable and immovable property; (c) To institute legal proceedings; (d) To enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Tribunal.”).

138. See Agreement, *supra* note 5, at art. 11(1) (“The judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office, while in Lebanon, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the Vienna Convention on Diplomatic Relations of 1961.”).

139. *Id.* at art. 11(1); Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

140. See Agreement, *supra* note 5, at art. 11(2) (“Privileges and immunities are accorded to the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office in the interest of the Special Tribunal and not for the personal benefit of the individuals themselves.”).

141. *Id.* at art. 13.

the exercise of their role as lawyers for the suspects or accused before the Tribunal; immunity from criminal or civil process for oral or written statements made in the course of discharging their duties—which immunity survives the end of their function; and protection from immigration restrictions during their stay in the country or journey to and from Tribunal business.<sup>142</sup> The importance of this provision cannot be emphasized enough. To take but one example, in the ICC Libya Situation, Melinda Taylor, interim court-appointed duty counsel for Saif Al Islam Gaddafi, was subject not only to search and seizure of her documents but also to unlawful arrest and detention by Libyan authorities.<sup>143</sup> There have been similar arrests and harassment of defense lawyers in other tribunals in, for instance, Rwanda.

Finally, Article 15(1) of the Agreement establishes that Lebanese authorities shall cooperate with all organs of the STL, especially the Prosecution and defense counsel, throughout the proceedings.<sup>144</sup> This includes facilitating access for all counsel to sites, persons, and relevant documents required in the investigation.<sup>145</sup> Article 15(2) creates a further obligation to comply with any request for assistance by the Tribunal, including its organs, the prosecutor, and the head of the defense, or an order for assistance made by the Chamber.<sup>146</sup> Drawing upon the experience of the ad hoc courts, this provision is another important step forward in the march toward equality between the prosecution and defense in the international criminal tribunals. As national authorities are commonly known to afford a higher level of cooperation to prosecution than to defense lawyers, this positive obligation will help provide practical assurance that the

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142. Article 13 provides that:

[T]he counsel shall be accorded: (a) Immunity from personal arrest or detention and from seizure of personal baggage; (b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused; (c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused; (d) Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Tribunal and back.

*Id.*

143. ICC Staff Members.

144. Agreement, *supra* note 5, at art. 15(1).

145. *See id.* (“The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation.”).

146. *See id.* at art. 15(2) (“The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to: (a) Identification and location of persons; (b) Service of documents; (c) Arrest or detention of persons; (d) Transfer of an indictee to the Tribunal.”).

defense will not face obstacles that could be put in place by Lebanese authorities to hinder the defense of potentially domestically unpopular or controversial defendants.<sup>147</sup> Indeed, likely because of the independence of the Defense Office, it has negotiated a memorandum of understanding with Lebanon's Ministry of Justice to enable full cooperation and access into the country for defense counsel investigations and other matters related to the exercise of their functions in representing suspects (or the accused).<sup>148</sup> This is a welcome development and, to this writer's knowledge, is a first in the history of international criminal tribunals. It plainly enables the Defense Office to create a special legal regime to benefit the defense counsel in relation to several areas of state cooperation. The office thus brings institutional weight to bear for the defendants and their counsel, to permit access to the country and investigations, in a manner similar to the way the prosecutor could take such arrangements for granted at the SCSL and other ad hoc courts.

In addition to the above provisions in the UN-Lebanon Agreement, Articles 15 and 16 of the STL Statute enshrine fundamental rights for "suspects" and the "accused."<sup>149</sup> These rights are familiar to American lawyers and probably the public. Article 15 explains that a suspect, i.e., a person being questioned during Prosecution investigations before the laying of formal charges in an indictment, has the right be informed before that questioning that there are grounds to believe that she is a suspect in a criminal investigation;<sup>150</sup> the right to be questioned in the presence of counsel unless she has voluntarily waived that right;<sup>151</sup> the right to not be

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147. This is a comment on the equality of the cooperation mechanisms available, not on the sufficiency of mechanisms generally available. For critical analysis of the STL cooperation mechanisms, see Lukasz Korecki, *Procedural Tools for Ensuring Cooperation of States with the Special Tribunal for Lebanon*, 7 J. INT'L CRIM. JUST. 927 (2009); Swart, *supra* note 1.

148. See Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of Their Cooperation, July 28, 2010, available at [http://www.stltsl.org/index.php?option=com\\_k2&Itemid=286&id=143\\_727112d5627cab330afb0297dfdf2df&lang=en&task=download&view=item](http://www.stltsl.org/index.php?option=com_k2&Itemid=286&id=143_727112d5627cab330afb0297dfdf2df&lang=en&task=download&view=item) [<http://perma.cc/FTT8-L2NF>] (archived Feb. 21, 2014).

149. The Statute does not define the terms *suspect* or *accused*. A person is a suspect until he or she is formally indicted, while an accused is a person that has been formally indicted by the prosecutor.

150. See STL Statute, *supra* note 5, at art. 15(a) ("A suspect who is to be questioned by the Prosecutor . . . shall be informed by the Prosecutor prior to questioning, in a language he or she speaks and understands: (a) The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Special Tribunal . . .").

151. See *id.* at art. 15(e) ("A suspect who is to be questioned by the Prosecutor . . . shall be informed by the Prosecutor prior to questioning, in a language he or she speaks and understands: . . . (e) The right to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.").

compelled to incriminate herself or confess guilt;<sup>152</sup> the right to remain silent, without any adverse inferences being drawn as to her guilt or innocence;<sup>153</sup> and the right to legal assistance of her own choosing when the interests of justice so require.<sup>154</sup>

This paragraph introduces the right to counsel, laying out the basic distinctions between Article 16 of the Statute governing suspects and the clauses protecting the rights of the accused in other tribunals, which will be discussed in further detail below. The right to legal assistance of a suspect's choosing presumably means, consistent with the jurisprudence of the ad hoc criminal tribunals, the right to be assigned a *qualified* lawyer from either the Defense Office or the list of counsel maintained by it. It does not include a right to a *particular* lawyer.<sup>155</sup> Perhaps because of the generally serious gravity of international crimes, the tribunals have been relatively more generous in according certain rights to suspects compared to the black letter requirements of international human rights law and perhaps many national jurisdictions. The Lebanon Tribunal continues this tradition even though its jurisdiction is only over common crimes under Lebanese law.<sup>156</sup>

Article 16 of the Statute of the STL outlines the basic rights akin to those enjoyed by each accused person in international criminal courts. It guarantees the accused, among other things, equality before

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152. See *id.* at art. 15 ("A suspect who is to be questioned by the Prosecutor shall not be compelled to incriminate himself or herself or to confess guilt.").

153. See *id.* at art. 15(b) ("A suspect who is to be questioned by the Prosecutor . . . shall be informed by the Prosecutor prior to questioning, in a language he or she speaks and understands: . . . (b) The right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he or she makes shall be recorded and may be used in evidence . . .").

154. See *id.* at art. 15(c) ("A suspect who is to be questioned by the Prosecutor . . . shall be informed by the Prosecutor prior to questioning, in a language he or she speaks and understands: . . . (c) The right to have legal assistance of his or her own choosing, including the right to have legal assistance provided by the Defence Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it . . .").

155. See Schomburg, *supra* note 98, ¶ 38 (noting that, amongst other things, the defendant's choice might be limited by conflicts of interest as in Gotovina); Prosecutor v. Ante Gotovina, Case No. IT-06-90-AR73.1, Decision on Miroslav Separović's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest and Finding of Misconduct, ¶ 37 (Int'l Crim. Tribunal for the Former Yugoslavia, May 4, 2007).

