



Yale Law School

Paul Tsai China Center

耶鲁大学法学院蔡中曾中国中心



国际法促进中心

Chinese Initiative on International Law

Presents:

中国及国际刑法中的专家证人体系
Expert Witnesses in Chinese and International Criminal Law

活动手册
Program Book

2017年8月6日(星期天)

Sunday, August 6, 2017

2:00-5:00pm

Hosted by:

Yale Center BEIJING | 耶鲁北京中心

活动手册目录

Table of Contents

| | |
|--|----|
| I) 欢迎信 | 1 |
| Welcome Letter | |
| II) 嘉宾介绍 | 3 |
| Speaker and Commentator Biographies | |
| III) 活动时间安排表 | 7 |
| Event Schedule | |
| IV) 活动介绍 | 9 |
| Concept Note | |
| V) 提问嘉宾的问题 | 11 |
| Speaker Topic Questions | |
| VI) 关于中国刑事诉讼专家证人制度的文章 | 13 |
| Expert Witness Systems in Chinese Criminal Proceedings Article | |
| VII) 关于国际刑事法专家证人制度的文章 | 22 |
| Expert Witness Systems in International Criminal Law Article | |

欢迎信

各位嘉宾、各位朋友们，

很荣幸今天能够有机会跟大家一起在这里举行这个活动。

当我们第一次见面讨论一个结合中国和国际法的项目时，刘毅强想到的一个故事，激发我们举办了这个活动。曾经在柬埔寨红色高棉特别法庭工作的时候，他记得有一天早晨开庭比平时晚了一些，原因是一名来自英国的辩护律师前几天在伦敦开庭，即使她在那边开庭结束以后立即坐飞机来金边也会比正常开庭时间晚一个小时。尽管她十分的诚恳的向法庭和在法庭里面的所有人表示了歉意，我们还是对她充满了羡慕。毕竟能够同时在自己国家的法庭和国际法庭这两个完全不同的场合执业绝非易事。这使我们认识到，我们的工作可能影响我们国家和国际法的法律体系。

今天，我们会讨论在中国和国际刑事法的专家证人制度。这个话题既有意思又非常有现实价值。同时，我们也十分希望这能够为我们将来进行更加广泛的讨论做出铺垫，让中国的法治进程与国际刑事司法和国际正义的事业能够更加紧密的相关联。

让这样的一个研讨会从脑子的一个概念到能够成功的举办绝非易事，这中间有大量的人在为之努力。我们首先要感谢一直与我们一起准备这次研讨会的耶鲁大学法学院蔡中曾中国中心以及中国国际法促进中心。他们的坚持不懈和对品质的要求让我们在准备本次研讨会的过程中克服了各种困难。我们也要感谢耶鲁北京中心主办这次活动。一个研讨会的质量会在很大程度上取决于参与嘉宾的发言以及他们和与会人员的互动。感谢你们对本次活动的信任。最后，我们也想由衷的感谢本次活动的工作人员，包括我们的实习生和翻译者在过去几个月的付出。

非常感谢大家今天来参加我们的活动，希望都会喜欢我们的研讨会！

祝好，

刘毅强
执行主任
中国国际法促进中心

孔志琛
研究员
耶鲁大学法学院蔡中曾中国中心

Welcome Letter

To All of Our Event Participants, Distinguished Guests, and Friends:

It is our great pleasure and privilege to have all of you with us today.

When we first met to discuss working on a project combining Chinese and international law, Michael was reminded of a story that helped inspire us to put on this event. While Michael was working at the Extraordinary Chambers in the Courts of Cambodia, he recalled one morning where the hearing started one hour past the scheduled time. This was because an English barrister, who was acting as the defense counsel for one of the accused, informed the court that she had had another hearing a few days prior to our hearing, and could only fly into Phnom Penh that morning. While she was humble and sincere in her apology for causing this inconvenience, the rest of us sitting in the courtroom truly envied her. She had a career of practicing in her own national jurisdiction and in the international jurisdiction, which is something we could only dream of. It made us realize the possibility that our work could impact both jurisdictions.

Today we will examine expert witnesses in Chinese and international criminal procedures. It is a very interesting topic and of practical value as well. We hope this can be a stepping-stone for a wider discussion on how can we bring the two jurisdictions closer to each other and achieve the goal of shaping law across borders.

It took painstaking efforts to put on an event of this quality. We want to thank the Yale Law School Paul Tsai China Center and the Chinese Initiative on International Law for working relentlessly to pursue this idea and make it into a reality. We would also like to thank the Yale Center Beijing for hosting this event. The quality of the event will be measured by our speakers and their interactions with the audience, and we thank them for putting trust in us by agreeing to participate. Lastly, our sincere appreciation goes to our event preparation team, our interns and event interpreters, who have been critical in the past months.

