



**An International Bar Association International Criminal Court & International Criminal Law Programme report**

## **Legal Representation, Fairness and Access to Justice in Hybrid Tribunals and Specialised Chambers**

**December 2018**

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# About the Programme

The International Bar Association (IBA) commenced the IBA International Criminal Court (ICC) Programme in 2005.

The Programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals, and encourages the legal community to engage with the work of these courts. The IBA's work includes the thematic legal analysis of proceedings and ad hoc evaluations of legal, administrative and institutional issues that could potentially affect the rights of defendants, impartiality of proceedings and development of international justice.

Based at the Peace Palace in The Hague, the IBA's International Criminal Court and International Criminal Law (ICC & ICL) Programme acts as an interface between the courts and the global legal community. As such, special focus is placed on monitoring emerging issues of particular relevance to lawyers and collaborating with key partners on specific activities to increase the engagement of the legal community on ICC and ICL issues.

Programme information is disseminated through regular reports, expert discussions, workshops and expert legal analysis on issues relevant to our mandate.

## Methodology

The IBA's monitoring work and research are complemented by consultations with key legal professionals, including court officials, academics and legal researchers, non-governmental organisations, individual counsel and diplomatic representatives. This report forms part of the Programme's thematic publication series *IBA ICL Perspectives* and presents the Programme's views on key developments in ICL that have a particular impact on fair trial standards. It reflects the IBA's monitoring and analysis of developments and jurisprudence to 30 August 2018.

The report was researched, written and reviewed by the legal staff of the IBA's ICC & ICL Programme, Kate Orlovsky, Senior Researcher, and Aurélie Roche-Mair, Programme Director. Invaluable research assistance was provided by Anisa Sućeska, IBA Programme Assistant, and IBA interns Camilla Allegrucci, Eléonore Coeuret, Claudia Vernis Figueras, Beatriz Mayans Hermida and Sarah Reilly. The report was further reviewed by senior IBA officials, including Dr Mark Ellis, IBA Executive Director, and senior lawyers with relevant expertise.

The IBA expresses its gratitude to all persons who graciously participated in consultations for this report and to the expert reviewers for their input.

# List of abbreviations

ADC-ICT	Association of Defence Counsel practising before the International Courts and Tribunals, formerly the ADC-ICTY
ADC-ICTY	Association of Defence Counsel practising before the ICTY
ADHOC	Cambodian Human Rights and Development Association
ASP	Assembly of States Parties
AU	African Union
AVCPR	Chadian Association of Victims of Political Repression and Crime
BAKC	Bar Association of the Kingdom of Cambodia
BiH	Bosnia and Herzegovina
CAR	Central African Republic
CAR SCC	Central African Republic Special Criminal Court
CoE	Council of Europe
CPR	Civil Party Representative
DRC	Democratic Republic of the Congo
EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCC VSS	ECCC Victims Support Section
EU	European Union
FIDH	International Federation for Human Rights
FPLC	Forces Patriotiques pour la Libération du Congo
IBA	International Bar Association
ICC	International Criminal Court
ICCBA	International Criminal Court Bar Association
ICCPR	International Covenant on Civil and Political Rights
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court
ICD	International Crimes Division in Uganda
ICTR	International Criminal Tribunal for Rwanda
ICTR RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for the former Yugoslavia
ICTYRPE	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
HRW	Human Rights Watch
IIIM	International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011
IRMCT	International Residual Mechanism for Criminal Tribunals
KLA	Kosovo Liberation Army
KSC	Kosovo Specialist Chambers
LCDH	Central African League for Human Rights
LRA	Lord's Resistance Army
MINUSCA	UN Multidimensional Integrated Stabilization Mission in the Central African Republic
NGO	non-governmental organisation
OCDH	Central African Observatory for Human Rights
OPBiH	Office of the Prosecutor of Bosnia and Herzegovina
OKO	Criminal Defence Section of the Registry of the Court (Odsjek krivične odbrane for its abbreviation in Bosnian)
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OSCE	Organization for Security and Co-operation in Europe
OSCE/ODIHR	OSCE Office for Democratic Institutions and Human Rights
OSJI	Open Society Justice Initiative
OTP	Office of the Prosecutor
RSCSL	Residual Special Court for Sierra Leone
SCSL	Special Court for Sierra Leone
SDWC	Special Department for War Crimes
SGBV	sexual and gender-based violence
SPO	[Kosovo] Specialist Prosecutor's Office
STL	Special Tribunal for Lebanon
UN	United Nations



UNGA	United Nations General Assembly
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNSC	United Nations Security Council
VPU	Victims' Participation Unit
WCC	War Crimes Chamber
WCCP	War Crimes Chamber Project

# Introduction

Trials for genocide, war crimes and crimes against humanity can take place in multiple jurisdictions and at both the international and national levels. This system of international justice includes the International Criminal Court (ICC) as well as state courts, specialised chambers of state courts and purpose-built mechanisms with national and international components, also known as hybrid courts. The relationship between these mechanisms within the system varies in respect of the indirect and direct influence that each mechanism may have on others. As discussed in this report, mechanisms can be created as standalone institutions or may be attached to domestic legal systems. They may be independent of the ICC, addressing crimes that fall outside its jurisdiction, or be in a complementary relationship to the ICC, dealing with crimes that the ICC has under preliminary examination or could potentially address. Mechanisms may also apply identical or similar substantive and procedural law, and look to the jurisprudence and structures of existing courts and tribunals.

The ICC's legal framework, including the Rome Statute and Rules of Procedure and Evidence (RPE), have played a crucial role in consolidating the substantive and procedural law for trying international crimes, and in standardising some of the structures and roles for international justice mechanisms and actors. In accordance with international fair trial standards, the ICC's framework creates structures and responsibilities on a number of levels to ensure that trials for international crimes are fair. Legal representation – the right to counsel – is among the most established fair trial rights. In keeping with emerging and newer norms of victims' roles in the justice process, the ICC's framework also creates structures and responsibilities for victims' participation and legal representation. While not the only actors with a mandate to ensure fairness and access to justice, defence counsel are among the most important actors for ensuring fair trials and victims' counsel play an essential role in bringing the views and concerns of victims into the courtroom.

## The expanding set of mechanisms addressing international crimes

This report focuses on legal representation in hybrid courts and specialised chambers. In particular, it looks at the structures that have arisen to make legal representation possible, for both the accused and for victims. It looks at how these structures have evolved, and what lessons have been learned. It looks at the sources of support for counsel, which can come both from inside an institution, mainly from the registry, and outside the institutions, for example from bar associations and civil society. In addition, the report draws on particular examples taken from hybrid tribunals and specialised chambers to show the effects of varying levels of support.

This is a timely topic because, even as existing institutions, including the ICC, are limited by jurisdiction, capacity or other factors, more accountability processes are being initiated and demanded. For example, efforts remain underway in Guinea to hold domestic trials for crimes committed in the 2009 stadium massacre, while the ICC continues its preliminary examination of the

same events.<sup>1</sup> A hybrid tribunal has been proposed for South Sudan as part of its peace process.<sup>2</sup> In Colombia, slow progress continues to be made towards accountability under the Special Jurisdiction for Peace.<sup>3</sup> As discussed in the report, mechanisms are already becoming operational to address crimes committed in Kosovo and the Central African Republic (CAR).

The initiatives to preserve evidence of crimes committed in Syria, through the 'IIM'<sup>4</sup> and other efforts, underline that accountability for serious crimes is now seen as obligatory, even when no mechanism exists to deliver it.<sup>5</sup> The IIM's mandate is 'to collect, consolidate, preserve and analyse evidence' of serious crimes and to prepare files for eventual prosecution in national, regional or international courts or tribunals.<sup>6</sup> While the forums for legal proceedings are not yet determined, the unprecedented creation of this mechanism by the United Nations General Assembly (UNGA) underscores the expectation that the international community will support some sort of trials for international crimes committed in Syria.<sup>7</sup> It is significant that the IIM mandate calls for its procedures to 'be based on international law and standards, notably the right to a fair trial and other due process provisions under international human rights law, as well as on the jurisprudence, procedural standards and best practices of the international criminal tribunals'.<sup>8</sup>

These institutions, including those addressed in the report, those aforementioned and others not mentioned, run the gamut in terms of structure.<sup>9</sup> Models include fully international and fully domestic courts, hybrid tribunals and specialised chambers in domestic courts.<sup>10</sup> This report focuses on courts that have certain characteristics, rather than attempting a comprehensive review of institutions. Of particular interest are ICC-related institutions and mechanisms. Some, such as the International Crimes Division (ICD) in Uganda and the Special Criminal Court (SCC) in CAR, are located in a country with an active ICC investigation or case and are thus in a position to benefit from this relationship with the ICC, for example, by sharing information and technical assistance. Such institutions may also be informed by, or rely on, the state's implementing legislation of the Rome Statute for part of its legal framework.

The report also pays specific attention to those institutions that provide for some form of victim participation in legal proceedings, and that therefore include both defence and victims' counsel. In this category, the Special Tribunal for Lebanon (STL) is of particular interest, as is the Extraordinary Chambers in the Courts of Cambodia (ECCC), both of which were in certain respects ground-

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1 See Human Rights Watch, 'Waiting for Justice: Accountability before Guinea's Courts for the 28 September 2009 Stadium Massacre, Rapes, and Other Abuses' (December 2012); See also ICC, Preliminary examination in Guinea, [www.icc-cpi.int/guinea](http://www.icc-cpi.int/guinea), accessed 21 November 2018.

2 The 2015 'Agreement on the resolution of the conflict in the Republic of South Sudan' envisaged the creation of a Hybrid Court for South Sudan (HCSS) responsible for investigating and prosecuting individuals 'bearing the responsibility for violations of international law and/or applicable South Sudan law, committed from 15 December 2013 to the end of the Transitional Period'. See Human Rights Watch, 'South Sudan: Stop Delays on Hybrid Court: Four Years Into Conflict, Rampant Abuse' (December 2017); UN Human Rights Council, 'Report of the Commission on Human Rights in South Sudan', A/HRC/37/71 (March 2018).

3 Special Jurisdiction for Peace Agreement, [www.altocomisionadoparalopez.gov.co/Prensa/Paginas/2017/Mayo/El-Acuerdo-de-paz-en-ingles.aspx](http://www.altocomisionadoparalopez.gov.co/Prensa/Paginas/2017/Mayo/El-Acuerdo-de-paz-en-ingles.aspx), accessed on 30 October 2018.

4 The 'International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011'.

5 IIM, Mandate, see <https://iim.un.org/mandate>; see also CIJA; The Syrian Accountability Project, <http://syrianaccountabilityproject.syr.edu>, accessed 30 October 2018.

6 UN General Assembly, Resolution adopted by the General Assembly on 21 December 2016, A/RES/71/248, (January 2017), para 4.

7 The IIM is funded from voluntary donations. See IIM Terms of Reference, para 36, <https://iim.un.org/terms-of-reference-of-iim>, accessed 21 November 2018.

8 *Ibid*, para 17.

9 For convenience, this report will primarily use the term 'court' to refer to the range of institutions.

10 See eg, OSJI, 'Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes' (Open Society Foundations, 2018).

breaking for their structures and procedures for legal representation. Although the Special Court for Sierra Leone (SCSL) did not allow for victim participation, aspects of its defence support structures are also discussed. More recently established institutions, such as the Kosovo Specialist Chambers (KSC), the CAR SCC and the ICD, build not only on the ICC's victim participation framework, but also draw lessons learned from the established hybrids, namely the STL and ECCC. The report also examines aspects of the Extraordinary African Chambers (EAC), a mechanism that combines domestic, regional and international components and that has been much discussed as a potential model for future institutions.

## **The importance of effective legal representation in emerging institutions**

In this report, the IBA seeks to highlight two important areas for consideration, regardless of the nature of the mechanism. First, it seeks to highlight the importance of fully planning for and resourcing legal representation for the accused to ensure that a court can provide for that aspect of a fair trial, particularly in a context where fair trial rights may already be fragile. Second, the report aims to highlight how victims' legal representation has become an indispensable component of trials for international crimes. The development of victim participation, in a capacity other than as a witness, in international criminal proceedings is a well-covered and vast topic beyond the scope of this report. This report addresses the narrower topic of legal representation for victims, and in particular, the institutional and resource implications of ensuring that victims, through their counsel, are able to participate according to the framework of a given court or tribunal.

As this report discusses, fairness and equality of arms matter for legitimacy of proceedings and the institution because of the now-universal expectation that mechanisms should deliver a fair trial in accordance with international standards. The ability of victims to access a form of justice through participating in accountability processes is now included in the mandates of many institutions, further establishing a norm that accountability processes must also respect victims' interests. This report seeks to promote reflection and action to ensure that both are possible in future institutions administering justice for international crimes.

In this context, the report seeks to bring a much-needed focus on counsel issues, and by doing so to strengthen support for fair trials and access to justice. The report also seeks to provide specific information about the norms for supporting both defence and victims' counsel. Adequate provision for counsel means not just addressing individual counsels' needs on a case-by-case basis, but integrating certain standards into the structure and funding of the institution. Examples include creating a defence office or victims' office in the structure of a tribunal, ensuring there is sufficient funding for legal aid, providing for training and substantive legal support for counsel and planning for delivery of reparations including through creation of a trust fund. Through analysing legal frameworks and records of legal proceedings, the report seeks to highlight examples and experiences that may be adapted to other contexts.

Chapter 1 looks at the renewed relevance of hybrid tribunals and specialised chambers for the adjudication of international crimes, the landscape of mechanisms with jurisdiction over serious crimes and the relevance of complementarity to hybrid tribunals and specialised chambers. Chapter 2 discusses the relationship between legal representation and both fairness and access to justice,

describing the roles of various actors, including counsel, for enforcing and reinforcing fairness and access to justice. In Chapter 3, the report examines structures and practices developed to support effective defence legal representation, and trends and challenges that affect the work of victims' counsel. Finally, Chapter 4 sets out future considerations for legal representation, fairness and access to justice at hybrid tribunals and specialised chambers.

# Chapter 1: Hybrid tribunals and specialised chambers, complementarity and fairness

## I. The renewed relevance of hybrid tribunals and specialised chambers for adjudication of serious crimes

This report focuses on legal representation within a number of legal mechanisms, including specialised chambers in domestic courts and ‘hybrid tribunals’, which are intended to address the most serious crimes committed by high-level perpetrators. The courts have varied formats. In legal framework, jurisdiction and practice, no two institutions are the same. They have in common what Carsten Stahn calls the ‘technique of hybridity’, in that they are created as ‘tailor-made mechanisms’ and ‘situation-specific responses’, seeking to provide accountability for serious crimes through some combination of domestic and international components.<sup>11</sup> There is a comprehensive body of literature describing how hybrid tribunals and specialised chambers arose, the landscape of variations between them and the various challenges encountered in executing their mandates.<sup>12</sup>

There has also been significant attention paid to the renewed interest from states, international organisations and civil society advocates in creating such mechanisms. The renewed interest comes with the closure of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), and the reflection on the record and legacy left by these standalone ad hoc international tribunals, as well as increased clarity about the jurisdictional and capacity limitations of the ICC. The ad hoc model may, in retrospect, be seen as too isolated from the affected community and with less potential to transform the domestic legal system. The ICC’s jurisdictional restrictions have left it unable to respond in some situations where accountability is most needed, for example, in Syria, where vetoes within the United Nations Security Council (UNSC) have left the court unable to take jurisdiction over the conflict. The ICC has also proven capable of handling only a relatively small number of investigations and cases at a time.

In contrast, Jennifer Trahan cites a number of positive factors in favour of hybrid tribunals including:

- ‘(1) the efficiency of hybrid tribunals; (2) the successful outreach that is possible; (3) the benefits of locating hybrid tribunals in their situation countries—which has generally been the practice; (4) the limited capacity of the ICC, suggesting the need for additional hybrid or other tribunals in situations of large scale atrocity crimes; (5) the ability of hybrid tribunals to better resist attempts at domestic political control than purely national courts; (6) the ability of hybrid tribunals (particularly ones located in their situation country) to contribute to domestic capacity-building,

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11 Carsten Stahn, ‘Tribunals are Dead, Long Live Tribunals: MICT, the Kosovo Specialist Chambers and the Turn to New Hybridity’ (EJIL Talk, 23 September 2016), see [www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity](http://www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity), accessed 26 September 2018.

12 See, eg. Beth van Schaack, ‘The Building Blocks of Hybrid Justice’ (2016) 44 *Denv J Int’l L & Poly* 169–208; Jenia Iontcheva Turner, ‘Pluralism in International Criminal Procedure’ in Darryl Brown, Jenia Tuner and Bettina Weisser (eds), *Oxford Handbook of Criminal Process* (2018); Jennifer Trahan, ‘Views of the Future of the Field of International Justice: A Scenarios Project based on Expert Consultations’ (2018) 33(4) *AM U Int L Rev*; Harry Hobbs, ‘Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy’ (2016) 16(2) *Chicago Journal of International Law*; Mark Kersten, ‘As the Pendulum Swings – The Revival of the Hybrid Tribunal’, in Mikkel Jarle Christensen and Ron Levi (eds), *Internationalizing Criminal Law: Institutions, Elites and Practices* (Routledge, 2017); Sarah Williams, *Hybrid and Internationalized Criminal Courts and Tribunals: Selected Jurisdictional Issues* (Oxford: Hart, 2012); Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination of Their Origins, Structure, Legitimacy and Effectiveness* (Springer Press, 2015).

and allow for more local ownership; and (7) the ability of hybrid tribunals to demonstrate to local communities rule of law functioning.<sup>13</sup>

Likewise, specialised chambers within domestic legal systems, while less insulated from potential political interference, can under the right circumstances provide an efficient and effective means for accountability.<sup>14</sup>

In this context, hybrid tribunals and specialised chambers have continued to be proposed and put in place in post-conflict processes and to address longstanding impunity, providing variations on the form and new models.<sup>15</sup> However, even as the ICC is no longer being held out as the predominant locus for prosecutions of international crimes, its legal framework retains a strong normative value as the benchmark for defining international criminal law and procedure. The complementarity regime of the ICC has also, by design, encouraged states to adopt Rome Statute crimes and procedures within domestic law, and seeks to encourage prosecutions of such crimes domestically, as discussed below. Likewise, the ad hoc tribunals have created law and procedures that have been used as a model in a number of contexts, as well as a significant body of jurisprudence that has informed decisions at many other mechanisms. For these reasons, the ICC and ad hoc tribunals provide helpful points of reference when discussing the law and procedures of hybrid tribunals and domestic prosecutions.

This chapter proceeds by examining some of the factors that influence the creation of an institution and its legal framework, with specific reference to the mechanisms discussed in this report. It then looks at the concept of complementarity, examining first how the ICC enacts complementarity and how, if at all, issues of fairness are taken into account. It also examines complementarity in non-ICC jurisdictions, specifically the capacity-building and legacy activities of the ad hoc tribunals that address legal representation and fairness.

## II. The landscape of institutions with jurisdiction over serious crimes

### *Creating mechanisms – the legal framework*

International criminal courts and tribunals are created through multilateral processes involving states as well as regional and international actors. The conflict or incident that the tribunal will address has usually been the subject of multiple investigations and inquiries. In this report, ‘legal framework’ refers to the documents that collectively define the format, composition, jurisdiction, substantive laws and procedures of a legal institution. Through a formal process of negotiation, including extensive preparatory work, a statute is created for the court that defines its mandate and jurisdiction. Following this, judges and staff are elected or appointed, and the tribunal’s procedures are further defined with the creation of additional legal instruments including the rules of procedure and evidence. The actors involved, the length of time between the negotiations, establishment and operationalising the institution, and the particular composition of the legal framework depend heavily on political circumstances.

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13 Jennifer Trahan, ‘Views of the Future of the Field of International Justice: A Scenarios Project Based on Expert Consultations’ (2018), 33 *Am U Int’l L Rev* 883. [Footnotes omitted].

14 See n 10, paras 14–28 for a detailed discussion of considerations on the relationship of an accountability mechanism to a domestic system.

15 Eg, Intergovernmental Authority on Development, ‘Agreement on the Resolution of the Conflict in the Republic of South Sudan’ (17 August 2015); Additional Agreement Between the Government of the Republic of Senegal and The African Union Relating to the Statute of the Extraordinary African Chambers for the Prosecution of International Crimes Committed in Chad During the Period from 7 June 1982 to 1 December 1990, 24 July 2014.

The structure of an institution will be shaped by its mandate, including the scale of the work it is intended to do and the timeframe for completing the mandate. Most institutions are intended to address a defined period of time and set of crimes, with the specific number of cases yet to be defined. An important factor is whether the institution has a fixed source of funding in a domestic budget, another source, such as the UN, international voluntary contributions, or it will be seeking additional funding throughout its mandate. Crucially, the institution must have genuine political will and support, both at domestic and international levels, to become operational and fulfil its mandate.

The legal frameworks of institutions addressing international crimes have continued to evolve and have become more tailored. This is evident in the Rome Statute, which, as the statute for the only permanent international criminal court, reflected both the revision of existing legal concepts and articulated new legal concepts and procedures, building in part on the law developed in the ad hoc tribunals. It is also evident in the detailed RPE created by the ICC, ad hoc and hybrid tribunals. International criminal courts and tribunals interpret their existing laws and procedures through jurisprudence, amend statutes and RPE, and create additional regulations, practice directions and administrative documents. Arriving at a clear and fixed legal framework is important, because institutions require clear and fixed law and procedures to function and to ensure fairness and predictability for those who will be tried before them. At the same time, institutions have also required some flexibility in their legal regimes, to continue to adapt laws and procedures for specific contexts. The specialised and evolving nature of international criminal law and procedure is relevant to the profile and expertise of advocates appearing before the courts, as discussed in Chapter 3.

### *Mechanisms with relatively high autonomy from the domestic system*

When an institution has broad multilateral support, the creation of the legal framework and operationalisation of the institution tends to come about more quickly and with greater certainty. For example, both the ICTY and STL reflect a relatively strong political will and high-level investment from states and the UN Security Council, allowing the tribunals to become established and operational within a relatively short timeframe. The UNSC created the ICTY in 1993, following the report of a commission of experts to investigate alleged grave crimes committed in the conflict in the former Yugoslavia starting in 1991.<sup>16</sup> The ICTY Statute defined the subject-matter jurisdiction of the tribunal, as well as key points of law including the rights of the accused.<sup>17</sup> The Statute also specified the primacy of the tribunal, meaning that it had the primary right to try cases over domestic courts.<sup>18</sup> Subsequently, as provided for in Article 15 of the Statute, RPE were drafted and adopted by the judges in 1994. The ICTY RPE have been revised more than 50 times from their initial adoption to the closure of the tribunal in 2017.<sup>19</sup> The ICTY also adopted about 18 practice directions, addressing issues such as procedures for appeals, sentencing and contempt proceedings, and a number of codes of conduct and other regulatory documents.<sup>20</sup> The budget for the ICTY was provided by the UNGA, and approved every two years.<sup>21</sup>

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16 Article 1 of the ICTY Statute defined the competence of the tribunal as having ‘the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991’.

17 ICTY Statute, Article 21.

18 ICTY Statute, Article 9(2).

19 See ICTY RPE, [www.icty.org/en/sid/136](http://www.icty.org/en/sid/136), accessed 26 September 2018.

20 See ICTY, Practice Direction, [www.icty.org/en/documents/practice-directions](http://www.icty.org/en/documents/practice-directions), accessed 26 September 2018.

21 ICTY, The Cost of Justice, [www.icty.org/en/about/tribunal/the-cost-of-justice](http://www.icty.org/en/about/tribunal/the-cost-of-justice), accessed 26 September 2018.



The STL was created primarily to address the bombing in the centre of Beirut in February 2005 that killed 22 people including the Prime Minister of Lebanon, Rafik Hariri. The tribunal was established in 2007 by the UNSC, after numerous investigations into the incident and pursuant to a request from the government of Lebanon. The statute, adopted in 2007, gave the tribunal jurisdiction over the 2005 bombing with the possibility of addressing other connected cases and specified that the tribunal would apply the existing Lebanese Criminal Code for substantive criminal law while following international criminal procedure.<sup>22</sup> The STL also has primacy over Lebanese courts.<sup>23</sup> The tribunal became operational in 2009, at which time it adopted RPE, which have been amended at least nine times as of the writing of this report.<sup>24</sup> The STL also has at least 24 internal regulatory documents, including practice directions, policies and codes of conduct.<sup>25</sup> The annual budget for the STL is funded by Lebanon and other donor states.<sup>26</sup> When creating a standalone tribunal such as the STL, additional structures to support counsel and victims may be more easily included in the framework, as discussed in Chapter 3.

### *Mechanisms embedded within or with strong ties to the domestic system*

When creating new chambers attached to an existing legal system, such as the ECCC or the ICD, the existing structures in place domestically will have a much larger impact on the new chambers or division. In such situations, existing structures may be adapted to try to meet the needs of the new chamber or division, with varying degrees of success, or special divisions may be created to address these needs. Should the proceeding be more embedded in the domestic legal system, such as the EAC, the institution will largely rely on the existing structures, though these may also be adapted to address the specific needs of a trial for international crimes. A domestic court may successfully try high-profile cases of mass crimes; however, additional resources and support structures will certainly be necessary. One reason to set up a standalone court or separate chamber is that such cases tend to be large in scale, take many years and may attract additional publicity and security risks. These cases may take a disproportionate amount of resources out of the regular system.

The KSC presents a new model of an institution that is part of a domestic system but is specially designed to protect the court and proceedings from domestic influence. Pursuant to indications from journalists and the former ICTY Prosecutor, Carla Del Ponte, that serious crimes had been committed in Kosovo and were unaddressed, the Council of Europe (CoE) commissioned an investigation and report<sup>27</sup> that led to the EU's formation of the Special Investigative Task Force in 2011.<sup>28</sup> The KSC and Specialist Prosecutor's Office (SPO) were created in 2015 by Kosovo, with an initial mandate of five years.<sup>29</sup> The KSC has jurisdiction over crimes against humanity, war crimes and other crimes

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22 STL Statute, Article 2.

23 STL Statute, Article 4.

24 See STL RPE, [www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence/rules-of-procedure-and-evidence-in-force/224-rules-of-procedure-and-evidence](http://www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence/rules-of-procedure-and-evidence-in-force/224-rules-of-procedure-and-evidence), accessed 26 September 2018.

25 STL, Internal Regulatory Documents, [www.stl-tsl.org/en/documents/internal-regulatory-documents](http://www.stl-tsl.org/en/documents/internal-regulatory-documents), accessed 26 September 2018.

26 UN, 'Secretary-General establishes management committee for Lebanon's Special Tribunal; says expected contributions to court will meet operational needs for first year' (February 2008), [www.un.org/press/en/2008/sgsm11412.doc.htm](http://www.un.org/press/en/2008/sgsm11412.doc.htm), accessed 26 September 2018.

27 Dick Marty, 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo', Report Committee on Legal Affairs and Human Rights (Parliamentary Assembly, Council of Europe, January 2011).

28 For a detailed summary of the events leading to the establishment of the KSC, see KSC, 'Kosovo Specialist Chambers and Specialist Prosecutor's Office: First Report' (March 2018), 8–13. The investigations and staff of the SITF were later absorbed into the SPO in September 2016. *Ibid.*, 58.

29 Constitution of the Republic of Kosovo (as amended August 2015), Article 162.

that occurred between 1 January 1998 and 31 December 2000 in Kosovo, or committed by, or against, persons of Kosovo or former Yugoslavian citizenship.<sup>30</sup> Investigations have indicated possible involvement of former members of the KLA, who are now senior government officials.<sup>31</sup> The KSC is funded by the EU Member States and a number of other contributing states.<sup>32</sup>

As a security measure, the KSC is located outside Kosovo in The Hague and is staffed entirely by international staff drawn from EU and contributing states.<sup>33</sup> In structure, the KSC is part of the legal system of Kosovo and includes basic, appeal, supreme and constitutional court chambers.<sup>34</sup> The KSC applies international customary law and substantive criminal law.<sup>35</sup> Soon after their appointment in February 2017, the KSC judges drafted and adopted the KSC RPE, which then entered into force in July 2017, making the court operational.<sup>36</sup> The KSC Registrar, who took office in April 2016, had by March 2018 also promulgated Staff Rules, a Code of Conduct for staff members, a Directive on Counsel, as well as 25 Administrative Directives, 14 Operational Instructions and seven Information Circulars.<sup>37</sup> As discussed in Chapter 4, there is a defence office within the KSC registry to deal with administrative matters for defence, as well as a victim participation office also within the registry. The KSC also includes an innovation not previously included in international or hybrid tribunals, with the creation of an Ombudsperson's office. The Ombudsperson has the mandate 'to act independently to monitor, defend and protect the fundamental rights and freedoms' in Kosovo's Constitution with respect to persons interacting with the KSC and SPO.<sup>38</sup> The KSC Law also provides that the tribunal 'shall adjudicate and function in accordance with' a number of legal sources, including the European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR).<sup>39</sup> Both the Ombudsperson and the requirement to be consistent with specific human rights treaties could provide additional support for fair proceedings at the KSC.

Compared to the KSC, the ECCC, ICD and SCC provide examples of courts or mechanisms that are in some way attached to a domestic system, and have had greater challenges in becoming operational. The need to harmonise laws and procedures with existing laws, to ensure that international legal concepts are included and can be applied domestically, and to find the necessary funding and resources have caused delays and at times stalled or derailed the set-up of mechanisms or legal proceedings.

The ECCC, created to try crimes committed by the Khmer Rouge regime between 1975 and 1979, took decades to be established, delayed by civil war and difficult political negotiations. Exploratory

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30 KSC Law No 05/L-053, Articles 7–8, 12–15. The KSC also has jurisdiction over certain crimes against the administration of justice when they relate to its official proceedings and/or officials.

31 See n 27; Sarah Williams notes that the EU considered that given the climate of impunity, only a fully internationalised institution would guarantee independence. See Sarah Williams, 'The Specialist Chambers of Kosovo: The Limits of Internationalization?' (2016) 14, *Journal of International Criminal Justice*, 36.

32 Canada, Norway, Switzerland, Turkey and the United States

33 See KSC Law No 04/L-274, the Law on ratification of the international agreement (The Exchange of Letters), which states that the structures will be staffed with and operated by EULEX international staff only. The KSC Directive on Counsel does not contain any restrictions on nationality for application to the list of counsel. See KSC, Directive on Counsel, KSC-BD-04, Section 5. Note that defence counsel may be from Kosovo, but are not considered staff of the KSC.

34 KSC Law No 05/L-053, Article 1.

35 KSC Law No 05/L-053, Article 3.

36 KSC RPE. See further, Alexander Heinze, 'The Kosovo Specialist Chambers' Rules of Procedure and Evidence: A Diamond Made Under Pressure?', (2017) 15(5) *Journal of International Criminal Justice*, 985–1,009.

37 See n 28, 36.

38 KSC RPE, Rule 28.

39 KSC Law, Article 3(2).

talks were initiated by the Cambodian government with the UN in 1997, with the final agreement signed in 2003.<sup>40</sup> The agreement entered into force in 2005, and the court adopted its Internal Rules in 2007, which at the time of writing have been amended at least nine times.<sup>41</sup> The ECCC also has a number of practice directions.<sup>42</sup> The structure of the ECCC, which provides for the court to be jointly administered by Cambodian and international actors, reflects the difficult negotiation process and over time has proved almost unworkable.<sup>43</sup> The ECCC, financed by voluntary contributions from states including Cambodia, has suffered from severe funding shortfalls.

In Uganda, an accountability mechanism to try crimes committed in the long-running conflict with the Lord's Resistance Army (LRA) was included in the Juba Peace Agreements of 2007 between the LRA and the government of Uganda as one of a number of transitional justice mechanisms to be put in place.<sup>44</sup> In 2008, a War Crimes Division was created in the High Court of Uganda with the jurisdiction to try serious crimes, which eventually became the ICD.<sup>45</sup> Its legal framework includes Uganda's International Criminal Court Act, adopted in 2010, which domesticates the Rome Statute in Uganda's legal system, and the ICD Internal Rules, adopted in 2016.<sup>46</sup> However, the ICD's first and only case to date that deals with LRA crimes, against Mr Thomas Kwoyelo, has been delayed by a number of issues including a legal challenge to the Constitutional Court regarding the applicability of an existing amnesty law.<sup>47</sup> The ICD also needed to resolve questions of its applicable law and procedure, which has required going through Uganda's law-making processes and courts.<sup>48</sup> The ICD is funded by the government of Uganda and international donors.<sup>49</sup> Similar to the ECCC, the ICD has struggled to find sufficient funds.

More recently, the CAR SCC was created in 2015 by the transitional government, following a 2014 memorandum of understanding with the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). The court was created as part of the CAR legal system by a *Loi Organique*.<sup>50</sup> The RPE were then drafted in 2017, and revised and put before Parliament in 2018.<sup>51</sup> A final version of the RPE was adopted in May 2018. The CAR SCC is funded by voluntary

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40 ECCC, 'Why has it taken so long to bring to trial those alleged to be responsible for the crimes committed in the Khmer Rouge period?': [www.eccc.gov.kh/en/faq/why-has-it-taken-so-long-bring-trial-those-alleged-be-responsible-crimes-committed-khmer-rouge](http://www.eccc.gov.kh/en/faq/why-has-it-taken-so-long-bring-trial-those-alleged-be-responsible-crimes-committed-khmer-rouge), accessed 26 September 2018.

41 ECCC, Internal Rules and Regulations, [www.eccc.gov.kh/en/document/legal/internal-rules](http://www.eccc.gov.kh/en/document/legal/internal-rules), accessed 26 September 2018.

42 ECCC, Practice Direction, [www.eccc.gov.kh/en/document/legal/practice-directions](http://www.eccc.gov.kh/en/document/legal/practice-directions), accessed 26 September 2018.

43 Open Society Justice Initiative, 'Performance and Perception: The impact of the Extraordinary Chambers in the Court of Cambodia' (2016), 19–20.

44 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan (July 2007)

45 'The High Court (International Crimes Division) Practice Direction, 2011', Article 3 creates the ICD, and Article 6 of the same Practice Direction specifies the ICD's jurisdiction over 'any offence relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime as may be provided for under the Penal Code Act, Cap 120, the Geneva Conventions Act, Cap 363, the International Criminal Court Act, No II of 2010 or under any other penal enactment'.

46 The Judicature (High Court) (International Crimes Division) Rules, 2016.

47 See Kasande Sarah Kihika, Meritxell Regue, 'Pursuing Accountability for Serious Crimes in Uganda's Courts: Reflections on the Thomas Kwoyelo Case' (ICTJ, January 2015), 5–6, [www.ictj.org/sites/default/files/ICTJ-Briefing-Uganda-Kwoyelo-2015.pdf](http://www.ictj.org/sites/default/files/ICTJ-Briefing-Uganda-Kwoyelo-2015.pdf), accessed 5 October 2018; *Thomas Kwoyelo alias Latoni v Uganda* (Const Pet No 036 of 2011 (reference)) [2011] UGCC 10 (22 September 2011), <https://ulii.org/ug/judgment/constitutional-court-uganda/2011/10>, accessed 5 October 2018.

48 Lino Owor Ogora, 'Judge Rules that Customary International Law is Applicable in Uganda's Domestic Courts' (OSJI International Justice Monitor, 3 December 2017), [www.ijmonitor.org/2017/12/judge-rules-that-customary-international-law-is-applicable-in-ugandas-domestic-courts](http://www.ijmonitor.org/2017/12/judge-rules-that-customary-international-law-is-applicable-in-ugandas-domestic-courts), accessed 26 September 2018.

