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Funding Justice: The Price of War Crimes Trials

*by Rupert Skilbeck**

IN THE SECOND HALF OF 2008, the trial of Thomas Dyilo Lubanga was originally expected to commence at the International Criminal Court (ICC),¹ five years after the Court commenced operations. The ICC's 2007 budget was \$146 million (93 million euros), leaving it still some way behind the \$1.2 billion (762 million euros) and \$1 billion (635 million euros) spent by the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) respectively in their ten years of operation, a cost of between \$10–15 million (6.4–9.5 million euros) per accused.

At the same time, two hybrid tribunals are moving forward. In late 2008, the trial of Kaing Guek Eav is due to commence at the Extraordinary Chambers in the Courts of Cambodia (ECCC), more than two years after the Court commenced operations. In March 2008 the ECCC presented a budget to donors requesting an additional \$115 million (73 million euros) on top of the \$56 million (35.5 million euros) originally budgeted for three years. With only five accused, a budget of \$180 million (114 million euros) would allocate \$36 million (23 million euros) per accused. Meanwhile, the Court of Bosnia and Herzegovina (BiH) in Sarajevo is running a large number of internationalized trials at \$709,000 (450,000 euros) per trial, which is predicted to reduce to \$236,000 (150,000 euros) over the next two years.

It is not clear why there are such vast differences in the cost of different tribunals, all of which officially meet international standards of fairness. Excessive costs and delays limit the ability of courts to try a broad range of people, leading to an element of arbitrariness where an individual will only be tried if it is probable that the budget of the court permits it. The delays also create a conflict between the positive obligation of the State to investigate violations of the right to life and the right of the accused to trial in a reasonable time.

THE COST OF JUSTICE

War crimes trials are expensive. In a well-developed national criminal justice system, a murder trial often takes hundreds of police hours to investigate, leading to a trial that may take months. Terrorist cases, organized crime, and white-collar crime cases are more complex and may cost millions of dollars.

Crimes against humanity are by definition widespread or systematic, so the investigative authorities must find evidence for

thousands of individual incidents, often with far less resources than would be dedicated to a simple murder in a rich country, often trying to undertake investigations in remote areas, years after the events, and probably in a foreign language.

This is not a new problem. Over 15,000 war crimes trials took place in Europe and Asia following the Second World War. The scale and speed of those investigations is remarkable, producing thousands of statements and tons of evidence within a few months, followed by trials that took a week or so. The relatively high acquittal rates indicate that the tribunals focused strongly on the legal and factual issues before them.

The trials undertaken by the military authorities of the United Kingdom (UK) in Asia took place in Singapore, Kuala Lumpur, Hong Kong, Shanghai, Burma, and North Borneo. The legal basis and political structures for the war crimes trials were negotiated in October 1944, with the Regulations for the Trial of War Criminals of June 1945, outlining the legal basis for the trials within the military justice system.²

The targets set were daunting to say the least. In October 1945, UK Attorney General Hartley Shawcross stated that 500 trials should be concluded by July 1946, i.e. within nine months. By December a total of 17 investigative teams were created, mainly utilizing agents of the Special Operations Executive. They collected 35,963 statements from ex-prisoners of war, together with civilian statements, placing advertisements in newspapers to appeal for information.

Trials started in Singapore in January 1946, and by May 8,900 suspects were in custody. However, delays started, and a lack of translators and Japanese defense counsel made it impossible to meet the targets. The estimates were revised, and the completion deadline was extended by 12 months to July 1947. A total of 919 individuals were tried for war crimes before the UK authorities.

FIFTY YEARS ON: THE SPECIAL PANELS FOR SERIOUS CRIMES IN EAST TIMOR

The United Nations (UN) Security Council created the Special Panels for Serious Crimes in East Timor — with the creation of the UN Transitional Authority for East Timor (UNTAET) — by Resolution 1272 of October 1999. UNTAET gave the Dili District Court exclusive jurisdiction for trials involving genocide, crimes against humanity, and war crimes. By June 2000 50 individuals were in custody. In contrast to the annual budgets of about \$100 million (63.5 million euros) then allocated to the ICTY and ICTR, the Special Panels 2001 budget was \$6.3 million (4 million euros), \$6 million (3.8 million euros) of which was allocated to the prosecution, with only \$300,000 (190,000 euros) for the rest of the court.³ The 2003–2005 budget was \$14,358,600 (9,116,340 euros), even less when divided annually.⁴

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Krešo Lučić, accused of crimes against humanity of torture, imprisonment and other inhumane acts, stands trial at the War Crimes Chamber in Bosnia.