Thank you all for coming today, and we hope that you will enjoy today's event!

Sincerely,

Michael Liu
Executive Director
Chinese Initiative on International Law

Jacob Clark
Research Associate
Yale Law School Paul Tsai China Center

嘉宾介绍

2017年8月6日（星期天）

14:00 - 16:00

耶鲁北京中心（IFC大厦，36层）

| 主讲人 | |
|-----|--|
| 刘大群 | <p>刘大群法官系现任联合国前南斯拉夫国际刑事法庭（ICTY）副庭长，前南刑庭和卢旺达国际刑事法庭的上诉庭法官以及国际刑事法庭余留机制（MICT）法官。同时，刘大群法官长期在国内和国际上教授国际刑法。</p> <p>在当选前南刑庭法官之前，刘大群法官在中国外交部担任要职，曾任中国驻牙买加大使，中国在国际海底管理局的常驻代表。刘大群法官也曾作为中国代表团副团长和首席谈判代表参加在国际刑事法庭成立时的《罗马规约》的谈判。</p> |
| 林维 | <p>林维法官现交流挂职于最高人民法院任刑事审判第一庭副庭长，系现任中国青年政治学院党委常委、副校长，研究生导师。</p> <p>林维法官毕业于吉林大学和北京大学，其主要研究方向为刑法学、犯罪学。林维法官在《中国法学》等学术期刊公开发表学术论文近百篇，主编、主译《英国刑法》、《刑事证据法》、《联邦最高法院死刑判决选辑》等，并把国家社会科学、司法部、教育部等机构的委托做科研项目。</p> <p>林维法官曾于2002年12月至2003年7月在联合国前南斯拉夫国际刑事法庭实习工作，并在台湾大学、早稻田大学等校作专题报告。</p> |
| 邹佳铭 | <p>邹佳铭律师系京都律师事务所高级合伙人，京都刑事辩护研究中心主任。</p> <p>邹佳铭律师专业领域是刑事辩护，擅长复杂、疑难案件，曾在多起案件辩护中取得撤案、不起诉、免于刑事处罚、改判轻罪的效果。多次接受《人民网》《财新》《新京报》《法治晚报》《凤凰周刊》等媒体采访，为《财新网》为专栏作家。</p> <p>2015年，邹佳铭律师获得了ALB评选的“ALB2015年最佳女律师”称号；2017年，邹佳铭律师被ALB评选为“2017年中国十五佳诉讼律师”。</p> |

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| <p><i>Karim A.A. Khan QC</i></p> | <p>Karim A.A. Khan QC 系国际刑法和国际人权法专家，现任国际刑事法庭律师协会会长以及为国际刑事法院辩护律师。</p> <p>Mr. Khan 曾在英国法律委员会担任高级检察官，并于1997年至2000年在前南刑庭（ICTY）和卢旺达特别法庭（ICTR）担任法律顾问，之后在东帝汶特别法庭（SCET）、塞拉利昂特别法庭（SCSL）、前南刑庭（ICTY）、卢旺达特别法庭等担任辩护律师。</p> <p>Mr. Khan 作为辩护律师参与多起影响重大的国际刑事案件，包括ICC一半以上的案件。Mr. Khan 曾带领辩护团队为前利比亚总统Charles Taylor 在塞拉利昂特别法庭进行辩护。Mr. Khan 最近作为国际刑事法院William Ruto 案辩护团队的首席辩护律师，该案在2016年4月5日因证据不足终止审理。现在Mr. Khan 作为国际刑事法院达尔富尔反叛集团领导Saleh Jerbo 以及利比亚政治人物Saif Al Islam Gadafi。</p> |
| <p>评论人</p> | |
| <p>胡倚婷</p> | <p>胡倚婷律师现任美国司法部、美国驻华大使馆法律顾问。来到中国之前，她曾作为美国华盛顿州西区联邦检察官，并之前在华盛顿州King 地区作为检察官。胡倚婷律师多次处理过家庭暴力、贩卖人口以及白领犯罪等刑事案件。</p> |
| <p>白睿云</p> | <p>白睿云律师现任国际司法桥梁中国项目主任。她以前在美国做律师，主要领域是刑事辩护和移民法。白睿云律师曾在联合国前南斯拉夫国际刑事法庭工作，并在联合国塞拉利昂特别法庭检察部做研究工作。</p> |
| <p>张旭涛</p> | <p>张旭涛律师现任辽宁省大连市法大律师事务所高级合伙人、大连市律师协会刑事法律专业委员会副主任以及大连市国际法学会副会长。他在2016年参加了纽约大学法学院刑事辩护培训。张旭涛律师拥有刑事辩护的丰富经验。</p> |
| <p>组织人</p> | |
| <p>刘毅强</p> | <p>中国国际法促进中心执行主任</p> |
| <p>孔志琛</p> | <p>耶鲁大学法学院蔡中曾中国中心研究员</p> |