49 Human Rights Watch, 'Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division' (January 2012), 9.

50 CAR SCC, *Loi Organique* N° 15.003.

51 Lewis Mudge, 'Wheels of Justice Turning in Bangui: Central African Republic Clears Major Hurdle for War Crimes Court' (Human Rights Watch, May 2018), [www.hrw.org/news/2018/05/29/wheels-justice-turning-bangui](http://www.hrw.org/news/2018/05/29/wheels-justice-turning-bangui), accessed 5 October 2018.

and UN contributions.<sup>52</sup> While the SCC is still in the set-up phase, there are already strong indications that funding will be an issue, along with a number of other problems including the slow revision and passage of the RPE through the CAR Parliament.<sup>53</sup> The CAR has also experienced recurrent violence and conflict since the passage of the *Loi Organique*, further complicating the set-up phase of the Court.

The EAC, created in 2012 by agreement between Senegal and the African Union (AU), presents a new model of institution, and ‘the first African application of universal jurisdiction, a doctrine enabling any judge in any court to consider commissions of internationally recognised crimes’.<sup>54</sup> Based in Senegal, the EAC had jurisdiction over genocide, crimes against humanity, war crimes and torture committed in the territory of Chad between 7 June 1982 and 1 December 1990.<sup>55</sup> The EAC applied the substantive and procedural law in its statute, with any lacunae filled by Senegalese law,<sup>56</sup> and was staffed by Senegalese judges and staff, with the exceptions of the Presidents of the Trial and Appeals Chambers who were non-Senegalese judges from AU Member States.<sup>57</sup> All key positions were nominated by the Minister of Justice of Senegal, and appointed by the Chairperson of the AU. The Statute provided that the EAC would be funded by the specific commitments made at a donors’ conference by Chad, the AU, the EU and other states.<sup>58</sup> The proceedings of the EAC and the trial of Mr Hissène Habré are discussed in Chapter 3.

### *Creating the legal framework as a participatory process*

The EAC was created following a lengthy process of advocacy that involved victims’ organisations, domestic and international non-governmental organisations (NGOs), regional organisations and states. As such, the creation of the EAC is emblematic of the more open process that has become common for creating institutions for accountability. At the formal level, the call for creation of a tribunal for a specific situation may form part of the official recommendations in reports from UN entities and commissions of inquiry.<sup>59</sup> Civil society advocates also document crimes and demand accountability, and in doing so may include detailed recommendations regarding the structure and jurisdiction of the tribunal, in efforts to ensure that it incorporates basic international standards for trying international crimes. Their advocacy also may include demands to include a progressive and up-to-date legal framework addressing specific categories of crimes, such as sexual and gender-based crimes, as well as to create an institution that is capable of

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52 Human Rights Watch, ‘Looking for Justice: The Special Criminal Court, a New Opportunity for Victims in the Central African Republic’ (2018) 30.

53 *Ibid.*

54 Kerstin Bree Carlson, ‘Trying Hissène Habré ‘On behalf of Africa’: Remaking Hybrid International Criminal Justice at the *Chambres Africaines Extraordinaires*’, in Joanna Nicholson (ed), *Strengthening the Validity of International Criminal Tribunals* (Brill, 2018), 342 [citations omitted]. For a detailed description of the proceedings leading to the set-up of the EAC and timeline of events, see Reed Brody, ‘Victims Bring a Dictator to Justice: The Case of Hissène Habré’ in Julia Duchrow and Maïke Lukow (eds), (2nd edn, Bread for the World, June 2017), 7–18.

55 EAC Statute, Articles 3–4.

56 EAC Statute, Article 16.

57 EAC Statute, Articles 11–15.

58 The United States, Belgium, Germany, France, and Luxembourg. See Reed Brody, ‘Victims Bring a Dictator to Justice: The Case of Hissène Habré’ in Julia Duchrow and Maïke Lukow (eds) (2nd edn, Bread for the World, June 2017) 13.

59 See AU Commission of Inquiry on South Sudan, ‘Final Report of the African Union Commission of Inquiry on South Sudan’ (October 2014), [www.peaceau.org/uploads/auiciss.final.report.pdf](http://www.peaceau.org/uploads/auiciss.final.report.pdf), accessed 27 September 2018. After Lebanon requested the UNSC to establish an international tribunal to prosecute those responsible for the terrorist attack, the Secretary-General recommended the establishment of a mixed tribunal, see UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1644* (2005), para 5, UN Doc. S/2006/176 (21 March 2006); The Secretary-General of the UN and the government of Cambodia engaged in significant efforts towards the establishment of the Extraordinary Chambers, which resulted in the Resolution adopted by the General Assembly 57/228, 27 February 2003; In relation to the KSC, see Statement of the Chief Prosecutor of the Special Investigative Task Force, 29 July 2014.

meeting international standards for handling witnesses and allowing for victim participation.

As an institution moves from the theoretical to the start-up phase, external actors may remain involved. The process of drafting legal frameworks in several hybrid tribunals has involved experts from previous courts, civil society, legal professionals and other interested parties. In its openness, this process builds on the important role played by civil society and legal experts in the creation of the ICC's legal framework. As an inclusive drafting process becomes more common, it also reflects the broad range of stakeholders in courts and tribunals dealing with international crimes. Investment of diverse actors in the justice field at the formative stage of an institution can be positive in a number of ways. It can increase the probability that the tribunal will be created and succeed in its mandate, increase its integration into a state's legal system and with other accountability efforts, and provide important links to victim associations, the local legal profession and other stakeholders who later prove important partners for documentation of crimes, outreach to affected communities, legal representation and trial monitoring.

For example, following the 2015 signing of the *Loi Organique* creating the CAR SCC, civil society groups remained engaged at both domestic and international levels to apply pressure and seek to move the commitment for the court towards fruition. Advocacy has taken the form of written statements and reports, which include extensive recommendations to the state and UN actors involved in the process.<sup>60</sup> At least one international NGO has established an office in the CAR jointly with local partners with a specific focus supporting victim involvement with the SCC.<sup>61</sup> The SCC has been the subject of multiple international conferences in Europe and in the capital Bangui, culminating in a workshop on drafting the CAR SCC RPE held in Bangui in October 2017.<sup>62</sup> Representatives of MINUSCA, the CAR government and the CSS participated in the meeting with legal and civil society experts and legal practitioners, including representatives of the Central African Bar Association. The draft from the workshop became the version that was later revised and forwarded to Parliament in 2018. In May this year, more than 40 civil society organisations sent a letter to Parliament urging the passage of the RPE.<sup>63</sup>

Similarly, civil society organisations have engaged extensively with the government of Uganda and international actors on the creation of the ICD, from the 2007 Juba peace process to ongoing

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60 See, eg, FIDH, 'Central African Republic: Make Justice a Priority', Joint Civil Society Appeal to the new President' (statement signed by 21 local and international NGOs), 21 April 2016; Amnesty International, 'The long wait for justice: accountability in the Central African Republic' (2017). See n 52.

61 FIDH, 'Inauguration du bureau conjoint FIDH-LCDH-OCDH pour lutter contre l'impunité' (11 March 2017); ASF also has an office in the CAR which includes activities that support the legal profession in the CAR domestic system, see ASF, 'ASF in the Central African Republic', [www.asf.be/action/field-offices/asf-in-the-central-african-republic](http://www.asf.be/action/field-offices/asf-in-the-central-african-republic), accessed 27 September 2018.

62 Eg, Workshop convened by ASF and Redress, Bangui, 12–13 July 2016, Redress, 'The Redress Trust Limited: Board of Trustees' Report & Financial Statements for the Year ended 31st March 2017', 13; Conference on 'Special Criminal Court for Central African Republic – Context, Challenges and Perspectives' convened by the Africa Group for Justice and Accountability and Wayamo Foundation (Bangui, 22 September 2016); Side Event on 'Strengthening the Central African Republic's justice system and operationalising the Special Criminal Court' convened by the Wayamo Foundation, the International Nuremberg Principles Academy and the Africa Group for Justice and Accountability (Brussels, 16 November 2016) (during the Brussels Conference for the Central African Republic); Ephrem Rugiririza, 'Centrafrique: le Règlement de procédure et de preuve de la Cour Spéciale en débat' (Justiceinfo.net, 3 October 2017), [www.justiceinfo.net/fr/justice-reconciliation/34803-centrafrique-le-projet-de-r%C3%A8glement-de-proc%C3%A9dure-et-de-preuve-de-la-cour-p%C3%A9nale-sp%C3%A9ciale-en-d%C3%A9bat.html](http://www.justiceinfo.net/fr/justice-reconciliation/34803-centrafrique-le-projet-de-r%C3%A8glement-de-proc%C3%A9dure-et-de-preuve-de-la-cour-p%C3%A9nale-sp%C3%A9ciale-en-d%C3%A9bat.html), accessed 27 September 2018.

63 Human Rights Watch, 'Letter to Parliament on Rules of Procedure and Evidence for the Special Criminal Court' (24 May 2018), [www.hrw.org/news/2018/05/24/letter-parliament-rules-procedure-and-evidence-special-criminal-court](http://www.hrw.org/news/2018/05/24/letter-parliament-rules-procedure-and-evidence-special-criminal-court), accessed 27 September 2018.

monitoring of the *Kwoyelo* trial.<sup>64</sup> Organisations have provided recommendations and technical assistance on the operation of the court, with a notable focus on victims' issues and reparations.<sup>65</sup> Civil society support for a justice mechanism, in its many forms, is most effective when it has the endorsement and participation of the mechanism itself, in particular high-level support by judges, prosecutors and registrars. However, civil society may also take the initiative to analyse and provide input at the drafting phase of a mechanism's legal framework without official participation. In January 2017, international and domestic civil society organisations, legal practitioners and academics held a roundtable to discuss the drafting of the RPE for the KSC, without participation from the tribunal.<sup>66</sup> The roundtable addressed the legal issues involved in the passage of the RPE and issues related to victims and witnesses, the rights of the accused, investigations and disclosure. The outcomes of the roundtable were shared with the KSC Registrar. In such processes, the inclusion and emphasis on the rights of the accused and fair trial considerations are important for creating a legal framework that can support fair trials. As discussed in this report, civil society support, in particular for victims' counsel and victim participation, has become indispensable in almost all institutions. Given that many civil society organisations will bring a victim-orientated focus, attention should be given to ensure that fair trial considerations are also included.

### **III. The relevance of complementarity to hybrid tribunals and specialised chambers**

#### *Complementarity in the ICC context*

In the context of looking at hybrid tribunals and specialised courts, the ICC remains relevant in two significant ways. First, as noted throughout this report, the ICC's legal framework and in particular the Rome Statute present in most instances the 'state of the art' in respect of defining international criminal law and procedures. The ICC's legal framework and jurisprudence has a clear normative value, and a number of institutions draw directly from the ICC's framework in drafting domestic legislation and in designing hybrid mechanisms and specialised chambers. Second, the ICC is relevant to hybrid courts and specialised mechanisms because it stands in a complementary relationship to domestic proceedings, in a system in which states have the primary responsibility to investigate and prosecute. The ICC is a court of last resort, and it will only take cases where the state is 'unwilling or unable genuinely to carry out the investigation or prosecution'.<sup>67</sup> When a state participates in a hybrid tribunal or creates a specialised chamber to consider crimes that might otherwise fall under the ICC's jurisdiction, this could satisfy the complementarity requirements of the ICC, leaving the ICC unable to take jurisdiction. This could be the case, for example, with the

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64 See, eg, Human Rights Watch. See n 49. Brenda Nanyunja, 'The Thomas Kwoyelo Case at the ICD: Issues of Victim Participation' (OSJI International Justice Monitor, 13 March 2017), see [www.ijmonitor.org/2017/03/the-thomas-kwoyelo-case-at-the-icd-issues-of-victim-participation](http://www.ijmonitor.org/2017/03/the-thomas-kwoyelo-case-at-the-icd-issues-of-victim-participation), accessed 21 September 2018; Lino Owor Ogora, 'To Participate or Not? Getting victim Participation Right in the Kwoyelo Case' (OSJI International Justice Monitor, 18 October 2016), see [www.ijmonitor.org/2016/10/to-participate-or-not-getting-victim-participation-right-in-the-kwoyelo-case](http://www.ijmonitor.org/2016/10/to-participate-or-not-getting-victim-participation-right-in-the-kwoyelo-case), accessed 24 September 2018.

65 See, eg, Redress, 'Ugandan International Crimes Division (ICD) Rules 2016: Analysis on Victim participation Framework Final Version' (August 2016); Redress and ASF, 'Victim and Witness Protection at the Ugandan International Crimes Division (ICD)' (1 September 2017) [https://redress.org/wp-content/uploads/2017/12/ICD-Protection-Workshop\\_May-2017\\_Report.pdf](https://redress.org/wp-content/uploads/2017/12/ICD-Protection-Workshop_May-2017_Report.pdf), accessed 3 September 2018.

66 Roundtable Discussion on the adoption of the Rules of Procedure and Evidence for the Kosovo Specialist Chambers, 11 January 2017, on file with the IBA Hague Office.

67 Rome Statute, Article 17(1)(a) states that: 'Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.'

CAR SCC or with the Uganda ICD if the particular prosecutions before those institutions satisfy all of the criteria.

The complementarity analysis describes the set of procedures and criteria followed by the ICC Prosecutor as part of her determination whether to open an investigation. This includes evaluating whether domestic authorities are undertaking genuine investigations and prosecutions. As part of this evaluation, the Office of the Prosecutor (OTP) states that it will evaluate proceedings for independence, impartiality and respect for the principles of due process ‘in light of the provision of Article 67 of the Rome Statute as well as of the principles of due process recognised by international law as elaborated in relevant international instruments and customary international law’.<sup>68</sup> However, the complementarity test, as interpreted to date, has not applied criteria of fairness or due process in any way that has been determinative of outcomes.<sup>69</sup>

Another dimension of complementarity seeks to ensure the normative function of the Rome Statute legal regime as a whole, either through formal judicial decisions associated with a particular case, or through interactions and evaluations at the preliminary examination or investigation stages. This dynamic of ‘mutual assistance and interaction’ with domestic jurisdictions has been termed ‘positive complementarity’.<sup>70</sup> As Mark Ellis has written:

‘[i]n line with its focus on positive complementarity, the ICC has exhibited a tendency to focus more on its role and ability to catalyze domestic prosecutions, rather than ensuring adherence to international standards of fairness at the domestic level. The problem is that the ICC’s endorsement of positive complementarity never really envisaged domestic trials of an irregular and dysfunctional nature, where the accused might suffer due process violations.’<sup>71</sup>

In general, the ICC’s support for fair trials in other jurisdictions could be strengthened through the court’s contacts in preliminary examinations and in its complementarity analyses, and increasing public statements and other forms of support for fair trial principles.<sup>72</sup>

### *Complementarity in other contexts*

Outside the ICC’s complementarity framework, there is a long-standing expectation that international criminal courts and tribunals have a mandate and obligation to encourage and support domestic proceedings, and connections are made between the work of these institutions and the

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68 ICC OTP, ‘Policy Paper on Preliminary Examinations’ (November 2013), paras 53–55. For a detailed discussion of how complementarity is applied in practice, see Paul Seils, ‘Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes’ (ICTJ, 2016), [www.ictj.org/sites/default/files/ICTJ\\_Handbook\\_ICC\\_Complementarity\\_2016.pdf](http://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf), accessed 21 November 2018.

69 See further, IBA, *Report on Fair Trials and Complementarity: An Experts’ Roundtable Discussion addressing Practice, Challenges and Future Perspectives* (September 2017).

70 Carsten Stahn, ‘Taking complementarity seriously’, in Stahn and El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011), 260.

71 Mark Ellis, ‘Beyond a Flawed Trial: ICC Failures to Ensure International Standards of Fairness in the Trails of Former Libyan Regime Members’ (2017), 33:1, *American University International Law Review*, 84.

72 See n 69, 15–17.

need to strengthen the domestic legal system.<sup>73</sup> At the ad hoc tribunals and hybrid tribunals that have completed their mandates, for example, the ICTY, ICTR and to some extent the SCSL, these activities were part of the completion strategy or legacy projects of the tribunals. While some of these activities consolidated and made accessible the work produced by the court, creating archives of the tribunals' evidence and jurisprudence, other activities supported domestic capacity to try international crimes. Both the ICTY and ICTR developed frameworks for transferring cases to domestic courts, necessitating both legal reform and technical assistance. To varying degrees, both tribunals also provided support and technical assistance for countries in the former Yugoslavia and in Rwanda to investigate and hold fair trials in cases that did not originate from the ad hoc tribunals.

The ICTY and ICTR differed from the ICC in that they had primacy over domestic courts.<sup>74</sup> As institutions created and backed by the authority of the UNSC, these institutions were not obliged to conduct a complementarity analysis in the same way as the ICC. However, under ICTY and ICTR RPE Rules 11 *bis*, judges could refer cases to the authorities of a state either where the crime was committed, the accused arrested, or which had jurisdiction and was 'willing and adequately prepared to accept such a case'.<sup>75</sup> The adoption of these rules was a necessary measure to reduce the workloads in the preparation for the tribunals' closure and was also a means of supporting accountability processes in the countries affected by the conflict. In light of the tribunals' mandates to try those most responsible, cases transferred to domestic jurisdictions largely involved lower-level perpetrators. ICTY Rule 11 *bis* specifically directed the referral bench to assess the gravity of the crimes charged and the level of responsibility of the accused prior to transferring a case.<sup>76</sup>

Under Rule 11 *bis*, the ICTR referral bench had to be satisfied that the accused would receive a fair trial and that the death penalty would not be imposed or carried out.<sup>77</sup> ICTY jurisprudence also sets out specific factors for assessing fairness in domestic proceedings,<sup>78</sup> which were mostly satisfied by the 'relevant legal instruments' being in place.<sup>79</sup> In making referrals, the tribunals could also try to address fair trial concerns that were raised. For example, to respect the right to be tried without undue delay, the ICTY could allow the case to proceed from the point at which the ICTY proceedings left off.<sup>80</sup> ICTY Rule 11 *bis* allowed the Prosecutor to send observers to monitor proceedings, as did ICTR Rule 11 *bis*, which further provides that the trial chamber may order the Registrar to monitor proceedings.<sup>81</sup>

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73 See, eg, UN Security Council, Resolution 1534 (2004) 26 March 2004, where it recalled 'that the strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular'; UN Security Council, Resolution 1315 (2000), 14 August 2000, requesting the UN Secretary-General to negotiate with the Government of Sierra Leone to create an independent special court, noting the 'pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone'; the ICTR Statute in its Preamble says 'Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large number of suspects'; KSC Law, Article 1, 'Specialist Chambers within the Kosovo justice system and the Specialist Prosecutor's Office are necessary to fulfil the international obligations undertaken in Law No 04/L-274, to guarantee the protection of the fundamental rights and freedoms enshrined in the Constitution of the Republic of Kosovo, and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo'.

74 ICTY Statute, Article 9(2); ICTR Statute, Article 8(2).

75 ICTY RPE, Rule 11 *bis*.

76 ICTY RPE, Rule 11 *bis* (C).

77 ICTR RPE, Rule 11 *bis* (B); ICTY RPE, Rule 11 *bis* (C).

78 *ICTY Manual of Developed Practices* (UNICRI Publisher, 2009), 169, citing ICTY, *Prosecutor v Radovan Stanković*, Case No IT096-23/2-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, Referral, 17 May 2005 (Partly Confidential and Ex Parte), para 55.

79 *Ibid*, para 28.

80 See, eg, ICTY, *Prosecutor v Gojko Janković*, Case No IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, 22 July 2005, para 89.

81 ICTY RPE, Rule 11 *bis* (D) (iv); ICTR RPE, Rule 11 *bis* (D) (iv).



The ICTY, for example, provided technical support to Bosnia and Herzegovina (BiH) in the reform of its domestic legal system. In 2000 and 2002, respectively, the Court of BiH and the Prosecutor's Office (OPBiH) were created as permanent institutions with a mandate to investigate and try war crimes as well as organised crimes cases. Both institutions initiated operations in 2002 with very limited resources. At the beginning of 2003, an internationalised judicial cooperation model was inserted in both the Court of BiH and OPBiH through the amendment of their laws. The amendments allowed the appointment of international judges and prosecutors to work on organised crime cases during a transitional period. In 2004, a War Crimes Chamber (WCC) and a Special Department for War Crimes (SDWC) were created within the Court of BiH and the OPBiH, respectively, receiving financial and technical support from the ICTY.<sup>82</sup> In addition, in 2005, the Criminal Defence Section of the Registry of the Court (*Odsjek krivične odbrane* or OKO) was created as part of the War Crimes Chamber Project (WCCP), a joint initiative of the ICTY and Office of the High Representative for BiH.<sup>83</sup> The establishment of the OKO was hailed as an important development in ensuring equality of arms and in contributing to the capacity-building of national legal professionals.<sup>84</sup>

The OKO was initially headed by an international director and organised in five regional teams, each consisting of one Bosnian lawyer and two interns, one Bosnian and one international. Since 2007, the OKO has been run by a Bosnian director. OKO counsel support defendants to choose their counsel for state court cases and provide legal and administrative assistance to defence counsel.<sup>85</sup> OKO staff also provide research on international criminal law and international humanitarian law and non-confidential ICTY materials.<sup>86</sup> In addition, OKO manages admissions for defence counsel to the list of counsel licensed to practise before the Court of BiH.<sup>87</sup> The OKO provides trainings and workshops, subject to the availability of funding.<sup>88</sup> Funding for the OKO initially came through funds raised by WCC Registry of the State Court and then directly from international donors. Since 2007, the OKO has been funded by the BiH government together with European Community Instrument for Pre-Accession Assistance funds.<sup>89</sup>

While the ICTY's involvement in the OKO was limited, the support it provided for the creation of a defence office and bringing the culture of a well-resourced and supported defence as a key element for fair trials is in itself significant. However, to be effective and sustainable, such initiatives require that offices such as the OKO find dependable sources of funding, including funding for defence investigations and other critical resources, and have full legal cooperation from the institution, for example to allow the defence access to evidence. Funding for ongoing training, corresponding to the needs of the legal system, remains crucial. For example, the ICTY's influence on the Bosnian legal

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82 Tarik Abdulhak, 'Building Sustainable Capacities – From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina' (2009), 9 *International Criminal Law Review*, 338.

83 See the Joint Conclusions between the ICTY and the Office of the High Representative for Bosnia and Herzegovina, OHR, 'Project Rimplementation Plan Registry Progress Report' (October 2004), at [www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf](http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf), accessed 27 September 2018. See also OKO, Additional Rules of Procedure for Defence Advocates Appearing before Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Court of Bosnia and Herzegovina (2005); See also Human Rights Watch, 'Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina' (2006) 22; IBA, Interview with OKO Director Jasmina Pjanic (29 August 2018).

84 Human Rights Watch, 'Looking for Justice The War Crimes Chamber in Bosnia and Herzegovina' (2006) Volume 18, No. 1 (D), 22, 24.

85 *Ibid.*, 22–23.

86 Human Rights Watch, 'Narrowing the Impunity Gap, Trials before Bosnian's War Crimes Chamber' (2007), 22–23.

87 Article 1.1 of the OKO Additional Rules of Procedure for Defence Advocates Appearing before Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Court of Bosnia and Herzegovina (2005).

88 See n 86, 22–23.

89 IBA, Interview with OKO Director (29 August 2018).

system introduced elements of adversarial criminal proceedings, which created a need to provide training for counsel in these practices.<sup>90</sup>

Another initiative undertaken by the ICTY together with the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR) and the UN Interregional Crime and Justice Research Institute (UNICRI), the War Crimes Justice Project, focused on ensuring the effective transfer of knowledge and materials from the ICTY to national judicial systems in the former Yugoslavia. This project was preceded by a nine-month needs assessment including consultation with legal practitioners throughout the region.<sup>91</sup> The War Crimes Justice Project's activities included: sponsoring the hiring of a limited number of additional support staff within domestic judicial institutions to bolster capacity in key areas such as analysis and witness support; cooperating with judicial-training institutions to develop curricula on IHL and research and analysis tools; supporting the creation of a Manual on International Criminal Defence,<sup>92</sup> in cooperation with the Association of Defence Counsel practising before the ICTY (ADC-ICTY); and created a training and e-learning portal for legal practitioners and judicial training institutions. The project supported peer-to-peer meetings and working visits as well as trainings.

As aforementioned, the ICTR played a role in bringing about some legislative reform in Rwanda, much of which took place to fulfil the requirements to transfer cases. Rwanda adopted Organic Law No 11/2007 (the 'Transfer Law') prior to the first round of application to transfer 11 *bis* cases. Also in 2007, Rwanda passed a law abolishing the death penalty.<sup>93</sup> In 2008, the death penalty law was modified prohibiting the application of the solidarity confinement to any cases referred by the ICTR or other states.<sup>94</sup> The Transfer Law was amended to provide witnesses and defence teams with immunity from search, seizure, arrest or detention during their testimony and travel, or during the performance of their legal duties.<sup>95</sup> Rwanda's Genocide Ideology Law was also amended to address ICTR referral chambers' concerns about the chilling effect the law could have on witnesses who could face prosecution for promoting 'genocidal ideology'.<sup>96</sup> The scope of the Genocide Ideology Law was narrowed in an attempt to reduce concerns for witnesses appearing for the defence.<sup>97</sup> The Rwandan Penal Code and the Criminal Procedure Code were also amended, reducing the range of criminal sentences and formalising the practice relating to the admission of accomplice testimony at trial.<sup>98</sup> An additional law allowed foreign and international judges to sit on the panel of the referred cases.<sup>99</sup> It is worth noting that in both Bosnia and Rwanda, legal reforms brought about some criticism in part

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90 See n 86, 26–27. At the time of the interviews for the report, HRW was informed that the OKO could not provide advocacy trainings to defence counsel because of funding constraints.

91 ICTY, UNICRI and ODIHR, The War Crimes Justice Project UN Crime Commission on Crime Prevention and Criminal Justice, see [www.unicri.it/news/article/1104-1\\_wcjp](http://www.unicri.it/news/article/1104-1_wcjp), accessed 27 September 2018.

92 UNICRI, ADC-ICTY, ODIHR OSCE, *Manual on International Criminal Defence ADC-ICTY Developed Practices* (UNICRI Publisher, 2011). It is worth noting, however, that this manual was created following the defence perspective being omitted from the ICTY's Manual of Developed Practices. See Colleen Rohan, 'The Defence in international criminal trials: important actor or necessary evil?' in M Hieramente and P Schneider (eds) *The Defence in International Criminal Trials: Observations on the Role of the Defence at the ICTY, ICTR and ICC* (Nomos 2016) vol 217, 22.

93 Rwanda's Organic Law No 31/2007 of 2007 Relating to the Abolition of the Death Penalty.

94 ICTR, Office of the Prosecutor, 'Complementarity in Action: lessons Learned from the ICTR Prosecutor's referral of International Criminal Cases to National Jurisdictions for Trial' (2015), 19.

95 *Ibid.*, 20–21.

96 William A Schabas, 'Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal for Rwanda' (2009), 13, Max Planck Yearbook of United Nations Law, 43.

97 See n 94, 23.

98 *Ibid.*, 22.

99 Organic Law No 03/2012/OL of June 2012. See n 94.

because, to the extent that they applied only to the referred cases, they created a ‘two-tiered legal system’ for transferred and domestic cases.<sup>100</sup>

In Rwanda, local defence counsel also needed training in international criminal law and in the procedural aspects of the new common law provisions.<sup>101</sup> The ICTR Registry organised several workshops for the members of the Kigali Bar Association to increase Rwandan lawyers’ knowledge about international criminal law, obligations of defence counsel, written and oral advocacy, as well as ICTR jurisprudence.<sup>102</sup> Expanded procedures were also introduced to allow the admission of foreign lawyers to the Rwandan bar, and to allow them to appear as defence counsel before national courts.<sup>103</sup> However, because remuneration provided to defence counsel through legal aid was minimal, representation was on a pro bono basis. In addition, counsel faced limited resources in respect of working facilities, investigators and other office staff, which could affect the accused’s right to a fair trial.<sup>104</sup>

In comparison to the ICTY and ICTR, hybrid tribunals are a mix of both procedural and substantive national and international law, and in theory, their potential to contribute to developing local capacity in national jurisdictions is higher than international tribunals.<sup>105</sup> However, at least one analysis of the Special Court for Sierra Leone (SCSL) highlights that the impact on the domestic legal system may have been limited, in part due to the staffing structure of the SCSL. Alejandro Chehtman notes, for example, that most key positions at the decision-making level were held by international staff.<sup>106</sup> While the defence teams included national and international counsel, there is limited information on specific actions taken by the SCSL Defence Office or the Residual Special Court for Sierra Leone (RSCSL) to support fair trials or defence counsel capacity in the domestic system following the closure of the SCSL. However, the RSCSL does note that ‘it was envisaged that the Defence Office would provide a role model to be adopted by the Sierra Leone criminal justice system’.<sup>107</sup> The SCSL Defence Office is discussed in Chapter 3.<sup>108</sup>

With the relatively recent closures of the ICTY, ICTR and SCSL, the long-term impact of the institutions is still being discussed. The actions taken under the ICTY and ICTR completion strategies provide potentially interesting models, in particular where the tribunals and other actors supported legislative changes such as those in Rwanda, and created structures such as the OKO in Bosnia, with the potential to increase access to legal representation, support for counsel and fairness in the domestic legal system. As discussed, under the ICC’s complementarity regime, the ICC has potential to influence domestic proceedings through its preliminary examinations, as well as in supporting the adoption of legislation that includes Rome Statute crimes and procedures in domestic law. The ICC also has the potential to support fairness in domestic proceedings by taking a more explicit focus on due process considerations in its complementarity analyses and in its contacts with domestic authorities.

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100 See n 94, 26.

101 International Legal Assistance Consortium, ‘Justice in Rwanda: An Assessment’ (2007), 17.

102 See n 94, 25.

103 *Ibid.*, 24.

104 See n 101, 8.

105 Alejandro Chehtman, ‘Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone, and Colombia’ (2013), 49 *Stan J Int’l L*, 310.

106 *Ibid.*

107 SCSL, Office of the Principle Defender, [www.rscsl.org/defence.html](http://www.rscsl.org/defence.html), accessed 28 August 2018.

108 David Cohen, ‘“Hybrid Justice” in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future’ (2007), 43 *Stan J Int’l L*, 1, 13.

# Chapter 2: Legal representation in trials for international crimes

## I. Legal representation and fairness

Legal representation, including the right to counsel, is one of the ‘minimum guarantees’ for a fair trial. In legal proceedings, and in particular in trials for international crimes, access to counsel and strong legal representation are necessary for an accused to be able to enforce other fair trial rights. The UN Human Rights Council comment to Article 14(3) of the ICCPR notes that: ‘[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.’<sup>109</sup> In this regard, defence counsel investigate the allegations as presented by the Prosecution, provide legal and factual arguments against charges on behalf of their client, present the accused’s case to the court and ensure that proceedings take place in accordance with established law and fair trial guarantees. Likewise, victims’ counsel inform victims of their legal rights in the proceedings, ensure that victims are kept informed of developments and present victims’ views and concerns in legal proceedings. In addition to counsel, many other actors within the legal process are charged with upholding and supporting the right to a fair trial, including judges, registrars and prosecutors.

This chapter will first examine the sources of fair trial standards for international criminal trials, and how selected minimum guarantees are included and enforced in the legal frameworks of international courts and tribunals. The chapter will then examine, in the specific context of trials for international crimes, the importance of defence counsel for ensuring a fair trial and the role of victims’ counsel in enforcing the rights of victims. In doing so, the chapter will illustrate that while the universal international law standards for a fair trial have been incorporated into the framework of international criminal courts and tribunals, hybrid tribunals and specialised chambers, more can be done to reinforce them on a number of levels. The fairness of trials for international crimes depends on these trials being held to these universal standards.

### *Standards of fairness for international criminal trials*

The right to a fair trial is well established in international treaties and as a matter of customary international law. Article 14(3) of the ICCPR states that:

‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

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109 UN Human Rights Committee (HRC), ‘General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial’ (23 August 2007) CCPR/C/GC/32, [www.refworld.org/docid/478b2b2f2.html](http://www.refworld.org/docid/478b2b2f2.html), accessed 9 March 2018.

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.<sup>110</sup>

This formulation is largely replicated in regional human rights treaties, as well as in the legal frameworks of international criminal courts and tribunals, and other courts created with specific jurisdiction over ‘international crimes’ such as genocide, war crimes and crimes against humanity.<sup>111</sup> International criminal institutions have also created a body of jurisprudence that interprets these minimum guarantees in the context of trials for international crimes.<sup>112</sup> At the ICC, Article 21(3) of the Rome Statute reinforces the relevance of human rights standards for a fair trial by providing that the court must apply its law consistent with internationally recognised human rights standards.<sup>113</sup>

Any assessment of whether a trial is fair must take into account the application and enforcement of these minimum guarantees. It has been established that courts have some latitude in assessing fair trial violations and ordering remedial measures to address lapses.<sup>114</sup> It is clear, however, that failure to provide for these minimum guarantees, without any remediation for violations, results in proceedings that do not meet international standards. In the practice of international criminal courts and tribunals, serious fair trial violations may cause the court to take significant measures, including ordering additional time and/or resources to prepare a defence, or otherwise suspending the proceedings pending resolution of the issues.<sup>115</sup>

As discussed later, while international criminal courts and tribunals reproduce the fair trial standards found in human rights instruments in their legal frameworks, whether in practice international criminal trials meet these standards remains controversial. Some have argued that the length, size and complexity of the typical international criminal trial, which seeks to connect leaders or ‘those most responsible’ to large-scale acts of criminality and acts of war, makes meeting fair trial benchmarks

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110 ICCPR, Article 14(3). According to the UN Office of the High Commissioner for Human Rights, the ICCPR has been ratified by 172 countries. See Status of Ratification Interactive Dashboard, International Covenant on Civil and Political Rights, <http://indicators.ohchr.org>, accessed 29 August 2018.

111 See, eg, ICTY Statute, Article 21; ICTR Statute, Article 20; SCSL Statute, Article 17; ECCC Law, Article 35 new and ECCC Agreement, Article 13; STL Statute, Article 16; CAR SCC Criminal Procedure Code, Articles 4–5.

112 See, eg, IBA, *Fairness at the International Criminal Court* (August 2011), 21–28, Annex III.

113 Rome Statute, Article 21(3) states that the ‘application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights’.

114 See n 112, 27–28.

115 See, eg, ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2517-Red, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (8 July 2010), paras 31–32.

impossible.<sup>116</sup> In this regard, criminal trials in well-functioning domestic jurisdictions may be able to adhere more strictly to the minimum guarantees and present a higher standard of fairness on certain procedural points, such as the right to be tried without undue delay and to certainty of charges and full disclosure prior to the start of proceedings.