Substantial organizational issues arose regarding staffing, translation, court management and the provision of defense lawyers. One highly informed commentator concluded:

“...the performance of the UN in East Timor represents a virtual text-book case of how not to create, manage, and administer a ‘hybrid’ tribunal. Handicapped from the beginning by a debilitating lack of resources, an unclear mandate, inadequate recruitment, ineffective management by a peacekeeping mission that had other priorities, and above all a lack of political will both at UN headquarters and at the mission level, the Special Panels struggled to meet the many challenges they faced.”⁵

During the tribunal’s creation, problems arose due to hiring personnel with little experience in court management, and not hiring a chief administrative officer. Simultaneous translation equipment arrived late in the process, and even then the interpreters were not trained to a standard sufficient to use them. The lack of transcriptions of court proceedings led to problems for appeals. Case and file management systems did not arrive until the very end of the process. Witnesses and accused were often transported in the same buses to get to court. Critically, initial attempts to use local defense lawyers against international prosecutors failed, leading to concerns as to the fairness of some convictions.⁶ Many concluded that the process was ‘deeply flawed’ and that trying to achieve justice on the cheap “does an injustice to those individuals convicted without a fair trial and undermines the very standards of the justice and the rule of law that the tribunals are supposed to advance.”⁷

THE EXTRAORDINARY CHAMBERS

At the same time, negotiations continued for the creation of another hybrid tribunal. In June 1997, the then Co-Prime Ministers of Cambodia, Prince Norodom Ranariddh and Hun Sen, wrote to UN Secretary-General Kofi Annan requesting UN

assistance to create a court to try the Khmer Rouge. Seven years of tortuous negotiations followed, with the UN withdrawing from the process but then being forced back to the negotiation table by the UN General Assembly.⁸

The Group of Experts Report issued by the UN in 1999 identified a number of concerns regarding trial operations. In particular, it warned of the weakness of the Cambodian legal system, concluding that “domestic trials organized under Cambodian law are not feasible and should not be supported financially by the United Nations.”⁹ The experts commented that any tribunal for the Khmer Rouge would “involve a significant commitment of resources”¹⁰ and warned that:

“any UN tribunal . . . will be established somewhat slowly and then only trudge through its caseload. The Group thus recommends that the UN, building upon its experience with the prior tribunals, undertake all necessary measures to expedite the establishment of the court. These should certainly include exemptions from competitive bidding and, most important, from limitations on secondment to take effect immediately upon the court’s legal establishment. The budgetary approval process also needs to be streamlined.”¹¹

The original budget for the ECCC was \$56 million (35.5 million euros), with \$13 million (8.25 million euros) provided by the Government of Cambodia and \$43 million (27.3 million euros) provided by the international community through voluntary donations. The entire process was supposed to take three years, commencing in June 2006 and finishing in June 2009. Whilst the donor community made pledges covering the UN portion, the Cambodian government was not able to produce the money it pledged and sought donor assistance, which still left a shortfall of over \$4 million (€2.5 million).¹²

During 2007 it became clear that the ECCC had no hope of completing the trials within the original timescale and budget. In March 2008 a new request for funding was presented to donors, extending the lifespan of the Court until March 2011 and requesting an additional \$115 million (73 million euros), taking the total budget to almost \$170 million (108 million euros). With only five accused, this created a cost per trial of \$36 million (23 million euros).

THE WAR CRIMES CHAMBER OF THE COURT OF BOSNIA AND HERZEGOVINA

Whilst the negotiations for Cambodia continued, another hybrid court came into being in Sarajevo. UN Security Council in Resolution 1503 of August 2003 called for the completion strategies of the ICTY and ICTR to be facilitated by the transfer of lower level cases to be tried in domestic courts. This became known as the “Rule 11bis” process. Consultations were undertaken in 2003 between the ICTY and the Office of the High Representative¹³ in BiH on the best way to ensure fair trials, and new national criminal and criminal procedure codes were subsequently enacted that reflected European legal standards. A new state court was created, and within that the War Crimes Chamber came into being to try genocide, war crimes, and crimes against humanity, together with a law regulating the use of evidence obtained by the ICTY and transferred to Sarajevo.¹⁴

The Court of BiH is a permanent institution within the domestic legal order, subject to Bosnia's international obligations, including an appeal to the European Court of Human Rights (ECHR), making it the first war crimes court subject to the ECHR's jurisdiction.