Speaker and Commentator Biographies

Sunday, August 6, 2017

2:00pm-5:00pm

Beijing Yale Center (IFC Building, 36th Fl.)

| Speakers | |
|--------------------|---|
| <i>LIU Daqun</i> | <p>Judge LIU Daqun is currently the Vice President of the U.N. International Criminal Tribunal for the Former Yugoslavia (ICTY), and a judge in the Appeals Chamber of the U.N. Mechanism for International Criminal Tribunals (MICT). He also teaches international criminal law courses in China and abroad, and has authored numerous publications on international criminal and humanitarian law.</p> <p>Prior to become a judge, Judge LIU held several posts in the Chinese Foreign Ministry, including being named the Chinese Ambassador to Jamaica and permanent representative of China at the International Seabed Authority. Judge LIU was also the Deputy Head and Chief Negotiator of the Chinese Delegation to the Rome Conference on the Establishment of the International Criminal Court.</p> |
| <i>LIN Wei</i> | <p>Professor LIN Wei is currently Vice Dean at the China Youth University of Political Sciences, and Deputy Chief Judge of the Supreme People's Court 1st Criminal Court.</p> <p>Prof. LIN received his B.A. and Master's degree from Jilin University Law School, and his Ph.D. in criminal law from Peking University. His main research areas include criminal law and criminology. Prof. LIN has published nearly 100 academic papers in China Legal Science Journal, and edited and translated the U.K. Criminal Code, Criminal Evidence Law, and the Compilation of Federal Supreme Court Death Penalty Decisions into Chinese.</p> <p>From December 2002 until July 2003, Professor LIN conducted an internship at the U.N. ICTY.</p> |
| <i>ZOU Jiaming</i> | <p>Ms. ZOU Jiaming is a Senior Partner at King & Capital Law Firm and the Director of the King & Capital Criminal Defense Research Center. She specializes in Chinese criminal defense, and has successfully litigated complex and lengthy criminal cases, resulting in lighter sentencing, avoidance of criminal penalties, or dismissal of charges for her clients.</p> <p>In 2015, Ms. ZOU was named one of Asia Legal Business (ALB) Top Female Lawyers. In 2017, she was selected as one of ALB's Top 15 Litigation Attorneys. Ms. ZOU is frequently</p> |

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| | interviewed by media outlets such the People’s Daily, Caixin, The Beijing News, Legal Evening News, and Phoenix Weekly, and has a featured column on the Caixin news website. |
| <i>Karim A.A. Khan QC</i> | <p>Mr. Karim A.A. Khan QC is an expert in international criminal and human rights law, and is currently a defense attorney at the International Criminal Court (ICC) and President of the ICC Bar Association. Mr. Khan was formerly the Senior Crown Prosecutor at the British Law Commission, and from 1997-2000 served as Legal Advisor to both the U.N. International Criminal Tribunals for the Former Yugoslavia and Rwanda.</p> <p>Mr. Khan has appeared as a defense attorney in front of several International criminal tribunals, including the Special Courts in East Timor, Sierra Leone, as well as the Yugoslavia and Rwanda tribunals. He was appointed to lead the Defense team for former Liberian president Charles Taylor in front of the Special Court for Sierra Leone (SCSL). Most recently, Mr. Khan successfully defended Kenyan Deputy President William Ruto, whose case was thrown out in April 2016. Mr. Khan is currently lead counsel for Darfur rebel leader, Saleh Jerbo and Saif al Islam Gadafi (Libya).</p> |
| Commentators | |
| <i>Ye-Ting Woo</i> | Ms. Ye-Ting Woo is currently the Resident Legal Advisor for the U.S. Department of Justice (DOJ) at the U.S. Embassy in Beijing. Prior to arriving in China, Ms. Woo served as a federal prosecutor at the U.S. Attorney’s Office in Seattle, Washington, and as a district attorney at the King County Prosecutor’s Office in Washington state. Her cases involved domestic violence, human trafficking, and white-collar crime. |
| <i>Aurora Bewicke</i> | Ms. Aurora Bewicke is currently the China Program Director at International Bridges to Justice. Prior to her work at IBJ, Ms. Bewicke was a practicing attorney in criminal defense and immigration. Ms. Bewicke has also appeared before the U.N ICTY, and has conducted research for the Office of the Prosecutor for the SCSL. |
| <i>ZHANG Xutao</i> | Mr. ZHANG Xutao is currently a Senior Partner at Fada & Partners, the Vice Chair of the Dalian Lawyer’s Association Professional Committee for Criminal Law, and Vice Chair of the Dalian International Law Society. Mr. ZHANG participated in the 2016 New York University Law School Criminal Defense Training, and possesses a wealth of criminal defense experience. |
| Organizers | |
| <i>Michael Liu</i> | Executive Director, Chinese Initiative on International Law |
| <i>Jacob Clark</i> | Research Associate, Yale Law School Paul Tsai China Center |