Indeed, as international criminal procedure has developed through practice and jurisprudence, important concerns have been raised about diminishing standards of fairness with respect to key minimum guarantees.<sup>117</sup> In this regard, the IBA emphasises the clear role of international criminal courts and tribunals as standard-setting institutions, and the courts themselves have highlighted the importance of providing the highest standards of procedural fairness in their statutes, jurisprudence, and public information.<sup>118</sup> Fairness is ‘at the heart of international criminal justice... something that should not be diluted even when faced with competing priorities’.<sup>119</sup> The ability of a court to provide a fair trial matters not only for the rights of that individual and for that proceeding, but supports the legitimacy of the institution, specifically the authority of the institution to issue judgments and the acceptance of those judgments by society.<sup>120</sup>

Among the minimum guarantees, the right to counsel is regularly cited and reinforced, in recognition of its central importance. This is evidenced, for example, in the creation of supporting structures such as legal aid provisions and lists of counsel in all international criminal courts and tribunals. It is also clear in the reluctance of chambers to allow self-representation in international criminal trials and the strict conditions and controls imposed on self-representation where it is allowed. The right to self-representation, as provided for in the ICCPR,<sup>121</sup> has been included in some legal frameworks of international criminal courts and tribunals.<sup>122</sup> However, chambers have qualified that right on a number of grounds, imposing requirements on the defendant and allowing for the appointment of counsel when the ‘interests of justice’ require. Taking into account the complexity of the proceedings and the specific role of the international criminal defence lawyer, some commentators have recommended precluding self-representation in this context, with the aim of ensuring fairness and guaranteeing that other rights will be realised.<sup>123</sup> For its part, the

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116 See, eg, Alexander Zahar, ‘Pluralism and the Rights of the Accused in International Criminal Proceedings’ in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2014), 225–250. Zahar discusses a number of potential responses to the inability of leadership trials to meet these benchmarks, including reducing the size of indictments and the use of complex legal theories (such as joint criminal enterprise) to achieve more focused trials that would ensure the rights of the accused are respected.

117 See, eg, IBA, *Offences against the administration of justice and fair trial considerations before the International Criminal Court* (August 2017); IBA, *Evidence Matters in ICC Trials* (August 2016), 52–60; Jonathan O’Donohue, ‘Appeal judgment raises serious questions regarding the fairness of the ICC’s approach to evidence’ (Amnesty International, 14 March 2018), see <https://hrij.amnesty.nl/fairness-icc-approach-evidence>, accessed 30 August 2018; see also, ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014.

118 Yvonne McDermott, *Fairness in International Criminal Trials*, (Oxford University Press, 2016), 132. McDermott defines the highest standards of fairness as ‘full respect for the rights of the accused as established by international human rights standards and repeated in the statutes of the tribunals in a manner that is consistent with principles of fairness, such as neutrality, equality, and consistency’, 34.

119 See n 69, 4–7, 16.

120 See n 118, 22–25.

121 ICCPR, Article 14(3)(d).

122 See, eg, ICTY Statute, Article 21(4)(d).

123 See, eg, Mirjan Damaška, ‘Reflections on Fairness in International Criminal Justice’ (2012), 10(3) *Journal of International Criminal Justice* 617. Damaška advances two arguments in favour of prohibiting self-representation in international criminal trials: first, ‘the tension with effective defence – another fair trial demand: due to the extraordinary complexity of processing international crimes, it is unlikely that the accused could successfully orchestrate their own defences’; and second, what he terms the ‘socio-pedagogical aspirations’ of defendants, where ‘charismatic leaders in the role of defendants could easily use trials as the stage in propagating causes harmful to the promotion of human rights culture, or in manipulating trials for some other reason’. See also Mirjan Damaška, ‘Assignment of Counsel and Perceptions of Fairness’ (2005), 3(1), *Journal of International Criminal Justice*, 3–8, discussing the right to self-representation in the context of the *Milosević* case at the ICTY.

KSC has significantly limited the right of the accused to elect to self-represent.<sup>124</sup>

### *Equality of arms*

The principle of ‘equality of arms’ is intrinsically linked to fair trial rights. Within the human rights framework, equality of arms is ensured as part of the right to equality before courts and tribunals, and ‘means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant’.<sup>125</sup> Within the legal frameworks of international criminal courts and tribunals, equality of arms itself is not included as an explicit minimum guarantee, but the principle is addressed in jurisprudence and has allowed for important discussion about the respective positions of the parties in proceedings.

As Kate Gibson has noted, ‘[a]lthough prosecution and defence in domestic cases do not enjoy a parity of resources under most national systems, these domestic gaps pale in comparison to the gaps that exist in international criminal courts’.<sup>126</sup> Analysis of the approach taken by ICTY chambers shows a narrow, ‘formalistic’ approach when construing equality of arms, declining to consider substantive issues ‘such as material or personal resources and facilities and the institutional position’.<sup>127</sup> According to Masha Fedorova, this approach marginalises ‘the very real practical handicaps under which international criminal defence functions’ and thus undermines ‘a meaningful interpretation of the principle of equality of arms’.<sup>128</sup> Persistent challenges have arisen in particular in the areas of defence investigative powers, material resources, the institutional position of the defence and disclosure.<sup>129</sup> The ICC has taken a slightly different approach. While the ICC trial chamber in *Lubanga* noted that ‘it will be impossible to create a situation of absolute equality of arms’, the chamber noted nonetheless that a ‘fact sensitive evaluation will be required whenever unfairness is alleged’.<sup>130</sup> Indeed, as the IBA has noted, the ICC’s legal framework places the Prosecutor in a different position, requiring her to investigate incriminating and exonerating evidence equally, along with the statutory requirement of ensuring an efficient and effective defence. These measures are ‘intended to reduce the inequality (especially in resources) between the prosecution and defence’.<sup>131</sup>

In hybrid and domestic trials for international crimes, any issues of equality of arms must be assessed primarily in the context of that legal proceeding with the acknowledgment that there may be entrenched issues of inequality of arms within the domestic legal system, in particular in post-conflict

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124 Law on KSC, Article 21(5). The KSC is the first international criminal tribunal or hybrid tribunal to place a limitation on the right to self-representation in its legal framework. According to its statute, self-representation is allowed only in limited circumstances: an accused cannot represent him or herself at hearings on detention on remand and throughout the time when he or she is in detention on remand; from the filing of an indictment for a crime punishable by imprisonment of at least ten years; or in all cases when an accused seeks to enter into an agreement to plead guilty to a crime punishable by imprisonment of one year or more. This framework would prohibit many of the same accused who sought to represent themselves at the ICTY, for example, from being able to do so at the KSC.

125 See n 109.

126 Kate Gibson, ‘Defence Counsel in International Criminal Trials’, in Cesare P Romano et al (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), 707. For example, Gibson notes that the ICC’s budget for the Prosecution in 2013 was more than ten times that allocated to the defence, resulting in the prosecution ‘having more manpower to conduct investigations, review evidence and raise or challenge procedural anomalies during the trial, placing the prosecution at an undeniable advantage’.

127 Masha Fedorova, ‘The principle of equality of arms in International Criminal Proceedings’, in Rohan and Zyberi (eds), *Defense Perspectives on International Criminal Justice* (Cambridge University Press, 2017), 208.

128 *Ibid.*

129 *Ibid.*, 211–233.

130 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1091, Decision on Defence’s Request to Obtain Simultaneous French transcripts, 14 December 2007, paras 18–19 (cited in Fedorova, 210).

131 See n 112, 19. See Rome Statute, Articles 54 and 67(1)(b).

countries and countries with under-resourced or less-developed legal systems. As discussed in Chapter 3, the structures put in place when designing these proceedings, along with judicial and political will, have a great impact on whether procedural equality of arms is possible and whether sufficient resources are made available to the defence.

### *Enforcement and reinforcement of standards of fairness: contextual factors and the roles of external and internal actors*

#### CONTEXTUAL FACTORS AND EXTERNAL ACTORS

A number of factors contribute to a court's ability to provide a fair trial. As a primary matter, the institution must be able to operate independently and without interference. External pressure or political interference, for example, corruption in the judiciary, or pressure and intimidation of judges, lawyers, court staff and witnesses, can prevent the court from being able to operate with the requisite independence and impartiality. Lack of sufficient resources can also contribute to unfair trials. An under-resourced court or tribunal may not adequately respect the rights of the accused, in particular the right to counsel and legal aid, to adequate time and facilities to prepare the defence, to trial without undue delay, to examine witnesses and evidence, and to translation and interpretation. Underfunded legal institutions may also leave court officials more vulnerable to bribes and corruption, prevent proper witness protection and prevent public access to proceedings through inadequate facilities as well as lack of outreach and publicity. Lack of resources remains one of the most challenging and common problems in efforts to try international crimes in many hybrid courts and domestic jurisdictions, as discussed in Chapters 1 and 3.

External actors, including international organisations and observers, along with other states that are contributing rule of law or development assistance, may also support fair trials. Such external actors may provide resources, including training, technical assistance, personnel and other types of material support with the aim of supporting fair trials. External actors may also exert pressure by increasing the scrutiny on courts and legal proceedings in the context of bilateral and diplomatic relations. On the other hand, donors providing funding and technical assistance may have a limited ability to enforce standards in the proceedings in the long run, raising important questions about the required levels of oversight and the possibility of withdrawing support should proceedings fall below international standards of fairness. For example, international donors supported the Iraqi High Tribunal, which held proceedings that have been criticised as falling short of international fair trial standards.<sup>132</sup> Uganda's ICD, discussed in Chapters 1 and 3, is another example of a tribunal that, in part due to a lack of resources, has been unable to meet standards of fairness, specifically the right of the accused to a speedy trial. International criminal courts and tribunals, as discussed in Chapter 1, may play a role in reinforcing fairness through information sharing, technical assistance and complementarity.

Civil society, both domestic and international, can support fair trials by monitoring trials and disseminating information to interested stakeholders, victims and the general public. Civil society

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<sup>132</sup> Specific fair trial concerns were raised with legal representation and the imposition of the death penalty. See, eg, Jennifer Trahan, 'A Critical Guide to the Iraqi High Tribunal's Anfal Judgment: Genocide Against the Kurds' (2009), 30, *Michigan Journal of International Law*, 305–412; Miranda Sissons and Ari S Bassin, 'Was the Dujail Trial Fair?' (2007), 5, *Journal of International Criminal Justice*, 272–286; Human Rights Watch, 'Judging Dujail: The First Trial before the Iraqi High Tribunal' (November 2006).



organisations may also make *amicus curiae* filings in legal proceedings, partner with institutions for trainings and provide input to courts on institutional development.<sup>133</sup> For civil society to engage fully, it must have access to information and to proceedings, and sufficient expertise and training to follow legal proceedings and the resources to devote to monitoring proceedings. While international civil society organisations can monitor trials for fairness, partnerships with local and/or regional organisations can be critical to understand the content of proceedings and witness testimony, and to create linkages to the affected communities. Local organisations may obtain funding for their activities from international organisations or form partnerships that allow them to work together for trial monitoring and other activities. Bar associations and lawyers' organisations can help to ensure that the legal profession is engaged in the early stages of a tribunal's formation by continuing to engage lawyers in trainings and other relevant activities.

#### ACTORS WITHIN THE LEGAL FRAMEWORK

In international criminal courts and tribunals, all organs have been given specific roles within the legal framework for ensuring fair trials. The legal frameworks for international courts emphasise the central role of judges in ensuring the fairness of proceedings, first by requiring that individuals in this position possess the highest moral character, integrity, independence and competence.<sup>134</sup> Codes of judicial conduct and ethics may contain language to reinforce the responsibility of judges to ensure fair proceedings and to place that responsibility within an established framework of principles for the international judiciary.<sup>135</sup>

From the earliest stage of proceedings, through the initial appearance and pre-trial hearings, judges are responsible for ensuring that the suspect is aware of their rights, including the right to counsel. During the pre-trial stage of proceedings, judges rule on issues that directly relate to fair trial rights, such as adequate and timely disclosure, the accused's right to translation and interpretation, and requests for provisional release. During the trial itself the primary responsibility for ensuring fairness again falls to the judges.<sup>136</sup> Trial chambers rule on issues raised by prosecution, defence and victim participants, and manage courtroom proceedings in a manner consistent with the fair trial standards as enumerated in the legal framework of the court.

Judges also influence the fairness of proceedings through creating jurisprudence, in particular on matters of procedural law and the applicability of fair trial standards for international criminal courts and tribunals. In this regard, the appeals chamber plays a particularly important role in interpreting points of procedural law in decisions that are then binding on all pre-trial and trial chambers. Of note

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133 See, eg, the role played by the Coalition for the International Criminal Court and its member organisations, including the IBA Hague Office, with the ICC. IBA, 'IBA Hague Office to mark Rome Statute 20th anniversary with push to wider audience of ICC equality of arms issues' (14 May 2018), [www.ibanet.org/Article/NewDetail.aspx?ArticleUid=31662c08-7fce-4ae0-9b5d-d2cf1cc7659e](http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=31662c08-7fce-4ae0-9b5d-d2cf1cc7659e), accessed 21 November 2018.

134 See, eg, Rome Statute, Article 36(3).

135 In this regard, some codes of judicial ethics are more explicit than others. See, eg, KSC, *The Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of the Kosovo Specialist Chambers*, KSC-LD-2017-01/COR/1, 14 March 2017. The preamble recognises 'that the independence and impartiality of Judges is fundamental to the protection of the rights of the accused and to ensuring public confidence in a fair and transparent judicial process', and has regard to a number of international and domestic rules and standards relating to judicial conduct and the right to a fair trial. The KSC Code of Conduct also stipulates that 'Judges shall deliver their decisions and any other rulings fairly, with reasonable promptness and without undue delay' (Article 7). The Code of Professional Conduct for the judges of the IRMCT also explicitly recognises the role of judges in enforcing fairness. By contrast, the ICC Code of Judicial Ethics does not specifically frame judges' responsibilities in terms of fairness. See, IRMCT, Code of Professional Conduct for Judges of the Mechanism, MICT/14, 11 May 2015; ICC, Code of Judicial Ethics, ICC-BD/02-01-05, 9 March 2005.

136 For example, Rome Statute, Article 64(2) states that: 'The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.'

is the now-established structure of international criminal courts and tribunals, in which judges are supported by legal officers who assist with research, managing and analysing evidence, and drafting decisions and judgments. This structure of chambers with experienced legal officers for international criminal cases may not be replicated in hybrid and domestic trials for international crimes; however, it can play an important role in bringing specific expertise on international criminal law and procedure into the jurisprudence of a court, and in creating a coherent body of law between institutions.

Judges can also safeguard the fairness of trials by ensuring that legal representation for the interests of the defence is in place at all relevant times. For example, the interests of the defence may be at stake during the investigation phase and the very early stages of proceedings where there has been no arrest, as well as in *ex parte* proceedings that take place without the defendant or their legal representatives present. Appointing counsel to make legal arguments on behalf of the defence in these contexts is an important fair trial guarantee. The court may appoint ad hoc or duty counsel from the list of counsel, and in some instances the defence office may represent the general interests of the defence, in particular in respect of institutional issues that may affect multiple accused.<sup>137</sup> The registry may also request representation for the interests of the defence.<sup>138</sup>

The Prosecutor, and by extension the OTP, also has specific duties with respect to the fair conduct of proceedings. The Prosecutor has the fundamental obligation to act independently and to not seek or act on instructions from any external source.<sup>139</sup> At the ICC, the Prosecutor has the statutory responsibility to investigate both inculpatory and exculpatory evidence, ‘in order to establish the truth’.<sup>140</sup> Likewise, all prosecutors have the responsibility to pursue justice, not merely criminal convictions. The Prosecutor further has the burden of proof, meaning the affirmative responsibility to make the case against the accused.<sup>141</sup> Among the most important duties of the Prosecutor for upholding the rights of the accused are timely notification of the charges to the accused, including the factual and legal basis for the charges, and timely disclosure to the accused of both incriminating and exonerating evidence.<sup>142</sup> In international criminal proceedings, in particular at the ICC, both certainty of charges and disclosure have appeared to pose particular challenges for the Prosecution.<sup>143</sup> As with the judiciary, codes of conduct can provide important reinforcement of the Prosecutor’s responsibilities for ensuring a fair trial.<sup>144</sup>

As discussed in Chapter 3, the registry is the body in charge of the administration of the institution, and the Registrar, as head of this organ, has specific duties relating to the rights of the defence.<sup>145</sup> These duties include facilitating appointment of counsel, ensuring the defence team has adequate resources and working conditions, managing the legal aid programme and supervising the detention

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137 See, eg, memorandum filed by the STL Defence Office addressing defence efforts in analysing call data records in the *Ayyash et al* case. This memorandum presents the pre-trial judge with an overview of issues common to all defence teams with the prosecution’s digital evidence. STL, *Prosecutor v Ayyash et al*, Public Redacted Version of ‘Annex A to Defence Office Internal Memorandum Regarding Call Data Records’, Filed 31 January 2013, Corrected Version, R244687.

138 See, eg, IBA, *Offences against the administration of justice and fair trial considerations before the International Criminal Court* (August 2017), 21, 23, citing instances where the registry raised concerns regarding lack of representation for the defence in *ex parte* proceedings.

139 See, eg, Rome Statute, Article 42(1).

140 Rome Statute, Article 54(1)(a).

141 See, eg, Rome Statute, Articles 66(2), 67(1)(i).

142 See, eg, Rome Statute, Articles 67(1)(a), 67(2).

143 On disclosure challenges in early ICC cases, see n 112, 21–28. On charging practices and amendment of ICC cases using ICC Regulation 55, see IBA, *Evidence Matters in ICC Trials* (August 2016), 61–68.

144 See, eg, ICC, Code of Conduct for the Office of the Prosecutor (3 September 2013), Articles 8(c), 20(c), 29–30, 49–55, 69, 71.

145 See, eg, ICC RPE, Rules 20–22.

facilities. Importantly, it is usually the registry that sets the qualifications for counsel who can practise before the court, evaluates counsel for their admission to the list of counsel and supports list counsel through training and other activities intended to ensure a high standard of legal representation. Many legal frameworks have included a dedicated unit to manage administrative functions for defence within the registry. In the model of the STL, where the Defence Office was created as a separate organ of the court, the fully independent Defence Office performs many of the registry's functions in relation to the defence.

#### THE ROLE OF DEFENCE COUNSEL

Over time, the role of defence counsel in international criminal trials has become more defined and better understood. This development has been led by practitioners, often within the structures and with the support of counsel associations, bar associations, and court defence offices and counsel support sections.<sup>146</sup> As discussed in Chapter 3, the specialised needs and role of international criminal law defence counsel have historically been marginalised and overlooked in the set-up phases of international criminal law courts and tribunals. At the ICTY, for example, counsel were initially unable to access basic resources to perform their duties and were excluded from many of the spaces within the tribunals.<sup>147</sup> Even the ICC, with the benefit of lessons learned from prior tribunals and the mandate of creating a permanent institution, has continually debated counsels' position within the court.<sup>148</sup>

A counsel's independence is a key facet of their ability to properly represent the interests of their client, and the practice has been to appoint counsel not as staff of the court but as independent contractors. However, counsel remain responsible for conforming with applicable court regulations and practices, in particular when being funded through a court's legal aid system, and for upholding professional standards consistent with the court's codes of conduct and their domestic professional bar or qualification. Only the STL provides for non-counsel members of the defence team to be appointed as staff as the court. The respective roles of independent counsel and the institution are discussed further in Chapter 3, in particular with respect to ensuring adequate institutional support.

Just as defence counsel have a specialised role, they have developed a more specialised profile, including expertise relevant to international criminal proceedings.<sup>149</sup> To qualify to represent an accused before an international court, defence counsel are required to be qualified and in good standing in a domestic jurisdiction and highly experienced in domestic criminal law practice, with at least ten years of experience required for a lead counsel. There has been significant development in legal education, with focused academic programmes, advanced degrees and courses available to train lawyers in international criminal law practice. There is also a growing understanding and consensus that practice before international criminal courts and tribunals carries specific ethical issues, with

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146 See, eg, C Rohan, G Zyberi (eds) *Defence Perspectives on International Criminal Justice* (Cambridge University Press, 2017). See n 92; IBA, *Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practising before the ICC* (November 2012). See, also, activities of the ADC-ICT, ICCBA and the Fifth International Meeting of the Defence (International Nuremberg Principles Academy, 2017), [www.nurembergacademy.org/events/detail/7b7c98bf621e81029ca35fb5d7c475a4/the-fifth-international-meetings-of-the-defence-81](http://www.nurembergacademy.org/events/detail/7b7c98bf621e81029ca35fb5d7c475a4/the-fifth-international-meetings-of-the-defence-81), accessed 21 November 2018.

147 Dominic Kennedy, Isabel Dusterhoft, 'How to Manage the Defence – Experiences from the ADC-ICTY' in M Hieramente and P Schneider (eds) *The Defence in International Criminal Trials: Observations on the Role of the Defence at the ICTY, ICTR and ICC* (Nomos, 2016) vol 217, 230.

148 IBA, *Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practising before the ICC* (November 2012).

149 For an outline of best practices and considerations for counsel, see, eg, Defence Office of the Special Tribunal for Lebanon, *Practitioner's Handbook on Defence Investigations in International Criminal Trials* (December 2017), [www.st-tsl.org/images/Documents/handbook/PractitionerHandbook-on-Defence-Investigations-EN.pdf](http://www.st-tsl.org/images/Documents/handbook/PractitionerHandbook-on-Defence-Investigations-EN.pdf), accessed 21 November 2018.

efforts to create a common body of ethical standards ongoing.<sup>150</sup> Counsel representing a client at an international court or tribunal must sign an undertaking and are bound by the code of conduct of that institution.

The framework for legal representation reflects the seriousness of the crimes charged and the complexity of the proceedings. Purely international courts and tribunals such as the ICC and ad hoc tribunals apply substantive and procedural law that is specific to that institution, with reference to a large and growing body of jurisprudence developing the elements of crimes as well as the applicable modes of liability. Even when international crimes are tried in a purely domestic proceeding, international criminal legal concepts and jurisprudence may be referred to and may form the basis of decisions. Because the modes of liability and definitions of crimes before international courts have evolved to reflect a more accurate understanding of criminality in mass conflict, substantive international criminal law may remain relevant in domestic proceedings dealing with international crimes.<sup>151</sup> There may also be a greater influence of international criminal law in domestic proceedings that involve domestic prosecutors and judges with international tribunal experience or training. In both international and domestic proceedings, legal training is necessary to identify and challenge issues of procedural fairness. An accused, in particular a person without legal training or formal education, may not be in a position to identify these issues; their counsel must ensure that issues of procedural unfairness are challenged at the appropriate time.

A defence counsel's role varies over the timeline of the case.<sup>152</sup> In some international criminal courts and tribunals, legal frameworks create phases of proceedings that may call for counsel to represent their clients in novel types of proceedings. A threshold challenge to the jurisdiction of the court generally or over a specific case may be appropriate at the very early stage of the case. Particularly in its first cases, for example, the ICC's confirmation of charges and reparations proceedings have involved extensive litigation to clarify the rights of the accused and the positions of the parties at that stage of the case. The inclusion of the legal right for victims to participate has also required defence counsel to address victim participants' legal rights vis-à-vis the defence, and engage with the legal arguments presented by victims' counsel. In institutions that provide for reparations in the event of a conviction, counsel may remain appointed to represent the rights of the accused in that process. Jurisprudence at the ICC has established that the accused should have legal representation in the reparations phase of proceedings, and if indigent, access to legal aid.<sup>153</sup>

## II. Legal representation and access to justice for victims

Across the spectrum of international criminal courts and tribunals, there is a broad range of levels of participation and roles that victims can have in legal proceedings. However, the inclusion of the legal right to victim participation in the only permanent international criminal court reflects the increasingly established norm that victims will both have participation rights and the possibility

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150 See Chapter 3.

151 For example, international criminal law has developed modes of liability such as command responsibility, joint criminal enterprise, detailed definitions of gender crimes relevant to situations of armed conflict, and the legal concepts of genocide and crimes against humanity.

152 See Jens Dieckmann and Marie O'Leary, 'The Role of Defence Counsel in Pre-Trial'; Michael G Karnavas, 'The Role of the Defence in the Trial Stage'; and Colleen Rohan and John Ackerman, 'The Role of Defence Counsel on Appeal', in C Rohan, G Zyberi (eds) *Defense Perspectives on International Criminal Justice* (Cambridge University Press, 2017), 253–382.

153 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2800, Trial Chamber I, 30 August 2011.

of reparations as part of the criminal proceeding. Despite this, legal frameworks providing for victim participation, including at the ICC, often lack clarity, and the diverse approaches employed by chambers across institutions and cases have resulted in a lack of consistency in victims' legal representation and in their specific participation rights.

In addition to the increased prevalence of victims as participants, victims, as individuals and associations of survivors, have mobilised effectively to demand and seek to initiate legal proceedings. In this capacity, victims and their counsel may be involved in documenting alleged crimes, in negotiating legal frameworks and in creating, through advocacy, the crucial political will required for a legal proceeding to take place. Victims' active role in the criminal justice process has implications for their position vis-à-vis the prosecution and defence. It also has implications for the types and sources of support for victims and for victims' counsel, which, in addition to or instead of being organised by the court or tribunal, may take place within the network of other victim-focused initiatives supported by domestic and international civil society and international organisations.

### *Victim participation in the legal framework*

Legal frameworks have varied in the framing and specificity of victims' right to participate. The most fully articulated and realised rights for victims to participate in an international criminal trial are included in the legal framework of the ICC. Article 68(3) of the Rome Statute provides that:

‘where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.’

Victims in the ICC's legal framework are defined as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court’ and may also include organisations or institutions.<sup>154</sup> The ICC's early jurisprudence clarified that to participate in trial proceedings for a specific case, victims' harm must have a direct causal link to the charges confirmed against the accused, meaning that the injury, loss or damage suffered by victims must be a result of the crimes confirmed against the accused.<sup>155</sup> The ICC also allows for participation for ‘indirect victims’, who must establish that, as a result of their relationship with the direct victim, the loss, injury or damage suffered by the latter gives rise to harm to them.<sup>156</sup>

The requirement of this causal link can have great significance in situations of mass conflict, where the formulation of charges will define who qualifies as participating victims. For example, if charges relate to one geographical area, victims of similar crimes in another location will be excluded, or if sexual and gender-based crimes are not charged, even if there is evidence that they were committed, those victims, unless they are also victims of other charged crimes, will not qualify to participate in

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154 ICC RPE, Rule 85. To qualify as an institution or organisation, the harm must be to property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

155 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, 11 July 2008, paras 58, 65.

156 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/07-1491-Red-t-ENG, Trial Chamber II, 23 September 2009, paras 51–56.

legal proceedings. Such details underscore the importance of clear communication with victims about the limitations of victim participation, as well as the importance of ensuring that sufficient information is gathered and transmitted during the victim application process to ensure accurate identification of victims. While the primary responsibility for outreach and victim applications lies with the ICC, victims' counsel and civil society organisations have taken on these responsibilities at times, in particular when they have long-standing relationships with victim communities.

Despite the language stating that victims 'may' participate through their legal representatives, ICC practice and jurisprudence has reinforced that this is the norm, often through what is known as common legal representation, with one team of lawyers representing a group of victims and with very limited in-person testimony from victims permitted on a case-by-case basis.<sup>157</sup> At the ICC, some of the participation rights exercised through counsel include the right to:<sup>158</sup> attend and participate in the hearings before the court;<sup>159</sup> make opening and closing statements;<sup>160</sup> present their views and concerns;<sup>161</sup> submit observations in the proceedings dealing with a challenge to the jurisdiction of the court or the admissibility of a case;<sup>162</sup> request a chamber to order measures to protect their safety, psychological wellbeing, dignity and privacy;<sup>163</sup> and request a chamber to order special measures.<sup>164</sup>

The ECCC was the first 'hybrid' tribunal to include victim participation rights. However, the ECCC's initial legal framework addressed victim participation in the most minimal fashion, with the statute only including one mention of victims' right to appeal, leaving the court to further define the parameters of participation.<sup>165</sup> Drawing on the existing procedures of the *partie civile* participation in the Cambodian legal system, and encouraged by the advocacy of civil society, victim participation became an established feature of ECCC procedure.<sup>166</sup> More detailed provisions were included in the 2007 Internal Rules, although over time these provisions have been extensively revised in efforts to streamline participation procedures. Some of the most important changes relate to limiting the rights of victims to appear in person before the court, as well as grouping of victims for all proceedings following the pre-trial stage.<sup>167</sup> Issues with grouping of victims and common legal representation are further discussed in Chapter 3.

The STL also provided for victim participation in the legal framework, in comparatively comprehensive and clear provisions. Lebanon also provides for *partie civile* participation in its domestic legal system, making involvement of victims in criminal law proceedings familiar, although

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157 See, eg, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/07-1119, 18 January 2008, paras 115–116.

158 See further, ICC OPCV, *Representing Victims before the International Criminal Court: A Manual for legal representatives* (2010), 28–29.

159 ICC RPE, Rule 91(2). The chamber may also restrict the representative's intervention to written observations or submissions.

160 ICC RPE, Rule 89(1).

161 Rome Statute, Article 68(3); ICC RPE, Rule 89.

162 Rome Statute, Article 19(3).

163 Rome Statute, Article 68(1); ICC RPE Rule 87(1).

164 Rome Statute, Article 68(1); ICC RPE, Rule 88(1).

165 ECCC Law, Article 36. See further Impunity Watch, 'Research Report: Victim Participation and Transitional Justice in Cambodia: the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)' (April 2016), 20–22.

166 Impunity Watch, 'Research Report: Victim Participation and Transitional Justice in Cambodia: the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)' (April 2016), 21. See also, Brianna McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011), 221–222. As Leyh notes, 'despite adopting the label civil parties, the participation of victims before the ECCC is markedly different both from Cambodia's domestic system as well as other international criminal courts. Their participation is far more limited than that of civil participation elsewhere'.

167 ECCC Internal Rules, Rule 23(3): 'At the pre-trial stage, civil parties participate individually. Civil parties at the trial stage and beyond shall comprise a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers as described in IR 12 *ter*. The Civil Party Lead Co-Lawyers are supported by the Civil Party Lawyers described in Rule 12 *ter* (3). Civil Party Lead Co-Lawyers shall file a single claim for collective and moral reparations.'

the domestic procedures remain qualitatively distinct from participation rights at the STL. In language almost identical to the ICC's provisions, the STL's statute provides that victims may present victims' views and concerns on matters where victims' personal interests are affected, subject to the pre-trial judge or chamber's permission, and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>168</sup> The STL statute also provides that such views and concerns may be presented by the legal representatives of the victims where the pre-trial judge or the chamber considers it appropriate, which has been the norm in practice.<sup>169</sup> The modalities of victim participation and victims' rights in the proceedings are further defined in the STL RPE and jurisprudence.<sup>170</sup> The STL example is also noteworthy due to victims' participation in a trial *in absentia*, in *Prosecutor v Ayyash et al.*<sup>171</sup>

The KSC law provides that 'a victim's personal interest and rights in the criminal proceedings before the Specialist Chambers are notification, acknowledgement and reparation'.<sup>172</sup> The law further provides that participation will be in a single group, unless otherwise provided by the trial panel, and that victims will be represented by victims' counsel appointed by the registry.<sup>173</sup> The application procedures and modalities of victim participation are set out in the RPE, with the possibility of further procedures being set out by the trial panels.<sup>174</sup> The RPE provide that all participation shall be through victims' counsel, who have the right to make opening and closing statements, and when victims' personal interests are affected, make oral and written statements as well as question witnesses.<sup>175</sup> The KSC Law and RPE provide that individual and collective reparations may either be accessed through civil procedures in Kosovo or by direct order against a person convicted by the KSC.<sup>176</sup> The KSC Law explicitly creates the right of the trial panel in its judgment to either 'include a decision on the scope and extent of any damage, loss and injury' to victims, or 'if such a decision would unduly prolong the criminal proceedings', to limit its decision to the identity of victims of any crimes established in its judgment.<sup>177</sup> While at the time of writing no trials have commenced before the KSC, the legal framework is unique in providing the trial panels with a choice based on efficiency for addressing reparation to victims. The KSC legal framework does not provide for a trust fund or other framework for reparation funding.

The CAR SCC and the EAC take slightly different approaches, as institutions that are primarily based on domestic law, and function within legal systems that include participation rights for victims as *parties civiles*. Both institutions draw more directly on domestic procedures. Notably, the CAR SCC Law provides for victims to directly file complaints with the SCC Special Prosecutor or an investigative judge,<sup>178</sup> following the *partie civile* procedures in the CAR Code of Criminal Procedure,

168 STL Statute, Article 17.

169 STL Statute, Article 17. See, eg, STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/T/TC F3292, Decision Allowing Participating Victims to Attend Proceedings in the Courtroom, 24 August 2017.

170 STL RPE, Rules 86–87; see, also, STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/PT/PTJ, F0236, Decision on Victim's participation in the proceedings, 9 May 2012; STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/PT/PTJ, F0256, Decision on the VPU's Access to materials and the Modalities of Victim's Participation in Proceedings Before the Pre-Trial Judges. Public, 18 May 2012.

171 See further IBA, *Experts' Roundtable on trials in absentia in international criminal justice* (September 2016).

172 KSC Law, Article 22(3).

173 KSC Law, Articles 22(4)–22(5).

174 KSC RPE, Rules 13, 114.

175 KSC RPE, Rule 114.

176 KSC Law, Articles 22(8)–22(9); KSC RPE, Rules 167–168.

177 KSC Law, Article 22(7).

178 CAR SCC, 'Guide de Sensibilisation à l'Usage des Organisations de la Société Civile' (2017), 19–20, [www.justiceinfo.net/media/k2/attachments/RCA/GuideOSC\\_CPS\\_1.pdf](http://www.justiceinfo.net/media/k2/attachments/RCA/GuideOSC_CPS_1.pdf), accessed 25 September 2018.

which provides that direct victims of a crime have a right to bring civil action for reparation at the same time as the prosecution for a specific crime.<sup>179</sup> At the CAR SCC, through their lawyers, *parties civiles* will have a number of participation rights including the right to be notified of procedural developments, produce evidence during the investigation and during the trial, and call witnesses and expert witnesses.<sup>180</sup> The EAC Statute also provides limited ‘general principles’ for victim participation in its statute, allowing civil parties to join the proceedings at any stage during the investigative phase through submitting a written request to the registry.<sup>181</sup> The participation of victims in EAC proceedings was otherwise governed by the Senegalese Code of Criminal Procedure.<sup>182</sup>

In contrast to tribunals that drew on, or were part of, legal systems inclusive of existing victim participation rights, the ICD provides an example of inserting victim participation into a legal system without participation rights. As discussed in this report, the ICD has faced a number of challenges, all of which have contributed to delays in its procedures. In this context, the lack of precedent for victim participation and the lack of inclusion of clear provisions in the legal framework have also led to significant problems. The participation of victims is referred to in the 2007 peace agreement giving rise to the ICD,<sup>183</sup> and also included in the 2016 RPE. However, the RPE, while referring to victims’ rights to information and protection, fail to provide clear guidance for a number of important substantive rights and procedural steps, including the methods of application and criteria for considering applications during the pre-trial stage of proceedings and the participation rights of victims and victims’ counsel during all stages of proceedings.<sup>184</sup> Following requests for clarification from the parties in the *Kwoyelo* case, in 2016, the ICD pre-trial judge ruled that victims should have similar participation rights to those in the ICC.<sup>185</sup> As of July 2018, the ICD registry has created draft guidelines that ‘elaborate in detail the concept of victims’ participation ranging from the selection of the victims’ representative, the role of victims’ counsel, and how the victims should initiate their participation’.<sup>186</sup> These guidelines have not been made public at the time of writing.

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179 CAR Criminal Procedure Code, Articles 2–3, 56–62.

180 See n 178, 21.

181 EAC Statute, Article 14(1) (informal HRW translation).

182 EAC Statute, Article 14(5) (informal HRW translation).

183 Annexure to the Agreement on Accountability and Reconciliation, between the Government of the Republic of Uganda and the LRA/M on 29 June 2007, Article 8: ‘The special division of the High Court shall have a registry dedicated to the work of the division, and in particular, shall make arrangements to facilitate the protection and participation of witnesses, victims, women and children.’