156. ICTR Statute, *supra* note 51, at art. 17(3)(f); ICTY Statute, *supra* note 51, at art. 18(3)(f); Sierra Leone Statute, *supra* note 54, at art. 17(4)(f); Rome Statute, *supra* note 22, at art. 55; SIERRA LEONE COURT RPE, *supra* note 111, r. 43(A); International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), entered into force March 14, 1994, amendments adopted Jan. 8, 1996, r. 42(a) [hereinafter ICTY-RPE]; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995, r. 43(A) [hereinafter ICTR-RPE]; see also Schabas, *supra* note 98, at 358, 503.

the tribunal;<sup>157</sup> the right to a fair and public hearing;<sup>158</sup> and the right to be presumed innocent until proven guilty by the prosecutor beyond a reasonable doubt.<sup>159</sup> The usual minimum guarantees then follow, including the right to notice of the charges in a language the accused understands; to adequate time and facilities to prepare his defense and to communicate with counsel of his own choosing; to be tried without undue delay; to examine, or have examined, witnesses under the same conditions as witnesses against him; to the free assistance of an interpreter if he cannot understand or speak the language used in the Tribunal; and not to be compelled to testify against himself or to confess his guilt.<sup>160</sup>

*B. No Longer Second Class? The Defense as an Equal  
Before the Altar of Justice*

There are three noteworthy differences between Article 16 of the Lebanon Tribunal's Statute and its equivalent provisions from all the other international criminal courts that preceded it. First, the right of the accused to be tried in his presence is subject to Article 22 which permits, for the first time in a UN-sponsored tribunal, trials in absentia.<sup>161</sup> The secretary-general's report noted that trials in absentia are common in a number of civil law jurisdictions, including in Lebanon.<sup>162</sup> Thus, under Article 22, the proceedings in the Tribunal may take place in the absence of the accused (a) if he waives, in writing, his right to be present; (b) if relevant national authorities fail to render him to the Tribunal; or (c) if he absconds and cannot otherwise be located after all reasonable steps have been taken to secure his appearance. In the limited circumstances in which trials in absentia are held, Article 22 triggers a secondary set of protections, requiring the Tribunal to ensure, amongst others, that certain notices are published and that the accused is represented by a private or publicly funded lawyer from the Defense Office to protect his interests.<sup>163</sup> If convicted in absentia, an accused person who

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157. See STL Statute, *supra* note 5, at art. 16(1) ("All accused shall be equal before the Special Tribunal.").

158. See *id.* at art. 16(2) ("The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of victims and witnesses.").

159. See *id.* at art. 16(3)(a)–(c) ("The accused shall be presumed innocent until proved guilty according to the provisions of this Statute . . .").

160. See *id.* at art. 16(4)(a)–(h) (detailing the minimum guarantees any accused person shall enjoy under the statute).

161. *Id.* at art. 22(1). See Aptel, *supra* note 1, at 1121 (discussing the complications of including this element of inquisitorial proceedings in the STL).

162. See U.N. Secretary-General, *Report*, *supra* note 29, ¶ 32(b) ("The institution of trials in absentia is common in a number of civil law legal systems, including Lebanon's.").

163. STL Statute, *supra* note 5, at art. 22(2).

subsequently appears may elect to accept the judgment or to be retried if he had not previously designated counsel of his choosing.<sup>164</sup> These in absentia provisions have been invoked in, inter alia, the case involving Hassan Habib Merhi. His trial opened in January 2014, and is under consideration for a joinder with other cases in February 2014.<sup>165</sup>

Second, under Article 16(f), in addition to being entitled to be informed promptly of the nature of the charges against her, the accused is separately entitled to “examine all evidence to be used against him or her during the trial” in accordance with the RPE.<sup>166</sup> In the other international criminal courts, the right of an accused to examine the evidence against him is seen as an integral aspect of the right to be informed promptly and in detail of the nature and cause of the charges and to examine witnesses against him—both of which are given further effect through various procedural rules of the tribunals.<sup>167</sup>

The travaux préparatoires does not explain why this new language was imported into the fair trial provision common to the statutes of contemporary international criminal courts. Perhaps the parties felt it important to clarify the point because of the mélange of common and civil law in the procedures applicable in the Tribunal. Unlike in common law, in civil law systems such as that of Lebanon, it is the court and more specifically the *juge d’instruction*, not the

164. *Id.* at art. 22(3). Note that there might be difficulty in making this work in practice. See generally Aptel, *supra* note 1; Chris Jenks, *Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?* 33 *FORDHAM INT’L L.J.* 57 (2009).

165. See Press Release, Counsel Assigned to Represent the Rights and Interests of the Accused Hassan Habib Merhi (Dec. 13, 2013), available at <http://www.stl-tsl.org/en/media/press-releases/defence-office-press-release-counsel-assigned-to-represent-the-rights-and-interests-of-the-accused-hassan-habib-merhi> [<http://perma.cc/TEZ-2GY2>] (archived February 22, 2014); Press Release, A Joint Hearing on Joinder Scheduled for 11 February 2014 (Feb. 3, 2014), available at <http://www.stl-tsl.org/en/media/press-releases/04-02-2014-a-joint-hearing-on-joinder-scheduled-for-11-february-2014> [<http://perma.cc/C7LZ-4922>] (archived February 22, 2014). For the decision authorizing the trial in the absence of Mr. Merhi, see Prosecutor v. Hassan Habib Merhi, Case No. STL-13-04/I/TC, Decision to Hold Trial *In Absentia* (Special Trib. for Leb. Dec. 10, 2013).

166. Article 16(4) of the STL Statute provides that:

In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in the language which he or she understands of the nature and cause of the charge against him or her; . . . (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; (f) To examine all evidence to be used against him or her during the trial in accordance with the Rules of Procedure and Evidence of the Special Tribunal.

STL Statute, *supra* note 5, at art. 16(4).

167. *Id.*

parties, that is in charge of conducting impartial investigations and developing evidence.<sup>168</sup> With the judges playing a more inquisitorial role, the obligation to disclose all the “evidence” to be used against the accused is underscored in the Statute and effectively brings the procedure in the STL closer to the essentially adversarial common law system in other ad hoc international criminal courts. In those courts, it is the prosecution’s obligation to secure a fair trial by not only proving the accused guilty beyond a reasonable doubt, but also informing the accused what he is accused of. Additionally, before the trial, there is also the obligation to provide the accused the evidence against him—not only inculpatory but also exculpatory. The latter would include evidence tending to impeach the credibility of prosecution witnesses.

The third difference between the Tribunal’s fair trial clause and those of ad hoc international criminal tribunals is that the accused, under Article 16(5), “may make statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue.”<sup>169</sup> The rule leaves it to the Chamber to determine the probative value, if any, of such statements. This interesting provision may reflect the STL’s fusion of civil law and common law approaches and principles. To appreciate its significance, a little foray back into the history of international criminal tribunals appears helpful.

During the Nuremberg and Tokyo trials, the accused could make a final statement, without taking the oath.<sup>170</sup> The statement, generally made at the end of the trial, offered an opportunity for the defendants to apologize if they wished to do so. In the modern ICTY, but not the ICTR or the SCSL, a rule was adopted in July 1999 to allow an unsworn statement to which the Trial Chamber acquiesced.<sup>171</sup> Other than that, at other times, counsel speak on behalf of their clients and in doing so expedite trials by identifying and narrowing the contentious issues.<sup>172</sup> The statement could be made at various stages, for example, after the prosecution’s opening statement or following the defense’s opening statement. The chance to speak at the end of the process removes the gag over the defendant. Perhaps not surprisingly, this right appears to have only been occasionally exercised by the accused.<sup>173</sup> It is interesting that a

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168. See RICHARD MAY & MARIEKE WIERDA, *INTERNATIONAL CRIMINAL EVIDENCE*, at xvii (2002).

169. STL Statute, *supra* note 5, at art. 16(5).

170. IMT Charter, *supra* note 62, at arts. 24(j), XI(i).

171. See ICTY Rules of Procedure and Evidence, art. 84*bis*, as amended Oct. 20, 2011, IT/32/Rev.46 (providing that an accused person can make a statement, under the control of the Chamber, without taking an oath or being cross examined), available at [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/it032rev46e.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/it032rev46e.pdf) [<http://perma.cc/XKP5-GK9A>] (archived Feb. 21, 2014).

172. MAY & WIERDA, *supra* note 168, 294–95.

173. See *id.* (“In practice this right has been rarely exercised.”).

similar provision giving the accused a right to make an unsworn oral or written statement was included in the Rome Statute.<sup>174</sup>

Under the statutes and rules of international criminal courts, it is clear that the accused has a right to represent himself or hire legal assistance of his choosing (or where he cannot afford counsel, obtain a publicly funded lawyer). The norm is for the accused to choose legal representation. The jurisprudence has interpreted these rules to mean that the accused takes on a secondary role in the conduct of his defense once he chooses or is afforded public counsel.<sup>175</sup> The gravity of the charges, the complex and technical nature of proceedings, and the possibility of self-incrimination and disruptiveness on the part of recalcitrant defendants all reinforce this position.<sup>176</sup> Thus, when an accused has statements to make, he is typically expected to make them through his counsel, and when he wishes to make them directly, he must do so only after first securing the permission of the Chamber—often through his counsel.<sup>177</sup> Under this model, to directly address the court, the accused would usually elect to testify on his own behalf, but even in such circumstances, his evidence would usually be elicited through an examination in chief conducted by his defense counsel.<sup>178</sup> The option to make unsworn statements, orally or in writing, without being led by a lawyer does exist, but such statements are generally perceived as having limited probative value if untested through prosecution cross-examination.