专家证人活动的时间安排表
 2017年8月6日（星期天）
 下午两点到五点
 耶鲁北京中心（IFC大厦，36层）

| 时间 | 阶段 | 参加人 |
|------------------------|-----------|---|
| 2:00pm - 2:05pm (五分钟) | 引言 | 孔志琛，耶鲁大学法学院 蔡中曾中国中心研究员 |
| | | 刘毅强，中国国际法促进 中心执行主任 |
| 2:05pm - 2:15pm (十分钟) | 主讲人 | 刘大群，联合国前南国际 刑事法庭副庭长 * |
| 2:15pm - 3:45pm (九十分钟) | 邀请主讲人的Q&A | 邹佳铭，京都律师事务所 高级合伙人，京都刑事辩 护研究中心主任 |
| | | 林维，中国青年政治学院 副院长，最高人民法院任 刑事审判第一庭副庭长 |
| | | <i>Karim A.A. Khan QC</i> , 国 际刑事法院律师协会会长 以及辩护律师* |
| 3:45pm - 4:00pm (十五分钟) | 自由发言 | 邹佳铭，京都律师事务所 高级合伙人，京都刑事辩 护研究中心主任 |
| | | 林维，中国青年政治学院 副院长，最高人民法院任 刑事审判第一庭副庭长 |
| | | <i>Karim A.A. Khan QC</i> , 国 际刑事法院律师协会会长 以及辩护律师* |
| 4:00pm - 4:30pm (三十分钟) | 邀请评论人的Q&A | 胡倚婷，美国司法部，美 国驻华大使馆法律顾问 |
| | | 白睿云，国际司法桥梁中 国项目主任 |
| | | 张旭涛，大连市法大律师 事务所高级合伙人 |
| 4:30pm - 5:00pm (三十分钟) | 观众的Q&A | |

*主讲人通过预录的视频来发言

Expert Witness Event Schedule
 Sunday, August 6, 2017, 2-5pm
 Yale Center Beijing (IFC Building, 36th Fl.)

| Time | Session Description | Speaker(s) |
|---------------------------------|--------------------------------|--|
| 2:00pm - 2:05pm (5 minutes) | Introductory Remarks | <i>Jacob Clark</i> , Research Associate, Yale Law School Paul Tsai China Center |
| | | <i>Michael Liu</i> , Executive Director, CIIL |
| 2:05pm - 2:15pm (10 minutes) | Keynote Video Speech | <i>Judge LIU Daqun</i> , Vice President, U.N. International Criminal Tribunal for the Former Yugoslavia* |
| 2:15pm - 3:45pm (90 minutes) | Speaker Q&A Session | <i>ZOU Jiamin</i> , Senior Partner, King & Capital Law Firm; Director, King & Capital Criminal Defense Law Research Center |
| | | <i>LIN Wei</i> , Vice Dean, China Youth University of Political Sciences; Deputy Chief Judge, Supreme People's Court 1 st Criminal Chamber |
| | | <i>Karim A.A. Khan QC</i> , Defense Attorney, International Criminal Court; President, ICC Bar Association * |
| 3:45pm - 4:00pm (15 minutes) | Final Thoughts | <i>ZOU Jiamin</i> , Senior Partner, King & Capital Law Firm; Director, King & Capital Criminal Defense Law Research Center |
| | | <i>LIN Wei</i> , Vice Dean, China Youth University of Political Sciences; Deputy Chief Judge, Supreme People's Court 1 st Criminal Chamber |
| | | <i>Karim AA. Khan QC</i> , Defense Attorney, International Criminal Court; President, ICC Bar Association* |
| 4:00pm - 4:30pm (30 minutes) | Commentator Q&A | <i>Ye-Ting Woo</i> , Resident Legal Advisor, DOJ, U.S. Embassy – Beijing |
| | | <i>Aurora Bewicke</i> , China Program Director, International Bridges to Justice |
| | | <i>ZHANG Xutao</i> , Senior Partner at Fada & Partners |
| 4:30pm – 5:00pm | Audience Q&A | |