184 Rule 46(5) ICD RPE (‘Judgment and sentencing’) provides that ‘Counsel for a victim is entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Trial Judge or Trial Panel.’ In analysing victim participation rights in the RPE, Redress recommended that ‘the respective organs should apply Rule 46(5) which allows the presence and participation of victims’ counsel at all stages of the proceedings’. Redress, ‘Ugandan International Crimes Division (ICD) Rules 2016: Analysis on Victim Participation Framework, Final Version’ (August 2016), 11, <https://ulii.org/ug/legislation/consolidated-act/6http://judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html>, accessed 21 November 2018.

185 See Lino Owor Ogora, ‘Landmark Ruling on Victim Participation in the Case of Thomas Kwoyelo’ (OSJI International Justice Monitor, 4 October 2016), [www.ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo](http://www.ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo), accessed 3 September 2018: ‘The court therefore ruled that victims would be allowed to participate in a manner similar to provisions of the International Criminal Court (ICC) Rules of Procedure and Evidence. The court directed that victims apply formally to the ICD Registrar for participation and that each application was to be made individually and considered on its own merit. The court ordered the Registrar to compile a list of all victims for purposes of formal recognition. The court also ruled that the victims’ lawyers would be at liberty to provide evidence to the prosecution and the defense. The court finally ruled that the extent of participation of victims at different stages of the trial would be subject to determination by the trial chamber.’

186 Jane Patricia Bako, ‘One Step Forward, One Step Back: The Fate of Victims Before the International Crimes Division of Uganda’ (27 July 2018), at [www.ijmonitor.org/2018/07/one-step-forward-one-step-back-the-fate-of-victims-before-the-international-crimes-division-of-uganda](http://www.ijmonitor.org/2018/07/one-step-forward-one-step-back-the-fate-of-victims-before-the-international-crimes-division-of-uganda), accessed 31 August 2018.



### CONTEXTUAL FACTORS AND EXTERNAL ACTORS

As outlined, one of the principal defining factors of victim participation is whether victims have participation rights in criminal proceedings in the domestic legal system and the relationship of the mechanism to that system. Even where there is a *partie civile* right domestically, victim participation may be less successful without a clear framework that adapts those rights to the context of international criminal trials and the specifics of that institution. The types of crimes addressed and number of victims are other important contextual factors. As discussed further in Chapter 3, the scale of the harm and number of participating victims has a direct relationship within the types of structures and amount of resources required. The single attack addressed in the *Ayyash* case at the STL, for example, will present a smaller group of victims and narrower types of harm than a multiyear large-scale set of crimes such as those committed by the Khmer Rouge. Another important contextual factor is the location of the mechanism, which when near the affected communities may allow victims to access proceedings and counsel to communicate more directly with clients. Locating the mechanism elsewhere will require different resources for counsel to communicate with their clients and to provide outreach and information to affected communities. Finally, the success of victim participation may be affected by the level of mobilisation of victims and their interest in judicial mechanisms, as opposed to other mechanisms such as traditional justice, truth commissions, administrative reparations programmes or other forms of support.

The roles of states and international organisations discussed with respect to fairness will also affect the success of victim participation. A well-resourced and supported fair trial also benefits participating victims; this includes the provision of adequate legal aid for victims, who are often unlikely to be able to afford the costs of legal representation, and the setting of appropriate legal aid policies, where these are developed jointly between states and courts. In addition, one of the most important roles for states and international organisations is securing the methods and means for reparations. This includes providing assistance to courts in financial investigations and asset recovery,<sup>187</sup> which may later be used for the benefit of reparations or through creation and funding of a trust fund. For example, the STL does not have a trust fund, and reparations may only be provided through additional domestic proceedings in the event of a conviction. However, it has been noted that the procedures for reparations in Lebanon's domestic procedures are difficult and that this creates an uncertain route for reparations for STL victims.<sup>188</sup> The STL legal aid policy does not provide funding for victims' counsel to continue representing victims in these domestic proceedings. Reparations awards to participating victims at the ECCC are restricted to collective and moral reparations, and there is no trust fund at the ECCC or secured funding for reparations from Cambodia. The ECCC's limitations in respect of reparations have reportedly negatively affected victims' satisfaction with its outcomes.<sup>189</sup>

The inclusion of a trust fund in the legal framework is an important first step. It is also crucial that funding will be available to implement reparations orders in a timely manner, and that they are

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187 See, eg, Declaration of Paris, in ICC ASP, Report of the Bureau on cooperation, ICC-ASP/16/17, (22 November 2017), Annex.

188 See n 171.

189 Impunity Watch, 'Research Report: Victim Participation and Transitional Justice in Cambodia: the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)' (April 2016), 43–46.

detailed and reflect consultations with victims in respect of modalities of reparations to be provided. The EAC Statute provided for a trust fund to be financed ‘by voluntary contributions from foreign governments, international institutions, non-governmental organizations and other entities wishing to support the victims’, and further provided that reparations can be provided for victims who did not participate in EAC proceedings.<sup>190</sup> However, the trust fund was created only in 2018 by the AU, almost a year after the EAC Appeals Chamber’s judgment upholding Mr Habré’s conviction and awarding FCFA 82bn (approximately \$154m) to more than 7,000 named victims, with thousands more eligible to apply. During this time several victims died before receiving their reparations.<sup>191</sup> The EAC’s award also did not specify modalities of reparations, and together with the lack of existing funding, this created an atmosphere of uncertainty about the extent to which reparations will be delivered.<sup>192</sup>

Civil society is among the most important facilitators for victim participation. Victims’ associations and other civil society groups with an accountability focus have been instrumental in advocating for accountability through criminal trials, collecting and preserving evidence for trials, providing input to the legal frameworks of institutions, providing and supporting victims to access their rights of participation and legal representation, and providing outreach and information to victims and the public about trials.<sup>193</sup> Civil society groups can have the strongest ties to the affected communities, in particular if they include victims of the crimes and if they have been working directly in the affected communities during and after a conflict. Civil society networks have also provided invaluable support for sharing information and technical assistance about victims’ rights and victim participation in international criminal justice.<sup>194</sup> Civil society groups can also be formally engaged by courts as ‘intermediaries’ or partners in justice processes, for example, supporting the gathering of victim applications, communicating developments and consulting on the appropriate modalities of reparations.

#### ACTORS WITHIN THE LEGAL FRAMEWORK

Judges are responsible for shaping victim participation in a number of contexts. By confirming charges, they play a role in defining which victims will participate, as only those whose harm relates to the charges will be accepted. In most legal frameworks judges also rule on applications to participate, accepting or rejecting applications (based in some frameworks on the registry’s recommendation). Judges also determine the modalities of participation for a specific trial, according to the legal framework, and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Furthermore, judges will be responsible for deciding when victims’ personal interests are affected – in many frameworks the threshold for any intervention by victims’ counsel. Judges may be called on to determine protective measures. Depending on the legal framework, judges may also make reparations orders determining the

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190 EAC Statute, Article 28 (informal HRW translation).

191 Human Rights Watch, ‘Hissène Habré Case: Trust Fund for Victims’ (7 February 2018), [www.hrw.org/news/2018/02/07/hissene-habre-case-trust-fund-victims](http://www.hrw.org/news/2018/02/07/hissene-habre-case-trust-fund-victims), accessed 31 August 2018.

192 See Nader Iskandar Diab, ‘Challenges in the Implementation of the Reparation Award against Hissène Habré: Can the Spell of Unenforceable Awards across the Globe be Broken?’ (2018), 16(1) *Journal of International Criminal Justice*, 141–163.

193 See, eg, n 58; Christoph Sperfeldt, ‘The trial against Hissène Habré: networked justice and reparations at the Extraordinary African Chambers’ (2017), 21(9), *The International Journal of Human Rights*, 1,243–1,260; Redress, ‘Establishing a Trust Fund for Victims in the case of Hissène Habré: options for the way forward (April 2017)’, Redress and ASE, Victim and Witness Protection at the Ugandan International Crimes Division (ICD) (1 September 2017) [https://redress.org/wp-content/uploads/2017/12/ICD-Protection-Workshop\\_May-2017\\_Report.pdf](https://redress.org/wp-content/uploads/2017/12/ICD-Protection-Workshop_May-2017_Report.pdf), accessed 3 September 2018; ‘FIDH-ADHOC-LICADHO Comments on victim participation at the Extraordinary Chambers in the Courts of Cambodia (ECCC)’ (29 January 2010), [www.fidh.org/en/region/asia/cambodia/eccc/FIDH-ADHOC-LICADHO-Comments-on](http://www.fidh.org/en/region/asia/cambodia/eccc/FIDH-ADHOC-LICADHO-Comments-on), accessed 20 September 2018.

194 See, eg, Victims Rights Working Group, [www.vrwg.org](http://www.vrwg.org), accessed 20 September 2018.

principles and modalities for reparations to be delivered.

In the ICC's victim participation framework, victims have a distinct status as participants, setting them apart from the parties before the court – the Prosecutor and the defence – and giving them a distinct set of participatory rights that are not the same as the rights of the defence or the rights and obligations of the Prosecutor. While in many respects there is a natural allegiance between victims' interests and those of the prosecution, a Prosecutor has the obligation to act independently and impartially, based on the evidence available. For example, the ICC Prosecutor's mandate is to establish the truth, taking into account incriminating and exonerating circumstances equally,<sup>195</sup> while at the same time respecting victims' interests and the rights of the accused.<sup>196</sup> To varying degrees, institutions provide victims with the ability to directly file complaints or information to the Prosecutor, and a Prosecutor may also as a matter of policy seek consultations with victims at different points in the process, outside formal victim participation procedures.<sup>197</sup> However, the decision as to whether to open an investigation or bring charges against a specific accused remains with the Prosecutor. The ECCC's internal rules notably state that the purpose of civil party action is to 'participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution' as well as to seek collective and moral reparations.<sup>198</sup> It is worth noting that in practice, however, the legal strategies of the participating victims and the prosecution may not be aligned.<sup>199</sup>

The Registrar, with the mandate for administration of the institution, has a broad set of duties and functions for supporting victims and victim participation. As discussed in Chapter 3, the registry has responsibilities including outreach to victims, processing victim applications to participate, providing administrative and substantive support to victims' counsel to varying degrees and managing aspects of reparations, in particular applications for reparations. As with the defence, with respect to counsel the registry will also maintain the list of victims' counsel (either combined with, or separate from, the list of defence counsel), set qualifications to practise before the court, evaluate counsel for admission to the list and support counsel through trainings and other activities. The registry will administer a legal aid programme for victims who cannot pay for their legal representation, although access to legal aid for victims has not been provided at all courts. The registry may also manage protection for victims and witnesses, as well as psychosocial support. Legal frameworks vary in the structure of victim-related functions within the registry, as discussed in Chapter 3. At the ICC, substantive support to victims' counsel is provided through an Office of Public Counsel for Victims, independent of the registry.

#### THE ROLE OF VICTIMS' COUNSEL

As with defence counsel, victims' counsel practising before international criminal courts and tribunals have developed a distinct role and profile. Victims' counsel must also meet the professional qualifications for practising before the institution; like defence counsel, victims' counsel, in some

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195 Rome Statute, Article 54(1)(a).

196 Rome Statute, Article 54(1)(b) and (c).

197 See, eg, ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, para 22. 'The Office will increasingly seek opportunities for effective and appropriate engagement and consultation with victim groups and representatives in order to take into account the interests of victims at various stages of its work.'

198 ECCC Internal Rules, Rule 23 *bis*.

199 See, eg, Impunity Watch 'Research Report: Victim Participation and Transitional Justice in Cambodia: the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)' (April 2016), 52–54, describing the differing strategies of the civil parties and prosecution in the Duch trial at the ECCC.

circumstances, may be funded by the legal aid scheme should their clients be indigent, and victims' counsel rely heavily on the registry of the court for support to perform their functions.

However, there are important distinctions, relating principally to the different positions of their clients in legal proceedings. The role of the defence counsel relates to a single client who has the central role in proceedings as well as clearly defined rights in international law. The role of the legal representative for victims relates to the interests of clients who have much more abbreviated rights in the legal proceedings, and usually to multiple clients represented within a group.

During trial proceedings victims' counsel will be responsible for providing opening and closing statements, for making written and oral legal arguments, and may also examine witnesses over the course of the trial. In practice, and particularly in the initial cases before international courts and tribunals, victims' counsel have also raised and addressed matters of procedure and other relevant legal issues during the case. The developing practice of legal representation has made clear that victims, through their counsel, bring a distinct perspective on the developing law and procedure for international criminal trials. To provide adequate representation, victims' counsel must be conversant in the specific law and procedure of these institutions, similar to the aforementioned requirements of defence counsel.

As discussed in Chapter 3, the role of victims' counsel usually involves representing interests for multiple clients, numbering from the tens to the hundreds. The clients usually are not able to travel to the seat of the court but remain in the communities where the conflict or acts charged took place, or may form part of a diaspora or refugee community. As such, the nature of the support that victims' counsel provides also involves organising and communicating with clients to ensure a two-way process of communication takes place. Counsel must keep victims informed about developments in the proceedings while the victims must inform counsel of their wishes regarding representation in the proceedings. This may require translators, interpreters and travel from the seat of the court to the location of the victims.

# Chapter 3: Creating the conditions for effective legal representation at hybrid tribunals and specialised chambers

This chapter describes the structures and practices of selected hybrid tribunals and specialised chambers for facilitating effective legal representation of accused persons and access to justice for victims participating in legal proceedings. As discussed here, the courts examined show some emerging norms developing around legal representation. Many courts have put in place versions of defence support offices, coordinated legal representation for victims and legal aid schemes for both defendants and victim participants. However, the landscape remains uneven, showing promising developments as well as structures and procedures that remain ad hoc, insufficiently defined, delayed or lacking in the support and resources needed to be effective. This chapter looks at institutional structures to support both defence and victims' counsel, taking into account the norms developing in respect of support needed, the structures and practices of various tribunals, and factors that influence fairness and victims' access to justice. In respect of the defence, it specifically considers the role of defence offices, lists of counsel and legal aid, and examines the *Kwoyelo* trial at the Uganda ICD and *Habré* trial at the EAC. In respect of victims' counsel, issues relating to common legal representation and the role of civil society in supporting victims' counsel are examined, drawing on examples including the EAC and the ECCC.

## I. Supporting defence legal representation

The rights of the accused, including the rights to legal representation and legal aid, are included in the legal frameworks of international criminal courts and tribunals in articulations that largely follow Article 14 of the ICCPR.<sup>200</sup> The legal frameworks therefore reflect the universality of basic fair trial standards, rooted in established international human rights law. These rights have also been included in the framework of hybrid tribunals. In addition to setting out the rights of the accused, most legal frameworks also articulate detailed rules and procedures to ensure the realisation of these rights, by creating structures and/or functions, and designating responsibilities for facilitating the work of counsel.

As the IBA has noted, 'services and structures which qualitatively support the defence and victims are *indispensable* to ensuring the fairness of proceedings'.<sup>201</sup> Counsel support functions for both defence and victims have been organised in a number of different configurations across international criminal courts and tribunals, as illustrated in the Annex to this report. These configurations reflect both the circumstances in which the court was set up, as well as the anticipated work to be undertaken. Rupert Skilbeck notes that these variations are in part responding to the context of the court. He writes that:

'[c]onflicting demands arise when ensuring that there is an effective defence in such domestic or hybrid trials, and there is no "one size" that fits all. There must be a full analysis of the domestic

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200 See, eg, ICTY Statute, Article 21; ICTR Statute, Article 20; SCSL Statute, Article 17; STL Statute, Article 16; KSC Law, Article 21. See n 112, 18–20 and Annex I.

201 See n 112, 29. Emphasis in original.

legal order and of the comparative strengths and weaknesses of the system. Local traditions must be taken into account, and full consultations undertaken with all the relevant actors. There will be the competing demands of providing an effective defence whilst also building the capacity of local lawyers and leaving a lasting legacy in the country concerned, all of which must be done on time and in budget.’<sup>202</sup>

Variations in counsel support and administration structures also reflect the historically low priority accorded to the defence. It is well established that structural support for the defence in international criminal tribunals has been overlooked in the design and set-up of the courts. It has thus needed to be scaled up, both through action by courts and the creation of external bodies such as specialised bar associations.<sup>203</sup> Even following on the well-documented issues faced by the ICTY, subsequent international criminal tribunals continued to accord less priority to planning for the support of counsel than for other functions of the tribunal.

At the SCSL, for example, while the tribunal’s legal framework had created a defence office with the potential to advance the rights of the accused, due to budgetary constraints, the appointment of the first principal defender was made in 2004.<sup>204</sup> This was two years after the establishment of the tribunal in 2002, and immediately prior to the first arrests. The late appointment of the head of this office contributed to a ‘sense of insecurity’ for the defence office’s funding and affected its ability to perform its mandate.<sup>205</sup> Once structures are in place and appointments have been made, matters concerning the defence may continue to receive insufficient attention, to the detriment of the economy and efficiency of proceedings. A more recent expert review of ICC practices, for example, found that last-minute decision-making by the ICC registry in respect of defence resources has entailed increased costs for the court.<sup>206</sup> In general, by failing to adequately plan for defence support and resources, courts may be negatively affected in terms of the efficiency of the institutions and proceedings, raising concerns about fair trials and equality of arms, and may also have to cover costs that should have been, but were not, anticipated at the outset of proceedings.<sup>207</sup>

Since the creation of the ad hoc tribunals, there has been a significant amount of reflection and information gathered regarding the services and support required for defence counsel to provide an

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202 Rupert Skilbeck, ‘Ensuring Effective Defense in Hybrid Tribunals’ (2010) *Rev quebecoise de droit int’l*, 91–108. Skilbeck drew these insights from his experiences leading defence support structures at three tribunals. ‘From 2006-2008 he was the Principal Defender at the Extraordinary Chambers in the Courts of Cambodia. Prior to that he was the Director of Odsjek Krivicne Odbrane (OKO), the criminal defence section of the Court of Bosnia and Herzegovina in Sarajevo, and the Defence Advisor at the Special Court of Sierra Leone.’

203 See, eg, n 112, 29–30 and n 147. Mark Ellis, ‘The Evolution of Defence Counsel Appearing before the International Criminal Tribunal for the former Yugoslavia’ (2002), 37(4) *New England Law Review*, 968–997.

204 Alison Thompson and Michelle Staggs, ‘The Defence Office at the Special Court for Sierra Leone: A Critical Perspective’ (UC Berkeley War Crimes Studies Center, April 2007) 19.

205 *Ibid.*

206 Dr Guénaél Mettraux et al, ‘Expert Initiative on Promoting Effectiveness at the International Criminal Court’ (Amsterdam University, December 2014), 214: ‘With a view to reducing the costs associated with the Defence, the Registry should take a longer view of preparation needs – rather than a practice of last-minute decisions that have affected Defence preparation and increased cost.’ The report expands in a footnote: ‘For example, the Legal Aid Unit often makes decisions concerning Defence requests at the very last minute, which entails greater travel costs for Defence missions. Since there is a lump sum travel budget, the impact of such decisions is not immediately apparent. It is, however, self-evident that if the travel costs are greater, the Defence will be able to conduct fewer missions within that budget, which will mean that they will have to request additional resources in the future.’

207 See also IBA, *IBA Comments on ‘Concept Paper: Review of the International Criminal Court Legal Aid System’* (9 June 2017), 5–10.

effective defence in an international criminal trial.<sup>208</sup> Some commentators have noted an ‘increased recognition’ of the support required, which can be seen to be reflected, to some extent, in the creation of both internal and external support systems for counsel.<sup>209</sup> It is also worth noting that various commentators have identified and prioritised different forms of support.<sup>210</sup> At this stage of the development of international criminal justice, the amount of information and feedback available strongly supports incorporating these lessons learned in new and existing courts. While, as illustrated next, few courts and tribunals provide comprehensive support, it is possible to identify the functions that experience has shown to be essential for full realisation of the rights of the accused and ensuring equality of arms and fair legal proceedings. These functions include:

- **Administrative support:** Creating and managing a list of counsel, appointing counsel, ensuring counsel have the means and resources to effectively represent clients; managing legal aid, payments, and making discretionary decisions about requests for additional resources; managing human resources for counsel and defence teams.
- **Substantive support:** Providing legal research to defence counsel and teams; maintaining legal databases of relevant jurisprudence; creating, maintaining and disseminating institutional knowledge; providing training and professional development for defence counsel and teams, and if applicable, to the broader legal community.
- **Institutional representation:** Providing defence-specific input in high-level discussions; representing the general interests of the defence in legal matters including by submitting *amicus curiae* briefs; and representing the role of the defence and fundamental fair trial concepts in outreach and other public functions.
- **Institutional development:** Proposing and providing input on proposed amendments to the legal framework; and creating defence-specific documents and directives such as codes of conduct and practice directions.
- **Monitoring:** Monitoring the quality of legal representation, protecting rights of accused to effective representation; supporting quality of legal proceedings (as appropriate and while respecting the independence of counsel); and addressing any complaints or misconduct alleged against defence counsel and teams.

Across tribunals there are two main models to provide defence support structures: the model adopted within the majority of courts, placing support within offices under the court’s registry, with varying degrees of independence; and the model pioneered by the STL, a fully independent defence office. The next section discusses some of the considerations for both of these models.

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208 See, eg, n 92. Colleen Rohan, Gentian Zyberi (eds), *Defense Perspectives on International Criminal Justice* (Cambridge University Press, 2017). See n 126; Kate Gibson, John RWD Jones QC, Michael G Karnavas and Melinda Taylor, ‘Regulation of the international bar: the particular challenges for defence counsel at the international criminal courts and tribunals’, in William A Schabas and Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Elgar, 2017); William St-Michel, Chloe Grandon and Marlene Yahya Haage, ‘Strengthening the Role of Defence at the International Criminal Court: Reflections on How Defence is and Can be Supported for Greater Effectiveness and Efficiencies’ (2018), 18, *International Criminal Law Review*, 517–539; Wayne Jordash QC and Matthew R Crowe, ‘Evidentiary Challenges for the Defence: Domestic and International Prosecutions of International Crimes’ in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2014).

209 See n 92, 219.

210 For example, Skilbeck cites a need for legal support, administrative support, legal assistance and training, while the ADC emphasises legal advice to defence counsel. See n 202 and n 92, 223 (‘The primary role that a Defence support institution can and should play in complex crimes cases is to provide legal advice to Defence counsel’).

## II. Structures and practices for effective defence legal representation

### *Registry-based support for defence counsel and independent defence offices*

The registry provides a broad range of logistical and support functions for the entire court and is mandated to be a neutral service provider for all organs. The registry's counsel support functions are therefore drawn from the registry's total budget, along with the other administrative costs of the court. The success of registry-based defence support depends, to a great extent, on whether defence support is adequately resourced and treated as a significant, specialised and differentiated task within the registry's mandate. Defence structures within the registry, for example, at the ICTY and ICC, provide for offices focusing on defence administration, and in particular the appointment of counsel and administration of legal aid. Recent developments have increased the structural support within the framework of courts. For example, unlike the ICTY or ICTR, the ICC additionally has the Office of Public Counsel for the Defence (OPCD), an independent office to provide substantive support for defence counsel.<sup>211</sup>

While in many respects the Rome Statute and the ICC reflect the most advanced set of norms regarding international criminal law and practice, this is not the case for structural support for counsel, which in fact is better provided for in the structure and framework of the STL. The STL Defence Office is a fully independent organ of the court, and presents the most comprehensive model to date in respect of providing for services and support for defence counsel. The STL Defence Office mandate includes administrative and substantive support, institutional representation, institutional development and monitoring.<sup>212</sup> In creating the STL Defence Office, the UN Secretary-General noted that:

‘[t]he need for a defence office to protect the rights of suspects and accused has evolved in the practice of United Nations-based tribunals as part of the need to ensure “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>213</sup>

Francois Roux, former Head of the STL Defence Office, further emphasised the need for institutional representation of the defence at the same level as the prosecution:

‘[a]s long as the Prosecutor will be an Organ of the institution, with offices within its premises, it seems essential to me to also have, inside the institution, an independent Organ for the Defence with equal footing with the Office of the Prosecutor. This is the guarantee that the voice of the defence is heard inside the institution for all questions related to its functions, and notably in all-organs coordination and management meetings of the institution, where today the defence is cruelly absent.’<sup>214</sup>

The development of the STL's defence office introduced new standards and possibilities for defence structures within tribunals, and prompted re-examination of some of the existing structures including

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211 The OPCD is housed within the registry for administrative purposes. See n 112, 29.

212 STL RPE, Rules 57–59.

213 UNSC, *Report of the Secretary-General on the establishment of a special tribunal for Lebanon*, S/2006/893, (15 November 2006), para 30.

214 IBA, *Towards an ICC Association of Counsel* (November 2015).



at the ICC. Reflecting both the development of the STL's defence office, as well the shortcomings of the ICC in this area, the IBA called for the ICC to establish a defence organ at the same level as the chambers, prosecution and registry. The IBA has noted that this would uphold equality of arms, raise the profile of defence rights and provide financial autonomy and independence for the defence.<sup>215</sup> In particular, the IBA has said that 'the lack of financial autonomy is one of the major limitations to the effective functioning of the current defence office at the ICC'.<sup>216</sup> The need for financial autonomy relates both to ensuring that adequate funds are available for defence counsel and teams, and that funds are effectively and efficiently allocated. At the time of writing this report, the ICC's legal framework has not been amended to create an independent defence organ.

Despite the variations in forms and frameworks, it is noteworthy that versions of the defence office framework and set of functions have passed on to much smaller institutions. One such example is the agreement for the inclusion of a defence office in the EAC agreement, discussed here, which did not come to fruition. A newer hybrid, the CAR SCC, has within its legal framework a novel structure, the *corps spécial d'avocats*, headed by an international lawyer, that will serve many functions of a defence office including maintaining the list of counsel. The draft RPE of the CAR SCC provide that the *corps special d'avocats* will be led by a head of office who notably tracks many of the requirements and responsibilities for the STL Head of the Defence Office.<sup>217</sup> However, other courts created since the STL, such as the KSC, have opted to maintain defence support as an internal function of the registry.

### *Defence office leadership and representation of defence interests within the institution*

The lack of a 'seat at the table' has remained a concern for the defence at international criminal tribunals, in particular for processes that take place among the organs of a court, in most institutions the organs consisting of the chambers, registry and prosecution.<sup>218</sup> The lack of a defence organ can lead to defence representatives being excluded from decision making and lacking official representation in important processes including amendment of the legal framework, management and operational decisions on the court. As Kenneth Gallant notes, this creates a 'democratic deficit' where 'persons with specific interests in civil rights and the Defence are systematically excluded from the law-making process'.<sup>219</sup> In addition to the ability to initiate and provide input on amendments to the legal framework, representation for the defence may be absent from other proceedings and events that take place at a head of organ level. This includes interactions with major stakeholders and donors and outreach to affected communities. When the defence perspective is excluded from such events, the presentation of the court is imbalanced, lacking a key voice to speak to issues of fairness and equality of arms. In addition, defence representatives and staff may have to expend time and resources to petition for access to procedures and visibility in the overall work of the court.

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215 See n 112, 34.

216 *Ibid.*

217 CAR SCC Draft RPE 50.

218 See, eg, remarks of Melinda Taylor cited in Kenneth S Gallant, 'Addressing the Democratic Deficit in International Criminal Law and Procedure: Defence Participation in Lawmaking' in Charles C Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2014), 573, fn 5.

219 See n 218, 579.

Some institutions have created positions that could provide high-level representation for the defence, such as the Principal Defender of the SCSL and the Principal Counsel of the ICC's OPCD, although these positions have not been created at the head of organ level. In some frameworks the registry would have the mandate to represent the interests of the defence; however, institutional issues may arise where there are conflicts of interest between the registry and defence counsel. This can be addressed to some extent through providing for consultation between the registry and counsel representatives and bar associations.<sup>220</sup> However, the independent defence office model, which has 'as its sole duty promotion of the interests of the defence', significantly reduces the potential for conflict between the registry and defence counsel.<sup>221</sup> In this regard, the STL Defence Office is notable for including a head of organ appointed by the UN Secretary-General, allowing for institutional representation of the interests of the defence at a high level and equal to the other organs of the court.

In addition to establishing clear relationships between defence offices and the registry, institutions must also balance the need for high-level defence representation with the independence of counsel and the privileged counsel–client relationship. This can be illustrated by the experience of the SCSL, where the court created one of the first registry-based defence offices. The establishment of the SCSL Defence Office was hailed as an advance with the potential to provide more substantial representation and support for the defence than previous tribunals. However, the mandate of the SCSL Defence Office lacked clarity, in particular regarding its position relative to individual appointed counsel.<sup>222</sup> The role of the principal defender in particular was insufficiently defined, creating conflicts between the office and individual counsel.<sup>223</sup> A number of issues arose, including questions as to whether the principal defender and defence office staff should have contact with an accused person once counsel had been appointed. In this regard, the SCSL RPE provided the defence office both a broad mandate, to 'provide advice, assistance and representation to suspects questioned by the Special Court and accused persons before the Special Court', followed by a separate provision to provide 'initial legal advice and assistance', as well as legal assistance ordered by the Special Court to the accused persons.<sup>224</sup> Alison Thomson and Michelle Staggs noted that 'this doctrinal oversight has meant that the Principal Defender's interpretation of the Rules has, at points, pitted him directly against the accused persons' Assigned Counsel when determining what is best for their clients'.<sup>225</sup>

More detailed guidance in the legal frameworks provides clearer parameters to the defence office for contact with represented accused. For example, the STL RPE states that '[n]either the Head of Defence Office nor its members shall take any instructions from suspects or accused persons or be involved in factual allegations or matters relating to a specific case, which may raise conflicts of interest and affect the independence of the Office'.<sup>226</sup> Such language serves to protect the appointed counsel's relationship with their client and the defence office's ability to equally support all accused with general legal research.

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220 See, eg, ICC Regulations of the Registry, Regulations 120–121; ICC RPE, Rule 20(3).

221 See n 218, 584.

222 See n 204, 13.

223 Sareta Ashraph, 'The Naked Defence Office: How an Unclear Mandate, Poor Staffing, and Registry Disinterest Stripped the Office of the Principal Defender' in Charles C. Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2014).

224 SCSL RPE, Rule 45(A) (i) and (B) (i), (ii). Emphasis added.

225 See n 204, 30.

226 STL RPE, Rule 57(I).

## *Monitoring and codes of conduct for legal representation*

Courts, and specifically defence offices, can also put in place procedures or take measures to monitor the performance of counsel, as part of upholding the accused's right to effective legal representation. The IBA has previously cautioned that monitoring counsel's representation for effectiveness is challenging due to the lack of detailed standards governing what constitutes effective representation, and the highly subjective nature of counsel's professional judgement and case strategy.<sup>227</sup> Monitoring should also be informed by the particular experience of counsel familiar with the practice of international criminal defence work.

The STL uniquely provides for the defence office to have a pre-emptive monitoring mechanism. The STL RPE give the Head of the Defence Office a monitoring function, 'in the interests of justice', to 'ensure that the representation of suspects and accused meets internationally recognised standards of practice' and is consistent with the STL's legal framework.<sup>228</sup> The RPE also provides for the Head of the Defence Office to be able to take measures including requesting information, providing advice and, with the permission of lead counsel, inviting the views of the suspect or accused on the matter. Should the Head of the Defence Office find that the legal representation is not satisfactory, the RPE provide that they can withhold fees from counsel or initiate disciplinary proceedings. The regime created by the RPE is further detailed in the STL Code of Professional Conduct for Defence Counsel and Legal Representatives for Victims, which among other things states monitoring procedures, time limits and maximum penalties.<sup>229</sup> It also provides detailed criteria against which legal representation should be monitored, including criteria for working practices and case management, appearing in court, filing motions, developing a case strategy, investigations and knowledge of the law, and facts relevant to the case.<sup>230</sup> While the STL's model has yet to be replicated in other hybrid or international courts, some versions of these monitoring functions and criteria could have a particular utility in hybrid tribunals and specialised chambers that involve counsel less familiar with international criminal practice. However, monitoring should still be approached with caution, ensuring that the independence of counsel is not unduly encroached upon and that any monitoring is performed by a highly experienced head of defence office or body of peers.

More generally, both registries and independent defence offices can support the integrity of the legal proceedings through the promulgation of defence-specific codes of conduct for counsel. Codes of conduct make important contributions to the legal framework, in light of the novel issues that defence counsel may face in international practice. Counsel may have to contend with standards and practices that are different from their home jurisdictions, creating the potential for them to be in breach of their obligations under their national bar.<sup>231</sup> Codes of conduct are usually created in the early stages of the operation of the tribunal, and there now are a number of models that may be drawn on.<sup>232</sup> Consultation, in particular with counsel practising before the tribunal, is an important

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227 See n 148, 29.

228 STL RPE, Rule 57(G).

229 STL, Code of Professional Conduct for Defence Counsel and Legal Representatives for Victims appearing before the Special Tribunal for Lebanon (December 2012), Articles 32, 34.

230 *Ibid*, Article 33.

231 Kate Gibson, John RWD Jones QC, Michael G Karnavas and Melinda Taylor, 'Regulation of the international bar: the particular challenges for defence counsel at the international criminal courts and tribunals', in William A Schabas and Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Elgar, 2017), 410–415; see also n 171, 10.

232 ICC, Code of Professional Conduct for counsel, ICC-ASP/4/Res.1; ICTY, Code of Professional Conduct for Counsel Appearing before the International Tribunal (IT/125 Rev 3)

part of the process of drafting codes of conduct and other operational guidance for counsel. For example, the ICTY/International Residual Mechanism for Criminal Tribunals (IRMCT) registry has consulted over the years with the ADC-ICTY for the code of conduct.<sup>233</sup> The STL Defence Office has also initiated an ongoing process to create a model common code of conduct, which could provide a template for new courts to draw on.<sup>234</sup>

### *Lists of counsel and bar associations*

The structure of international and hybrid criminal courts and tribunals provide for external counsel, rather than staff, to be appointed as lead defence counsel representing the accused. Lists of counsel have therefore become an established feature of the permanent ICC and established international and hybrid criminal courts and tribunals such as the ICTY, ICTR, STL and ECCC. Some newer hybrid tribunals, such as the KSC and CAR SCC, have also included provision for a list of counsel in their legal framework. Other tribunals, such as the ICD and EAC, have relied on individual appointments of counsel identified by the accused and existing networks such as Uganda's 'state brief' counsel if they have a need to appoint counsel. The scale of a tribunal's anticipated cases, in respect of number of cases and their size and length, is one factor in whether a tribunal creates a list of counsel – for institutions that will try one case or do not have ongoing investigations and multiple cases, it may not be necessary or efficient to develop and maintain a list of counsel.

When a tribunal has a longer mandate and a higher volume of cases, lists of counsel support an effective and efficient criminal process in a number of ways. Lists of counsel enable the court or tribunal to appoint counsel without delay and ensure that appointed counsel will have the requisite qualifications, thus supporting the court in meeting fair trial requirements. Lists of counsel, along with bar associations, may also contribute to capacity-building and reinforcement of important norms and practices in the legal profession, through their support and adherence to codes of conduct and ethical standards. Lists of counsel should seek to include counsel from the communities of persons involved in proceedings before a court, and as such courts should adopt outreach strategies to increase geographical and gender representation on the lists.<sup>235</sup>

International institutions such as the ICC, as well as hybrid tribunals such as the ECCC and STL, have implemented training programmes for lawyers on the list of counsel.<sup>236</sup> Training and capacity-building activities are particularly important to reinforce the legal profession at the national level and to increase expertise in international criminal law among domestic practitioners. As highlighted by the IBA with regards to the ICC, only a small fraction of the lawyers admitted to the lists will actually appear before the court.<sup>237</sup> Membership on a list of counsel therefore may have a greater value for professional development than for prospective employment as counsel. Membership gives counsel access to training and resources in international criminal law that can support further development

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233 'Although the ADC-ICTY is not institutionally an organ of the ICTY, in recent years the ICTY Registrar has involved the ADC in Tribunal-wide committees and projects. The Registrar, for example, now consults with the ADC prior to adopting major policies affecting the work of Defence teams.' See n 92, 205.