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174. See Rome Statute, *supra* note 22, at art. 67(1)(h) (“[T]o make an unsworn oral or written statement in his or her defense.”); International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, r. 87 (2000) [hereinafter ICC-RPE] (Rule 84*bis*: “[T]he accused may, if he or she wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement. The Trial Chamber shall decide on the probative value, if any, of the statement.”).

175. Of course, the scenario is different when an accused decides to represent himself instead of through counsel.

176. See Jalloh, *supra* note 104, at 717 (indicating that statutory language may qualify the right of a defendant in relation to their counsel, once selected).

177. *Id.*

178. See IMT Charter, *supra* note 62, at art. 16(b), (d), (e). Article 16(b) gave an accused, during a preliminary examination or the trial, the right to “give any explanation relevant to the charges made against him.” Article 16(d) conferred the right to conduct his “own defense before the Tribunal or to have the assistance of Counsel.” Finally, Article 16(e) gave the “right through himself or through his Counsel to present evidence at the Trial in support of his defense.” The Tokyo Tribunal was more explicit and specified. See IMTFE Charter, *supra* note 99, at art. 9(d) (providing that an “accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense,” which included the right to examine witnesses). None of the modern international criminal courts addressed such a right, except of course, the Rome Statute. See Rome Statute, *supra* note 22, at art. 67(1)(h) (providing the right of an accused “[t]o make an unsworn oral or written statement in his or her defense”).

In general under the civil law model, including that prevailing in Lebanon, an accused's decision to have counsel representing him does not automatically limit his preeminent right to directly participate in the proceedings, including by making statements in court.<sup>179</sup> However, even in such systems such a right would be subject to reasonable limits and exclude statements deemed to abuse the court or otherwise obstruct the proceedings.<sup>180</sup> The Statute of the STL anticipates such concerns by conditioning the right to make statements at any stage of the proceedings on the proviso that "such statements are relevant to the case at issue."<sup>181</sup> Although the rule does not specify who will determine relevance, this decision would typically fall to the Trial Chamber. Of course, the accused's ability to make statements does not obligate the Chamber to accord such statements any probative value. Indeed, it is up to the Chamber to assess, at the end of the trial, all statements in the light of all the evidence to determine whether to accord the statements any weight.<sup>182</sup> Interestingly, not even the Rome Statute, which gives an accused the explicit right "[t]o make an unsworn oral or written statement in his or her defense"<sup>183</sup> appears as expansive as the broad right conferred by Article 16(5).<sup>184</sup>

## VI. FUNCTIONS OF THE DEFENSE OFFICE: LESSONS FROM THE SIERRA LEONE COURT

Article 13 (Defense Office) of the Statute of the STL is a seminal and complex provision. It provides that:

1. The Secretary-General, in consultation with the President of the Special Tribunal, shall appoint an *independent* Head of the Defense Office, who shall be responsible for the appointment of the Office staff and the *drawing up of a list of defense counsel*.
2. The Defense Office, which may also include one or more public defenders, shall protect the rights of the defense, provide support and assistance to defense counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of

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179. See Jalloh, *supra* note 104, at 724 ("In civil law systems, the presence of counsel is not necessarily seen as divesting the defendant of his right to speak in court on his own behalf due to the assistance of a lawyer.").

180. Even though civil law systems liberally permit the use of defendant statements in the courtroom, such statements cannot be unreasonable to, abuse, or obstruct courtroom proceedings. See *id.* at 741.

181. STL Statute, *supra* note 5, at art. 16(5).

182. The last sentence reads: "The Chambers shall decide on the probative value, if any, of such statements." *Id.*

183. Rome Statute, *supra* note 22, at art. 67(1)(h).

184. See STL Statute, *supra* note 5, at art. 16(5) ("The accused may make statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue. The Chambers shall decide on the probative value, if any, of such statements.").

evidence and advice, and appearing before the Pre-Trial Judge or a Chamber in respect of specific issues.<sup>185</sup>

The mandate of the Defense Office is largely set out in the second paragraph. But the general statements in this provision should be read together with the first paragraph—which outlines the powers of the head of the Defense Office—the RPE, and several ancillary instruments and directives that are more explicit, flesh out the core of its essential functions, and clarify several major ambiguities.<sup>186</sup> Under Article 13(1), the secretary-general appoints an “independent” head of the Defense Office, who in turn appoints his staff and draws up a list of defense counsel.<sup>187</sup> This suggests that drawing up a list of lawyers is a primary function. In his report to the Council, the secretary-general of the United Nations explained the rationale for the inclusion of the Defense Office in the Statute of the Tribunal. He observed that there is now a clear “need for a defense office to protect the rights of suspects and accused” and that this had “evolved in the practice of UN-based tribunals as part of ‘equality of arms,’ where the prosecutor’s office is an organ of the tribunal and is financed in its entirety through the budget of the tribunal.”<sup>188</sup> Thus, the Statute of the Tribunal “institutionalizes the defense office,” whose role will be “to protect the rights of the defense, draw up the list of defense counsel and provide support and assistance to defense counsel and persons entitled to such legal

185. STL Statute, *supra* note 5, at art. 13 (emphasis added).

186. See, e.g., SPECIAL TRIBUNAL FOR LEBANON, PRACTICE DIRECTION ON THE ROLE OF THE HEAD OF THE DEFENCE OFFICE IN PROCEEDINGS BEFORE THE TRIBUNAL (Mar. 30, 2011); SPECIAL TRIBUNAL FOR LEBANON, DIRECTIVE ON ASSIGNMENT OF COUNSEL (Mar. 20, 2009) (as amended Mar. 18, 2013) [hereinafter DIRECTIVE ON ASSIGNMENT OF COUNSEL] available at [http://www.stl-tsl.org/images/Defence\\_documents/Directive\\_on\\_the\\_Appointment\\_and\\_Assignment\\_of\\_Defence\\_Counsel-March\\_2013\\_EN.pdf](http://www.stl-tsl.org/images/Defence_documents/Directive_on_the_Appointment_and_Assignment_of_Defence_Counsel-March_2013_EN.pdf) [<http://perma.cc/8MQV-S4DT>] (archived Mar. 9, 2014); SPECIAL TRIBUNAL FOR LEBANON, LEGAL AID POLICY FOR DEFENCE, (Sept. 9, 2011) [hereinafter LEGAL AID POLICY FOR DEFENCE], available at <http://www.stl-tsl.org/en/documents/defence-office-documents/legal-aid-policy-for-defence> [<http://perma.cc/DYX4-TJZW>] (archived Mar. 9, 2014). In what appears to have been an unprecedented practice, the then President of the Lebanon Tribunal, Judge Antonio Cassese, issued an explanatory memorandum explaining the rationale for the various rules that were ultimately adopted. See SPECIAL TRIBUNAL FOR LEBANON, RULES OF PROCEDURE AND EVIDENCE, EXPLANATORY MEMORANDUM BY THE TRIBUNAL’S PRESIDENT (Apr. 12, 2012), available at [http://www.stl-tsl.org/index.php?option=com\\_k2&Itemid=287&id=1210\\_d4590de8b8d6fbd42dbe2f6e3a60c2d5&lang=en&task=download&view=item](http://www.stl-tsl.org/index.php?option=com_k2&Itemid=287&id=1210_d4590de8b8d6fbd42dbe2f6e3a60c2d5&lang=en&task=download&view=item) [<http://perma.cc/BLU8-H564>] (archived Mar. 9, 2014). Part of the stated purpose was to “resolve some ambiguities raised by the Statute”, including “(4) the role of the Defence Office” . . . “(8) the role of an accused in court” . . . “(9) the right of an accused to self-representation . . . and “(12) the holding of trials in absentia . . .” *Id.*

187. See STL Statute, *supra* note 5, at art. 13(1) (“The Secretary-General, in consultation with the President of the Special Tribunal, shall appoint an independent Head of the Defence Office, who shall be responsible for the appointment of the Office staff and the drawing up of a list of defence counsel.”).

188. U.N. Secretary-General, *Report*, *supra* note 29, ¶ 30.

assistance.”<sup>189</sup> Based on Article 13 and the drafting history, one can essentially discern a four-pronged mandate for the Defense Office, which is confirmed by the Defense Office practice. This mandate constitutes its core functions. Each of these elements will be discussed in turn below, with the analysis emphasizing the language contained in the Statute. After all, the latter takes primacy and is the source of authority for all the other subordinate directives and policies adopted by the court and the Defense Office.