*Indicates that speaker will be presenting through a pre-recorded video

专家证人活动的介绍

孔志琛，研究员，耶鲁大学法学院蔡中曾中国中心
李珏、傅浩悦和傅浩怡，翻译

在许多刑事诉讼案件中，案件事实经常会涉及一些超出法官和案件当事人能力之外的领域。在这些案件之中，公诉人、辩护方以及法官经常会通过专家证人提供的书面或者口头的专家证人意见和证言，明确那些他们不熟悉的信息和事实，并在专家证人的协助下将这些复杂而晦涩的事实置于更加合适的场景之中。一个允许当事人提交专家证人意见和证言，同时又可以针对对方提交的专家证人意见和证言进行质证的诉讼程序对于法官来说非常重要，在这种程序中，法官能够最大程度上保证程序正义，并且能够做出最高质量的判决。

前南斯拉夫问题国际刑事法院（“前南刑庭”）、国际刑事法院和中国刑事诉讼法均规定了专家证人制度。前南刑庭和国际刑事法院把专家证人归类为特殊证人。他们是间接地参与到调查活动中的证人，而非直接参与者。一些国际性法院的专家证人包括军事和政治分析员、著名学和研究员。

中国存在两种不同类型的专家证人：鉴定人和有专门知识的人。鉴定人是指属于国家司法鉴定机构并部分参与案件的专家，而有专门知识的人通常是指通过法官指定、公诉人或者辩护方申请等方式，参与到案件审理过程中，并在某一个领域具有专门知识的独立第三方专家，他们帮助各诉讼主体理解某些特定的专业问题。在中国和国际法律体系中，专家证人提出的书面或口头意见会成为法官考虑定罪和量刑的证据之一。

考虑到中国在世界舞台上的地位愈发重要，中国提出的“一带一路”战略和公共政策将在政府间组织中和形成新的国际法律规则方面发挥更加重要的作用¹，其结果是中国可能会考虑将更多国际刑法概念和经验应用到国内法律体系之中。因此，专家证人制度本身就是一个非常有价值的话题和概念。我们进行这些对话活动的目标是探讨如何更好地利用及发展中国的专家证人制度，促进中国和国际社会在这一方面的交流。此外，这一话题也为探讨中国如何在国内应用国际法，以及在更广义的层面上来说，中国如何在塑造国际法过程中发挥作用及增加在国际事务中的领导力提供了一个绝佳的机会。

¹ See PRC President Xi Jinping's Keynote Speech, "Jointly Shoulder Responsibility of Our Times, Promote Global Growth," World Economic Forum at Davos, Switzerland, Jan. 17, 2017, <https://america.cgtv.com/2017/01/17/full-text-of-xi-jinping-keynote-at-the-world-economic-forum>; see also Stephen Fidler, Te-Ping Chen, and Lingling Wei, "China's Xi Jinping seizes Role as Leader on Globalization," The Wall Street Journal, Jan. 17, 2017, <https://www.wsj.com/articles/chinas-xi-jinping-defends-globalization-1484654899>; 周斌, "周强强调: 增强司法话语权和国际规则制定权", 法制日报, 2017年6月6日, http://www.legaldaily.com.cn/index_article/content/2017-06/06/content_7194464.htm?node=5955

Concept Note

Jake Clark, Research Associate, Yale Law School Paul Tsai China Center

In many criminal proceedings, the facts often include areas of specialized knowledge that go beyond the capacity of the judge and the parties to the case. In these instances, prosecutors, defendants, and the judges often rely on expert witnesses to provide written or oral testimony that clarifies that information, and helps put those complicated facts into the proper context. Having procedural mechanisms to allow parties to produce expert witness reports and testimony, as well as being able to question experts on the record on their findings, are all important and necessary contributions to making judges best equipped to ensure a fair criminal process and the highest quality judgment.

The International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Court (ICC), and Chinese criminal justice systems all include provisions on expert witnesses and their use in criminal trials. The ICC and ICTY classify experts as a distinct category of witness. They are witnesses connected to the investigation in some manner but not directly involved in the events. Some examples of expert witnesses at the international tribunals include military and political analysts and respected academics.

Chinese courts distinguish between two types of experts: the Evaluator (鉴定人) and Person with Expert Knowledge (有专门知识的人). The former refers to experts involved in a part of the case like the autopsy or psychological evaluation that belong to an official State judicial assessment body, while the latter refers to a third-party specialist brought in through application by the judge, procurator, or defense to help understand certain specialized facts. In both the international and the Chinese system, written and oral testimony of experts can be considered in conviction and sentencing by the court.