234 See, eg, STL, 'Working session on the Joint Code of Ethics' (July 2017). See [www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/defence-2/defence-office-69/statements/5847-working-session-on-the-joint-code-of-ethics](http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/defence-2/defence-office-69/statements/5847-working-session-on-the-joint-code-of-ethics), accessed 10 September 2018.

235 For example, counsel from ICC situation countries form a small number of the over 700 lawyers on the ICC's list of counsel, and female counsel remain under-represented.

236 See, eg, STL RPE, Rule 57(E) (iii); ECCC Internal Rules (Rev 9), Rule 11(2)(k).

237 See n 148, 14.

of international criminal legal practice at the national level. In this regard, the IBA has highlighted the need for the legal community to seek opportunities for transfer of skills gained in international practice to domestic legal systems.<sup>238</sup>

Across international criminal tribunals and hybrid courts, requirements for admission to a list of counsel are largely uniform and the standards are relatively high. The majority of institutions require prospective counsel to be admitted to practise law in a recognised national jurisdiction; to have at least ten years of experience as a lawyer, judge or prosecutor; to be proficient in the working language(s) of the tribunal; and to have a clean record in terms of criminal or disciplinary proceedings.<sup>239</sup> Candidates may also be required to demonstrate competence in international criminal law or, if at a hybrid tribunal, in domestic criminal law and procedure.<sup>240</sup> Admission to a list of counsel is usually determined by the defence section of the registry,<sup>241</sup> or in the case of the STL, the independent defence office.<sup>242</sup> When the court allows for victim participation, courts may maintain a single list for both defence and victims' counsel, or there may be separate lists.<sup>243</sup>

Some hybrid tribunals reflect their international and domestic character in the list of counsel requirements, for instance through co-representation. The ECCC legal framework provides one example of a model for domestic/international co-representation. According to the ECCC RPE, any accused or suspect 'shall have the right to the assistance of a national lawyer, or a foreign lawyer in collaboration with a national lawyer, of their own choosing [...]'.<sup>244</sup> The internal rules further specify that 'a foreign lawyer shall work in conjunction with a national lawyer before the ECCC', and that the national lawyer has the right to speak first in all proceedings.<sup>245</sup> The ECCC lists of counsel reflect the co-counsel structure by maintaining separate lists of counsel for Cambodian and international lawyers.<sup>246</sup>

The ability to appoint an international lawyer as part of a defence team, and for indigent persons to have the lawyer funded through legal aid, can form an important aspect of fairness. For example, Skilbeck recommends that, '[w]here foreign prosecutors are involved there must be foreign defence lawyers to assist their local counterparts'.<sup>247</sup> When specific expertise in international criminal law will inform the prosecutor's construction of their case and will be part of the basis of the charges the accused must face, equality of arms in such cases would demand that specific expertise in international criminal law and/or procedure should also be available to the defence.

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238 *Ibid.*

239 See KSC Directive on Counsel, Section 5; STL RPE, Rules 58(A) and 59(B); and Article 2 ('Qualifications'), ECCC, Defence Support Section, DSS Administrative Regulations.

240 Competence and experience in domestic criminal law is required by Section 5(a), KSC Directive on Counsel; Rule 59(B) (ii), STL RPE; and Article 2.1(ii), ECCC, DSS Administrative Regulations.

241 See Section 7, KSC Directive on Counsel.

242 STL RPE, Rule 59(B).

243 The STL, ECCC and KSC all have separate lists for defence counsel and victims' counsel.

244 ECCC Internal Rules (Rev 9), Rule 22.

245 ECCC Internal Rules (Rev 9), Rule 22(1) (c). See also the ECCC, DSS Administrative Regulations, Articles 5 and 6, which mention co-counsel in addressing selection and assignment of counsel.

246 ECCC, DSS Administrative Regulations, Article 1. The ECCC has two different lists: the UNAKRT list, for lawyers whose cost is born by the Tribunal, and the non-UNAKRT list, for privately retained counsel. Both lists are then divided into two further sub-lists, one for national lawyers and one for foreign lawyers.

247 See n 202, 91.

The CAR SCC *corps spécial d'avocats* also serves as the list of counsel, and both national and international lawyers are required to be members in order to practise before the tribunal.<sup>248</sup> The chief of the *corps spécial d'avocats* is responsible for developing and maintaining the list of its members, including drafting criteria and supervising admission.<sup>249</sup> The CAR SCC also makes a special provision for integrating international lawyers into the tribunal, but limits the participation of international lawyers to 'the most sensitive cases, in particular those where the safety of national lawyers and their relatives is threatened or is likely to be'.<sup>250</sup> The lack of access to international lawyers may have implications for the equality of arms, if the CAR SCC OTP has international staff and relies heavily on international criminal law. The head of the *corps spécial d'avocats* office will have a general function of 'legal assistance' for lawyers, but will not be able to interact directly with the accused or intervene in respect of specific cases when it is likely to lead to conflicts of interest or to compromise their independence, according to the draft RPE.<sup>251</sup>

Another challenge that the CAR SCC will face is the low number of lawyers in the country, and in particular the low number of lawyers with training and experience in international criminal law. One international organisation working in the CAR estimated that there are about 100 lawyers registered in total, with only one of those lawyers outside Bangui.<sup>252</sup> The number of CAR lawyers on the ICC list of counsel gives some indication of how many practitioners might meet the usual requirements to appear before an international court: for the CAR there are six, while for the DRC there are almost 70 and for France about 100.<sup>253</sup>

The types of legal training and levels of experience of domestic lawyers may also need to be taken into account for setting the requirements of the list of counsel. At the ECCC, fewer domestic lawyers had enough experience to fulfil the ten-year practice requirement.<sup>254</sup> The legal framework therefore set different standards for admission to the lists of counsel for domestic and international lawyers. Domestic lawyers must be members of the Bar Association of the Kingdom of Cambodia (BAKC) and have established competence in criminal law and procedure at the national or international level, while international lawyers have an additional ten-year practice requirement.<sup>255</sup> By comparison, the STL and KSC require the same qualification from both national and international practitioners, and neither tribunal imposes a co-counsel requirement for foreign and international lawyers.<sup>256</sup> It is worth noting that while the KSC prohibits Kosovar nationals from holding staff positions at the tribunal, it does allow them to act as defence and victims' counsel.<sup>257</sup>

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248 See Article 65, CAR SCC Organic Law 15.003 and Article 51, CAR SCC Draft RPE.

249 See Article 50, CAR SCC Draft RPE.

250 CAR SCC Draft RPE, Article 53(A) (informal translation by the IBA).

251 CAR SCC Draft RPE, Article 50(A) (j) and (D).

252 ASF, 'ASF in the central African Republic' (2015), see [www.asf.be/fr/action/field-offices/asf-in-the-central-african-republic](http://www.asf.be/fr/action/field-offices/asf-in-the-central-african-republic), accessed 10 September 2018; see also Amnesty International, 'The Long Wait for Justice: Accountability in Central African Republic' (2017), 29.

253 ICC list of counsel, 29 June 2018 version, see [www.icc-cpi.int/about/registry/Pages/list-of-counsel.aspx](http://www.icc-cpi.int/about/registry/Pages/list-of-counsel.aspx), accessed 21 November 2018.

254 See n 202, 93.

255 ECCC Internal Rules (Rev 9), Rule 11(4).

256 See KSC Directive on Counsel, Section 5; STL RPE, Rules 58(A) and 59(B).

257 See Law No 04/L-274, the Law on ratification of the international agreement (The Exchange of Letters), which states that the 'structures will be staffed with and operated by EULEX international staff only'. The KSC website states that: 'Employment at Kosovo Specialist Chambers and Specialist Prosecutor's Office is ONLY open to nationals of the EU Member States and contributing third States (Canada, Norway, Switzerland, Turkey and the United States of America)'. KSC, Employment Regime, [www.scp-ks.org/en/employment/staffing](http://www.scp-ks.org/en/employment/staffing), accessed 21 September 2018. The KSC Directive on Counsel does not contain any restrictions on nationality for application to the list of counsel. See KSC, Directive on Counsel, KSC-BD-04, Section 5.

Hybrid courts, in particular those rooted in a particular domestic system, might give a national bar association a role in determining which lawyers are entitled to practise before the court. The ECCC requires that national lawyers be members of the BAKC<sup>258</sup> and that foreign lawyers receive the BAKC's authorisation to practise before the ECCC.<sup>259</sup> The CAR SCC also provides that the organ responsible for overseeing admission to the Special Corp of Lawyers shall be established by the chief of the *corps special* in consultation with the local bar association.<sup>260</sup> Close cooperation with national bar associations supports a stronger engagement with the local legal profession, and can yield many advantages. In particular, such cooperation supports a two-way transfer of legal knowledge, bringing domestic practitioners' expertise in domestic law and practice to the hybrid institution, and creating more opportunities for skills-sharing and transfer in international law and practice from the hybrid institution.

However, the level of independence of the national bar association should be taken into account. The IBA has emphasised that independent bar associations are critical to ensure the independence of lawyers and fair administration of justice.<sup>261</sup> In Cambodia, for example, civil society organisations have criticised the BAKC, stating that 'the government tightly controls the country's bar association to prevent it from becoming a vehicle for organized political activity'.<sup>262</sup> The level of influence of the bar association on the procedures of the hybrid tribunal may therefore be of concern, in particular when the bar association has an active role in determining admission before the list of counsel, as at the ECCC.

International criminal bar associations also have the potential to contribute to hybrid tribunals, in particular with training and capacity-building for lawyers. The Association of Defence Counsel practising before the International Courts and Tribunals (ADC-ICT, formerly the ADC-ICTY) was established in 2002 to begin to address the lack of support and collective voice of the defence at the ICTY.<sup>263</sup> The ADC-ICTY's role and importance expanded over the years, and membership in the association became compulsory to join the ICTY list of counsel.<sup>264</sup> Following the closure of the ICTY, the ADC evolved to include defence counsel at the IRMCT as well as other international criminal tribunals. The ADC-ICT has provided training on trial advocacy for defending accused against international crimes. The International Criminal Court Bar Association (ICCBA) was established in 2016. Membership in the ICCBA is open to all those who are on the ICC list of counsel practising as independent counsel.<sup>265</sup> The ICCBA also provides training for its members. Both organisations have active outreach programmes and, in some instances, have formed partnerships with regional bar associations.

The expertise developed by these bar associations could provide useful support and training for counsel at new hybrid tribunals and specialised chambers. As discussed later, civil society and legal organisations have provided training to legal representatives for victims, for example at the EAC

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258 See ECCC Internal Rules, Rule 11; ECCC, DSS Administrative Regulation Articles 1.7, 2.1–2.2 and 3.

259 See ECCC Internal Rules, Rule 11; ECCC, DSS Administrative Regulation Articles 1.7, 2.1–2.2 and 3.

260 CAR SCC Draft RPE, Article 50(A), '*Le chef du corps special d'avocats exerce les fonctions suivantes: a) presider et constituer, en consultation avec le Barreau, l'organe chargé de donner son agrément à l'integration des avocats candidats au sein du Corps special d'avocats.*'

261 See n 214.

262 See n 43, 62.

263 See n 214.

264 See ICTY RPE, Rule 44, current version.

265 See the ICCBA Constitution, Article 3.

and the CAR SCC. However, in particular given the limited timeframe for the operation of hybrid tribunals, it would be important to work with existing bar associations and to create linkages within the legal framework to provide for consultations and other technical support to counsel. Historically, institutions have also been slow to accommodate counsel organisations. For example, the ADC-ICTY was formed in 2002, while the ICTY itself was constituted in 1993.<sup>266</sup> The ICC became operational in 2002, and its RPE, drafted in 2002, provided for the Registrar to consult with independent associations of counsel and for the ICC Assembly of States Parties (ASP) to facilitate the establishment of such a legal association, while the ICCBA was only formed in 2016.<sup>267</sup> In particular, when there is no defence office as an organ of the court, counsel associations have proven important for ensuring that counsel's interests and concerns are represented within institutional discussions and decision-making.<sup>268</sup>

### *Legal aid*

The IBA has emphasised that an adequately funded and well-run legal aid system is essential to ensure the fairness of judicial proceedings. An indigent defendant's right to legal aid is recognised in international human rights law as well as in the legal framework of all international criminal courts and tribunals. The right is also included in the legal frameworks of the hybrid tribunals addressed in this report.<sup>269</sup> A court's provision of legal aid supports equality of arms and fair proceedings, and also has significant implications for the credibility of a court. As the IBA has emphasised, failure to adequately provide for legal aid may negatively affect perceptions about the fairness of trials, and for a court, these costs may be far greater than the actual expenses associated with operating the legal aid system.<sup>270</sup> Securing sufficient funding for legal aid has remained a consistent issue for international courts and tribunals, and there is significant variation in legal aid funding and levels of pay for counsel and for experts and investigations among international and hybrid courts.<sup>271</sup> An analysis of legal aid policies shows that the ICC has had lower expenditure on defence and levels of pay compared to the STL, ICTY and ECCC, for example, creating concerns about equality of arms where the prosecution's budget can be ten times higher than that of the defence.<sup>272</sup>

A comprehensive legal aid policy covers all of the costs associated with an effective defence over the course of proceedings including pre-trial, trial, appeals and reparations phases. It covers reasonable professional fees for lead defence counsel as well as the necessary co-counsels and support staff, materials and workspace, and experts and investigations. In this regard, the inclusion of the right to legal aid in the framework is by itself insufficient. Courts that provide legal aid develop detailed policies addressing what will be provided and when, as well as provisions for administration and

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266 ADC-ICTY Constitution, Preamble.

267 ICC RPE, Rule 20(3); ICCBA Constitution, Preamble.

268 See n 214.

269 See, respectively: Article 64, CAR SCC Loi Organique 15.003; Article 21(4)(e), KSC Law No 05/L-053; Agreement on Accountability and Reconciliation, Government of the Republic of Uganda – LRA (2007), Article 3.8; Article 24 new, ECCC Law on the Establishment of the Extraordinary Chambers; Article 16, STL Statute; Article 21, EAC Statute.

270 See n 207, 4.

271 As the IBA has previously emphasised, funding for investigations and for experts is an essential matter for fair trials at the international level, in particular as trials increasingly rely on new forms of evidence, such as digital evidence. See, IBA, *Evidence Matters in ICC Trials* (August 2016), 32–33.

272 See Richard J Rogers, 'Assessment of the ICC's Legal Aid System' (5 January 2017), 15–20, [www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf](http://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf), accessed 21 November 2018. At the time of writing, the ICC is in the process of revising its legal aid policy. See also n 126.



oversight of the legal aid policy by the registry or a defence office, depending on the structure of the institution. At international courts and tribunals that allow for victim participation, legal aid programmes also cover costs for victims' counsel, addressed separately later.

Hybrid tribunals have varied greatly in the comprehensiveness of their legal aid provisions. For example, in keeping with the comprehensiveness of the STL's framework for defence support structures and its creation of the defence office as an independent organ of the court, the STL also has a detailed and comprehensive legal aid policy. The STL legal aid policy was promulgated by the Head of the Defence Office, in consultation with the Registrar and the President of the court. Importantly, it affirms the obligation of the Head of the Defence Office and therefore the court to 'ensure that the representation of a suspect or accused by counsel meets internationally recognised standards of practice' and that it is consistent with the requirements in the STL's legal framework.<sup>273</sup> The policy provides a detailed specification of fees and the composition of the defence team for each stage of proceedings.<sup>274</sup> It further outlines the covered expenses for investigations, consultants and experts, and travel, which is elaborated on an separate policy.<sup>275</sup>

A detailed legal aid policy provides transparency, allowing counsel to plan their work and prepare their defence within set parameters and registries to adequately budget for cases. Transparency in respect of legal aid also supports the credibility of the institution by ensuring that donors receive a clear accounting of how funds are being spent.<sup>276</sup> Another significant feature of the STL legal aid policy is that it provides for flexibility, both as a principle<sup>277</sup> and in a number of specific circumstances. A flexible legal aid policy allows counsel to request additional resources, either in the form of funding or staff, as needed to address new or unforeseen situations. However, it is important that decisions made about additional defence resources are informed by sufficient expertise in defending an international criminal case. While the comprehensive legal aid policies of established institutions as well as the significant experience of defence practitioners provide ample information about the resources required to mount an effective defence, there remains a tendency to assume that defence can be done on a shoestring. Decisions about defence resources should therefore be made by court staff with special expertise in these matters, and with a general presumption in favour of counsel, who is in the best position to evaluate the needs of the defence. There should also be a means for counsel to appeal denial of funds.<sup>278</sup>

In situations where a chamber is attached to an existing domestic system, it may be more difficult to provide for funding and administration of legal aid, in particular if there is not a strong facility for legal aid already in existence. For example, in Uganda, while there is an existing framework for legal aid, it applies in limited situations, namely where charges carry a life sentence or the death penalty.<sup>279</sup> Furthermore, the 'state brief system' provides only minimal funding, 'undermining

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273 STL Legal Aid Policy for the Defence, July 2018, 1(A)(1.2).

274 *Ibid*, Part I.

275 *Ibid*, Sections 13–14; STL Defence Travel and Allowances Policy.

276 See, eg, n 273, Annex A 'Framework Financial Accountability'.

277 See, eg, *ibid*, Section 1 (General Principles), A(1.5): 'Only tasks that are necessary and reasonable for the effective defence of the client can be paid for under the LAP. *In exceptional circumstances, if it is warranted by the complexity or expeditiousness of the case, a defence team may seek by requesting from the Head of Legal Aid to be awarded additional resources in personnel and/or means provided such request is necessary and reasonable.* Any such request is subject to the fact that the Defence Office has a limited budget for legal aid and cannot grant more resources than those which have been allocated to it [emphasis added].'

278 See, eg, *ibid*, Annex B 'Procedure for the Review of Legal Aid Decisions by the Pre-Trial Judge or Chamber'.

279 See Article 28(3)(e) of the Constitution of Uganda.

the chances that adequately experienced and skilled counsel participate'.<sup>280</sup> The Agreement on Accountability and Reconciliation that forms the basis for the ICD provides for legal aid to individuals facing 'serious criminal charges' or 'allegations of serious human rights violations'.<sup>281</sup> However, the extent to which the current ICD cases rely on the Ugandan legal aid system is not clear from the public record of the case.

### *Fair trial issues in domestic trials for international crimes – the ICD and EAC examples*

Hybrid tribunals and specialised chambers that are closely tied to the domestic legal system may bring greater challenges for providing defence support and thus merit special consideration. In these courts, a registry may be expected to cover a broad range of defence support functions with a very small staff and budget, without creating an independent office or hiring dedicated defence support staff. A registry of a specially created chamber or court within a domestic system may also suffer from any shortcomings that exist in the regular legal system, including: lack of resources and administrative structure for legal aid; lack of material resources including work and research facilities and adequate detention facilities; and overall efficiency challenges, brought on, for example, by inadequate communication facilities or lack of personnel.

Proceedings in the *Kwoyelo* trial at the ICD made halting progress and highlight the challenges that arise for a complex international criminal case in Uganda's domestic legal system. The *Habré* trial at the EAC took place in a much more efficient manner.<sup>282</sup> In comparing the *Kwoyelo* and *Habré* trials, some key distinctions should be noted. The AU was an important partner and catalyst in creating the EAC's legal framework and ensuring its viability, while the ICD is purely domestic, without the dedicated support of an international or regional body. A wide donor base supported the EAC, specifically for the purposes of the *Habré* trial,<sup>283</sup> while the ICD funds come largely from the Ugandan government, through the regular budgeting of the justice sector, with some funding from international donors.<sup>284</sup> The EAC also had clearly defined international crimes with Rome Statute-influenced definitions as applicable law in its statute, while the ICD charges fall under existing domestic law in the *Kwoyelo* case, including law that pre-exists the Rome Statute, such as the 1964 Geneva Conventions Act and the Ugandan Penal Code. Furthermore, the Senegalese justice system provided an existing modality for a form of victim participation, while in the Ugandan justice system and the ICD there was no modality for victim participation, which was in broad terms established in the ICD's RPE and had to be further determined by the judges.

In this context, the ICD's first trial was delayed to the point where Mr Thomas Kwoyelo has been detained for more than ten years, and has recently had a judgment in his favour from the African

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280 Human Rights Watch, 'Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division' (January 2012), 17.

281 See n 44, Article 3.8.

282 For both the ICD and the EAC, and specifically the *Kwoyelo* and *Habré* cases, the public record is limited and there are few if any official court filings such as decisions or submissions addressing legal and procedural issues. In this context reports from journalists and trial monitors, as well as first-hand accounts of those involved in the proceedings, provide an important basis for understanding legal representation and fair trial issues that arose during the course of the proceedings.

283 'Funding for the court came from Chad (2 billion CFA francs or € 3 million), the European Union (€ 2 million), the Netherlands (€ 1 million), the African Union (US\$ 1 million), the United States (US\$ 1 million), Belgium (€ 500,000), Germany (€ 500,000), France (€ 300,000), and Luxembourg (€ 100,000). The donors also agreed to create a Steering Committee chaired by the AU and composed of Senegal and the contributing countries to help mobilize the funds, assist in the selection of outreach providers, and receive and approve periodic reports by the Administrator'. See n 58, 13.

284 See n 280, 9.

Commission on Human and Peoples' Rights based on his prolonged detention.<sup>285</sup> As discussed later, there are many factors that have caused delay in the *Kwoyelo* case, some of which are related to resources for the registry. A statement by the Registrar of the ICD indicates the difficulty of prioritising an international criminal case, even a significant one, in the context of an under-resourced legal system, stating 'Uganda is dealing with hundreds of thousands of cases for all Ugandans. You cannot say I am trying Kwoyelo, because of the war crimes he committed and you do not try the other 10,000 defilement cases, murder cases, rape cases. The whole of Uganda needs justice.'<sup>286</sup> The ICD RPE gives the Registrar the mandate to 'organise the staff of the Registry in a manner that promotes the rights of the Defence, consistent with the principle of fair trial' and a detailed set of responsibilities.<sup>287</sup> However, the *Kwoyelo* case illustrates that inclusion in the legal framework alone is insufficient to ensure that these responsibilities can be performed.

Other contributing factors for the delay include lack of funds,<sup>288</sup> the need to address questions of applicable law and the Prosecutor's revising of the charges.<sup>289</sup> Fluctuations in political priorities may have also contributed. It is worth noting that other ICD cases, which focus on terrorism and not LRA crimes, have faced delays but have overall proceeded with greater efficiency.<sup>290</sup> Mr Kwoyelo's counsel raised legal challenges on his behalf that, while they contributed to delays, also addressed issues that needed resolution to ensure the trial proceeded in accordance with Ugandan law. To the extent that these challenges added time to proceedings, they also form an important component of a fair trial and effective legal representation. It does not appear, however, that these legal challenges were given any priority or expedited status in the higher courts.<sup>291</sup>

Delays are also attributed to the fact that the legal framework of the ICD was not complete at the time of the initial charges against Mr Kwoyelo, as the court had yet to develop RPE and have them passed into law. Since March 2016, when the RPE were passed, the ICD has held at least ten pre-trial conferences or hearings, showing an effort to move the *Kwoyelo* case towards

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285 See Lino Owor Ogora, 'African Commission Rules that Uganda Must Pay Former LRA Commander Thomas Kwoyelo for Illegal Detention', (OSJI International Justice Monitor 18 October 2018), [www.ijmonitor.org/2018/10/africa-court-rules-that-uganda-must-pay-former-lra-commander-thomas-kwoyelo-for-illegal-detention](http://www.ijmonitor.org/2018/10/africa-court-rules-that-uganda-must-pay-former-lra-commander-thomas-kwoyelo-for-illegal-detention), accessed 30 October 2018; ICD, *Thomas Kwoyelo v Ugandan*, Communication 431/12, [www.achpr.org/files/sessions/23rd-eos/communications/431.12/communication\\_431\\_12.pdf](http://www.achpr.org/files/sessions/23rd-eos/communications/431.12/communication_431_12.pdf), accessed 30 October 2018.

286 Halima Athumani, 'Uganda's International Crimes Division Struggling' (Voice of America, 16 May 2018), see [www.voanews.com/a/uganda-s-international-crimes-division-struggles-10-years-after-creation/4396361.html](http://www.voanews.com/a/uganda-s-international-crimes-division-struggles-10-years-after-creation/4396361.html), accessed 6 September 2018.

287 ICD RPE, Rule 52(2) and (3). The Registry 'where possible, shall': '(a) ensure adequate time and facilities for the preparation of the Defence and the right of the accused person to communicate freely with counsel of the accused person's choosing in confidence; (b) assign a duty counsel, at state expense where the case is committed, to participate during the pre-trial and trial proceedings; (c) provide support, assistance, and information to all Defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence; (d) be responsible for the practical organisation and management of the disclosure of evidence; (e) upon receiving the record of committal proceedings, assist the accused person in obtaining legal advice and the assistance of Government paid legal counsel; (f) inform the Prosecution and the Judges, as necessary, on relevant defence-related issues; (g) provide the Defence with such facilities as may be necessary for the direct performance of the duties of the Defence; (h) enforce any orders of the Court which affect the welfare of the accused; and (i) facilitate the dissemination of information and case law of the Court to Defence counsel.'

288 See Lino Owor Ogora, 'Confirmation of Charges Hearing against Thomas Kwoyelo in Ugandan Court Postponed Indefinitely; Judiciary Cites Lack of Funds' (OSJI International Justice Monitor, 23 July 2018), [www.ijmonitor.org/2018/07/confirmation-of-charges-hearing-against-thomas-kwoyelo-postponed-indefinitely-judiciary-cites-lack-of-funds](http://www.ijmonitor.org/2018/07/confirmation-of-charges-hearing-against-thomas-kwoyelo-postponed-indefinitely-judiciary-cites-lack-of-funds), accessed 6 September 2018; see Lino Owor Ogora, 'Ten Years Later, Ugandan Court Finally Confirms 93 Charges against Thomas Kwoyelo' (OSJI International Justice Monitor, 4 September 2018), [www.ijmonitor.org/2018/09/ten-years-later-ugandan-court-finally-confirms-93-charges-against-thomas-kwoyelo](http://www.ijmonitor.org/2018/09/ten-years-later-ugandan-court-finally-confirms-93-charges-against-thomas-kwoyelo), accessed 24 September 2018.

289 For an overview of the legal challenges before the Ugandan Constitutional Court and Supreme Court, see Kasande Sarah Kihika and Meritxell Regue, 'Briefing: Pursuing Accountability for Serious Crimes in Uganda's Courts: Reflections on the Thomas Kwoyelo Case' (ICTJ, January 2015), 4–7.

290 See Lino Owor Ogora, 'Confirmation of Charges Hearing against Thomas Kwoyelo Postponed Again', (OSJI International Justice Monitor, 14 June 2018), [www.ijmonitor.org/2018/06/confirmation-of-charges-hearing-against-thomas-kwoyelo-postponed-again](http://www.ijmonitor.org/2018/06/confirmation-of-charges-hearing-against-thomas-kwoyelo-postponed-again), accessed 7 September 2018, comparing the relative progress of the *Mukulu* and *Kwoyelo* cases before the ICD.

291 Susan Kendi, Interview with Nicholas Opiyo, former Kwoyelo lawyer, Journalists for Justice (3 August 2018). In this interview, Mr Opiyo noted that the Supreme Court was not known for its expeditious handling of cases.

confirmation of charges and trial.<sup>292</sup> The ICD RPE provide for a single judge to preside over pre-trial conferences and a pre-trial hearing at which charges are confirmed, as well as providing procedures for amending charges and challenging the indictment.<sup>293</sup> The ability of a single judge to rule on pre-trial matters can support efficiency, in that it may be easier to schedule hearings only involving one judge, in particular when the judges also have cases outside of the specialised chamber. Delays have also been caused by scheduling conflicts with trainings for ICD officials and by a strike of state prosecutors.<sup>294</sup>

Some of the contributing factors do indicate a lack of institutional support and coordination for Mr Kwoyelo's defence counsel. At least one counsel has stated that defence counsel are working pro bono, and it is not clear that any of the counsel are benefiting from Uganda's existing legal aid system.<sup>295</sup> In the course of the pre-trial conferences, defence counsel failed to appear twice, pointing to communication issues about the timing and place of proceedings. The pre-trial judge appointed additional counsel, who have since remained on the case together with the original counsel.<sup>296</sup> While appointing additional counsel can protect the rights of the accused in relation to that particular proceeding, it may also contribute to lack of clarity about Mr Kwoyelo's representation. There have been indications that Mr Kwoyelo was not satisfied with his legal representation, and in at least one pre-trial conference Mr Kwoyelo requested to change his counsel.<sup>297</sup> It has also been reported that 'the numerous postponements are having a negative psychological and physical impact on Kwoyelo', and one counsel raised concerns that Mr Kwoyelo had become suicidal as a result.<sup>298</sup> The issues relating to Mr Kwoyelo's legal representation underscore the role that could be played by a defence office at the specialised chamber, including ensuring that there is continuity of legal representation

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292 Pre-Trial conferences and hearings have been held on: 4 April 2016, Anthony Wesaka, 'Rebel Kwoyelo hearing to resume May 2' (Daily Monitor, 5 April 2016), [www.monitor.co.ug/News/National/Rebel-Kwoyelo-hearing-to-resume-May-2/688334-3146192-pfe9y/index.html](http://www.monitor.co.ug/News/National/Rebel-Kwoyelo-hearing-to-resume-May-2/688334-3146192-pfe9y/index.html), accessed 11 September 2018; 15 August 2016, Julius Ocungi, 'Ex-LRA rebel Kwoyelo turns down new lawyers' (Daily Monitor, 16 August 2016), [www.monitor.co.ug/News/National/Ex-LRA-rebel-Kwoyelo-turns-down-new-lawyers/688334-3345796-138x1yr/index.html](http://www.monitor.co.ug/News/National/Ex-LRA-rebel-Kwoyelo-turns-down-new-lawyers/688334-3345796-138x1yr/index.html), accessed 11 September 2018; September 2016 (three days), Julius Ocungi, 'Kwoyelo's lawyers question legality of presiding judge' (Daily Monitor, 22 September 2016), [www.monitor.co.ug/News/National/Kwoyelo-lawyers-question-legality-presiding-judge/688334-3390924-f7w56nz/index.html](http://www.monitor.co.ug/News/National/Kwoyelo-lawyers-question-legality-presiding-judge/688334-3390924-f7w56nz/index.html), accessed 11 September 2018; 31 January–1 February 2017 (two days), Lino Owor Ogora, 'Kwoyelo's Trial Drags On in Ugandan Court as Defense Counsel Labels the Charges "Fatally and Incurably Defective"' (OSJI International Justice Monitor, 27 March 2017), [www.ijmonitor.org/2017/03/kwoyelos-trial-drags-on-in-ugandan-court-as-defense-counsel-labels-the-charges-fatally-and-incurably-defective](http://www.ijmonitor.org/2017/03/kwoyelos-trial-drags-on-in-ugandan-court-as-defense-counsel-labels-the-charges-fatally-and-incurably-defective), accessed 11 September 2018; 22–23 February 2017 (two days), Lino Owor Ogora, 'Kwoyelo's Trial Drags On in Ugandan Court as Defense Counsel Labels the Charges "Fatally and Incurably Defective"' (OSJI International Justice Monitor, 27 March 2017); 14–16 March 2017, Lino Owor Ogora, 'Kwoyelo's Trial Drags On in Ugandan Court as Defense Counsel Labels the Charges "Fatally and Incurably Defective"' (OSJI International Justice Monitor, 24 July 2017); 9 May 2017, Lino Owor Ogora, 'Ugandan Court Fails to Hold Confirmation of Charges Hearing in Kwoyelo Case' (OSJI International Justice Monitor, 24 July 2017), [www.ijmonitor.org/2017/07/ugandan-court-fails-to-hold-confirmation-of-charges-hearing-in-kwoyelo-case](http://www.ijmonitor.org/2017/07/ugandan-court-fails-to-hold-confirmation-of-charges-hearing-in-kwoyelo-case), accessed 11 September 2018; 12 June 2017, Lino Owor Ogora, 'Ugandan Court Fails to Hold Confirmation of Charges Hearing in Kwoyelo Case' (OSJI International Justice Monitor, 24 July 2017); 18 July 2017, Lino Owor Ogora, 'Ugandan Court Fails to Hold Confirmation of Charges Hearing in Kwoyelo Case' (OSJI International Justice Monitor, 24 July 2017); 11 June 2018, Lino Owor Ogora, 'Confirmation of Charges Hearing against Thomas Kwoyelo Postponed Again' (OSJI International Justice Monitor, 14 June 2018), [www.ijmonitor.org/2018/06/confirmation-of-charges-hearing-against-thomas-kwoyelo-postponed-again](http://www.ijmonitor.org/2018/06/confirmation-of-charges-hearing-against-thomas-kwoyelo-postponed-again), accessed 11 September 2018.

293 ICD RPE, Part II Pre-Trial Proceedings.

294 Lino Owor Ogora, 'Ugandan Court Fails to Hold confirmation of Charges Hearing in Kwoyelo Case' (OSJI International Justice Monitor, 24 July 2017), [www.ijmonitor.org/2017/07/ugandan-court-fails-to-hold-confirmation-of-charges-hearing-in-kwoyelo-case](http://www.ijmonitor.org/2017/07/ugandan-court-fails-to-hold-confirmation-of-charges-hearing-in-kwoyelo-case), accessed 7 September 2018.

295 See n 291.

296 The first time all defence counsel failed to appear was at the pre-trial hearing held on 15–16 August 2016 in Gulu. Defence counsel stated they were given late notice of hearing and could not travel to Gulu on short notice. The Pre-Trial Judge, Susan Okalany, appointed two new defence counsel during the hearing of 16 August 2016, who remained appointed along with the original two counsel. Julius Ocungi, 'Ex-LRA rebel Kwoyelo turns down new lawyers' (Daily Monitor, 16 August 2016), [www.monitor.co.ug/News/National/Ex-LRA-rebel-Kwoyelo-turns-down-new-lawyers/688334-3345796-138x1yr/index.html](http://www.monitor.co.ug/News/National/Ex-LRA-rebel-Kwoyelo-turns-down-new-lawyers/688334-3345796-138x1yr/index.html), accessed 11 September 2018 and Julius Ocungi, 'State appoints new layers for former LRA rebel Kwoyelo' (Daily Monitor, 17 August 2016), [www.monitor.co.ug/News/National/State-appoints-new-lawyers-for-former-LRA-rebel-Kwoyelo/688334-3347144-13j12oi/index.htm](http://www.monitor.co.ug/News/National/State-appoints-new-lawyers-for-former-LRA-rebel-Kwoyelo/688334-3347144-13j12oi/index.htm), accessed 11 September 2018. The second time, three of the four defence counsel failed to appear at the ICD Pre-trial hearing held on 11 June 2018 in Kampala, citing late notice of the hearing.