*A. The Legal Aid Administrator Role:  
“[D]raw up a list of defense counsel”*

Under the first prong of its mandate, as expressed in Article 13(1) of the Statute, the Defense Office shall establish a list of defense counsel from which the legal representatives of suspects and accused are drawn for appointment. The simplicity of Article 13(1) belies the complexities involved in preparing such a list of counsel. The clause essentially mandates the devising of a new legal aid system for the Tribunal, if the experience of other courts is any guide, often while working with limited staff under tight budgets and strict timelines. Though otherwise unique in its legal nature and stature, the Defense Office has drawn on the experience and expertise of the international criminal tribunals that preceded it to set up a Legal Aid Unit and to adopt several policy directives aimed at advancing the realization of the suspects and accused’s rights to legal representation.

Essentially, regarding the responsibility to establish a new legal aid system, a three-step process may be distilled from the practice of existing international courts and that which is already set out by the STL. Firstly, the tribunals usually establish basic requirements that lawyers wishing to represent a suspect or an accused must fulfill. Anyone seeking to be “listed” on the roster of counsel must fulfill those pro forma requirements and must complete and submit the requisite forms and supporting documentation. This essentially includes a general requirement of a bar license in a national jurisdiction,<sup>190</sup> several years’ experience in national and or

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189. *Id.*

190. STL RPE 58 provides that:

[A] counsel shall be considered qualified . . . if the counsel satisfies the Head of Defense Office that he: (i) is admitted to practice law in a recognized jurisdiction . . . (ii) has written and oral proficiency [of one of the languages of the Tribunal]; (iii) has not been . . . disciplined [for violations of bar and ethics requirements]; (iv) has not been found guilty in criminal that were fair and impartial and met the requirements of due process . . . (v) has not engaged in conduct which is dishonest or otherwise discreditable . . . to the administration of justice . . . (vi) has not [lied about] his qualifications and fitness to practice . . .

international criminal law practice, fluency in one or more of the official languages of the Tribunal, a statement affirming willingness, a clear professional record, and availability to take up a provisional or permanent assignment.<sup>191</sup> The requirements and modalities are then further fleshed out in a secondary legal document outlining detailed procedures for the assignment and withdrawal of counsel.<sup>192</sup>

In the context of the Lebanon Tribunal, which entrusts defense rights, including that of counsel, to the head of the Defense Office with ultimate responsibility of drawing up a list of counsel, at least two approaches appeared to exist for devising a counsel listing regime. To begin, the Defense Office might have taken the lead in drawing up the requirements for the roster of counsel based on the comparative research of the similar requirements in Lebanese and international criminal tribunals. It would be typical to have internal consultations with the judges, registrar, and president of the Tribunal and with other interested actors, such as the Lebanese defense bar and NGOs. The Defense Office would then adopt a practice directive on the assignment of counsel setting out the requirements and notifying the Lebanese as well as the international defense bars of those requirements. A key advantage of this approach would be the flexibility that the Defense Office would have had to periodically revise the requirements based on direct experience with their practical application.

A second option, which was generally followed in the other UN courts, was as follows. The Defense Office, in consultation with the court's administration, might have established the general requirements that defense counsel must meet to qualify for assignment. These would then be incorporated into the formal RPE of the Tribunal as well as into a more detailed directive on counsel assignment that the registrar, instead of head of defense matters, would adopt. The judges, under Article 28 of the Statute, are empowered to adopt such rules.<sup>193</sup> There is therefore nothing to bar

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See RPE, *supra* note 16, at r. 58; see also *id.* at r. 59(B) (providing additional requirements such as that the lawyer must possess relevant competence, must have at least seven years of relevant experience, and must have indicated her willingness to work for an indigent accused).

191. *Id.*

192. The STL *Directive on the Appointment and Assignment of Defense Counsel*, adopted and entered into force on March 20, 2009, is the governing instrument. See DIRECTIVE ON ASSIGNMENT OF COUNSEL, *supra* note 186. This is consistent with the practice of other courts. In the SCSL, a similar instrument was adopted by the registrar. See SPECIAL COURT FOR SIERRA LEONE, *Directive on the Assignment of Counsel*, in CONSOLIDATED LEGAL TEXTS FOR THE SPECIAL COURT FOR SIERRA LEONE 191 (Charles Jalloh eds., 2007) [hereinafter SCSL DIRECTIVE ON THE ASSIGNMENT OF COUNSEL].

193. See STL Statute, *supra* note 5, at art. 28 ("The judges of the Special Tribunal shall, as soon as practicable after taking office, adopt Rules of Procedure and Evidence for the conduct of the pre-trial, trial and appellate proceedings, the admission

them from incorporating the general requirements for the lawyers that would be appearing before them within the rules of the court of which they are primary legislators. In fact, their rules provided the general requirements that were then fleshed out in the subsequent directive on counsel assignment. Given the specific mandate of the Defense Office to draw up the list of counsel and to effectively run the legal aid scheme, this approach is ultimately less desirable in the context of the STL and was not used because the head of the defense was perfectly capable of carrying out his mandate using the first option above.<sup>194</sup> In addition, this makes sense since that office would then be responsible for administering a legal aid policy. This is yet another advance compared to the practice of the SCSL, where the registrar, though informally acknowledging the operational independence of the OPD, was formally responsible for the adoption and ultimately the implementation of the rules in the *Directive on the Assignment of Counsel and Other Ancillary Instruments*.<sup>195</sup>

Once the directive on counsel is drawn up and enters into force, the second step in Tribunal practice typically requires the Defense Office to maintain an up-to-date roster of counsel to be presented to those suspects and accused persons requiring legal assistance. In all the ad hoc international tribunals including the Sierra Leone Court, the suspect or accused must show that he is “indigent” by filling out the requisite declaration of means form in order to qualify for legal aid. The threshold of proof of indigence is not necessarily high.<sup>196</sup> It is essentially presumed when an accused is found not to have sufficient financial and other resources to hire and remunerate the counsel of his choice to defend him for the expected duration of his case.

Equally, in the ad hoc tribunals, the intermediate category of “partially indigent” suspects and accused persons also benefit from publicly funded counsel. Partial indigence exists when the suspect or accused is found to have some resources that could be used toward his defense but are insufficient to cover the costs of his own private lawyer.<sup>197</sup> Of course, the applicant’s financial situation is assessed, taking into account all his means.<sup>198</sup> These would include assets or

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of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate.”).

194. In other tribunals, the formal rules were adopted by the registrar.

195. See SCSL DIRECTIVE ON THE ASSIGNMENT OF COUNSEL, *supra* note 192.

196. See *id.* at art. 4(A) (stating that “[a] person shall be considered indigent if he does not have the means to engage Counsel of his choice to represent him”); see also *id.* at art. 4(B) (providing that “[a] person shall be considered to be partially indigent if he does not have sufficient means to engage Counsel of his choice to represent him at proceedings before the Special Court but has means to contribute to the payment of Counsel for such representation”).

197. *Id.* at art. 4(B).

198. See *id.* at art. 6 (“A Suspect or Accused who requests the assignment of Counsel, must fulfill the requirement of indigence or partial indigence, defined in Article 4 of this Directive, in order to have Counsel assigned to him.”).

other property that he owns, family or social benefits to which he may be entitled, and what his spouse owns.<sup>199</sup> All of this is irrespective of where in the world such assets may be situated.<sup>200</sup> The categories of indigent or partially indigent notwithstanding, most accused persons in international criminal trials have availed themselves of publicly funded counsel. The small number of suspects that have chosen to retain private defense lawyers or to represent themselves stand as exceptions to the general rule.

It is settled in the jurisprudence of the tribunals that the right to publicly funded counsel does not necessarily mean that there is a right to choose specific counsel. In practice however, the Defense Office could and should play an important advisory role in identifying experienced counsel suitable for the particular suspect or accused. The curriculum vitae of experienced counsel are typically provided to suspects and accused to make a selection, though given the possibility of trials in absentia provided for in the Statute of the STL, this might not always be possible. Importantly, depending on the available budget for defense issues and whether the accused are in custody, it is not unheard of for prospective meetings to occur between counsel and the suspects in custody before counsel assignments are formally made. This is a prudent course of action to ensure that the accused and his counsel get along before such a big decision as representation is taken. Confidence between counsel and client is always important, but it becomes even more so as the pressure builds in what are typically high profile internationally observed trials.