For an initial transitional period there are international legal, judicial, and administrative staff. Within five years, however, the international staff will leave and hand the process over to their domestic counterparts. In September 2006 a Transition Council was created consisting of representatives from the government and the international community to ensure an effective transition.

The Court of BiH had to work quickly. The Registry was established in early 2005, and on September 1, 2005 the ICTY Appeals Chamber approved the first '11bis' transfer in the case of Radovan Stanković. In the intervening period, a vast amount of administrative work was undertaken to prepare for the first trials. This included recruitment of administrative and legal staff, prosecutors, and judges. Architects organized the renovation of a government building to provide office space and eight court rooms, one of which is suitable for high security cases. A new detention facility was built to house those under pre-trial detention.¹⁵

The Court of BiH and the Prosecutor's Office is partially funded by the Ministry of Justice's regular budget, and partially by voluntary contributions from individual donor countries. The government provided \$4.7 million (3 million euros) in 2005 and plans to provide approximately \$15.8 million (10 million euros) annually by 2010. A separate donor-funded budget funds the international staff, which amounted to \$15.8 million (10 million euros) in 2006, reducing to \$7.9 million (5 million euros) in 2009. National staff will increase from 125 in 2006 to 380 in 2010, whilst over the same period international staff will decrease from 65 to 14. The real difference from all other tribunals is that with eight courtrooms and 53 judges, the Court of BiH is able to process several hundred cases per year. This creates a pre-trial cost of approximately \$708,000 (450,000 euros) in 2006 reducing to \$236,000 (150,000 euros) in 2010.¹⁶

BUILDING A COURT

Hybrid tribunals are complex to create. Even where the proposed court is constructed within the existing legal system it normally requires a new legal structure, new buildings, a new budget and new staff. Once the tribunal is created, the trials will almost certainly be the most complicated trials that have ever occurred in that country, using techniques and concepts unknown to domestic judges, prosecutors, and lawyers.

The long period of preparatory work requires assessing whether there is political will for war crimes trials and persuading those who may be suspicious of such trials. If new legislation is required, it must be passed through the national assembly in a form that is acceptable to the international community. Diplomats who will later be invited to pay for the court must be kept involved. Widespread consultations must take place throughout different parts of the community to ensure full involvement of all key players. Large-scale reforms in other key areas may be necessary. For example, BiH instituted a large-scale re-appointment process for the judiciary that improved confidence in their independence and impartiality. In Cambodia

this never happened, leading to concerns that judges are still influenced by the government.¹⁷

Managing a new court requires unique individuals who understand the final "product" that is being created, and who have experience with criminal justice. Many trial lawyers and judges with years of courtroom experience never acquired the management skills required for such a multi-million dollar project, whereas some excellent administrators may not have necessary legal skills for negotiating with foreign judiciaries.

It may be necessary to build and equip new courtrooms. Internationally acceptable detention facilities may not exist, so one will have to be built. In BiH a fully-equipped building with six courtrooms equipped for simultaneous interpretation was built in less than a year. In Phnom Penh the ECCC has failed to convert the one room it has into a courtroom after more than two years in possession of the buildings, and interpretation equipment still has to be rented.

“Many experienced individuals now work at the ICTY and ICTR, but there is a risk that those who have only experienced the luxuries of a billion dollar budget may not understand how the job can be done for a fraction of the price.”

STAFFING THE COURT

Staff must be recruited, not only for legal positions but also for a broad range of administrative tasks. Systems for security, computers, interpretation and broadcasts of the proceedings must all be budgeted, purchased and managed. Court management systems must be created that can deal with large paper-based trials with hundreds of thousands of pages of evidence. These key positions require previous experience working in a criminal court system. Whilst UN staffers have a broad range of experience in peacekeeping missions, East Timor has demonstrated that those skills cannot easily transfer to running a war crimes court. Many experienced individuals now work at the ICTY and ICTR, but there is a risk that those who have only experienced the luxuries of a billion dollar budget may not understand how the job can be done for a fraction of the price.



Former Democratic Kampuchea foreign minister Ieng Sary stands for the first time in the Pre-trial Chamber.

Staff recruitment raises a crucial question as to the extent to which it is possible to build the capacity of under-skilled staff whilst at the same time ensuring that the trials meet international standards and are completed within a reasonable time. Many observers concluded the East Timor trials were unfair. BiH trials are required to meet the more exacting standards of the European Convention of Human Rights, and a challenge can be made to that Strasbourg-based court if they do not.