Given the use of experts in both systems, combined with China's rise to prominence on the world stage, its new "One Belt One Road" policy, and a public policy push to become more active in intergovernmental organizations and shaping international rules and public international law,¹ it follows that China may wish to consider international criminal law concepts to further advance Chinese domestic law. Thus, the topic of expert witnesses presents itself as an excellent topic for this event. The ultimate goal of these discussions will be to foster ideas on how to better utilize and advance the expert witness system in China, and exchange ideas between the Chinese and international law community in this area. As a bonus, the topic also presents a unique opportunity to discuss China's consideration of international law in its domestic practice, and China's role in shaping international law and its increased leadership role in the international community.

¹ See PRC President Xi Jinping's Keynote Speech, "Jointly Shoulder Responsibility of Our Times, Promote Global Growth," World Economic Forum at Davos, Switzerland, Jan. 17, 2017, <https://america.cgtn.com/2017/01/17/full-text-of-xi-jinping-keynote-at-the-world-economic-forum>; see also Stephen Fidler, Te-Ping Chen, and Lingling Wei, "China's Xi Jinping seizes Role as Leader on Globalization," The Wall Street Journal, Jan. 17, 2017, <https://www.wsj.com/articles/chinas-xi-jinping-defends-globalization-1484654899>; 周斌, "周强强调: 增强司法话语权和国际规则制定权", 法制日报, 2017年6月6日, http://www.legaldaily.com.cn/index_article/content/2017-06/06/content_7194464.htm?node=5955

提问嘉宾的问题

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- **1)** 关于专家证人出庭作证的程序
 - 在何种情况下，法官会认为需要专家证人出庭
 - 专家证人应具备的资格
 - 书面和口头意见及证词作为证据的可采性
 - 保护专家证人的措施以及专家证人参与案件和出庭作证的动力

- **2)** 中国法律体系和国际法体系均允许法官将专家证人的口头或书面意见和证词作为定罪量刑的证据之一。法官在考虑定罪量刑时如何衡量此类证据？知道专家证人的意见可以作为证据，辩护人和检察官如何使用专家证人的意见？
 - 专家证人的书面或口头意见和证词应符合哪些条件，才能够作为定罪和量刑时的证据？
 - 对专家证人及其证人证言进行交叉询问

- **3)** 从您作为一名法律/检察官/法官从业者/学者的角度来看，您认为在使用专家证人的过程中，中国和国际法律体系面临的最大挑战是什么？以及专家证人制度有何可以发展或改进的地方？

- **4)** 国际法是否以及如何影响中国和其他国家国内法律的发展？
 - 中国在国内法律实践中如何考虑国际法？
 - 中国在国际法律及政府间组织的发展上正在扮演何种角色？未来又会扮演何种角色？

Speaker Topic Questions

Jake Clark, Research Associate, Yale Law School Paul Tsai China Center
Michael Liu, Executive Director, Chinese Initiative on International Law

- **1) Process of deciding on and getting an expert to court to testify**
 - *When/how does the court deem it necessary to use expert witness*
 - *Confirming qualifications of expert*
 - *Admissibility of written and oral opinions and testimony as evidence*
 - *Protection measures and incentives for experts to appear*

- **2) Both Chinese and International legal systems allow judges to consider expert witness oral and written opinions and testimony as evidence in conviction and sentencing. How do judges weigh that in making a decision? How do defense lawyers and prosecutors use expert witness testimony to argue conviction and sentencing issues?**
 - *What threshold does the expert testimony need to meet in order to be considered in conviction and sentencing*
 - *Questioning of witnesses and their findings*

- **3) From your point of view as a legal practitioner/academic, what have been some challenges in utilizing expert witnesses? What about trends, developments, or improvements?**

- **4) Is there a role for international law and norms in shaping domestic law?**
 - *How has China considered international law in domestic practice?*
 - *What has been China's role in developing/shaping international law and intergovernmental organizations? What about in the future?*

关于中国刑事诉讼专家证人制度

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傅浩悦，翻译者

I. 引言

专家证人不是普通类型的证人。他们既不是犯罪的目击者也通常与案件没有任何联系。相反，他们是在专业知识领域具备某些专业资格、接受过特定教育并且有一定经验。他们可能会参与刑事调查或庭审去分析案件中涉及到的专业事实，并帮助双方当事人理解该事实。与很多国家的制度以及国际制度相同，中国《刑事诉讼法》以及相关规定制定了针对专家证人的具体规则。本文将探究中国的法律体制并讨论目前刑事诉讼专家证人的一些问题。