The third general step in the counsel appointment and selection process in the tribunals is that once an accused has settled on a choice of counsel, assuming proof of lack of means, a formal appointment will then have to take place. The appointment may be provisional or permanent, depending on the circumstances. In the STL, this appointment is made by the head of the Defense Office, much like the principal defender does in the SCSL.<sup>201</sup> In the other ad hoc tribunals, the registrar—the technical manager of the legal aid system—formally makes the appointment based on the recommendation of the head of the defense.<sup>202</sup> Needless to say, a resort to the registrar in the STL context would have been

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199. *Id.*

200. *Id.*

201. LEGAL AID POLICY FOR DEFENCE, *supra* note 186, §§ 1.1, 4.9. Depending on whether a decision is made to furnish, much like the OPD in the SCSL had to do, not just one lawyer but a team of lawyers and other professionals working to represent the accused. In fact, under the Legal Aid Policy, a standard defense team includes a co-counsel, a legal officer, a case manager, an investigator, and a language assistant. Note that, in addition to this team, counsel may also request the assistance of ad hoc experts. *Id.*

202. DIRECTIVE ON ASSIGNMENT OF COUNSEL *supra* note 186, at art. 18.

inappropriate given its Statute's conferring of primary responsibility for this function on the Defense Office.

Power to appoint implies power to withdraw, replace, or revoke the appointment of counsel.<sup>203</sup> However, as a general rule, the presumption is that once appointed, counsel shall represent the accused to the finality of the case. Replacement of counsel is only permitted in the most exceptional circumstances. This threshold is intended to be and is often treated as being very high. Consequently, the later such a request is made in the proceedings, which can emanate either from the accused or his counsel, or sometimes both, the less wiggle room the head of the Defense Office has to meet that request. A withdrawal of an appointment at a late stage, generally after the trial has started, may derail the trial of an accused, so the permission or at least consultation of the trial judges, who have inherent power to manage the trials, may be prudent and is even required under the *Directive on the Assignment of Counsel*.<sup>204</sup> A complementary practice could even be prescribed in the rules. Under this scenario, once the trial has started, requests for termination of an assignment should be made to the Trial Chamber, which would then satisfy itself that the request is not made in bad faith or otherwise designed to delay the proceedings.<sup>205</sup>

As already observed, the idea contained in the Statute of "drawing up a list" of counsel connotes a simple administrative act or process. However, stripped of its simplicity, the phrase essentially requires the Defense Office to devise an entire legal aid scheme for the STL, thereby giving practical content to the right to counsel for suspects and accused persons. This has led to the adoption of a host of ancillary instruments including a formal legal aid policy.<sup>206</sup> In addition, Article 13 of the Statute is silent as to who has responsibility for certain related matters, for example, the payment of counsel contracted for legal aid purposes. But the funding allocation for legal aid necessarily comes from the registrar. Administration of the funds is different, however, and is essentially a shared responsibility in the sense that the assessment of funds owed takes place in the Legal Aid Unit of the Defense Office while payment is

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203. See *id.* at art. 34 (outlining the power to withdraw or suspend appointed counsel).

204. See *id.* (providing for consultation of pre-trial judge of the chamber before withdrawal is approved).

205. See Jalloh, *supra* note 104, at 714 (explaining that termination of counsel is typically only permitted in exceptional circumstances, often only during the pre-trial phase).

206. The Defense Office, in exercise of this mandate, adopted a Legal Aid Policy for the Defence on September 9, 2011. See LEGAL AID POLICY FOR DEFENCE, *supra* note 186 (covering all aspects of the representation of suspects and accused, before the STL, including counsel fees, costs of investigations, expert witnesses/consultants, and general administrative expenses).

made by the financial officer in the Registry.<sup>207</sup> The head of the Defense Office is in principle the administrator of legal aid, while the registrar has overall responsibility for the financial health of the Tribunal.

By implication, it follows from the statutory mandate to draw up a list of counsel that the Defense Office also has the corollary duty to ensure that counsel is paid. This requires that a level of remuneration as well as a payment system be developed. Such a payment system could be developed in-house by the Defense Office, or alternately, by another office designated by the registrar in consultation with the head of the Defense Office. The good choice was thus made to set up a Legal Aid Unit within the Defense Office.<sup>208</sup> This means that the initial processing of legal aid fees are, in the first instance, assessed by the Defense Office before such funds are then disbursed by the Tribunal's finance officers.<sup>209</sup>

In creating a payment arrangement, the STL Defense Office had to determine whether to use the lump sum payment system that has been employed in some of the other internationalized tribunals, or whether to design an entirely new payment arrangement taking into account the specificities of the Tribunal. The end result was a mixed system that, depending on the stage of the trial, constitutes a combination of hourly, monthly fees, and lump sum payments.<sup>210</sup>

There are several examples of legal aid payment schemes from the ICTY, ICTR, ICC, ECCC, and the OPD in the Sierra Leone Court. Basically, those schemes offered various possibilities. In the ICTY, a lump sum system with case ranking criteria (Level 1 (medium), Level 2 (difficult), Level 3 (very difficult), or Level 3.5 (extremely difficult/leadership)) and a ceiling was used at the trial phase, whereas in the ICTR an hourly rate with a monthly ceiling system was employed.<sup>211</sup>

The Defense Office necessarily considered the core principles that the ICC identified when it devised its own legal aid payment scheme.<sup>212</sup> These are equality of arms between the Prosecution and

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207. See *id.* § 11.1 (discussing the payment of counsel).

208. See *id.* § 11.4 (outlining the delegation of legal aid decision-making authority).

209. *Id.* at 5, 32–33.

210. See *id.* § 11.1 (“Payment of counsel included in the LAP can take the shape of: a) hourly remuneration; b) monthly fees; or c) a lump sum.”).

211. INTERNATIONAL CRIMINAL COURT, ASSEMBLY OF STATES PARTIES, ICC-ASP/3/16, REPORT TO THE ASSEMBLY OF STATES PARTIES ON OPTIONS FOR ENSURING ADEQUATE DEFENCE COUNSEL FOR ACCUSED PERSONS ¶ 15, Annex 1 (Aug. 17, 2004), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/library/asp/ICC-ASP-3-16-\\_defence\\_counsel\\_English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-3-16-_defence_counsel_English.pdf).

212. *Id.* ¶ 16.

Defense;<sup>213</sup> objectivity, in the sense of ensuring that resource allocation reflects the specific needs of the case as opposed to the standing of team members; transparency, guaranteeing sufficient budgetary oversight over public funds without breaching lawyer-client confidentiality or threatening the autonomy of the defense teams; continuity, building sufficient flexibility within the system to adapt to changing conditions that prioritize the interests of justice; and, finally, the principle of economy, ensuring that legal aid, as part of public money, only covers necessary and reasonable costs required for a proper defense.<sup>214</sup>

At the Sierra Leone Court, a decision was made to model the contract payment scheme on the Very High Cost Cases system used by the Legal Aid Commission of the United Kingdom.<sup>215</sup> This resulted in a system that established a legal services contract between the defense team, on the one part, and the OPD acting on behalf of the registrar and therefore the court, on the other. An hourly fee was fixed for each team member, though there was a cap on the hourly and monthly fees that can be paid by the Sierra Leone Court based on pre-agreed hours for each of the main stages of the trial. The contracts were thus predicated on detailed “stage plans” as well as task lists tracking the work to be performed by each team member.

In practice, this system provided a disincentive for counsel to balloon costs. It nevertheless proved to be dissatisfactory to attorneys, excepting those in the Charles Taylor trial (who were exempted from that requirement), who spent many hours complying with the detailed billing requirements. Given the unpredictable nature of trial processes as well, counsel and their teams often had to seek “special consideration” from the registrar of the court, a euphemism for requests for additional money to cover unanticipated slowness in trials or unbudgeted costs. Ultimately, in the most complex case before the tribunal (that of former-Liberian President Charles Taylor), the OPD implicitly acknowledges the limitations of this regime. With the acquiescence of the registrar, the OPD therefore agreed to contract a fixed monthly fee for counsel and his subordinates so that, among other things, the burden of administrative compliance with detailed billing requirements would be minimized. This was seen as a way to free up counsel to focus on the more pressing demands of a high profile trial while maintaining oversight and accountability in requiring submission of a pro forma

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213. *Id.* Fees for members of the defense team were pegged to the salaries paid in the Office of the Prosecutor and at the ad hoc Tribunals. These were then increased by a certain percentage to account for increased expenses arising from appointment. *Id.*

214. *Id.* ¶ 16.

215. See Skilbeck, *supra* note 103, at 81 (discussing the controversy surrounding the Very High Cost system and the ultimate decision to use this structure).

invoice before payment (but without exacting billing requirements that might be found in private practice).