297 Lino Owor Ogora, 'Confirmation of Charges Hearing against Thomas Kwoyelo in Uganda Court Postponed Indefinitely Judiciary Cites Lack of Funds' (OSJI International Justice Monitor, 23 July 2018), [www.ijmonitor.org/2018/07/confirmation-of-charges-hearing-against-thomas-kwoyelo-postponed-indefinitely-judiciary-cites-lack-of-funds](http://www.ijmonitor.org/2018/07/confirmation-of-charges-hearing-against-thomas-kwoyelo-postponed-indefinitely-judiciary-cites-lack-of-funds), accessed 7 September 2018.

298 See n 295.

according to the defendant's wishes, maintaining communication about scheduling of hearings and ensuring payment of counsel through legal aid.

At the same time, as aforementioned, Mr Kwoyelo's defence team has been active in seeking to uphold his rights in the ICD proceedings. In addition to the challenges brought regarding the amnesty and applicable law, they have requested recusal of the presiding judge, challenged the procedures for victim participation and status of participating victims, and challenged the completeness of disclosure.<sup>299</sup> They have requested acholi translations of the indictment and other key documents and resources to prepare for trial, including financial support, researchers, vehicles and computers.<sup>300</sup> Mr Kwoyelo's counsel also challenged the introduction of new charges and changing the legal basis for a significant number of these charges, with the court ruling in favour of the prosecution.<sup>301</sup>

By comparison, the trial of Mr Hissène Habré took place in a relatively quick timeframe. Mr Habré was charged on 2 July 2013, the trial judgment delivered on 30 May 2016 and the appeal judgment rendered on 27 April 2017.<sup>302</sup> The trial is notable, both in terms of time and cost, for its efficiency, which has been a major reason for hailing the EAC as an important new model for trying international crimes. At the same time, like the *Kwoyelo* trial, the *Habré* trial indicates a number of areas which could be improved to protect the fairness of proceedings. It is worth noting that, when Mr Habré's court-appointed defence counsel was asked to reflect on the proceedings, he submitted a number of respects in which the trial was, in his view, unfair.<sup>303</sup>

Mr Habré had retained private counsel, but because he rejected the legitimacy of the EAC proceedings, his retained counsel refused to participate.<sup>304</sup> Without participation of Mr Habré's counsel at the pre-trial investigation stage of proceedings, the case went to trial solely based on the evidence of the prosecution.<sup>305</sup> Mr Habré also refused to participate during the opening of the trial, leading the judges to order the defendant physically be brought to court on the second day of trial, and to appoint three Senegalese counsel to represent him when his private counsel refused to appear.<sup>306</sup> According to the court-appointed counsel, there was 'no valid reason to refuse to be appointed', and in fact the counsel would face disciplinary sanction if they refused. However, reflecting on the proceedings, his court-appointed counsel 'remarked that Habré was not his client but someone accused that he was obliged to represent'.<sup>307</sup> The decision to bring Mr Habré to court

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299 See n 185 above.

300 *Ibid.* In the same hearing, the judge responded to these requests by ordering that Acholi interpretation be provided, and that the registry provide resources for the defence to prepare for trial.

301 Lino Owor Ogora, 'Kwoyelo's Trial Drags On in Ugandan Court as Defense Counsel Labels the Charges "Fatally and Incurably Defective"' (OSJI International Justice Monitor, 27 March 2017), [www.ijmonitor.org/2017/03/kwoyelos-trial-drags-on-in-ugandan-court-as-defense-counsel-labels-the-charges-fatally-and-incurably-defective](http://www.ijmonitor.org/2017/03/kwoyelos-trial-drags-on-in-ugandan-court-as-defense-counsel-labels-the-charges-fatally-and-incurably-defective), accessed 11 September 2018. 'The prosecution submitted that they were substituting and adding new counts under Common Article 3 of the Geneva Conventions and Uganda's Penal Code Act to have Kwoyelo charged under local laws of Uganda and to have the conflict characterized as one that is not of an international nature. The prosecution noted that they intended to bring 93 counts, 59 of which fell under customary international law. (This is an increase from the original indictment, which contained 53 charges.); see also Anthony Wesaka, 'ADF leader Mukulu's case set for hearing' (Daily Monitor, 8 January 2018), [www.monitor.co.ug/News/National/ADF-Mukulu-case-hearing-Rwakafuuzi/688334-4254890-14ryinb/index.html](http://www.monitor.co.ug/News/National/ADF-Mukulu-case-hearing-Rwakafuuzi/688334-4254890-14ryinb/index.html), accessed 11 September 2018.

302 See n 58, 9.

303 Mounir Ballal in AFLA, 'Carrying Forward the Legacy of the Extraordinary African Chambers in the Habré Trial: An African Solution to an African Problem' (African Legal Aid and African Union Commission, July 2017). Ballal spoke on behalf of all the appointed defence counsel for Mr Habré and 'went on to point out the several ways he thought the trial fell short of upholding the principles of fair trial for Habré'.

304 Mr Habré's counsel also challenged the legitimacy of the EAC proceedings before the ECOWAS Court of Justice in April 2013. The ECOWAS court held that it did not have jurisdiction to rule on the matter. See n 58 above, 14.

305 See n 303.

306 See n 58, 15; see n 54, 358.

307 See n 303.

by force was controversial, and by one account, local attorneys observing the trial left the courtroom in protest, noting that Senegalese law would permit a trial *in absentia*, and that Mr Habré's rights were violated by his forced presence in the court.<sup>308</sup>

The trial was delayed for 45 days to allow the appointed counsel time to prepare, which from the perspective of the court-appointed defence counsel was insufficient given the size of the case file.<sup>309</sup> From the perspective of victims who had been waiting and preparing for years, any additional delay was problematic and also raised the possibility that trial proceedings would be derailed on a more permanent basis.<sup>310</sup> For the tribunal itself, which was created with a limited mandate and budget, delays created potential problems as the tribunal had a narrow timeframe in which to hold the trial and issue its judgment. These reasons may have supported the judges' decision to proceed with the trial.

As the continued examination of the EAC as a model proceeds, commentators are also noting concerns about fairness and equality of arms that have been eclipsed by Mr Habré's conviction and sentencing. As Kerstin Bree Carlson notes, Habré's court-appointed lawyers, who 'had no particular background or experience' in this type of case, 'faced several significant challenges: their non-cooperative client; the short time window allotted to review extensive case files; and not least the unfamiliar territory of ICL'. Carlson notes that the legal representatives for victims in the case were in fact more conversant with concepts of international criminal liability and provided clarification of some of these concepts for the defence.<sup>311</sup> In this respect, Carlson comments that, 'while questions regarding the possibility of a vigorous, effective defense are always fraught in ICL in ways they are not in domestic criminal law proceedings, problems adhering to the construction of a defense were particularly acute in the *Habré* trial'.<sup>312</sup>

The EAC's statute did not include extensive guidance in respect of administration for the defence. Rather than a registry, the EAC had an administrator who was a Senegalese judge seconded to the tribunal.<sup>313</sup> However, the EAC's legal framework included an 'Additional Agreement' providing for the creation of a defence office, an office that was never created.<sup>314</sup> The agreement provided for the office to be headed by a principal defender and to provide substantive support, such as assisting defence counsel and persons entitled to legal assistance through the legal research, collection of

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308 See n 54, 359.

309 See n 303. As Brody describes: 'By the time the Chambers were established, the Coalition had spent 13 years building the factual case against Habré. After the first charges were filed, HRW and the FIDH sent a team of researchers to Chad to interview victims. This was followed up by repeated missions by HRW which interviewed over 300 victims and witnesses, including former officials of Habré's government. Bandjim Bandom, a former high-ranking DDS official now living in Paris, was deposed over several days, and provided HRW with a 50-page statement. The key moment in the investigation, however, came in 2001 when Reed Brody and Olivier Bercault of HRW stumbled on tens of thousands of DDS documents in its abandoned N'Djamena headquarters. Among the papers were daily lists of prisoners and deaths in detention, interrogation reports, surveillance reports, and death certificates. The files detailed how Habré placed the DDS under his direct control and kept tight control over DDS operations. HRW entered the documents into a data base and analysis by the Human Rights Data Analysis Group revealed the names of 1,208 people who were killed or died in detention and 12,321 victims of torture and detention. In these files alone, Habré received 1,265 direct communications from the DDS about the status of 898 detainees. All this information was used in the legal complaints filed in Belgium in 2001 and in Senegal in 2007 and finally before the EAC.' See n 58, 14–15.

310 *Ibid.*

311 '[E]arly arguments put forth by Habré's court appointed lawyers, for example, focused on questions of Habré's knowledge, intent, and participation; Habré's lawyers sought to distinguish the acts of Habré's subordinates from Habré himself. It was lawyers for the victims who clarified for the Commis d'Office, as a professional courtesy, that arguments regarding specific knowledge or intent were unlikely to assist in Habré's defense, because under ICL, individual liability can be assessed based on the simple foreseeability of crimes arising from a collective endeavor.' See n 54, 359.

312 *Ibid.*, [footnotes omitted].

313 *Ibid.*

314 Additional Agreement Between the Government of the Republic of Senegal and The African Union Relating to the Statute of the Extraordinary African Chambers for the Prosecution of International Crimes Committed In Chad During the Period from 7 June 1982 to 1 December 1990, 24 July 2014, [www.hrw.org/sites/default/files/related\\_material/Additional%20Agreement%20to%20the%20Statute%20of%20the%20Extraordinary%20African%20Chambers%2028July%2024%2C%202014%29.pdf](http://www.hrw.org/sites/default/files/related_material/Additional%20Agreement%20to%20the%20Statute%20of%20the%20Extraordinary%20African%20Chambers%2028July%2024%2C%202014%29.pdf), accessed 10 September 2018.

evidence, provision of legal advice or representational services.

As the EAC was created primarily to handle one case, it is possible that the creation and staffing of a defence office was viewed as an unnecessary use of resources. However, in light of the issues that arose in the *Habré* case, it is worth examining how a dedicated structure for the defence within the EAC could have acted to support fairness at various stages of the proceedings. For example, during the pre-trial investigation stage, a defence office could have acted as *amicus* or facilitated the appointment of an *amicus* or *amici* to represent the interests of the defence during the investigations.<sup>315</sup> A principle defender or duty counsel could have presented arguments in court on the accused's behalf during the hearing when the decision was taken to appoint counsel against the defendant's wishes. A defence office could also have maintained a list of counsel experienced in international criminal law and procedure, who could have been appointed to represent Mr Habré when his counsel refused to participate. A defence office could also have provided substantive legal research and other support to the defence team during the trial. Finally, a defence office could have provided defence counsel with training in certain aspects of international criminal procedure that arose in the case, such as the questioning of vulnerable witnesses including survivors of sexual and gender-based violence (SGBV).

### III. Trends and challenges in support and organisation of victims' counsel

With the majority of trials for international crimes now including some right for victim participation, courts have adapted their structures and procedures to accommodate victims' rights to participate, to choose and be represented by counsel including through provision of legal aid, and in many instances to apply for reparations. There is new legal space created for victims in international criminal law, starting with the ICC's Rome Statute, with legal provisions and jurisprudence that address how victims may participate and what their specific rights are in the proceedings. Structurally, the introduction of victim participation has led to the creation of additional divisions within institutions, in particular in the registry, that were not present at the ICTY, ICTR or SCSL. These structures support this expanded administration of justice inclusive of victims' participation, victim legal representation and reparations. For courts that are informed by civil law procedures, such as the ECCC and STL, some aspects of the existing *partie civile* role have been adapted for international criminal trials, in addition to adding new procedures. For courts that draw more exclusively on common law, entirely new procedures have been introduced in the adversarial trial proceeding.

This section examines some of the trends that are evident across institutions, focusing first on the structural support required to facilitate victim participation and specifically victims' counsel. For the most part, legal frameworks have mandated registries to provide this support, which registries have done through creating specific victims' offices in various forms. In addition, civil society has provided significant support for victim participation at all stages of proceedings, from initial outreach to application assistance and legal representation, often in coordination with the court but also independently. The section then looks at the issues raised by providing legal representation for large numbers of victims, examining how courts have employed common legal representation and the implications for both counsel and the victims who are represented. Throughout, challenges are noted, in particular tension between ensuring an efficient and fair trial and accommodating the legal

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<sup>315</sup> Mr Habré's court-appointed counsel, Mounir Ballal, has since suggested that the appointment of an *amicus curiae* would have been appropriate during pre-trial investigations. See n 303.

rights of large numbers of victims, dealing with vague or insufficiently articulated legal frameworks that create uncertainty in respect of victims' roles and rights, the limited resources of institutions, and the growing, and often unmet, expectation for providing reparations in contexts of limited resources and political will.

### *Supporting legal representation for victims*

The majority of courts have placed the mandate to support victims and victims' counsel with the registry. Some of the functions required, like managing a list of counsel and a legal aid system, are also relevant for defence counsel and are provided for jointly. In this respect, support needs for victims' counsel can overlap with those for defence counsel, premised on the victims' statutory rights to legal representation. Victims and their counsel have additional considerations for managing legal representation for potentially large numbers of clients who may be located in affected communities that are remote from the seat of the court. Institutions must therefore provide for a range of functions that do not overlap with the defence and are addressed either by the court itself or through civil society. While some of these functions take place prior to the formal appointment of victims' counsel for representation during the trial (and pre-trial proceedings, where applicable), in fact, victims' counsel may have early contact with victims prior to their formal appointment, and may be involved in many of these functions together with the court and NGOs. Functions for supporting victim participation and victims' counsel include:

- **Applications to participate and for reparations:** Disseminating applications to participate within affected communities; providing assistance for completing applications; receiving and processing applications; accepting or denying applications; and processing applications for reparations.
- **Communication:** Explaining basic functions of the court and right to participate; and providing information to victims regarding how to apply and status of applications.
- **Protection:** Ensuring best practices are applied to protect victims' personal information and avoiding exposure of victims in situations where their participation status or involvement with the court could place them at personal risk.
- **Administrative support to victims' counsel:** Creating and managing a list of counsel; appointing counsel (a function of both registries and judges, depending on the legal framework); ensuring counsel have the means and resources to effectively represent clients; managing legal aid and payments, and making discretionary decisions about requests for additional resources; and managing human resources for counsel and teams.
- **Substantive support to victims' counsel:** Providing legal research to victims' counsel and teams; maintaining legal databases of relevant jurisprudence; creating, maintaining and disseminating institutional knowledge; and providing training and professional development for victims' counsel and teams, and, if applicable, to the broader legal community.
- **Institutional representation for victims' views and concerns:** Providing input in high-level discussions; representing the general interests of victims in legal matters including by submitting *amicus curiae* briefs; and presenting information about the legal rights of victims in outreach and other public functions.



- **Institutional development:** Proposing and/or providing input on proposed amendments to the legal framework; and creating victims' counsel-specific documents and directives such as codes of conduct and practice directions.
- **Monitoring counsel:** Monitoring the quality of legal representation and supporting quality of legal proceedings (as appropriate and while respecting the independence of counsel); and addressing any complaints or misconduct alleged against victims' counsel and teams.

The ICC's legal framework and structures for supporting victims provide an example of how an institution seeks to accommodate these functions. At the ICC, the Victim Participation and Reparations Section within the registry handles applications and communication with victims in respect of those applications, in addition to assisting victims in obtaining legal advice and in organising their legal representation, following any guidance set out by pre-trial and trial chambers.<sup>316</sup> Protection matters and other forms of assistance including psychosocial support are addressed by the Victims and Witnesses Unit, although the focus of that unit is on victims who appear as witnesses before the court.<sup>317</sup> The ICC faces a distinct challenge in that it must provide victim-orientated services in all of the situations under investigation at any given time, for example in Uganda and Georgia, unlike other tribunals that focus on one geographical area. At the ICC, the registry's Counsel Support Section handles legal aid for both victims' and defence counsel.

The ICC framework provides for a separate, independent office for victim legal representation and support in the Office of Public Counsel for Victims (OPCV).<sup>318</sup> The OPCV provides both general legal support to victims' teams as well as undertaking direct representation of thousands of victims in multiple cases, where appointed to do so by the court's judges. In this regard, the OPCV differs from the OPCD, which undertakes representation of accused persons only in limited circumstances.<sup>319</sup> ICC victims' counsel are further supported by the external, independent ICCBA, which has a Victims' Committee that seeks to address challenges faced by victims' counsel at the ICC and provides training and professional development.<sup>320</sup>

Finally, the ICC has a Trust Fund for Victims, which is mandated to provide court-ordered reparations following a conviction. The Trust Fund also has an 'assistance mandate', which provides for assistance to victims of crimes within the jurisdiction of the court.<sup>321</sup> While the ICC's Trust fund does not support victims' counsel, the existence of the Trust Fund as a structure with a specific mandate for ICC reparations greatly improves the likelihood that case-based reparations can be delivered. In other institutions, as discussed below, reparations may only be available to victims through a separate process before the state (as at the STL), may be limited to symbolic and moral reparations (as at the ECCC), or may be ordered when there are not any funds or facility designated to implement the order, making the delivery of reparations uncertain (as at the EAC). The ICC's practice to date has also made clear that victims' counsel are indispensable during the reparations phase of proceedings,

316 ICC, 'Representing Victims before the International Criminal Court: A Manual for legal representatives' (2010), 204.

317 See Rome Statute, Article 43(6). This provision states that the VWU shall provide 'protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses'.

318 See n 316, 204.

319 See ICC Regulations of the Court, Regulation 77(4).

320 See ICC Victims Committee, [www.iccba-abcpi.org/victimcommittee](http://www.iccba-abcpi.org/victimcommittee), accessed 10 September 2018.

321 Rome Statute, Articles 75(2) and 79; ICC RPE, Rule 98. See also [www.trustfundforvictims.org/en/about/two-mandates-tfv](http://www.trustfundforvictims.org/en/about/two-mandates-tfv), accessed 10 September 2018.

to provide legal arguments on behalf of their clients in respect of the types and amount of reparations they would receive. The ICC's legal aid policy provides funding for victims' counsel to continue their representation during the reparations phase.<sup>322</sup>

The ICC's legal framework, in that it provides for victim participation and supporting victims' counsel, took the structure of institutions in a different direction from the structures created at the ad hoc tribunals, which did not provide for either. Subsequent courts have shown varying approaches but the majority have followed the ICC, although the ICC arguably provides the most comprehensive structural support for victim participation functions compared to the courts discussed next. It should be noted, however, that the satisfaction of victims vis-à-vis their experiences with the ICC varies greatly, and that efforts to ensure structures work effectively in practice still only represent part of the challenge in seeking to provide victims with meaningful interactions with the court, and satisfactory representation of their views and concerns in the trial.<sup>323</sup>

Within the STL's registry, victim and victims' counsel support functions are centralised in its Victims' Participation Unit (STL VPU), which is responsible for assisting victims with their participation in the proceedings and for providing support to legal representatives.<sup>324</sup> The STL VPU is mandated to ensure that victims or their legal representatives receive documents filed by the parties,<sup>325</sup> to ensure that they are informed of relevant decisions,<sup>326</sup> and to provide all necessary administrative and logistical assistance to victims and their counsel.<sup>327</sup> The STL VPU also provides professional training to counsel representing victims during the proceedings.<sup>328</sup> The STL RPE also provides that the STL VPU, in respect of victims' counsel, will exercise *mutatis mutandis* the same powers granted to the Head of Defence Office.<sup>329</sup> The STL does not have a trust fund but does provide that following a conviction, participating victims would receive support from the tribunal, including a certified copy of a judgment, which may be used to apply for reparations from the state of Lebanon.<sup>330</sup> The STL's legal aid policy for victim participation does not, however, provide for funding to victims' counsel beyond the appellate phase of proceedings at the STL.<sup>331</sup>

The KSC registry is also responsible for facilitating victim participation and has created an internal Victims' Participation Office (KSC VPO) with a broad mandate including administering the system of victim participation and the list of victims' counsel.<sup>332</sup> The KSC VPO registers and assesses applications and provides its recommendation for admissibility, common representation and

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322 ICC-ASP, Registry's single policy document on the Court's legal aid system, 4 June 2013, ICC-ASP/12/3, para 57.

323 See, generally, on the challenges of victim participation, Mariana Pena, Gaëlle Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013), 7(3), *International Journal of Transitional Justice*, 518–535; Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011), 44(1), *Case Western Reserve Journal of International Law*, 475–496; Sara Kendall, Sarah Nouwen, 'Representational Practices at the International Criminal Court: the Gap Between Juridified and Abstract Victimhood' (2014), 76, *Law and Contemporary Problems*, 235–262; Sergey Vasiliev, 'Victim Participation Revisited – What the ICC is Learning about Itself' and Conor McCarthy, 'The Rome Statute's Regime of Victim Redress: Challenges and Prospects', both in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), 1,133–1,201.

324 STL RPE, Rules 51(A), 51(C) (iv).

325 STL RPE, Rule 51(B) (iv).

326 STL RPE, Rule 51(B) (v).

327 STL RPE, Rule 51(B) (vi).

328 STL RPE, Rule 51(C) (iv).

329 STL RPE, Rule 51(C) (v). For the duties of the Head of the Defence Office, see STL RPE, Rule 57(G).

330 STL Statute, Article 25; STL RPE, Rule 86(G).

331 STL Legal Aid Policy for Victims' Participation (corrected on 10 November 2014).

332 KSC Law No 05/L-053, Article 34(6).

protective measures.<sup>333</sup> The KSC VPO is also responsible for administering the payment to counsel, and for providing assistance and advice in relation to the criminal proceedings to victims who are participating in the proceedings before the Specialist Chambers.

The ECCC's Victim's Support Section (ECCC VSS) also centralises the functions for facilitating victim participation, with a mandate to assist victims with their civil party applications, provide general information on participation and maintain the list of victims' counsel.<sup>334</sup> At the ECCC, civil society organisations have also been formally involved in organising and supporting victim legal representation, including by funding victims' counsel. The ECCC framework does not provide for legal aid for victims' counsel, with the exception of funding one team of Cambodian counsel as part of the national contributions to the courts' budget.<sup>335</sup> Due to the lack of legal aid, a number of victims' counsel at the ECCC have also been representing their clients pro bono.<sup>336</sup> As outlined in Chapter 2, victim participation has proved to be one of the most challenging aspects of the ECCC's operations and has been significantly revised over the course of the first trials. In light of the complexity of the issues that have been raised regarding victims' participation rights and legal representation, the lengthy legal proceedings before the court and the central importance of victims to the ECCC's mandate, the lack of legal aid for victims' counsel is a striking omission in the ECCC's framework.

The ICD's legal framework creates a right of victims to legal representation<sup>337</sup> as well as a right to legal aid for victims.<sup>338</sup> The ICD RPE provide that the Registrar is responsible for assigning legal representation,<sup>339</sup> as well as for providing support to victims' counsel. The RPE provide that the registry shall:

'liaise with the relevant Government authorities and other organisations responsible for victims and witness protection... to provide counsel for victims with assistance, information and adequate support, including such facilities as may be necessary for the direct performance of counsel's duty and for the purpose of protecting the rights of victims during all stages of the proceedings.'<sup>340</sup>

The Registrar also has general obligations with respect to informing victims of their rights and of developments at the court that may affect their interests.<sup>341</sup> As noted in Chapter 2, the ICD's RPE limit the provisions regarding victims' counsel to the judgment and sentencing stages, which does not address all situations in which legal counsel for victims will need assistance from the registry.<sup>342</sup> As with other courts, civil society groups have also been involved in supporting victims' counsel, including by providing training.<sup>343</sup> In the ICD's first case, concerns have been raised about the

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333 KSC RPE, Rule 113(2).

334 ECCC Internal Rules (Rev.9), Rule 12 *bis*.

335 FIDH, 'Victims' Rights Before the Extraordinary Chambers in the Courts of Cambodia (ECCC): A Mixed Record for Civil Parties' (2011), 32–33.

336 *Ibid*, 31–32.

337 See n 44, Article 3(7).

338 *Ibid*, 3(8).

339 ICD RPE, Rule 51(b): 'assist victims to obtain legal advice and organise their legal representation'.

340 ICD RPE, Rule 49(2).

341 ICD RPE, Rule 51(2).

342 See n 184.

343 See n 280, 26.

capacity of the registry to delivery its mandate on victim participation.<sup>344</sup>

The CAR SCC Draft RPE provide for a section supporting victims' participation and reparations within the registry, with a broad mandate including supporting victims applications, reparations, and assigning legal representation from the *corps special d'avocats*.<sup>345</sup> It remains to be seen how these functions will be organised in the final RPE and in practice.

### *Common legal representation and choice of counsel*

The large numbers of victims participating in proceedings have resulted in two procedural measures that almost all courts have taken: exercising the court's prerogative to organise and group victims for the purposes of legal representation; and enforcing the presentation of victims' views and concerns through their legal representative, instead of allowing individual victims to appear in court. This means that, if victims have a right to choose counsel in the legal framework, this right is also qualified by the ability of the court to organise victims' legal representation by appointing counsel on their behalf, and by grouping victims together with a common legal representative. For example, the ICC RPE state that 'a victim shall be free to choose a legal representative', but the same regulation qualifies this provision with the right of the court to request victims to choose a common legal representative and to request the registry to appoint one if victims are unable to choose.<sup>346</sup> The ICC Regulations of the Court further provide that the court may consider the 'interests of justice', and appoint either external counsel or the OPCV 'following consultation with the Registrar and, when appropriate, after hearing from the victim or victims concerned'.<sup>347</sup> In practice at the ICC, the court has intervened to appoint common legal representatives in almost all cases.<sup>348</sup>

In light of the large numbers of victims that are potentially eligible to participate in trials for international crimes, provisions allowing the appointment of counsel and the grouping of victims for the purposes of legal representation are necessary to balance victim participation with the right to an efficient and fair trial. Not all eligible victims may have the opportunity or choose to seek participation rights, but experience has shown that, given the opportunity, a significant number of victims will seek to participate. For example, the STL in the *Ayyash* trial has 72 participating victims,<sup>349</sup> the *Kwoyelo* trial at the ICD has 73;<sup>350</sup> the *Habré* case at the EAC had approximately 4,500 participating during the trial and 7,396 named as eligible for reparations;<sup>351</sup> and the ECCC trials have ranged from 64 participating civil parties in Case 001 to almost 4,000 in Case 002.<sup>352</sup> Common legal representation and limited participation rights in the trial must also be balanced against the need to acknowledge

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344 Lino Owor Ogora, 'To Participate or Not? Getting victim Participation Right in the Kwoyelo Case', (OSJI International Justice Monitor, 18 October 2016), [www.ijmonitor.org/2016/10/to-participate-or-not-getting-victim-participation-right-in-the-kwoyelo-case](http://www.ijmonitor.org/2016/10/to-participate-or-not-getting-victim-participation-right-in-the-kwoyelo-case), accessed 24 September 2018.

345 CAR SCC Draft RPE, Articles 60–61.

346 ICC RPE, Rule 90.

347 ICC Regulations of the Court, Regulation 80.

348 Human Rights Watch, 'Who Will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond' (2017), 14.

349 STL Bulletin June/July 2018, 6, [www.stl-tsl.org/en/media/stl-bulletin/6289-stl-bulletin-june-july-2018](http://www.stl-tsl.org/en/media/stl-bulletin/6289-stl-bulletin-june-july-2018), accessed 21 November 2018.

350 At the time of the pre-trial hearings held on 31 January and 1 February 2017, 73 victims had confirmed their participation in the case. Brenda Nanyunja, 'The Thomas Kwoyelo Case at the ICD: Issues of Victim Participation' (OSJI International Justice Monitor, 13 March 2017), [www.ijmonitor.org/2017/03/the-thomas-kwoyelo-case-at-the-icd-issues-of-victim-participation](http://www.ijmonitor.org/2017/03/the-thomas-kwoyelo-case-at-the-icd-issues-of-victim-participation), accessed 21 September 2018.

351 Human Rights Watch, 'Procès Hissène Habré: Les auditions des témoins et des parties civiles prennent fin' (13 December 2015), [www.hrw.org/fr/news/2015/12/13/procès-hissène-habré-les-auditions-des-témoins-et-des-parties-civiles-prennent-fin](http://www.hrw.org/fr/news/2015/12/13/procès-hissène-habré-les-auditions-des-témoins-et-des-parties-civiles-prennent-fin) accessed 21 September 2018, accessed 21 September 2018. See n 191.

352 'ECCC at a Glance' (January 2018), 3, [www.eccc.gov.kh/sites/default/files/eccc%20at%20a%20glance%20-%20january%202018.pdf](http://www.eccc.gov.kh/sites/default/files/eccc%20at%20a%20glance%20-%20january%202018.pdf), accessed 21 September 2018; and ECCC, 'Case 001' [www.eccc.gov.kh/en/case/topic/90](http://www.eccc.gov.kh/en/case/topic/90), accessed 21 September 2018.

the individuality of victims and of their harm. Victims' counsel play an important role in mediating between these factors, and the ability to choose counsel and have that choice respected can be one form of acknowledgment.<sup>353</sup> Therefore, the framework for appointing counsel and for grouping victims, whether by a judge, the registry or choice of the victims, is also significant. The need to strike a balance between efficiency and victims' choice of counsel was recently highlighted in the *Ongwen* case at the ICC, where a large group of victims were initially denied legal aid for the counsels of their choice on the basis that these counsel were not the common legal representatives appointed by the court.<sup>354</sup> Although the victims were later provided with legal aid for the counsel of their choice, as Human Rights Watch noted, the decisions 'deepened ambiguity as to when counsel appointed by victims are eligible to access legal aid' at the ICC.<sup>355</sup>

In the framework of the STL, the pre-trial judge is responsible for deciding whether the victim applicant meets the requirements for participation – a decision that may be appealed.<sup>356</sup> The pre-trial judge is also responsible for grouping victim participants for the purposes of common legal representation, taking into account conflicting interests, shared or similar interests and the rights of the accused, and the interests of a fair and expeditious trial. The decision to group victim participants may not be appealed.<sup>357</sup> While the STL's legal framework treats common representation as the norm, the Directive on Counsel suggests that the pre-trial judge may permit an individual victim to be represented separately, in that it provides for the Registrar to designate a lead counsel for that victim.<sup>358</sup>

The STL has created a detailed Directive on Victims' Legal Representation, which designates the Registrar as responsible for appointing a lead counsel for each group of victims, and provides criteria for appointment, and appeal to the pre-trial judge should victims disagree.<sup>359</sup> Among the criteria for appointing counsel are the views or preferences of the victims, the nature and complexity of the case, the background of the victims and the nature of their harm, and any existing relationship between the victims and a proposed representative.<sup>360</sup> The skills, experience and personal attributes are also to be considered, including language skills, experience in international criminal proceedings, experience working with victims, and familiarity with Lebanon and Lebanese law.

Like the STL, the KSC's legal framework provides for common legal representation in a single group unless the trial panel orders that they should be divided into multiple groups, including, if appropriate, a group for victims of SGBV.<sup>361</sup> The Registrar is responsible for assigning counsel, taking into account both the proposal of the KSC VPO as well as consultations with victims.<sup>362</sup> In both the

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353 Killean and Moffett frame this in respect of agency: 'Given the limits on the rights of victims to participate directly in proceedings, the selection of representatives is important, particularly for legal agency. If legal agency is understood as the power to make choices and to pursue chosen goals within legal systems, then the selection of representatives constitutes an important element of victims' legal agency. Furthermore, choosing a legal representative may enhance a sense of moral agency, by recognizing victims' legal entitlement and dignity in contrast to their victimhood'. Rachel Killean, Luke Moffett, 'Victim Legal Representation before the ICC and ECCC' (2017), 15(4), *Journal of International Criminal Justice*, 722.

354 ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, para 18.

355 See n 348, 37–40.

356 STL RPE, Rule 86.

357 STL RPE, Rule 86(d).

358 STL Directive on Victims' Legal Representation (4 February 2015), STL-BD-2012-04-Rev 1-Corr 1, Article 16(B).

359 *Ibid*, Articles 16, 19 and 22.

360 *Ibid*, Article 19(C).

361 KSC Law No 05/L-053, Article 22(4).

362 KSC RPE, Rule 26(2).

STL and KSC, the legal frameworks provide a high degree of control to the judiciary and the registry in shaping common legal representation.

The legal frameworks of the ECCC, EAC, ICD and CAR SCC have allowed for a comparatively higher degree of autonomy on the part of victims and their counsel. This less formal approach may be the result of a number of factors, including the earlier mobilisation of victims and prior relationships with counsel and civil society in the period from the commission of the crimes to the start of the judicial process. It may also reflect the more limited resources available for victims' legal representation provided by the courts. If a court is not providing legal aid to victims' counsel, as at the ECCC for example, it may be less able to dictate how victims are organised and represented, with a role limited to ensuring that counsel are qualified and act in accordance with the civil parties' participatory rights. In this context, courts retain varying degrees of judicial control and provide varying degrees of support, while civil society, victims and counsel play highly significant roles in organising common legal representation.

In the first trial held at the ECCC, groups of civil party lawyers were given broad participatory rights, each being able, for example, to question each witness on behalf of their clients. This resulted in an imbalance between the time accorded to victims and the right of the accused to an expeditious trial.<sup>363</sup> After the first trial both jurisprudence and procedural amendments sought to further define and narrow the scope of victim participation.<sup>364</sup> The ECCC has since further organised victims' counsel by creating Lead Co-Lawyers<sup>365</sup> for the civil parties, one Cambodian and one international lawyer, who represent the interests of the consolidated group of civil parties and have the 'ultimate responsibility to the court for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group of Civil Parties'.<sup>366</sup> Victims may also choose to be represented as part of a Victims' Association, and to be represented by that association's lawyers.<sup>367</sup> This system has been criticised on the basis that Lead Co-Lawyers lack a direct mandate from the victims, and as such are unable to represent their views. Another criticism centred on civil party lawyers not being afforded the opportunity to challenge decisions taken by the Lead Co-Lawyers, to safeguard the particular interests of certain victims, in particular victims of sexual violence.<sup>368</sup> Civil parties have said they felt less involved in the proceedings of Case 002,<sup>369</sup> and only one-third mentioned the Lead Co-Lawyers when asked about who represents civil parties at the ECCC.<sup>370</sup> Within the Lead Co-Lawyers structure, civil society has remained instrumental in organising and providing victims' legal representation, as discussed further below.

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363 Elisa Hoven, 'Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia' (2014), 12(1), *Journal of International Criminal Justice*, 97.

364 *Ibid*, 88 and 98.

365 ECCC Internal Rules (Rev 9), Rule 12 *ter* (1). See, also, ECCC, Civil Party Lead-Co-Lawyers, [www.eccc.gov.kh/en/organs/civil-party-lead-co-lawyers](http://www.eccc.gov.kh/en/organs/civil-party-lead-co-lawyers), accessed 10 September 2018.

366 See n 335, 29.

367 ECCC Internal Rules (rev 9), Rule 23 *quater*.

368 Elisa Hoven, 'Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia' (2014), 12(1), *Journal of International Criminal Justice*, 100–101.

369 *Ibid*, 101.

370 ADHOC, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia: Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002' (January 2013), 37.