II. 法律体制

A. 专家证人的类别以及谁能担任专家

中国的刑事制度中有两类专家：1) 鉴定人；以及2) 有专门知识的人。鉴定人是受雇于官方司法鉴定机构的鉴定人。法医、验尸员、心理学家、工程师或法医技术人员都可以是鉴定人。有专门知识的人是第三方专家；经由刑事诉讼中的任一方的申请后被准予参与诉讼中。有专门知识的人不隶属于任何官方司法鉴定机构或其他法律解释的鉴定组织，且通常以其私人身份出庭。¹ 有专门知识的人可以是独立的心理学家、科学家、学者、工程师、分析者等专家。

i. 鉴定人v. 有专门知识的人——不同之处

最需要注意的一点是：鉴定人和有专门知识的人是截然不同类别的专家。在中国的刑事诉讼中，鉴定人是第一类被确立的专家。最高法院更偏好鉴定人而不是有专门知识的人，并把这种偏好写入法规之中。² 法院曾经把专家证人限定于鉴定人。有专门知识的人是2012年修改《刑事诉讼法》时新增加的一类专家证人；³ 其大大提高了专家证人在法庭审理过程中的使用率。有专门知识的人并不需要达到像鉴定人那么高的资质门槛要求。⁴ 此外，有专门知识的人体制仍在发展之中且使用有专门知识的人存在不确定性。尽管两者都可以就他们被咨询的专业事项出具书面鉴定

¹宋莹，《对专家证人参与刑事诉讼相关问题的思考》，人民法院报，2016年4月6日，available at http://rmfyb.chinacourt.org/paper/html/2016-04/06/content_110474.htm?div=-1. (“宋莹文章”)

²最高人民法院，《最高人民法院关于适用刑事诉讼法的解释》，第87条，2013年1月1日，available at <http://www.chinalawtranslate.com/%E6%9C%80%E9%AB%98%E4%BA%BA%E6%B0%91%E6%B3%95%E9%99%A2%E5%85%B3%E4%BA%8E%E9%80%82%E7%94%A8%E3%80%8A%E5%88%91%E4%BA%8B%E8%AF%89%E8%AE%BC%E6%B3%95%E3%80%8B%E7%9A%84%E8%A7%A3%E9%87%8A/>， (“最高法院解释”)，最高法解释规定只有在无官方司法鉴定机构或法定主体进行鉴定时，才可以让有专门知识的人帮助解决专业问题。

³林青，《“有专门知识的人”之地位及诉讼程序》，法制日报，2012年，available at http://article.chinalawinfo.com/ArticleHtml/Article_70072.shtml.

⁴宋莹文章

意见（简称为“鉴定意见”），但只有在无官方司法鉴定机构去完成鉴定时，才能委任有专门知识的人去出具鉴定意见。⁵

ii. 鉴定人v. 有专门知识的人——相似之处

尽管有上述区别，但鉴定人和有专门知识的人之间有不少相似之处。例如，在出庭和回避基本标准上，二者都受到相似规则的约束；⁶ 二者的询问和证言被要求分别进行，并在其他证人询问和作证时，二者均不得旁听。⁷ 另外，鉴定人和有专门知识的人都可以担任相似的专业职务。二者都可以出具鉴定意见并可被传唤去讨论他们的调查结果，或是去帮助解释其他鉴定人或专门知识的人的调查结果。但是，尽管有专门知识的人符合部分鉴定人的规定，二者仍被认为是截然不同的两类专家。

B. 哪一方在什么时候可以使用专家以及如何使用

在调查阶段，调查机构或控方可以使用鉴定人或专门知识的人；而在庭审阶段，当案件中存在需要澄清的“专业”事实时，控方、被告或其他诉讼当事人可以让鉴定人或专门知识的人出具一份鉴定意见或出庭作证。⁸ 就此，出具最初鉴定意见的专家通常会鉴定人。如果一方对该鉴定意见的内容有异议，该方可向法院提出申请，申请书应该说明该鉴定人（或有专门知识的人）有必要出庭就其调查结果作证并接受交叉询问的理由。⁹ 在实践中，法官通常会考量三个因素以决定专家是否有必要出庭：“（1）专门性问题与待证事实高度关联；（2）待证专门性问题可能影响对被告人的定罪量刑；（以及）（3）法庭只有在专家证人帮助下才能公正裁决的。”¹⁰ 当鉴定人或专门知识的人出庭时，他们可能会被要求出具另一份鉴定意见、就最初的鉴定意见提供他们自己的证词以及/或者被交叉询问。¹¹ 另外，法官也可能讯问他们。¹² 使用鉴定人和使用有专门知识的人的最大的不同点之一在于：可以使用有专门知识的人就专业事实或鉴定意见的内容去交叉询问鉴定人。