*B. The Public Defender Role: Appearing Before the Pretrial Judge or a Chamber in Respect to Specific Issues*

Article 13(2) of the Statute of the STL provides that the Defense Office “*may* also include one or more public defenders.”<sup>216</sup> While not the mandatory “*shall*,” the use of *may* suggests that the intent of the parties was to create the option of having a mixed Defense Office that is on the one hand staffed with lawyers that can serve as public defenders while maintaining, in light of the thrust of Article 13(1), a list of defense counsel that can be assigned to suspects and accused persons. Regrettably, neither Article 13(2) nor the travaux préparatoires spelled out the envisaged role of the public defenders. This ambiguity left room for at least two possible interpretations.

First, while the role of duty counsel is not explicitly mentioned in Article 13(2), as it is in Rule 45 of the SCSL RPE, the first part of the sentence implies that the head of the office or his staff could serve as public defenders for a suspect or accused.<sup>217</sup> As part of this, it seems equally implied that they could appear in court, such as during the initial appearance. At the same time, the Defense Office could provide support to individual defendants, through legal research and advice, and might even in certain circumstances have rights of audience before the judges with regard to fairness of proceedings in respect to a specific defendant.<sup>218</sup>

The second plausible reading is that the mandate of the Defense Office in Article 13 is primarily to manage the legal aid system of the court, and that while the head of the office can hire lawyers as part of his staff to run the public defense system, they need not play any role in representing suspects and accused persons in court proceedings.<sup>219</sup> The exception would be that in their role supporting defense counsel, the public defenders in the Defense Office may “appear before the

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216. STL Statute, *supra* note 5, at art. 13(2) (emphasis added).

217. Compare *id.* (containing no reference to the role of duty counsel), with RPE, *supra* note 16, at r. 45(B) (mandating the Defense Office provide “legal advice and assistance by duty counsel”).

218. See STL Statute, *supra* note 5, at art. 13(2) (providing for the “support . . . to the persons entitled to legal assistance”); RPE, *supra* note 16, at r. 57(e)–(f) (permitting “rights of audience in relation to matters of general interest to defence teams” to the head of Defense Office); see also Gillett & Schuster, *supra* note 24, at 891–92 (providing a brief description of the ambiguity in the role of the Defense Office).

219. RPE, *supra* note 16, at r. 57(I); see Gillett & Schuster, *supra* note 24, at 891–92 (explaining the “somewhat blurred” distinction between the independence of the Defense Office and the representation of specific accused).

Pre-Trial judge or a Chamber in respect of specific issues.”<sup>220</sup> As worded, Article 13 assumes that there are defense counsel. It also assumes that it is they who benefit from the support provided by the Defense Office. Such may include the provision of public defenders that would appear in court in respect of specific matters, presumably on the basis of prior instructions of defense counsel. In any event, the use of *may* in the rule appeared to indicate that it is permissive and that the Defense Office can choose, taking all factors into consideration, not to provide public defender services even if it does possess the statutory powers to do so.<sup>221</sup>

This ambiguity in the rule suggested that an early decision had to be made whether to provide, as is done in the Sierra Leone Court, limited legal representation to defendants (suspects and accused) before the court. The experience of the SCSL’s OPD and the existing international criminal tribunals shows that each of the aforementioned approaches has its advantages and disadvantages. On the one hand, public defenders within the Defense Office may be assigned to represent the defendants at various stages, when for whatever reason they do not have counsel. This function of the public defenders would be particularly important in the early phases of the judicial process, including periods when a suspect might be under questioning by the prosecution and wish to be advised of his legal rights but has not yet acquired the status of an accused.<sup>222</sup> The assigned public defenders would represent suspects and, once arrested, the accused persons up to the assignment of provisional or permanent counsel.

Indeed, initial representation of accused persons would be required and might be particularly useful given the possibility of in absentia trials. Similarly, it is critical in the immediate aftermath of arrest and transfer to the Tribunal, including during the arraignment, when it is often difficult to quickly identify and hire private counsel while upholding the accused’s right to be promptly brought before a competent judge to be informed of the charges against him.<sup>223</sup> In addition, during the trial there may be occasions when counsel is simply unavailable, say for health or other reasons, to attend court. Public defenders assigned to a specific case could step

220. See STL Statute, *supra* note 5, at art. 13(2) (indicating that such appearances would be a way of providing support and assistance to defense counsel).

221. See *id.* (“The Defence Office . . . may also include one or more public defenders.”).

222. See Wilson, *supra* note 24, at 8 (describing how the OPD and Duty Counsel serve the important function of stepping in during the “crucial initial stages” to offer advice before she is formally assigned counsel).

223. See John R.W.D. Jones et al., *The Special Court for Sierra Leone*, 2 J. INT’L CRIM. JUST. 211, 215–16 (2004) (describing specific instances in which the Defense Office was very useful during initial appearances).

in to prevent unnecessary adjournments and delays to the trial in these circumstances.

A key lesson from the Charles Taylor trial illustrates the latter point.<sup>224</sup> At the opening of his trial in June 2004, the accused terminated his counsel to spotlight a range of issues from inadequate provisioning of his defense team to inadequate time given to his defense team to prepare his defense to inadequate investigative support for his defense team.<sup>225</sup> The accused was convinced that, absent a radical change, he would be unable to secure a fair trial from the SCSL.<sup>226</sup> So, he wrote a letter to the registrar of the court and the Trial Chamber in which he terminated the services of his provisional counsel and purportedly undertook to represent himself.<sup>227</sup> The Chamber, undeterred by counsel's position that he was ethically unable to act for a client that did not wish to be represented, appointed counsel to represent the accused for the duration of the trial, and subsequently, for the duration of the hearing.<sup>228</sup> Counsel refused the court's order in respect of both directives and walked out of the courtroom.<sup>229</sup>

By being absent from the court, the accused was not available to represent himself. This meant that even if he had been acting as his own counsel, the proceedings would have had to have been stopped until he was brought to the court—the suggestion of the Prosecution.<sup>230</sup> The Chamber rejected the prosecutor's proposal, and having determined that duty counsel was present, appointed duty counsel to act as counsel for the accused for the purposes of the opening of the trial.<sup>231</sup> This critical backstop function enabled the

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224. See Wilson, *supra* note 24, at 6 (describing the Charles Taylor experience as a “paradigmatic example of the ongoing struggle to define rules and structures to protect the independence of defense counsel, and the defense office in general, in international criminal tribunals”).

225. Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01, Transcript, 9–11 (June 4, 2007); see Wilson, *supra* note 24, at 6 (requesting adequate time and facilities for the defense team).

226. See *Charles Ghankay Taylor*, Case No. SCSL-03-01 (“I have only . . . one counsel against a Prosecution team fully composed of nine lawyers. This is neither fair nor just.”).

227. See *id.* at 9–11 (providing a letter to the registrar in which the accused terminates Mr. Khan as his representation and elects to represent himself).

228. See *id.* at 27 (directing Mr. Jalloh, as duty counsel, to “take charge of Mr. Taylor’s case” throughout the opening statements).

229. The Court warned Mr. Khan, “you have not been given leave to withdraw . . . You have not been permitted to leave . . . There is a directive of this court asking you to sit down and to represent your client, which you apparently have defied, and now you are walking out with further defiance, without leave.” To which he responded, “I am no longer instructed in this case . . . Your Honor, I must. I do apologize.” See *id.* at 25–27.

230. *Id.* at 252.

231. This writer, in his capacity then as legal advisor to the OPD and head of the Defense Sub-Office in The Hague, was appointed duty counsel to represent Mr. Taylor.

proceedings to continue as the court would have had to adjourn the hearing had OPD counsel not been present.<sup>232</sup> Viewed in this context, the importance of the Defense Office providing and assigning public defenders to act as “duty counsel” in specific cases cannot be overemphasized. It is not only in line with the interests of the accused, but also consistent with the broader interests of the court (and its ability to control its process) as well as the overall interests of justice.<sup>233</sup> The duty counsel system is employed in virtually all of the tribunals. This has not yet proved to be a concern since no suspect has been arrested.