The ICD Agreement gives victims ‘the right to a lawyer of his or her choice’.<sup>371</sup> The ICD internal rules provide for the registry to assign legal representation for victims<sup>372</sup> and the trial chamber can request victims to choose a common counsel with the help of the Registrar,<sup>373</sup> who is also in charge of providing assistance and information to victims’ counsel for the purpose of protecting the rights of victims during all stages of the proceedings.<sup>374</sup> As previously noted, the ICD internal rules for legal representation of victims only appear under the section applicable to the judgment and sentencing stage, although such representation is essential for all stages of the proceedings.<sup>375</sup>

### *Civil society support for victim participation and victims’ counsel*

As noted elsewhere in this report, civil society organisations maintain close and important contact with victims before, during and after trial proceedings, and support both victims and the institutions themselves in all stages of the accountability process. In particular, when victim participation structures and resources are limited in a court, civil society has provided counsel, assisted victims with organising and provided important training for counsel unfamiliar with international criminal procedure to ensure that they are able to represent victims’ views and concerns within the court. However, such engagement and support seems to be most effective when there is a high level of coordination both with the court itself and among civil society, and when the civil society organisation includes well-resourced international partners. As discussed next, the role of civil society was instrumental in both bringing about the *Habré* trial at the EAC, and in representing victims during the trial. At the ECCC, civil society does the lion’s share of organising and representing victims in the trials, with the court providing limited financial resources or material support for victims’ counsel. Civil society is also mobilising to provide important support for victims’ counsel at the CAR SCC.

#### EXTRAORDINARY AFRICAN CHAMBERS (SENEGAL)

The EAC illustrates how victims’ counsel can benefit from the coordination and resources brought by civil society. The creation of the EAC and the process of bringing Mr Habré to trial was largely driven by civil society, starting with the formation of the Chadian Association of Victims of Political Repression and Crime (AVCPR) in 1991 by Souleymane Guengueng and other victims of Mr Habré’s regime with a mandate to ‘pursue national or international judicial proceedings against perpetrators of crimes and repression under Habré and to demand compensation to the victims’.<sup>376</sup> The subsequent advocacy campaign by AVCPR and other civil society organisations has been well covered, as has the trial, in which almost 4,500 victims were recognised as civil parties,<sup>377</sup> and which resulted

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371 Agreement on Accountability and Reconciliation, Government of the Republic of Uganda – LRA (2007), Article 3(7).

372 ICD RPE, Rule 51(1)(b); Brenda Nanyunja, ‘The Thomas Kwoyelo Case at the ICD: Issues of Victim Participation’ (OSJI International Justice Monitor, 13 March 2017), [www.ijmonitor.org/2017/03/the-thomas-kwoyelo-case-at-the-icd-issues-of-victim-participation](http://www.ijmonitor.org/2017/03/the-thomas-kwoyelo-case-at-the-icd-issues-of-victim-participation), accessed 11 September 2018.

373 ICD RPE, Rule 46(4).

374 ICD RPE, Rules 49(2) and 51(2).

375 Redress, ‘Ugandan International Crimes Division (ICD) Rules 2016: Analysis on Victim participation Framework Final Version’ (August 2016), 13.

376 Bridget Rhinehart, ‘Prosecuting Hissène Habré: Establishing a Factual Background of the Rise, Rule and Fall of Hissène Habré’ (2012), 19(1), *African Yearbook of International Law Online*, 364.

377 Human Rights Watch, ‘Procès Hissène Habré: Les auditions des témoins et des parties civiles prennent fin’ (13 December 2015), [www.hrw.org/fr/news/2015/12/13/proces-hissene-habre-les-auditions-des-temoins-et-des-parties-civiles-prennent-fin](http://www.hrw.org/fr/news/2015/12/13/proces-hissene-habre-les-auditions-des-temoins-et-des-parties-civiles-prennent-fin), accessed 11 September 2018.

in 7,396 victims being awarded reparations.<sup>378</sup> The model presented, of a ‘transnational advocacy coalition’ or ‘networked justice’, has been widely discussed in respect of its applicability to other contexts.<sup>379</sup>

Analysis of the scope of victims’ involvement and participation in the *Habré* process highlights the importance of coordination of victims organisations and of adequate financial and material support, in this instance from Human Rights Watch (HRW), which acted as a well-resourced and dedicated international partner. In 2007, a Steering Committee was created to guide the coalition of civil society organisations seeking accountability, at that time exploring multiple fora including Senegal. The Steering Committee was put in charge of the victims’ legal team and included Chadian, Senegalese and international lawyers. It was based in HRW’s Brussels office and had a full-time staff coordinator and up to five interns working under HRW’s Reed Brody and Chadian victims’ counsel Jacqueline Moudeïna. Its activities included information-sharing, building the dossier against Mr Habré, fundraising, advocacy and media work, and training of the legal team.<sup>380</sup>

By the time the EAC had been created and trial proceedings were a reality, the ability of victims’ counsel to organise and represent thousands of clients during the trial continued to depend heavily on this transnational advocacy coalition. The EAC’s legal framework provides limited regulation of the legal representation of victims, whose participation is governed by the EAC Statute and otherwise by Senegalese Criminal Procedure.<sup>381</sup> The EAC Statute provides that victims may choose to form groups and may decide to be represented by a joint representative, and also provides that when the interests of justice require, the EAC judges and EAC administrator may request or appoint a common legal representative.<sup>382</sup> The EAC Statute also provides that a group of victims may request funding for legal representation from the Administrator, but does not specify any legal aid scheme or dedicated resources for victim legal representation.<sup>383</sup> In fact, all funding for victims’ counsel came from outside sources, and the coalition relied on HRW to raise the necessary funds.<sup>384</sup> It does not appear that the EAC judges took any measures to organise victims’ legal representation. During the trial, there were two groups: the first led by Moudeïna and supported by international and Chadian lawyers<sup>385</sup> and the second representing Chadian victims’ associations and led by Senegalese and Chadian lawyers.<sup>386</sup>

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378 Human Rights Watch, ‘Hissène Habré Case: Trust Fund for Victims’ (7 February 2018), [www.hrw.org/news/2018/02/07/hissene-habre-case-trust-fund-victims](http://www.hrw.org/news/2018/02/07/hissene-habre-case-trust-fund-victims), accessed 11 September 2018.

379 Reed Brody, ‘Victims Bring a Dictator to Justice: The Case of Hissène Habré’ in Julia Duchrow and Maike Lukow (eds) (2nd edn, *Bread for the World*, June 2017); Christoph Sperfeldt, ‘The trial against Hissène Habré: networked justice and reparations at the Extraordinary African Chambers’ (2017), 21(9), *The International Journal of Human Rights*, 1243–1260; AFLA, ‘Carrying Forward the Legacy of the Extraordinary African Chambers in the Habré Trial: An African Solution to an African Problem’ (African Legal Aid and African Union Commission, July 2017).

380 Reed Brody, ‘Victims Bring a Dictator to Justice: The Case of Hissène Habré’ in Julia Duchrow and Maike Lukow (eds) (2nd edn, *Bread for the World*, June 2017), 22–23.

381 EAC Statute, Article 14(5).

382 EAC Statute, Article 14.

383 EAC Statute, Article 14(4).

384 Brody describes that ‘sustaining the Coalition’s political and legal work to get to the trial required 15 years of funding. This covered the costs of the secretariat, salaries for the Chadian lawyers, the victims, and staff in Chad, Senegal and Brussels, international travel (the airfare alone from Chad to Senegal is some € 1,200), trainings, conferences, the creation of a system of victims’ focal points to distribute information, honoraria for international lawyers at trial, etc’. Reed Brody, ‘Victims Bring a Dictator to Justice: The Case of Hissène Habré’ in Julia Duchrow and Maike Lukow (eds) (2nd edn, *Bread for the World*, June 2017), 29.

385 In addition to Moudeïna, counsel for this group included Assane Dioma Ndiaye (Senegal), Alain Werner (Switzerland), William Bourdon (France), Georges-Henri Beauthier (Belgium), Delphine Djiraibe (Chad) and Lambi Soulgan (Chad).

386 Counsel for the Association of Victims of Political Crimes and Repression (AVCRP) and for the Chadian Human Rights League (RADHT) included Yaré Fall (Senegal), Fatima Sall (Senegal), Lamine Ndintamadji (Senegal) and Philippe Houssine (Chad). According to HRW this group was ‘seen as close to the Déby government’. Reed Brody, ‘Victims Bring a Dictator to Justice: The Case of Hissène Habré’ in Julia Duchrow and Maike Lukow (eds) (2nd edn, *Bread for the World*, June 2017), 31.



Notably, the main group of victims led by Moudeïna studied the experience of civil parties at the ECCC and sought to organise victims' counsel to avoid issues that had arisen in that court. As Brody writes:

'[a]mong the problems detected at the ECCC were (1) clashing theories between the prosecutor and the civil parties, (2) lack of coordination among the civil parties themselves, and (3) deficiencies in representation due to (a) a lack of legal knowledge and experience by the Cambodian lawyers combined with (b) a lack of familiarity by international pro-bono lawyers about the case or the evidence. To a large extent, the Coalition was able to avoid these problems because of its preparation and legitimacy, and its close work with the prosecutor. The Coalition organized trainings in Dakar and Paris, including moot courts, for Moudeïna's legal team to bolster their capacities and confidence. While relations between the Chadian and international lawyers were often strained, Moudeïna's uncontested role both as the lead lawyer and the bridge to the victims/clients was an important cohesive factor.'<sup>387</sup>

In respect of the composition of legal representation, the mix of counsel from Belgium, France and Switzerland, together with Chadian and Senegalese counsel, allowed the team to bring experience in international criminal law and procedure with specific knowledge of the crimes charged and close relationships with the victim community, as well as expertise in Senegalese criminal law and procedure. The coalition identified advocacy training for the victims' counsel as an essential form of support. As noted, in other international and hybrid tribunals such support may also be provided by courts and bar associations to lawyers on the list of counsel.

#### ECCC (CAMBODIA)

The ECCC civil party participation scheme continues to be discussed and lessons are still being formulated.<sup>388</sup> However, the ongoing critical analysis should not overlook or minimise the important support from civil society towards realising victims' participation rights in Cambodia. In the decades between the Khmer Rouge period and the operationalisation of the ECCC, Cambodian civil society, together with international partners, played an essential role in preserving evidence, advocating for a formal justice mechanism and, when the tribunal was formed, providing outreach and information to victims.<sup>389</sup> Specifically with respect to victims' participation rights, civil society organisations have continued to take measures to increase access to the court for civil society and filled gaps where the court could not provide support.

For example, in Case 002, the Cambodian Human Rights and Development Association (ADHOC) created a Civil Party Representative (CPR) scheme to increase efficiency and to facilitate communication between the civil parties and the court.<sup>390</sup> A CPR 'does not legally represent or speak on behalf of Civil Parties, but rather acts as the nexus or focal point between Civil Parties, the

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387 *Ibid*, 30–31 [footnotes omitted].

388 See, eg, the views expressed in Silke Studzinsky and Gianna M Schlichte, 'On "Civil Party Participation in Trials of Mass Crimes" by Elisa Hoven' (2015), 13, *Journal of International Criminal Justice*, Marie Giraud, 'A Well-Reasoned Critique? – Marie Guiraud responds to East-West Center Report' (Cambodia Tribunal Monitor, 6 January 2016), [www.cambodiatribunal.org/2016/01/06/a-well-reasoned-critique-marie-guiraud-responds-to-east-west-center-report](http://www.cambodiatribunal.org/2016/01/06/a-well-reasoned-critique-marie-guiraud-responds-to-east-west-center-report), accessed 11 September 2018.

389 For an overview of activities by civil society in relation to the ECCC, see Christoph Sperfeldt, 'Cambodian Civil Society and the Khmer Rouge Tribunal' (2012), 6(1), *International Journal of Transitional Justice*, 149–160.

390 ADHOC, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia: Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002' (January 2013), 7.

court, and the lawyers to ensure that Civil Parties are provided with sufficient information and are regularly updated on the latest developments' in the case.<sup>391</sup> The ADHOC's 122 CPRs, who were unpaid volunteers, received training from the ADHOC on basic legal knowledge, fair trial rights, civil party rights and the ECCC's legal framework.<sup>392</sup> One reason behind the ADHOC's establishment of the CPR scheme was the substantial increase in civil party participation between Case 001, with less than 100 civil parties, and Case 002, with almost 4,000 civil parties.<sup>393</sup> In Case 002, there are 11 teams representing civil parties in both large and small groups, for the most part established around pre-existing NGOs and organised around specific themes.<sup>394</sup> With the exception of one team of Cambodian lawyers funded through the ECCC VSS, as noted, victims' counsel at the ECCC are externally funded or working pro bono. While the ADHOC programme did not receive financial or logistical support from the ECCC, an external assessment of the ADHOC CPR scheme recommended the establishment of a court–civil society liaison mechanism, 'with an officer tasked with coordinating and collaborating with civil society, intermediaries, and the court through regular contacts, and developing clear and consistent outreach messages to be disseminated to the Civil Parties and Cambodian population in general'.<sup>395</sup> This recommendation underscores the importance of formal coordination and communication between civil society and the court, in particular when civil society is performing quasi-internal functions such as outreach to victims.

Going forward, it is clear that this trend of civil society taking a leading role in supporting victim participation and victims' counsel will continue. Many of the civil society groups that had worked on the EAC are now working with Gambian civil society organisations seeking accountability for crimes committed during the regime of former President Yahya Jammeh.<sup>396</sup> At the CAR SCC, several civil society organisations, including the International Federation for Human Rights (FIDH), the Central African League for Human Rights (LCDH), and the Central African Observatory for Human Rights (OCDH), have started a collective of 15 NGOs that seeks to organise lawyers to represent victims before the SCC.<sup>397</sup> The FIDH has established a joint office in Bangui with the LCDH and OCDH that among other things works to identify victims who may participate in proceedings.<sup>398</sup> However, such initiatives require a corresponding effort from the justice system. After interviewing victims in the CAR, Amnesty International noted that 'many victims lacked the information and assistance to file complaints, or were reluctant to do so, feeling that they would not lead anywhere because of both the perceived inefficiency and the partiality of the justice system'.<sup>399</sup> The CAR SCC's ability to provide a functional legal and procedural framework for victim participation, legal representation

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391 ADHOC, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia: Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002' (January 2013), 8.

392 *Ibid.*, 9.

393 *Ibid.*, 7.

394 FIDH, 'Victims' Rights Before the Extraordinary Chambers in the courts of Cambodia (ECCC): A Mixed Record for Civil Parties' (2011).

395 ADHOC, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia: Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002' (January 2013), 47.

396 Reed Brody, 'A Campaign for Justice in Gambia is Born: Jammeh Implicated in Slew of Abuses During 22-Year Rule' (October 2017), [www.hrw.org/news/2017/10/23/campaign-justice-gambia-born](http://www.hrw.org/news/2017/10/23/campaign-justice-gambia-born), accessed 11 September 2018; Mark Kersten, 'Mission Report of the AGJA-WAYAMO Delegation to the Gambia: Meeting Expectations on the Road to Justice: Achieving Accountability in The Gambia' (WAYAMO Foundation, Africa Group for Justice and Accountability, May 2018), [www.wayamo.com/wp-content/uploads/2018/05/2018-TheGambia-Report-Wayamo.pdf](http://www.wayamo.com/wp-content/uploads/2018/05/2018-TheGambia-Report-Wayamo.pdf), accessed 11 September 2018.

397 Ephrem Rugiririza, 'Centrafrique: la Cour spéciale ne doit pas limiter son action à quelques auteurs sans envergure' (Justice Info, July 2017), [www.justiceinfo.net/fr/justice-reconciliation/33728-centrafrique-la-cour-sp%C3%A9ciale-ne-doit-pas-%C2%AB-limiter-son-action-%C3%A0-quelques-auteurs-sans-envergure-%C2%BB.htm](http://www.justiceinfo.net/fr/justice-reconciliation/33728-centrafrique-la-cour-sp%C3%A9ciale-ne-doit-pas-%C2%AB-limiter-son-action-%C3%A0-quelques-auteurs-sans-envergure-%C2%BB.htm), accessed 11 September 2018.

398 FIDH, 'Inauguration du bureau conjoint FIDH-LCDH-OCDH pour lutter contre l'impunité' (March 2017), [www.fidh.org/fr/regions/afrique/republique-centrafricaine/inauguration-du-bureau-conjoint-fidh-lcdh-ocdh-pour-lutter-contre-l](http://www.fidh.org/fr/regions/afrique/republique-centrafricaine/inauguration-du-bureau-conjoint-fidh-lcdh-ocdh-pour-lutter-contre-l), accessed 11 September 2018.

399 Amnesty International, 'The Long Wait for Justice in the Central African Republic' (2017), 27.

and protection will depend on the political will of the CAR government and of donors and partners creating and working with the court.

# Chapter 4: Future considerations for legal representation, fairness and access to justice in hybrid tribunals and specialised chambers

Hybrid tribunals and specialised chambers that are holding legal proceedings for serious international crimes have an obligation to deliver fair trials in accordance with international standards. Tribunals and chambers that allow victim participation have an obligation to make that participation accessible and meaningful. The types of support needed in a hybrid tribunal or specialised chamber are context-specific and relate to a number of factors, including the scale of the crimes and number of cases to be tried, the court's relationship to the domestic legal system, the level of international and domestic support, and the level of participation of civil society. The specific challenges of a domestic context will vary, and this report does not attempt to address broader questions of capacity-building or rule of law support beyond the activities of a hybrid tribunal or specialised chamber. However, a hybrid tribunal or specialised chamber's ability to conduct fair proceedings, and to incorporate victims' views and concerns into proceedings, may have some spillover effects on the larger domestic legal system. Institutions and proceedings can be a vehicle for introducing substantive and procedural law to deal with international crimes, create structures such as defence offices that may be retained in domestic courts, contribute to building expertise in the legal profession and provide an example of international law and procedure that may introduce or reinforce norms such as fair trial standards.

This chapter sets out some future considerations for hybrid tribunals and specialised chambers for decision-makers and donors at the earliest stages of planning the institution. It calls for the consolidation of lessons learned and promotion of good practices for supporting counsel by committing to structures and resources to support counsel early in the process, and by involving practitioners, both defence and victims' counsel, in planning and decision-making. It highlights structures that will support fair trials, such as defence offices, legal aid policies and lists of counsel. It also calls for supporting fairness by including high-level institutional representation for the defence and internal expertise on defence issues, by securing and providing resources for the defence, and through outreach and trial monitoring. To support victims' access to justice, this chapter highlights the importance of a clear legal framework for victim participation and legal representation, and the need to balance internal and external support for victims' counsel and to coordinate these functions within the court. Finally, it discusses the importance of managing the reparations process and expectations about reparations.

## I. Consolidating lessons learned and promoting good practices for supporting counsel at hybrid tribunals and specialised chambers

### *Committing to structures and resources to support counsel early in the process*

The structures, law and procedures included in the legal framework can be determinative in whether an institution can deliver fair trials. In support of a fair trial, decision-makers must commit to adequate structures for defence and victims' counsel at the beginning of the process. Likewise,

the funding that is committed and allocated in the initial stages of a court must include funding for support for counsel and legal aid. The planning and set-up of a tribunal is a context where the focus on investigations and building cases for prosecution may create blind spots in respect of structures and resources for the defence. It has not been uncommon to create a registry with a broad mandate, leaving the details of defence support and victims' participation to be determined at a later stage. This can result in both an overburdened registry and in missed opportunities to create sufficient supporting structures and put in place necessary staff. Some courts have also left the details and scope of victim participation to be judicially determined at a later stage of the proceedings, allowing for proceedings to advance without tackling some of the major issues necessary to ensure fairness and access to justice. By the time charges are brought, there is a rush to work out the details of legal representation including choice of counsel and funding for counsel, placing in jeopardy both the rights of the accused and the ability of victims to participate.

### *Involving practitioners in the process*

The participatory nature of forming the legal framework has resulted in better engagement in new courts as well as incorporation of lessons learned. Based on their first-hand involvement in international courts, hybrid tribunals and specialised chambers, and in domestic practice, defence and victims' counsel present a wealth of knowledge and ideas about what has worked and what has not. For this reason, it is imperative to involve counsel, and in particular practitioners experienced in international criminal proceedings, in the process of creating legal frameworks and in other institutional decisions. Unlike, for example, the situation at the time of the creation of the ICTY, there is now a body of experienced international criminal law practitioners, including defence and victims' counsel, many of whom have practised before multiple international criminal courts, hybrid tribunals and specialised chambers. Experienced counsel are members of national and international bar associations, as well as the lists of counsel of the ICC and other institutions. Counsel bring a unique perspective and practical experience that will help build strong legal frameworks and support fairness and access to justice.

## **II. Supporting fairness**

### *The value of a defence office*

The creation of a defence office supports fairness, in particular when it combines high-level representation for the defence, administrative responsibilities including managing the list of counsel and legal aid for the defence, and substantive legal support to counsel. A defence office, responsible for providing both administrative and substantive support for the defence, has been a feature of many institutions and is usually located within the registry. Following the STL's framework, most courts would benefit from a defence office as a fourth organ of the court, providing greater autonomy and institutional representation for the defence. For institutions operating on a smaller scale, such as trying a single case, it is essential to ensure adequate funding and flexibility to support counsel and a defence team within the registry or body administering the institution. Even on a smaller scale, the inclusion of a defence office and principal defender may still provide benefits, as noted, for example, in the *Habré* case.

### *Including institutional representation for the defence and internal expertise on defence issues*

Registry staff assigned to deal with defence matters should have experience in international criminal defence. Likewise, institutional representation for the defence is key to building courts that are capable of providing fairness. The input of a defence perspective in the development and amending of a legal framework supports fairness and equality of arms. The inclusion of a defence perspective is also important in interactions with major stakeholders and in outreach to affected communities. At the same time, as illustrated by the SCSL experience, the independence of counsel must be respected, and legal frameworks should establish clear relationships between the defence office and the registry and clear boundaries for defence offices and contacts with counsel and clients.

Likewise, the mandate of an institution to monitor counsel may have some utility in ensuring that a reasonable standard of representation is maintained, and to protect the right of the accused to effective representation. However, such monitoring should be approached with caution, proceed according to clear guidelines and be performed by counsel familiar with the practices of international criminal defence. Effective representation can also be supported by the promulgation of defence-specific practice directions and codes of conduct for counsel, which can provide support for counsel dealing with new standards and practices at a hybrid tribunal or specialised chamber.

### *Securing and providing resources for the defence*

Providing resources for the defence will continue to be a challenge for hybrid tribunals and specialised chambers, as resources tend to be limited for such institutions as a whole. Funders can, and should, commit to resources for the defence in the planning stages of the institutions and as part of their commitment to a fair trial. The amount of resources required will vary, and in the mechanisms discussed in this report there is a wide variation. However, in respect of models, the more comprehensive approach of the the STL's legal aid policy, for example, corresponds more accurately to the needs of the defence, including allocating funds for defence investigations and experts. The availability of sufficient resources can be determinative in the outcome of a case: '[i]f adequate resources are lacking, the weakest case against an accused may succeed'.<sup>400</sup>

Particularly in the context of complementarity and increased support and momentum for domestic trials of international crimes, attention should be paid to the relationship between structures and resources for the defence and ensuring a fair trial. For example, the ICD provides a possible venue for trying LRA crimes that would otherwise be in the jurisdiction of the ICC. In this context, it is concerning that some defence counsel at the ICD have reported to be working pro bono and that the registry remains under-resourced. Without careful planning and attention from states and donors, as well as other major stakeholders designing and supporting accountability mechanisms, similar problems will continue to occur in future hybrid tribunals and specialised chambers. The ICC can play a role in this regard, in particular when it has an ongoing investigation in that state, by reinforcing the importance of international fair trial standards in its public statements about the situation and in its contacts with the state in question.

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400 W Jordash and M R Crowe, 'Evidentiary Challenges for the Defence' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford, 2014), 277.

### *Including a clear and comprehensive legal aid policy*

A court's provision of legal aid supports equality of arms and fair proceedings and has significant implications for the credibility of a court. A court or tribunal's reputation as a fair and impartial institution may be undermined if there are indications that defendants, for lack of resources, are unable to mount an effective defence. As the IBA has emphasised, failure to adequately provide for legal aid may negatively affect perceptions about the fairness of trials, and for a court, these costs may be far greater than the actual expenses associated with operating the legal aid system. The inclusion of the right to legal aid is by itself insufficient. Hybrid tribunals and specialised chambers should include a detailed legal aid policy that clearly sets out what legal aid covers, including team composition and the costs covered per stage of proceedings.

Detailed legal aid policies provide transparency, allowing counsel to plan their work and prepare their defence within set parameters, and allowing registries to adequately budget for cases. Transparency in respect of legal aid also supports the credibility of the institution by ensuring that donors receive a clear accounting of how funds are being spent. Legal aid policies should allow for flexibility, so counsel can request additional resources or reallocate resources, as needed. Decisions about defence resources should be made by court staff with expertise in international criminal defence, and with a general presumption in favour of counsel, who are in the best position to evaluate the needs of the defence. There should also be a means for counsel to appeal denial of funds.

### *Ensuring expertise on international criminal law and procedure*

Cases charging international crimes rely on a specialised body of law and procedure. The ability to appoint an international lawyer as part of a defence team, and for indigent persons to have the lawyer funded through legal aid, can form an important aspect of fairness. In particular where international support has been given to the investigations and the prosecution, expertise in international criminal law will inform the Prosecutor's construction of their case and will be part of the basis of the charges the accused must face. Equality of arms in such cases means that expertise in international criminal law and/or procedure should also be available to the defence.

Mixed teams, including both domestic and international counsel, can bring relevant expertise to the defence team. Many tribunals have appointed mixed teams, and some, such as the ECCC, have required them. Lists of counsel can provide an important function in this regard, to screen counsel for admittance to practise before the tribunal on criteria including expertise in international criminal law. Lists of counsel and bar associations can also support the development of this expertise through training. Skills-based advocacy training for counsel can be particularly useful, such as the advocacy training and moot courts for victims' counsel who would appear before the EAC.

### *Creating lists of counsel and engaging the legal profession*

Courts have an obligation to ensure for the effective legal representation of the accused, and to this end international criminal courts and tribunals maintain lists of counsel to facilitate the appointment of qualified counsel. By providing training for their members, lists of counsel contribute to legal education and reinforcement of important norms and practices in the legal profession. This includes providing support for, and encouraging adherence to, codes of conduct and ethical standards for counsel.

In addition to lists of counsel, close cooperation with national bar associations supports a stronger engagement with the local legal profession and supports a two-way transfer of legal knowledge between domestic lawyers and international practitioners who are practising at hybrid tribunals or specialised chambers. However, the level of independence of the national bar association should be taken into account, in particular when the bar association has any formal status or role with the court, such as determining admission to the list of counsel. Independent bar associations are critical to ensure the independence of lawyers and fair administration of justice.

### *Supporting fairness through outreach and trial monitoring*

Outreach and public information units have become established components of international courts and tribunals, with mandates to inform the public about the jurisdiction and activities of the court, and to maintain contact and dialogue with affected communities about proceedings. The public information provided by an institution about its mandate and proceedings should include information about the rights of the accused, the presumption of innocence and the role of the defence in legal proceedings. Outreach is particularly important in contexts where trials may easily become politicised, and in this regard it is important for the institution itself to publicise its adherence to international fair trial standards. Participation of defence office staff in outreach can reinforce these messages and provide information regarding the court's incorporation of international standards of fairness.

The right to a public hearing is an important dimension of a fair trial;<sup>401</sup> however, public accessibility of proceedings before the hybrid tribunals and specialised chambers in this report has varied. As only a limited number of people may be able to attend proceedings in person, online information and web streaming of proceedings have become standard for international courts and tribunals. Inaccessible proceedings and lack of public information can undermine perceptions of fairness, as lack of official information and inaccurate information may undermine the perceived legitimacy of the institution. Public information and outreach can come in many forms, including online information, radio broadcasts and holding information events in affected communities, and should include messaging about fair trial rights.

As with a number of functions, civil society has played a supporting role in both outreach and trial monitoring, including by providing some form of trial monitoring, either through informal reporting or a more dedicated programme.<sup>402</sup> Hybrid tribunals and specialised chambers should ensure that they are accessible to such initiatives and that they provide support for journalists and trial monitors seeking to access proceedings.

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401 Article 14 ICCPR; see further IBA, *The Quest for a Public Face: the public debate on the ICC and its efforts to develop a vision and coherent strategy on external communications* (October 2009), 15

402 For example, civil society organisations and academic institutions can fund trial monitors and provide platforms such as blogs and websites for disseminating summaries and analysis of proceedings. See, eg, Virtual Tribunal of the Special Court for Sierra Leone, Joint Project between UC Berkeley War Crimes Studies Center and Department of Computer Science, [www.ocf.berkeley.edu/~changmin/SCSL.html](http://www.ocf.berkeley.edu/~changmin/SCSL.html), accessed 21 November 2018; OSJI International Justice Monitor, Khmer Rouge Trials at the Extraordinary Chambers in the Courts of Cambodia, [www.ijmonitor.org/category/khmer-rouge-trials](http://www.ijmonitor.org/category/khmer-rouge-trials), accessed 21 November 2018.



### **III. Supporting access to justice**

#### *A clear legal framework for victim participation and legal representation*

Most hybrid tribunals and specialised chambers have included the right to victim participation as part of their legal framework. However, by not including clear guidelines for participation at the early stages of the development of the institution, courts and tribunals have also created obstacles for victims and setbacks to the efficient conduct of trials. Victim participation requires significant resources to ensure that victims receive adequate information and support about their rights to participate, for the application process, to access legal representation and interact with counsel, and to apply for and receive reparations.

The ability of courts to implement victims' participation rights and provide access to justice has necessitated the development of new structures and new law. Institutions' practices to support victims' access to justice and participation continue to develop. While the ICC's structures and legal framework reflect a relatively comprehensive set of norms for victim participation, even at the ICC, procedures for victims and victims' legal representation lack clarity and consistency. Courts including the ICC have relied heavily on civil society to provide victim-related resources and perform victim-related functions.

Clear guidelines for participation should be arrived at as early as possible in the discussions to create a court, and be included with sufficient detail within the legal framework. Following the existing practice of international courts and tribunals, as well as practical considerations for including large numbers of victim participants in a criminal trial without violating the rights of the accused, legal frameworks should include clear provisions addressing common legal representation. These provisions should include procedures for assigning counsel, criteria for grouping victims and provisions to address conflicts of interest among victims in the group. In light of the importance of the victims' counsel role as the primary point of contact with the judicial institution and trial proceedings, efforts should be made to ensure that victims' choice of counsel is respected wherever possible, and that legal aid is equally available for all victims' counsel.

Victims' counsel should have expertise in international criminal law and procedure. As outlined in the report, mixed teams of counsel, including both experts in international criminal law and domestic law, can be one means to ensure expertise in victims' legal representation. Lists of counsel maintained by the institution can identify qualified counsel and support counsel through training and other activities. Victims' counsel should have a means to be included in institutional decision-making as well as in outreach.

#### *Balancing internal and external support for victims' counsel and coordinating between external and internal victims' functions*

Civil society organisations are present at all stages of the development of institutions and proceedings, and provide resources and personnel for victim-related functions such as applications to participate, victims' counsel and outreach. Many hybrid tribunals and specialised chambers have relied heavily on civil society organisations to perform these functions, and in some instances the institutions themselves have provided only minimal resources and support. Well-resourced tribunals, such as the

STL and KSC, have created better-resourced internal structures within their registries to facilitate legal representation and participation for victims, and have provided legal aid for victims' legal representation. Others, such as the ECCC, have created structures but have very limited resources in terms of legal aid and outreach to victims, relying on pro bono counsel and civil society organisations.

Civil society is a natural partner for victims' functions in tribunals, in light of the longer-term relationships that organisations have with affected communities, which among other things may create greater trust between victims and such organisations, as well as allow organisations to have greater information about extent of harm suffered by victims and communities as a result of the crimes within the jurisdiction of the courts. Hybrid tribunals and specialised chambers that provide for victim participation as part of the legal process should take measures to formally liaise with civil society organisations to ensure that there are open channels of communication between the institution and the organisations working with victims. Institutions should make clear, accurate and standardised information available to organisations working with victims about their mandate, participation rights and application procedures.

Institutions should also take measures to reach out to a diverse group of organisations in respect of their geographical location and the types of harms suffered by victims. For example, well-resourced organisations may have greater ability to access the tribunal, but may not have contacts in all relevant locations where potential victim participants live. Likewise, particular groups of victims, such as victims of sexual violence and children, may have less access and representation in prominent civil society groups. Internal efforts on the part of the institution are important to equalise access for victims to participation, legal representation and reparations.

### *Managing reparations and expectations for reparations*

As with victim participation, many hybrid courts and specialised chambers have included or acknowledged a right to reparations, but do not have clear procedures in the legal framework for their delivery, including for determining eligibility for and modalities of reparations, and for identifying sources for funding reparations. As the majority of the hybrid tribunals and specialised chambers discussed in this report have yet to reach the reparations stage of proceedings, there is limited practice to draw on in respect of how the reparations phase of a trial for international crimes may be handled.

Some institutions, such as the STL and KSC, create the possibility of a two-step reparations process where victims may take the court's judgment to a domestic court and bring a suit for reparations in that venue. In this regard, victims who may have had access to legal aid and legal representation before the tribunal may need to find additional resources and support to pay for counsel for the next stage of the legal process, in order for the reparations regime to have any meaning. In such scenarios, victims may also be limited in their access to reparations by lack of precedent for such awards in the domestic court, lack of assets to implement any orders on the part of the convicted person and the additional time necessary to go through the legal proceedings.

The time-limited nature of some courts may also create issues for reparations, in particular where there are ongoing orders that require judicial resolution and where victims' services are provided or overseen in part by the registry. For example, an institution such as the EAC with a limited mandate

and budget may not have the possibility for the trial or appeals judges to remain on the bench for a reparations phase. Experience at the ICC in the *Lubanga* case, however, has shown that a reparations order may give rise to a prolonged appeals process, meaning that both judges and counsel for victims and defence remain engaged long after the appeal on the judgment has been delivered. While there is now precedent for ‘residual mechanisms’ to cover some long-term functions of an international tribunal following the end of its mandate, there is no practice to date of a residual mechanism specifically to deal with victims’ issues such as reparations.<sup>403</sup> Victims’ counsel often act as the link between the court and the victims, which also raises issues of longer-term funding for legal aid and legal representation.<sup>404</sup>

Clarity in the legal framework about reparations, and clear messaging from the court and civil society, is essential to provide victims with a realistic expectation of the procedure and potential benefits of reparations. Finally, the majority of hybrid tribunals and specialised chambers have lacked any provision for creating and funding a trust fund for victims to provide reparations in the event of an award against an indigent person and/or reparations of an appropriate scale for a large group of victims. The lack of a trust fund may make reparations essentially undeliverable. The creation and funding of a trust fund must be considered in the formative stages of an institution that includes the possibility of reparations.

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403 See, eg, the IRMCT. However, because the ICTY and ICTR did not provide for victim participation or reparations, the IRMCT does not set any precedents for how those may be addressed in a residual mechanism.

404 FIDH, ‘The Bemba Case: Heavily criticized, the ICC must maintain victims’ legal representation as the establishment of assistance programmes for victims is awaited’ (October 2018), [www.fidh.org/en/region/Africa/central-african-republic/the-bemba-case-heavily-criticised-the-icc-must-maintain-victims-legal](http://www.fidh.org/en/region/Africa/central-african-republic/the-bemba-case-heavily-criticised-the-icc-must-maintain-victims-legal), accessed 30 October 2018.