As a secondary benefit, hybrid tribunals can raise the quality of justice in a country, and leave a lasting legacy. In a court such as the ECCC it is not clear how such laudable processes can be effective given the limited timescale and the small number of trials that will take place. The Cambodian judges, prosecutors, and defense lawyers will learn new skills that they can take with them back to their ordinary practice, but there will be little direct effect on the other courts in Cambodia. In BiH, the permanent nature of the Court and the detailed transition may make the skills-transfer more deeply embedded, making Court of BiH a genuine example to other national courts.

One of the most controversial aspects of setting up a tribunal is deciding on the different pay rates that will apply to “international” staff and those recruited locally. Some argue that all staff should be paid the same amount for doing the same job, as at the ICTY and the ICTR where all staff is “international.” However, one of the advantages of a hybrid tribunal is the lower staff cost, allowing the court to get more for its dollars. UN missions set salary levels for local staff, as opposed to those who were selected from a global competition for the position. In BiH, local salary levels were close to government salaries, with local staff being paid approximately 20 to 30 percent of a full international salary. In Cambodia, local salaries have been set at 50 percent of the gross UN salary, meaning that local judges, prosecutors and lawyers are paid approximately three to four times the salary of their counterparts in BiH. Hence the ECCC has lost many of the financial advantages of being based in a developing country.

There is also a phenomenon of “Rolls Royce” staffing levels. In a domestic trial involving multiple defendants, the prosecution is normally represented in court by one or two advocates and supported by a small team of lawyers who help prepare the case. The defense may have two advocates, which often means the prosecution will be outnumbered in the courtroom. This is perfectly normal and fair. By contrast, in international criminal trials, multiple advocates often appear for the prosecution during the course of the trial, with only one or two advocates for each defendant. Whilst such staffing levels may make the prosecutors’ job easier, it is a luxury that is not affordable in most domestic jurisdictions and certainly not for hybrid tribunals on a tight budget.

BUDGETARY AMNESTY

Where there have been violations of the right to life, human rights law guarantees a proper investigation into the killings. There are also significant soft law standards that support and enhance this “right to the truth.” Human rights law, however, specifically guarantees the right of the accused to be tried within a reasonable time, and where the trials deal with widespread allegations of criminal violations, it is often impossible to reconcile the two conflicting positions. There is also a danger that judges and prosecutors, keen to write history, bite off more than they can chew, leading to unwieldy trials with excessive charges that the accused may not survive. In domestic jurisdictions, prosecutors are accustomed to utilizing “sample counts” to prove a course of conduct without necessarily having to prove each act of the accused.

Prosecutors or investigating judges do not like to accept constraints on their discretion. As state agents, however, they have a duty to organise themselves in such a way as to ensure the human rights of the accused are protected. The ECHR has frequently stated that the state is obligated to organise its criminal justice system to ensure the rights of the accused, and that it must show “special diligence” in its attempts to move the process forward. The Court has explicitly stated that delays occasioned by a shortage of equipment or personnel might be taken into consideration as displaying a lack of due diligence.¹⁸ Similarly, the Court has held that legal systems of member states should be able to cope with such requirements.¹⁹

Detaining someone if there was little possibility of a trial due to lack of funding would be an arbitrary and unlawful act. If the budget only permits nine trials, is it acceptable under human rights standards to arrest a tenth on the basis that money will be found at some time in the future? Whilst with national budgets the government may divert funds from another area, the same does not apply to tribunals funded by voluntary contributions from the international community. If the money is not in the bank account in New York, no one can spend it.

Where the court will only have a limited mandate it essentially means that there is *de facto* impunity by way of budgetary amnesty for all other offenders. In BiH there are approximately 13,000 police files for offenses during the war. The Court of BiH will be able to try perhaps 5,000 people in the next ten to 15 years, with the rest being sent to lower courts. In Cambodia, perhaps only five people will face trial. All other perpetrators will have effective immunity.

CONCLUSION

COURTS MUST ACT within their financial limits. Domestic courts are permanent institutions, allowing some flexibility in case management and timing of trials. Hybrid tribunals may be working towards a date when they have to shut down, making the financial controls more blunt.

Complex criminal trials require highly experienced staff, whether they be administrators, court managers, prosecutors, or defense lawyers. National criminal systems have constant pressures to cut costs, and discretion is exercised to ensure that the appropriate cases are taken to court and tried within a reasonable time. The huge budgets of the ICTY and ICTR have produced unsustainable and un-repeatable models, and hybrid tribunals may wish to look to national models to obtain the most efficient staff.