On the other hand, assigning public defenders from the Defense Office to suspects and accused poses some serious challenges. Firstly, and most importantly, the same public defenders cannot represent different accused due to actual or potential conflict of interests.<sup>234</sup> Secondly, representation must be circumscribed to specific issues consistent with the spirit of Article 13(2). Otherwise, the danger, based on the experience of the OPD in the Sierra Leone Court, is that the head of the Defense Office and his staff could find themselves in a battle with counsel subsequently assigned to represent the suspects and accused.<sup>235</sup> The moment Defense Counsel is assigned, only he would have the duty to represent the accused; a residual duty to play shadow counsel to defend the accused would not exist in the public defender. This would be so even if the Defense Office still had the overriding obligation to “protect the rights of the defence.”<sup>236</sup> In the legal framework of the STL, to the extent that a prior lawyer–client relationship existed between the public defender and the accused, it should be considered to have lapsed or terminated immediately following the assignment of counsel.<sup>237</sup> At that stage, in order to avoid

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232. See Wilson, *supra* note 24, at 7 (highlighting the crucial role of the OPD in the proceeding).

233. See *id.* (describing how the duty counsel system of the OPD provided a “convenient and effective vehicle to ‘fill the gap’” of Mr. Khan’s absence; “stepping on with a moment’s notice” is precisely what the office was “designed to do”).

234. See Jones et al., *supra* note 223, at 213 (“[T]here was potentially a grave conflict of interest in the Defence Office’s representing accused who are charged with many of the same crimes and who might well, therefore, implicate each other in the course of their defence.”).

235. See THOMPSON & STAGGS, *supra* note 110, at 49 (describing the lack of trust between the offices); Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Written Reasons for the Decision on Application by Counsel for the Third Accused to Withdraw from the Case, ¶¶ 6–10 (June 19, 2006).

236. STL Statute, *supra* note 5, at art. 13(2).

237. In the experience of the author, this is easier said than done. While he has no empirical evidence to support this contention in his experience at the Sierra Leone Court, OPD lawyers continued to see the accused as their clients even after counsel had been assigned to them. The fact that there was a solicitor-client confidentiality between the accused helped underscore this feeling. As noted by Alison Thompson & Michelle Staggs:

professional conflicts, discussion of the client's case by the public defender should only take place with the approval of assigned counsel.

On balance, the benefits of the Defense Office providing limited representation outweigh the costs. That said, if the lessons of Sierra Leone are of any guidance, the parameters of such representation must be strictly delimited to avoid any conflicts of interest as well as subsequent competition between public defenders and privately assigned counsel. It would seem that—partly because of the experience with some of these tensions within the defense family in Freetown, Judge Cassese, who had been an independent expert on the SCSL, played a crucial role in clarifying the role of the Defense Office in the STL RPE and in a subsequent practice directive that spoke to the rights of audience for the head of the office and his staff.<sup>238</sup> That document addressed a range of important issues that had been the source of tremendous tension between the OPD and the independent counsel before the SCSL. These included presence of Defense Office counsel in court, the ability to make written and oral submissions to the court, the right to receive information provided by particular defense teams, the duty not to provide any opinions on the factual and legal matters in the case, confidentiality of case documents shared with them, and simple forms to request standing to attend hearings.

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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 . . . . 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 . . . . [D]efense 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.

THOMPSON & STAGGS, *supra* note 110, at 49.

238. See the various roles delineated for the Defense Office vis-à-vis Defense Counsel in Rules of Procedure and Evidence, STL/BD/2009/01/Rev. 6, at r.57 (amended 2013); Practice Direction on the Role of the Head of the Defence Office in Proceedings Before the Tribunal, STL/PD/2011/04, 2 (Mar. 30, 2011) [hereinafter STL-RPE], available at [http://www.stl-tsl.org/index.php?option=com\\_k2&Itemid=288&id=287\\_0fd3d7d0e43e037f9dc453603a9c055b&lang=en&task=download&view=item](http://www.stl-tsl.org/index.php?option=com_k2&Itemid=288&id=287_0fd3d7d0e43e037f9dc453603a9c055b&lang=en&task=download&view=item) [<http://perma.cc/YP5K-9LQ7>] (archived Feb. 21, 2014).

*C. Logistical Support Role: “[P]rovide support and assistance for Defense Counsel and to the persons entitled to legal assistance”*

Under Article 13(2), the Defense Office shall “provide support and assistance to defense counsel and to persons entitled to legal assistance.”<sup>239</sup> This means that the office is expected to offer a measure of centralized institutional support and resources for the defense akin to that available to the attorneys in the office of the prosecution. Much of that support is to be directed at addressing the needs of defense counsel. However, the broad language of the provision does not preclude the possibility of the office providing support to others, such as suspects and accused opting for self-representation, for example through legal research, the evidence collection, and advice.<sup>240</sup> This reading is confirmed by Rule 57 of the RPE.<sup>241</sup>

With respect to legal research, the experience of the OPD in the Sierra Leone Court has been that it is hard to have a single office with limited staff providing legal research assistance to a large number of defense teams—even when a tribunal only has a small number of cases.<sup>242</sup> Generally, while some defense counsel relied on the office for various types of research support, others sharply criticized the OPD for providing irrelevant or inadequate legal research assistance to defense teams.<sup>243</sup> The attitude of the office has also been considered “reactive” instead of proactive in its approach to the needs of counsel.<sup>244</sup>

For its part, the office offered two major responses to these criticisms. Firstly, since the primary responsibility for research lies with the defense team, the office could not interfere in the work of the defense counsel and their legal assistants except when invited to do so.<sup>245</sup> Secondly, the office feared that offering too much legal research support in one trial, in relation to the filing of defense motions, for example, could lead its small legal staff to be “conflicted out.”

239. STL Statute, *supra* note 5, at art. 13(2).

240. *See id.* (listing “appearing before the Pre-Trial Judge or a Chamber” as an example of the type of support offered by the Defense Office). However, that support logically does not apply to instances of self-representation.

241. *See* STL-RPE, *supra* note 238, at r. 57(E)(ii) (mandating that the head of Defense Office provide “adequate facilities to . . . persons entitled to legal assistance in preparation of a case”).

242. *Id.*

243. *See* THOMPSON & STAGGS, *supra* note 110, at 51 (noting interviews in which actual counsel complained that the Office has periodically provided irrelevant research of little assistance).

244. *See id.* at 51–52 (describing how the Office of the Principal Defender provided legal research only when asked).

245. *See id.* at 51 n.236 (referencing the Written Comment of Defense Office given in September 2006).

Commentators have found those explanations wanting, suggesting that the office instead should have proactively offered research on big picture issues of common interest to the defense and that this would have not entailed issues of conflict of interest.<sup>246</sup>

At a basic level, a fully dedicated office conducting research support on legal issues would offer welcome relief for defense counsel under the pressures of litigation. Defense counsel often engage both oral and written advocacy for clients, usually facing complex factual and legal allegations regarding serious international crimes; additionally, defense counsel usually operate under tight budgets and timelines with limited staff.<sup>247</sup> A number of observations seem warranted based on this author's experience. These observations offer insight as to why the formula reached by Rule 57(E)(i), under which defense lawyers can request support or the Defense Office may proprio motu offer legal research, memoranda, or other advice, was the correct one.

To begin, the OPD had a tense and inherently contradictory mandate. The office had overall responsibility to review, assess, and approve defense counsel's legal bills, a function that in other international criminal courts is left wholly to a different section of the Registry.<sup>248</sup> This mandate was consistent with the OPD's supervisory function to ensure that counsel, as contractors, complied fully with the requisite administrative and financial regulations of the court. However, discharge of this mandate created tension between the support and supervisory roles of the office. With lawyers frequently threatening to dispute and actually disputing their OPD-assessed legal fees with higher authorities within the Registry, a poisonous environment emerged where at least some of the lawyers openly questioned whether theirs and their client's interests were necessarily coincident with those of the OPD, which, for good or ill, seemed to stand in opposition to them. The irony is that in playing this role, the OPD, which had the least to gain from the situation, effectively served as a buffer between the defense counsel and the registrar. It sheltered the latter from exposure to the tsunami of concerns that defense counsel typically suffered. The budget struggle ultimately served to underline the importance of the Office of the Defender as an independent office controlling its own budget.

Second, while a general collection of legal materials might be helpful legal research for some defense teams, the reality of defending

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246. See *id.* at 52 (describing the various ways in which the OPD could provide useful support).

247. In that sense, the research support is particularly welcome because in principle at least, it would avoid multiple defense teams spending significant time researching the same issues. See, e.g., Skilbeck, *supra* note 103, at 83 (noting that defense teams at the Sierra Leone Court were limited from billing for hours spent researching issues that had already been substantially researched for other teams).