# Appendix: Support structures for defence and victims' counsel in international criminal courts and tribunals, hybrid tribunals and specialised chambers

Institution	Defence counsel administration and support	Victim counsel administration and support
<p><b>ICTY (1993–2017)</b></p>	<p><b>Registry</b>            Defence support functions are provided by a number of offices within the ICTY registry. The ICTY structure puts the Registrar in charge of maintaining a list of counsel.<sup>1</sup></p> <p><b>Court Support Services Section (CSSS)</b>            The CSSS is a section within the registry mandated to provide administrative and legal support to court proceedings before the Tribunal. This support includes the provision of legal aid through the assignment of defence counsel.</p> <p>The Office for Legal Aid and Defence (OLAD) is one of the four units comprising the CSSS, and is the one in charge of providing legal aid.<sup>2</sup></p> <p><b>Office for Legal Aid and Detention Matters (OLAD)</b><sup>3</sup>            The mandate of the OLAD is to ensure the accused's and suspect's right to counsel, including the assignment and remuneration of counsel to those who cannot afford it (indigent defendants), as well as to guarantee that the facilities provided to the defence comply with the applicable policy and the law of the Tribunal.</p> <p><b>Advisory Panel</b><sup>f</sup>            The Advisory Panel is a body that was established to assist and provide advice to the Registrar, the President of the Tribunal and to associations of counsel with all matters relating to defence counsel. For instance, with relevant rules of the RPE affecting rights of suspects and accused, the Directive on the Assignment of Defence Counsel, the code of conduct, and the policies and practice of the Tribunal.</p> <p>Panel members must be selected from representatives of professional associations and from counsel who have appeared before the ICTY and who have recognised professional legal</p>	<p>No victim participation/victims' counsel.</p>

	<p>experience. The panel shall be formed by representatives of different legal systems.</p> <p><b>Association of Defence Counsel practising before the ICTY (ADC-ICTY)<sup>5</sup></b></p> <p>The ADC-ICTY<sup>6</sup> was an independent and external organisation created with the aim of ensuring a higher quality defence for the accused and to collectively represent all defence counsel before the organs of the ICTY.</p> <p>Counsel, among other requirements, must be full members of a 'good standing of an association of counsel practicing at the Tribunal recognised by the Registrar' in order to qualify for Rule 45 list of counsel.<sup>7</sup></p> <p>Functions:<sup>8</sup></p> <ul style="list-style-type: none"> <li>- support the function, efficiency and independence of defence counsel practising before the ICTY;</li> <li>- promote and ensure the proficiency and competence of defence counsel;</li> <li>- offer advice to the President, the Judges and the Registrar of the international Tribunal in relation to modifications to the ICTY Rules of Procedure and Evidence and all regulations, practice directives and policies related to the work of defence counsel; and</li> <li>- oversee the performance and professional conduct of defence counsel, in so far as it is relevant to their duties, responsibilities and obligations pursuant to the ICTY Statute, the Rules of Procedure and Evidence, the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, the Directive on the Assignment of Defence Counsel and the Detention Rules and Regulations of the ICTY.</li> </ul>	
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<p><b>ICTR (1994–2016)</b></p>	<p><b>Registry</b> Support for the defence was established and organised through the registry.<sup>9</sup></p> <p><b>Defence Counsel and Detention Management Section (DCDMS)</b><sup>10</sup> The DCDMS was created as part of the registry to liaise with and facilitate the work of defence counsel. It is responsible for matters related to detention of accused and, as of July 2012, it is also in charge of the supervision of all sentences pronounced by the Tribunal.</p> <p>The DCDMS also compiled and maintained a list of qualified defence counsel. The indigent accused selected from this list of qualified practitioners or was assigned one by the Registrar. Defence counsel at the ICTR were independent contractors.</p> <p>Functions:</p> <ul style="list-style-type: none"> <li>- provide competent defence counsel to indigent suspects and accused detained under the authority of the ICTR;</li> <li>- compile and maintain a List of Defence Counsel;<sup>11</sup></li> <li>- brief counsel on the functioning and jurisdiction of the ICTR;</li> <li>- collectively represent counsel with the registry;</li> <li>- counsel remuneration; and</li> <li>- oversee the work of the UN Detention Facility.</li> </ul>	<p>No victim participation/victims' counsel.</p>
<p><b>SCSL (2002–2013)</b></p>	<p><b>Registry</b> <b>Office of the Principle Defender (OPD)</b> The defence office was a permanent office administratively part of the registry,<sup>12</sup> but with 'considerable independence'.<sup>13</sup></p> <p>The OPD was tasked with maintaining a list of qualified and experienced counsel to represent indigent suspects and accused persons appearing before the Special Court. It also interacted with different units within the registry, OTP and chambers, on</p>	<p>No victim participation/victims' counsel.</p>

	<p>issues affecting the rights and detention conditions of the accused or convicts.<sup>14</sup></p> <p>Functions:<sup>15</sup></p> <ul style="list-style-type: none"> <li>- provide advice, assistance and representation to suspects and accused through initial legal advice and assistance by duty counsel;</li> <li>- provide legal assistance as ordered by the court (if the accused does not have sufficient means to pay for it);</li> <li>- ensure adequate facilities for counsel in the preparation of the defence; and</li> <li>- assign counsel and duty counsel.</li> </ul>	
<p><b>ECCC (2005–ongoing)</b></p>	<p><b>Office of Administration</b><sup>16</sup></p> <p><b>Defence Support Section (DSS)</b><sup>17</sup></p> <p>The DSS is a section set up by the Office of Administration only autonomous from the office with regards to the substantive defence matters set out in Rule 11 (outlined below).</p> <p>Functions:<sup>18</sup></p> <ul style="list-style-type: none"> <li>- draft and manage the list of counsel;</li> <li>- provide lawyers with a list of national and foreign personnel eligible to assist defence teams for indigent persons; and</li> <li>- offer basic legal assistance and support to lawyers, including legal and document research, as well as trainings in cooperation with the Bar Association of the Kingdom of Cambodia.</li> </ul> <p><b>Bar Association of the Kingdom of Cambodia (BAKC)</b><sup>19</sup></p> <p>The BAKC is an entity external to and independent from the court. The BAKC cooperates with the DSSS, for example in consultations for the adoption of administrative regulations and in the offering of trainings to counsel. In addition, national and international lawyers must be registered by the BAKC as a</p>	<p><b>Office of Administration</b></p> <p><b>Victims’ Support Section (VSS)</b></p> <p>The VSS is established by the Office of Administration,<sup>23</sup> and provides assistance to victims in: (a) lodging complaints, under the supervision of the Co-Prosecutors; and (b) submitting civil party applications, under the supervision of the co-investigating judges.<sup>24</sup> In addition, under the supervision of the co-investigating judges or the Pre-trial Chamber, the VSS shall present the list of lawyers and victims associations to victims or civil parties.<sup>25</sup></p> <p>Functions:<sup>26</sup></p> <ul style="list-style-type: none"> <li>- assist victims in submitting civil party applications;</li> <li>- maintain a list of foreign and national lawyers registered with the BAKC who wish to represent victims or victims’ associations before the ECCC;</li> <li>- receive, verify and translate applications by foreign lawyers to represent civil parties before the ECCC and forward completed applications to BAKC for registration;</li> <li>- administer applications for admission to the list of victims’ associations approved to act on behalf of civil parties before the ECCC;</li> </ul>

	<p>requirement to appear in the list of counsel authorised to appear before the ECCC.</p> <p>Functions:<sup>20</sup></p> <ul style="list-style-type: none"> <li>- cooperate with the DSS in adopting the administrative regulations;<sup>21</sup></li> <li>- admit foreign lawyers for the purpose of practising before the ECCC;<sup>22</sup> and</li> <li>- organise trainings in collaboration with the DSS.</li> </ul>	<ul style="list-style-type: none"> <li>- facilitate legal representation;</li> <li>- assist and support civil party and complainants' attendance in court proceedings; and</li> <li>- provide legal and administrative support to the civil party lawyers.</li> </ul> <p><b>Civil Party Co-Lead Section</b> The Office of Administration established the Civil Party Co-lead Section, which is autonomous regarding all substantive matters in relation to civil parties.<sup>27</sup></p> <p>Functions:</p> <ul style="list-style-type: none"> <li>- ensure the effective organisation of civil party representation during the trial stage and beyond, while balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context;<sup>28</sup> and</li> <li>- seek the views of the civil party lawyers to reach consensus in order to coordinate representation of civil parties at trial.<sup>29</sup></li> </ul> <p><b>Bar Association of the Kingdom of Cambodia (BAKC)</b> National civil party lawyers must be members of the BAKC in order to be accepted on to the list of lawyers maintained by the VSS eligible to be paid by the ECCC.</p>
<p><b>ICC (2002–ongoing)</b></p>	<p><b>Registry</b> <b>Counsel Support Section</b> The Counsel Support Section is the focal point of a number of services offered by the registry to all appointed counsel. '[I]t is established to provide institutional backing to external counsel and their team members.'<sup>30</sup></p> <p>Functions:<sup>31</sup></p> <ul style="list-style-type: none"> <li>- offer interpretation and translation services;</li> <li>- provide training for the e-court technology system;</li> <li>- offers office space at the seat of the court equipped with the necessary office supplies;</li> </ul>	<p><b>Registry</b> The Registrar is responsible for a number of functions relating to victims and witnesses participating in the proceedings.</p> <p>In relation to the victims, the Registrar has the following functions:<sup>38</sup></p> <ul style="list-style-type: none"> <li>- provide notice or notification to victims or their legal representatives;</li> <li>- assist them in obtaining legal advice and organise their legal representatives, and provide their legal information, including such facilities as may be necessary for the direct performance of their duty, for</li> </ul>



	<ul style="list-style-type: none"> <li>- provide counsel and their teams with assistance and support in the execution of their investigative requirements; and</li> <li>- liaise with national authorities and the organisation of local transport.</li> </ul> <p><b>Office of Public Counsel for the Defence (OPCD):</b> The OPCD is an independent office of the registry in terms of its substantive functions, but falls within the registry for administrative purposes.<sup>32</sup> These duties revolve around two main pillars: representation and assistance to defence teams.<sup>33</sup></p> <p>Functions:<sup>34</sup></p> <ul style="list-style-type: none"> <li>- represent and protect the rights of the defence during the initial stages of an investigation;</li> <li>- provide support and assistance to defence counsel and to persons entitled to legal assistance, either by providing legal advice, or by appearing before a chamber in respect of specific issues;</li> <li>- act as <i>ad hoc</i> counsel if appointed by a chamber, or as duty counsel if selected by a suspect who has not yet secured permanent legal representation; and</li> <li>- in the event of a dispute between the defendant and his or her defence counsel, the Registrar may offer mediation and the OPCD may be requested to act as a mediator.</li> </ul> <p><b>International Criminal Court Bar Association (ICCBA)</b> The ICCBA is an independent, professional association established in 2016 and recognised by the Assembly of States Parties to the Rome Statute in November 2016. It is registered as a non-profit foundation under the laws of the Netherlands and it is primarily funded by member subscriptions.<sup>35</sup></p> <p>The ICCBA represents the interests of counsel and legal support staff representing victims, defendants and other actors before the ICC.<sup>36</sup></p>	<p>the purpose of protecting their rights during all stages of the proceedings;</p> <ul style="list-style-type: none"> <li>- assist them in participating in the different phases of the proceedings; and</li> <li>- keep a special register for victims who have expressed their interest to participate in a case.</li> </ul> <p>In relation to victims and witnesses the Registrar has the following functions:<sup>39</sup></p> <ul style="list-style-type: none"> <li>- inform them of their rights, and of the existence and functions of the Victims and Witnesses Unit; and</li> <li>- ensure that they are informed of the relevant decision of the court that may have an impact on their interests.</li> </ul> <p><b>Victims and Witnesses Unit</b> A unit operating within the registry. It provides, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the court, and others who are at risk on account of testimony given by such witnesses.<sup>40</sup></p> <p><b>Victim Participation and Reparations Section (VPRS)</b> The VPRS informs victims of their rights relating to participation and reparations in the ICC, and assists them in the process of applying for participation in proceedings and reparations. It also supports victims and the chamber in finding legal representation of victims during the proceedings.<sup>41</sup></p> <p><b>Office of Public Counsel for Victims (OPCV)</b> The OPCV is an independent office falling within the registry solely for administrative purposes. It provides legal representation to victims throughout proceedings, as well as assistance and support to external lawyers appointed by victims.<sup>42</sup></p>
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	<p>Functions:<sup>37</sup></p> <ul style="list-style-type: none"> <li>- support the functions, efficiency and independence of counsel practising before the ICC;</li> <li>- promote and uphold the highest professional standards and ethics of counsel, relevant to their duties;</li> <li>- promote and facilitate the proficiency and competence of counsel in the field of advocacy, procedural and substantive international criminal law and information technology systems relevant to their function before the ICC;</li> <li>- facilitate counsel in having the necessary support, assistance and information from the organs and offices of the ICC to enable them to provide effective legal representation;</li> <li>- assist in resolving legal issues impacting counsel;</li> <li>- advocate for the enhancement of the rights of clients and counsel before the ICC;</li> <li>- establish channels of communication and hold consultations with the Registrar on matters related to counsel and their staff in the performance of their duties before the ICC; and</li> <li>- engage with counsel at other international, internationalised or hybrid courts or tribunals, or with a bar or association of counsel that has been established at such a court or tribunal on professional matters of mutual benefit and concerns.</li> </ul>	<p>Functions:<sup>43</sup></p> <ul style="list-style-type: none"> <li>- provides support and assistance to victims and to legal representatives of victims, including legal research and advice;</li> <li>- appears before a chamber in respect of specific issues; and</li> <li>- can also represent a victim or a group of victims in ICC proceedings.</li> </ul> <p><b>International Criminal Court Bar Association (ICCBA)</b></p> <p>The same functions performed by the ICCBA in relation to the defence also apply in the case of victims. In addition, the ICCBA also has a Victims Committee, which is mandated to take into consideration the interests of victims and provide proposals to the Legal Advisory Committee and advise the Executive Council and the General Assembly on all matters affecting victims' counsel.<sup>44</sup></p> <p>Functions:<sup>45</sup></p> <ul style="list-style-type: none"> <li>- contact all ICC victims' counsel who are involved in ongoing proceedings with a view to receiving information and looking at particular problems that they face in court;</li> <li>- follow up on legal aid issues relating to victims' counsel;</li> <li>- follow up on the issue of victims' legal representation and common legal representation;</li> <li>- follow up on the logistical support that is needed by victims' teams;</li> <li>- create a 'System of Updates' on ICC decisions and rulings that concern victims and the work of victims' counsel;</li> <li>- organise a non-public 'Workshop/Seminar/Round-Table', including ASP Presidency, ICC Presidency, ICC judges of all divisions, ICC Registry, ICCBA Presidency and ICCBA VC, to discuss both the difficulties caused by the judges' approach to victims' legal representation</li> </ul>
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<p><b>STL (2009–ongoing)</b></p>	<p><b>Defence Office</b> The Defence Office, together with the chambers, the Office of the Prosecutor and the registry, is one of the four independent organs of the STL. Its mandate is to ensure the protection of the rights of an accused and to make these rights effective.</p> <p>The three main responsibilities of the Defence Office are: (1) administration of the Office; (2) support for defence counsel; and (3) effective protection of the defence rights and the accused.<sup>46</sup></p> <p>Functions:<sup>47</sup></p> <ul style="list-style-type: none"> <li>- adopt a Directive on the appointment and assignment of defence counsel;</li> <li>- draw up and maintain the list of defence counsel, as well as a list of experts, investigators, legal assistants and case managers to assist defence counsel;</li> <li>- assign defence counsel in a number of situations;<sup>48</sup></li> <li>- create a legal aid policy in consultation with the President and Registrar;</li> <li>- act as representative of the Defence Office before bar associations and other professional bodies;</li> <li>- upon the request of counsel or <i>proprio motu</i>, provide adequate assistance and support to defence counsel and their staff;<sup>49</sup></li> <li>- monitor and ensure quality of representation and ensure that the representation meets internationally recognised standards of practice and is consistent with relevant STL provisions;<sup>50</sup> and</li> <li>- take action in the event of inadequate representation.<sup>51</sup></li> </ul>	<p>since 2012 and the future of victims’ representation at the ICC; and</p> <ul style="list-style-type: none"> <li>- organise training sessions on victims’ representation.</li> </ul> <p><b>Registry</b> The Judicial Division of the registry provides the necessary support to ensure that hearings run effectively and efficiently. This division includes the Victim’s Participation Unit (VPU), among other units.<sup>52</sup></p> <p><b>Victim Participation Unit (VPU)</b><sup>53</sup> The VPU is a unit set up by the Registrar, which has the mandate of assisting the victims in participating in the proceedings.</p> <p>Functions:</p> <ul style="list-style-type: none"> <li>- inform the victims of their rights and of relevant decisions of the tribunal that might have an impact on their rights;</li> <li>- receive applications from victims seeking to participate in the proceedings;</li> <li>- provide administrative and logistical assistance to the victims and their legal representatives;</li> <li>- draw up and maintain a list of victims’ counsel;</li> <li>- administer and monitor the provision of funds to the legal representatives of indigent victims;</li> <li>- on request of a victim or their legal representative or <i>proprio motu</i>, provide adequate assistance and support to the victim or his legal representative, including legal research, memoranda and other advice as necessary;</li> <li>- provide professional training to legal representatives of victims participating in the proceedings; and</li> <li>- exercise, <i>mutatis mutandis</i>, in respect of victims’ legal representatives, the powers granted to the Head of Defence Office under Rule 57(G) and, where appropriate, request the Registrar to exercise his powers under Rule 51(G).</li> </ul>
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<p><b>Uganda ICD (2008–ongoing)</b></p>	<p><b>Registry</b> The Registrar has ‘responsibilities in relation to rights of the defence’.<sup>54</sup></p> <p>Functions:<sup>55</sup></p> <ul style="list-style-type: none"> <li>- organise the staff of the registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial;</li> <li>- ensure adequate time and facilities for the preparation of the defence and the right of the accused person to communicate freely;</li> <li>- assign a duty counsel, at state expense where the case is committed, to participate during the pre-trial and trial proceedings;</li> <li>- provide support, assistance and information to all defence counsel appearing before the court and support for professional investigators necessary for the efficient and effective conduct of the defence;</li> <li>- be responsible for the practical organisation and management of the disclosure of evidence;</li> <li>- upon receiving the record of committal proceedings, assist the accused person in obtaining legal advice and the assistance of government-paid legal counsel;</li> <li>- inform the prosecution and the judges on relevant defence-related issues;<sup>56</sup></li> <li>- provide the defence with facilities for the direct performance of the duties of the defence;</li> <li>- enforce any orders of the court that affect the welfare of the accused; and</li> <li>- facilitate the dissemination of information and case law of the court to defence counsel.</li> </ul>	<p><b>Registry</b><sup>57</sup> The Registrar’s functions in relation to victims and witnesses are the following:</p> <p>Functions:</p> <ul style="list-style-type: none"> <li>- provide notice or notification to victims or their counsel;</li> <li>- assist victims to obtain legal advice and organise their legal representation;</li> <li>- assist victims in participating in the different phases of the proceedings;</li> <li>- takes gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings;</li> <li>- informs them of their rights and of any relevant decision of the court that might have an impact on their interest; and</li> <li>- at judgment and sentencing, the Registrar will assist the trial judge/panel to choose a common legal counsel for groups of victims.<sup>58</sup></li> </ul>
<p><b>Extraordinary African Chamber/ Senegal (2013–2017)</b></p>	<p><b>Administrator</b> The Administrator is responsible for the non-judicial aspects of the administration and the servicing of the Extraordinary African Chambers. Along with the Presidents of the chambers and the office of the Prosecutor, the Administrator shall also be</p>	<p><b>Administrator</b> There is no office or unit dealing specifically with victim representation. The participation of victims in legal proceedings is mainly through civil proceedings. Victims may stand as the</p>

	<p>responsible for managing the human resources of the Extraordinary African Chambers.<sup>59</sup></p> <p><b>Defence Office</b> While the Additional Agreement between the government of the Republic of Senegal and the African Union<sup>60</sup> provides a framework for the establishment of a defence office within the EAC, as a separate and independent organ, the defence office was never created.</p>	<p>civil party during the investigation phase, and they may appear individually or through lawyers that represent them.<sup>61</sup></p> <p>In relation to the victims, the Administrator is in charge of the following.<sup>62</sup></p> <p>Functions:</p> <ul style="list-style-type: none"> <li>- provide the victims or a group of victims the choice of having one or more joint representatives;</li> <li>- if the victims are unable to select one or more joint representatives within the time allotted by the relevant chamber, the chamber may request that the Administrator appoint one or several representatives; and</li> <li>- if a group of victims does not have the means to pay a joint representative, it may request assistance from the Administrator who shall rule on the request.</li> </ul>
<p><b>CAR Special Criminal Court (2015–ongoing) (set-up phase)</b> <i>(Based on IBA informal translations from the French)</i></p>	<p><b>Office of the Corps Special D’Avocats</b> The Office of the Corps Special D’Avocats is an entity attached to the court, independent from the registry. The Corps is represented by the Chief of the Corps Special D’Avocats.<sup>63</sup></p> <p>Functions:<sup>64</sup></p> <ul style="list-style-type: none"> <li>- establish and preside, in consultation with the Bar of CAR, the organ responsible for authorising lawyers to join the Special Corps;</li> <li>- draw up and maintain the list of lawyers that have joined the Special Corps;</li> <li>- temporarily assign a lawyer from the Special Corps to a suspect, accused or indigent accused to deal with any urgent matter;</li> <li>- adopt the rules defining the criteria for the payment of fees to duty counsel;</li> <li>- provide all necessary legal and administrative assistance to lawyers from the Special Corps of lawyers ; and</li> </ul>	<p><b>Registry</b> The Registry includes a victim participation and reparation service under the authority of the Deputy Chief Clerk.<sup>66</sup></p> <p><b>Office of the Corps Special D’Avocats</b> The Office of the Corps Special D’Avocats will also provide victims with free assistance of counsel.<sup>67</sup></p>

<p><b>Kosovo Specialist Chamber (2015–ongoing) (set-up phase)</b></p>	<ul style="list-style-type: none"> <li>- commit <i>ex officio</i> a lawyer from the Special Corps at the request of a suspect, accused or indigent accused.</li> </ul> <p><b>Central African Bar Association</b> All national members of the court must be lawyers in one of the bar associations of the Central African Republic.<sup>65</sup></p> <p><b>Registry</b> The Registrar is responsible for the administration and servicing of the Specialist Chambers and other necessary functions, including those related to the defence.</p> <p><b>Defence Office</b> The Defence Office is established within the registry.<sup>68</sup></p> <p>Functions:</p> <ul style="list-style-type: none"> <li>- adopt a Directive on Counsel and a Code of Professional Conduct, with approval of the President, who may consult with judges, Independent Representative Body of Specialist Counsel or other relevant outside bodies;<sup>69</sup></li> <li>- admit counsel to the List of Specialist Counsel or to the List of Victims' Counsel if they fulfil the requirements set out in the Directive on Counsel;<sup>70</sup></li> <li>- appoint or assign counsel from the List of Specialist Counsel to a suspect or accused in accordance with the Directive on Counsel;<sup>71</sup></li> <li>- where a suspect or accused fails to select counsel or chooses counsel not eligible to the List of Specialist Counsel, the Registrar or, where seized, the panel shall assign Specialist Counsel to them;<sup>72</sup> and</li> <li>- manage a system of legal aid for representation of indigent or partially indigent suspects and/or accused who do not have sufficient financial means.<sup>73</sup></li> </ul> <p><b>Ombudsperson</b> The registry will also include the Ombudsperson's Office, which shall act independently to monitor, defend and protect the fundamental rights and freedoms enshrined in Chapter II of the</p>	<p><b>Registry</b> The registry includes, among other offices, the Victims Participation Office.<sup>79</sup> The Registrar assigns counsel for common representation from the List of Victims' Counsel after having 'consulted with the victims participating in the proceedings and taken their views and interests into account'.<sup>80</sup></p> <p><b>Victims' Participation Office</b> The Victims' Participation Office will provide victim groups with counsel to represent and assist them, as well as provide them with advice and other services associated with the work of the Specialist Chambers. No other victim representation is permitted.<sup>81</sup></p> <p>Functions:</p> <ul style="list-style-type: none"> <li>- register and assess the applications and file them before the panel of judges together with a recommendation on admissibility and common representation, and a request for protective measures under Rule 80;<sup>82</sup> and</li> <li>- the panel, after having consulted the Victims' Participation Office, shall decide whether to divide victims participating in the proceedings into groups having common representation, and taking into consideration: any conflicting interests that may hinder common representation; any similar interest that may facilitate common representation; and the rights of the Accused and the interest of a fair and expeditious trial.<sup>83</sup></li> </ul>
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	<p>Constitution of persons interacting with the Specialist Chambers and Specialist Prosecutor’s Office.<sup>74</sup></p> <p>Functions:<sup>75</sup></p> <ul style="list-style-type: none"> <li>- intervene only in legal proceedings in instances of unreasonable delays;</li> <li>- conduct inquiries into complaints received from any person asserting a violation of their rights by the chambers of the Prosecutor’s office;</li> <li>- enter and inspect without notice the Specialist Chambers’ detention facilities;</li> <li>- facilitate mediation and reconciliation in order to resolve a complaint; and</li> <li>- make recommendations to the President or Prosecutor on matters related to their functions.</li> </ul> <p><b>Independent Representative Body of Specialist Counsel</b></p> <p>The Independent Representative Body of Specialist Counsel is established by Article 19(4) of the KSC Law, with the aim to represent the interests of Specialist Counsel before the Specialist Chambers.<sup>76</sup> The Rules of Procedure and Evidence award this body the ability to contribute to the amendment of the Rules,<sup>77</sup> as well as a consulting capacity for the implementation of the Directives on Counsel.<sup>78</sup></p> <p>At the time of writing, the details of this representative bar association for counsel at the KSC are still being considered.</p>	<p><b>Independent Representative Body of Specialist Counsel</b></p> <p>This body is also envisaged to represent the interests of victims’ counsel before the Specialist Chambers.</p>
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1	ICTY RPE, Rule 45(B), <a href="http://www.icty.org/en/about/registry/legal-aid">www.icty.org/en/about/registry/legal-aid</a> , accessed 13 September 2018.	44	ICC, Victims Committee, <a href="http://www.iccba-abcpi.org/victimcommittee">www.iccba-abcpi.org/victimcommittee</a> , accessed 17 September 2018.
2	ICTY, Organisational Chart, <a href="http://www.icty.org/en/about/tribunal/organisational-chart">www.icty.org/en/about/tribunal/organisational-chart</a> , accessed 13 September 2018.	45	ICCBA, 'Annual Report 2017/2018 of the ICCBA Victims Committee', 1–2.
3	ICTY, Court Support Services, <a href="http://www.icty.org/en/about/registry/court-support-services">www.icty.org/en/about/registry/court-support-services</a> , accessed 13 September 2018.	46	STL, Defence Office, <a href="http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/defence-2/defence-office-69">www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/defence-2/defence-office-69</a> , accessed 17 September 2018.
4	ICTY RPE, Rule 44(D) and Directive on the Assignment of Defence Counsel (Directive No 1/94), Article 33(A) (i).	47	STL RPE, Rule 57.
5	ICTY, Defence, <a href="http://www.icty.org/en/about/defence">www.icty.org/en/about/defence</a> , accessed 14 September 2018.	48	Including for short-term and urgent matters; to act temporarily for an accused; for indigent accused; appointing co-counsel at request of lead counsel; confirming suitability of, and formally appointing, privately retained counsel; assigning assistance and support for self-representing accused upon request; assigning counsel for the purpose of proceedings <i>in absentia</i> . STL RPE, Rule 57(D); Directive on Assignment of Defence Counsel.
6	Since the closure of the ICTY, the ADC-ICTY is now the ADC-ICT, (Association of Defence Counsel practising before the International Courts and Tribunals), <a href="http://www.adc-ict.org/about-us">www.adc-ict.org/about-us</a> , accessed 8 October 2018.	49	Including legal research and memoranda and other advice; adequate facilities to defence counsel and persons entitled to legal assistance in the preparation of a case; continuing professional training to defence counsel; any additional assistance ordered by a judge or chamber. STL RPE, Rule 57(E).
7	ICTY RPE, Rule 44(A) (iii).	50	Including by: subject to lawyer–client privilege and confidentiality monitoring performance and work of counsel, where valid reasons exist to do so; ensuring that the appropriate advice is given to the lead counsel to an effective defence of the suspect or accused; and in exceptional circumstances and after considering the opinion of the lead counsel, invite the suspect or accused to provide his views on the adequacy and effectiveness of his legal representation and the performance of the defence counsel. STL RPE, Rule 57(G).
8	ADC-ICTY Manual on Developed Practices (UNICRI, 2009) 205.	51	Including by: withholding fees pending resolution of the matter; making representations to a judge or chamber for the removal of counsel or for other measures intended to ensure the effective representation of the suspect or accused; initiating disciplinary proceedings against the counsel concerned. STL RPE, Rule 57(H).
9	IBA, <i>Fairness at the International Criminal Court</i> (August 2011), 42.	52	STL, Registry, <a href="http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/registry-stl">www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/registry-stl</a> , accessed 17 September 2018.
10	ICTR, Registry, <a href="http://unictr.irmct.org/en/tribunal/registry">http://unictr.irmct.org/en/tribunal/registry</a> , accessed 14 September 2018.	53	STL RPE, Rule 51.
11	ICTR RPE, Rule 45(A).	54	ICD RPE, Rule 52.
12	SCSL RPE, Rule 45.	55	ICD RPE, Rule 52.
13	SCSL, Office of the Principal Defender, <a href="http://www.rscsl.org/defence.html">www.rscsl.org/defence.html</a> , accessed 14 September 2018.	56	ICD RPE, Rule 52(3) (f).
14	SCSL, Office of the Principal Defender, see <a href="http://www.rscsl.org/defence.html">www.rscsl.org/defence.html</a> , accessed 14 September 2018.	57	ICD RPE, Rule 51.
15	SCSL RPE, Rule 45.	58	ICD RPE, Rule 46(4).
16	The Office of the Administration is the equivalent of the registry; see IBA, <i>Fairness at the International Criminal Court</i> (August 2011), 42.	59	EAC Statute, Article 15.
17	ECCC, Internal Rules (Rev 9), Rule 11.	60	Additional Agreement Between the Government of the Republic of Senegal and The African Union Relating to the Statute of the Extraordinary African Chambers for the Prosecution of International Crimes Committed In Chad During the Period from 7 June 1982 to 1 December 1990, 24 July 2014, <a href="http://www.hrw.org/sites/default/files/related_material/Additional%20Agreement%20to%20the%20Statute%20of%20the%20Extraordinary%20African%20Chambers%2028July%2024%2C%202014%29.pdf">www.hrw.org/sites/default/files/related_material/Additional%20Agreement%20to%20the%20Statute%20of%20the%20Extraordinary%20African%20Chambers%2028July%2024%2C%202014%29.pdf</a> , accessed 19 September 2018.
18	ECCC, Internal Rules (Rev 9), Rule 11.	61	EAC, 'Victim Participation', <a href="http://forumchambresafricaines.org/participation-2/?lang=en">http://forumchambresafricaines.org/participation-2/?lang=en</a> , accessed 19 September 2018.
19	ECCC, Internal Rules (Rev 9), Rule 11.	62	EAC Statute, Article 14.
20	ECCC, Internal Rules (Rev 9), Rule 11.	63	CAR SCC, 'Guide de Sensibilisation a l' usage des organisations de la societe civile -1' (1st edn 2017).
21	ECCC Internal Rules (Rev 9), Rule 11(2) (a).	64	CAR SCC Draft RPE, Article 50.
22	ECCC Internal Rules (Rev 9), Rule 22; ECCC, DSS Administrative Regulation, Regulations 2.2 and 3.2.	65	CAR SCC Loi Organique 15.003, Article 21.
23	ECCC, Internal Rules (Rev 9), Rule 12.	66	CAR SCC Draft RPE, Article 61(A).
24	ECCC, Internal Rules (Rev 9), Rule 12 bis 1(a) (b).	67	CAR SCC Draft RPE, Article 61(D) (a).
25	ECCC, Internal Rules (Rev 9), Rule 12 bis 1(g).	68	KSC Law, Article 37(7).
26	ECCC, Internal Rules (Rev 9), Rule 12(1).	69	KSC RPE, Rule 23(3).
27	ECCC Internal Rules (Rev 9), Rule 12.	70	KSC RPE, Rule 25(2).
28	ECCC Internal Rules (Rev 9), Rule 12 ter(1).	71	KSC RPE, Rule 26(1).
29	Internal procedures shall be developed by the Civil Party Lead Co-Lawyers, in consultation with Civil Party Lawyers, for this purpose; ECCC Internal Rules (Rev 9), Rule 12 ter(3).	72	KSC RPE, Rule 26(3).
30	ICC, The Defence, ICC-PIDS-FS-08-001/13_Eng, <a href="http://www.icc-cpi.int/iccdocs/PIDS/publications/DefenceEng.pdf">www.icc-cpi.int/iccdocs/PIDS/publications/DefenceEng.pdf</a> , accessed 19 September 2018.	73	KSC RPE, Rule 23(6).
31	ICC, The Defence, ICC-PIDS-FS-08-001/13_Eng, <a href="http://www.icc-cpi.int/iccdocs/PIDS/publications/DefenceEng.pdf">www.icc-cpi.int/iccdocs/PIDS/publications/DefenceEng.pdf</a> , accessed 19 September 2018.	74	KSC RPE, Rule 28(2).
32	ICC, The Defence, ICC-PIDS-FS-08-001/13_Eng, <a href="http://www.icc-cpi.int/iccdocs/PIDS/publications/DefenceEng.pdf">www.icc-cpi.int/iccdocs/PIDS/publications/DefenceEng.pdf</a> , accessed 19 September 2018; ICC Regulations of the Court, ICC-BD/01-01-04, Adopted by the judges of the court on 26 May 2004, Regulation 77.	75	KSC RPE, Rule 29.
33	William St-Michel et al, 'Strengthening the Role at the International Criminal Court: Reflections on How Defence is and Can Be Supported for Greater Effectiveness and Efficiencies' (2018) 18(3) <i>International Criminal Law Review</i> , 532.	76	KSC Law, Article 19(4), KSC RPE, Rule 2(1) 'Use of Terms'.
34	ICC, The Defence, ICC-PIDS-FS-08-001/13_Eng, <a href="http://www.icc-cpi.int/iccdocs/PIDS/publications/DefenceEng.pdf">www.icc-cpi.int/iccdocs/PIDS/publications/DefenceEng.pdf</a> , accessed 19 September 2018.	77	KSC RPE, Rule 7(3) and (4).
35	ICCBA, Our Mission, <a href="http://www.iccba-abcpi.org/aboutus">www.iccba-abcpi.org/aboutus</a> , accessed 17 September 2018.	78	KSC RPE, Rule 23(3).
36	ICC, Defence, <a href="http://www.icc-cpi.int/about/defence">www.icc-cpi.int/about/defence</a> , accessed 17 September 2018.	79	KSC Law, Article 24(1) (b).
37	ICCBA Constitution, Article 2	80	KSC RPE, Rules 26(2) and 113(7).
38	ICC RPE, Rule 16(1) and (3).	81	KSC RPE, Rule 22(5).
39	ICC RPE, Rule 16(2).	82	KSC RPE, Rule 113(2).
40	Rome Statute, Article 43(6).	83	KSC RPE, Rule 113(8).
41	ICC, Victims, <a href="http://www.icc-cpi.int/about/victims">www.icc-cpi.int/about/victims</a> , accessed 17 September 2018.		
42	ICC, Victims, <a href="http://www.icc-cpi.int/about/victims">www.icc-cpi.int/about/victims</a> , accessed 17 September 2018.		
43	ICC, 'Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court', 18, <a href="http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf">www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf</a> ,		







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