Whilst the Office of the High Commissioner for Human Rights is the UN authority for transitional justice, the Office of Legal Affairs in New York takes precedence regarding tribunals. When a court is created within the domestic legal order of a country, it is not entirely clear who would be responsible.

The two latest hybrid courts are very different. The ECCC in Cambodia is a joint project between the UN and Cambodia, utilizing an investigative judge system with a very fixed life span, at a cost of approximately \$35 million (22.2 million euros) per year to run one trial court. The Court of BiH has been created without UN involvement, as a permanent institution designed to try many hundreds if not thousands of people, at a cost of \$16 million (10 million euros) per year to run eight trial courts.

The two courts should be closely watched to establish which model should be repeated in the future if international justice requires domestic trials to complement the trials at the International Criminal Court. **HRB**

ENDNOTES: FUNDING JUSTICE

¹ See *Updates from the International Criminal Courts* in this issue on page 44 for a further discussion of recent developments in the *Lubanga* case.

² For information on UK war crimes trials in Singapore and elsewhere, see Hayashi Hirofumi, *British War Crimes Trials of Japanese*, 31 *Nature–People–Society: Science and the Humanities* (Kanto Gakuin Univ., Yokohama, Japan) (July 2001), available at <http://www32.ocn.ne.jp/~modernh/eng08.htm> (last visited June 29, 2008).

³ David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future*, 80 *Asia Pacific Issues* 5 (Aug. 2002), available at http://www.eastwestcenter.org/publications/search-for-publications/browse-alphabetic-list-of-titles/?class_call=view&pub_ID=2004&mode=view (last visited June 29, 2008).

⁴ Caitlin Reiger & Marieke Wierda, International Center for Transitional Justice, *The Serious Crimes Process in Timor Leste: In Retrospect* 30 (Prosecutions Case Studies Series, March 2006), available at <http://www.ictj.org/en/news/pubs/index.html> (last visited June 29, 2008).

⁵ Cohen, *supra* note 3, at 3.

⁶ *Id.*

⁷ *Id.* at 7.

⁸ For an analysis of the negotiation process see Craig Etcheson, Open Society Justice Initiative, *A 'Fair and Public Trial': A Political History of the Extraordinary Chambers*, (Justice Initiatives: Spring 2006), available at http://www.justiceinitiative.org/db/resource2?res_id=103182 (last visited June 29, 2008).

⁹ The Group of Experts for Cambodia, the Secretary-General and the President of the Security Council, *Report of the Group of Experts for Cambodia pursuant to G.A. Res. 52/135*, within *Identical Letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, ¶ 132, U.N. Doc. A/53/850, S/1999/231 (Mar 16, 1999).

¹⁰ *Id.*, ¶ 177.

¹¹ *Id.*, ¶ 213.

¹² The Secretary-General, *Report of Secretary General on the Khmer Rouge Trials*, U.N. Doc. A/59/432 (Oct. 12, 2004).

¹³ The 1995 Dayton Peace Accords that ended the 1992–1995 armed conflict in Bosnia created the Office of the High Representative to oversee implementation of civilian aspects of the Accords in Bosnia.

¹⁴ The laws required for the establishment of the War Crimes Chamber and transfer of cases from ICTY to BiH came into force on January 6, 2005. Collectively, they are: BiH OG 61/04 (Law on Amendments to the Law on the Court of BiH; Law on Amendments to the Law of the Prosecutor's Office of BiH; Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Admissibility of Evidence Collected by ICTY in Proceedings before the Courts in BiH; Law on Amendments to the Law on Protection of Witnesses under Threat and Vulnerable Witnesses; and Law on Amendments to the BiH Criminal Code).

¹⁵ For an excellent factual summary and analysis of the set up, structure and operations of the Court of BiH, see Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina* (vol. 18, no. 1(D) 5–6: Feb. 2006), available at <http://www.hrw.org/reports/2006/ij0206/> (last visited June 22, 2008).

¹⁶ *The General Budgets for the Judicial Institutions of Bosnia and Herzegovina*, June 2006 update, available at http://www.registrarbih.gov.ba/files/docs/budget_eng.pdf (last visited June 27, 2008).

¹⁷ The UN Special Rapporteur for Human Rights in Cambodia in the form of three different people has consistently reported for the past 14 years that the judiciary in Cambodia is neither independent nor impartial.

¹⁸ *W. v. Switzerland*, 254-A Eur. Ct. H.R. (ser. A) ¶ 30 (1993).

¹⁹ *Bezicheri v. Italy*, 164 Eur. Ct. H.R. (ser. A) ¶ 25 (1989).