248. This is the case, for example, at the ICC as well as in the STL.

international crimes is that providing meaningful legal assistance for defense counsel will require more than a passing familiarity with the details of a case. This implies access to evidentiary materials within the possession of the defense, based on the permission of defense counsel. Even assuming that conflict of interest concerns did not arise, defense counsel, not unlike other litigation counsel, usually play their cards close to their chests with respect to the ultimate defense strategy they and their clients plan to use during the trial.<sup>249</sup> In such an environment, where counsel also receive massive disclosure from the prosecution, much of which is usually subject to some form of protective measures for witnesses, it is easy to see that confidentiality issues alone will constitute a significant hurdle for counsel and Defense Office staff. Fortunately, under the directives and other instruments, the contracting defense lawyers in the STL could choose to share confidential filings and other evidence with the Defense Office generally or on a case-by-case basis. On balance, this a wise compromise.

The Defense Office in the STL is statutorily decoupled from the Registry. Thus, a cancerous tension in its mandate has been removed. In this regard, it is notable that, under Rule 57, the staff from the office is explicitly mandated to provide research support even though they are also explicitly barred from becoming embroiled in the factual matters of specific cases. In any case, they can aim to provide substantial support to defense counsel and self-representing accused persons, especially in the early part of case investigations. As part of this, the Defense Office should seek to provide general support, such as maintaining a library of materials relating to, amongst other things, preliminary challenges of jurisdiction; collecting relevant national and international case law; offering introductory seminars for defense team members; and informing counsel of developments within Lebanon and elsewhere that could affect their work.<sup>250</sup> This would be appropriate given the responsibility the office is given to ensure continuing legal education for assigned lawyers as well as its overall supervision of their work, including the ability to initiate disciplinary proceedings or to have lawyers removed from a case or

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249. See THOMPSON & STAGGS, *supra* note 110, at 45–46 (discussing the process involved in planning a defense strategy).

250. The Office has already begun hosting symposiums. See François Roux, Head of the Defence Office, Special Tribunal for Lebanon, Opening Speech at Seminar: Defending Before International Criminal Courts: Pleading Guilty or Not Guilty (Mar. 4, 2010), available at <http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/defence/defence-office/opening-statement-by-francois-roux-from-the-seminar-defence-before-international-criminal-courts-to-plead-guilty-or-not-guilty> [<http://perma.cc/TR8A-YABX>] (archived Mar. 9, 2014). It is unclear whether it is already gathering research on these pertinent issues as well.

fees withheld for failure to fulfill their duties.<sup>251</sup> Once the trials get under way, as they did recently, the office could offer counsel general litigation support assistance such as summarizing daily the transcripts of proceedings.

Besides legal research support, Article 13(2) envisages the Defense Office assisting in evidence gathering.<sup>252</sup> This is an important function to which the new office should pay close attention to offset the increasing imbalance between defense and prosecution investigations. Indeed, a key advantage the prosecution has enjoyed in international criminal tribunals is the benefit of a centralized office wherein an entire unit, staffed with skilled professional investigators, is dedicated solely to conducting investigations and gathering and providing evidence to the attorneys for use during the various trials. Many of those investigators have participated in large-scale investigations in other international tribunals or their national systems. At the SCSL, each defense team was offered two investigators to assist in the preparation of its case. Hired on a short-term contract by the OPD, those investigators were attached to and answerable only to the defense teams that assigned and supervised their work. While many of these investigators contributed meaningfully to the important work of the defense teams, many of those investigators were not as experienced and skilled as those engaged by the investigative unit of the prosecution.<sup>253</sup> In some cases, some of them failed to perform their duties in a manner that comported with the Tribunal's confidentiality rules, for instance, thereby leading to their prosecution for contempt of court.

Though the defense does not have the burden of proof (only a burden to raise a reasonable doubt), there is an obvious benefit in raising the standard of investigators. The Defense Office in the STL might consider establishing a centralized investigative or evidence unit with specific defense teams being assigned specific investigators. In the context of the Tribunal, it is highly likely that many of those investigators will be drawn from among those that were engaged in the international commission that preceded its establishment. Besides providing a strong foundational basis for further defense investigations, those investigators will offer the defendants a

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251. See DIRECTIVE ON ASSIGNMENT OF COUNSEL, *supra* note 186, at 21, 24 (providing procedures for the withdrawal or suspension of appointment or assignment of counsel).

252. See STL Statute, *supra* note 5, at art. 13(2) ("The Defence Office . . . shall protect the rights of the defence, provide support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice . . .").

253. See Human Rights Watch, *supra* note 116, at 26 (comparing the Defense team's single investigator to the Investigations Unit of the Office of the Prosecutor which is comprised of both international and national investigators).

significant advantage of familiarity with the crime base and existing networks for use in any follow-up matters.<sup>254</sup>

Not only the lack of investigators to gather evidence but also lack of other logistical support—such as access to basic infrastructure, equipment, and other materials—has proven to be a significant hurdle for the defense in other tribunals. This includes difficulty obtaining office space, computers, printers, photocopiers, office supplies, and vehicles. The new Defense Office will have to do the necessary lobbying for sufficient allocations to ensure that the defense is not disadvantaged in these various respects.<sup>255</sup>

#### D. *Assisting to Ensure the Health and Welfare of the Accused*

Another important if only implicit function of the Defense Office is to ensure the health and welfare of the different accused persons that may be arrested and put in the Tribunal's custody. So far, despite several indictments, none of the suspects are in custody. That might change in the future. If it does, the individual defense teams would likely not have the time and resources to address detention issues of their clients.<sup>256</sup> Moreover, the issues of welfare in detention, such as certain due process and liberty interests, differ in substance and procedure from the legal issues surrounding international criminal trials. The defenders within the office, semipermanent staff at the tribunals, have the unique opportunity to develop research and gain a thorough understanding of the legal issues surrounding the protection of the health and welfare of the suspects and accused.<sup>257</sup>

Issues regarding conditions of detention have fallen to different persons at the international tribunals. During the initial stages of detention, even before the suspects have been formally appointed counsel, they often face health issues that need be addressed. Such instances, similar to initial proceedings, are best dealt with by the Defense Office. During the trial, although counsel provide full and adequate support for legal issues, they are not specifically focused on the health and welfare of the accused. In addition, the health and welfare issues encountered by one accused often overlap with those faced by another, and thus might be more efficiently addressed

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254. See Aptel, *supra* note 1, at 1112–13 (describing how the prosecutor shall be assisted by the appropriate Lebanese authorities).

255. See generally Cassese, *supra* note 114, at 33 (providing independent expert evaluation of resources available to the principal defender at the Special Court, highlighting its potential, and recommending certain improvements).

256. See, e.g., Skilbeck, *supra* note 103, at 82 (noting that Duty Counsel could very easily visit the defendants in the detention facility, more easily than the actual counsel stationed abroad for instance).

257. See *id.* at 81–82 (describing the possibility for useful and necessary representation and unique innovations, in particular, introducing the writ of habeas corpus, made by Duty Counsel at the Sierra Leone Court).

through a joint motion or communication to the judges or other relevant organ, rather than a motion within the context of any individual trial. Finally, in some instances the registrar at the tribunals deals with the health and welfare of those detained by the tribunals, in particular, with respect to family and religious visits. In order to guarantee that the human rights on which the legitimacy of international criminal law depends, an adversarial interest represented by a counselor at the Defense Office might at times be necessary.

## VII. CONCLUSION

In summary, this Article has examined the evolution of the defense rights in international criminal tribunals. It took, as its central problem and its point of departure, the absence of a strong defense organ in the statutory instruments of international criminal courts to protect defense rights since Nuremberg and Tokyo immediately after World War II. The Article has shown that, while in principle the defense was touted as being an equally important partner in the processes of seeking justice for the victims of international crimes, in practice the defense has been treated as a second class citizen before the altar of international criminal justice. This practice, which regrettably started under a U.S.-led military tribunal as far back as 1945, continued for decades until the establishment of the STL by the United Nations in 2007. In what the author submits is a watershed moment, for the first time in the history of international criminal law, a statute of an international court included legal provision for a defense organ holding a status coequal to that of the Prosecution, Chambers, and the Registry.

The Article further suggested that the impact of recognizing the defense as an equal first class citizen could be significant if the principles in the Statute are matched with the practice. It would catapult the rights of defendants to a new level and help to move international criminal law from a primitive legal system to a more civilized legal system. Although the author applauds the Lebanon Tribunal example as potentially offering a significant contribution to international law and, toward that end, examines several policies and directives in place that further guarantee the smooth operation of the Defense Office, the Article warns of dangers that those trusted with ensuring the implementation of the rights in that court must avoid so as not to inadvertently surrender the principal legacy that they would otherwise bequeath to international criminal law. As it is a truism that justice must not only be done but be seen to be done, this latest development in the world's latest international criminal court is a significant step forward in the global march against impunity for serious international criminals.