C. 如何让专家证人出庭

让专家证人出庭有多种方式。第一种方式是诉讼一方当事人（被告或者控方）对鉴定人或专门知识的人出具的鉴定意见提出异议。¹³ 在这种情况下，如果法官认

⁵ 最高法院解释，第 87 条

⁶ 最高法院解释，第 213 条；全国人民代表大会，《中华人民共和国刑事诉讼法》，第 192 条，2012 年 3 月 14 日，“CPL”，available at <http://www.chinalawtranslate.com/criminal-procedure-law/?lang=en>；CPL，第 28 和 31 条；See also 最高法解释第193条第1款要求法官告知诉讼各方他们有权申请专家回避。同时也应当注意，尽管在回避方面，有专门知识的人和鉴定人受到相同规则的制约，有专门知识的人无须回避。See 宋莹文章

⁷ 最高法院解释，第 216 条

⁸ CPL，第 144-146 和 192 条；最高人民检察院，《人民检察院刑事诉讼规则(试行)》，第 209 和 368 条，2013 年 1 月 1 日，“最高检察院规则”，available at <http://www.chinalawtranslate.com/spp-rules-of-criminal-procedure/>.

⁹ CPL，第 187 条

¹⁰ 宋莹文章

¹¹ CPL，第 146, 189, 192 条

¹² CPL，第 189 条；最高法院解释，第 215 条

¹³ CPL，第 187 条

为有必要，那么法院会通知该鉴定人或有专门知识的人出庭就其鉴定意见作证并接受交叉询问。¹⁴ 第二种方式是申请重新鉴定的或申请让一位有专门知识的人出庭就最初的鉴定意见表达看法。¹⁵ 法官决定是否批准该申请；¹⁶ 该申请必须陈述需要有专门知识的人出庭的理由。¹⁷ 出庭的有专门知识的人人数不得超出两名。¹⁸ 一旦他们被批准出庭，鉴定人或有专门知识的人也可享有保护措施；¹⁹ 以及法院可通知鉴定人或有专门知识的人出庭。²⁰

D. 什么时候可以在定罪和量刑方面使用专家意见

总体而言，鉴定意见可以作为定罪和量刑的证据。²¹ 在调查阶段，调查机构可以在通知嫌疑人和被害人后将鉴定意见作为证据使用，但嫌疑人和受害人也可以申请补充鉴定或重新鉴定，由法院决定是否批准该申请。²² 在庭审阶段，如一方想要将鉴定意见作为证据使用，法院会审查该鉴定意见以确保该鉴定意见是由有资质的专家按照适当的程序出具的。²³ 如一方对鉴定意见提出异议，出具该鉴定意见的鉴定人或有专门知识的人必须出庭作证并接受交叉询问，否则该鉴定意见不得作为定罪或量刑的证据。²⁴ 不能使用鉴定意见作为定案依据的情形包括不恰当的鉴定程序、没有签字或盖章，或不具备恰当的资质。²⁵

III. 中国专家证人制度中存在的问题

尽管中国努力改进其刑事诉讼中专家证人制度的架构和使用，诸多从业者和学者都指出了尚需改进的领域。第一个问题是没有清楚地确定鉴定人和有专门知识的人的资质，尤其是有专门知识的人。尽管法官需要审查每一位专家的资质和资格，法律规定并没有一套统一的标准，也没有澄清鉴定人或有专门知识的人需要达到什么标准。²⁶

第二个问题是将专家证人出庭的批准权留给了法院。通过让法院决定鉴定人或有专门知识的人是否有必要出庭，中国允许法院限制各方当事人——特别是被告人和辩护人——引入自己选择的专家证人的权利，各方当事人甚至都不能引入一位专家。家庭暴力是一个能说明第一个问题和第二个问题的例子。在该领域，最高人民法院

¹⁴ *Id.*

¹⁵ CPL, 第 192 条

¹⁶ *Id.*

¹⁷ 最高法院解释, 第 217 条

¹⁸ *Id.*

¹⁹ CPL, 第 62 条

²⁰ *See* CPL, 第 187 条

²¹ CPL, 第 48(6)条.

²² CPL, 第 146 条

²³ 最高法院解释, 第 84 条

²⁴ CPL, 第 187 条; 最高法院解释, 第 86 和 87 条

²⁵ 不得使用鉴定意见作为定案依据的全部情形参见最高法解释第 85 条

²⁶ *See* 宋莹文章; *see also* 胡文丽, 《谁是鉴定意见中“有专门知识的人”》, 检察日报, 2013 年 11 月 6 日, available at http://www.spp.gov.cn/llyj/201311/t20131106_64177.shtml.

刑事审判第四庭的宋莹法官讨论了家庭暴力专家在中国法律下是否能作为鉴定人或者有专门知识的人出庭作证。²⁷ 因为专家资质标准模糊以及法官有自由裁量权决定出庭是否有必要，不同法院在家庭暴力专家能否作为专家的问题上有不同决定；这对控方和被告人提出充分论据都有负面影响。

第三个问题是法院倾向于更多地使用鉴定人而不是有专门知识的人。在很多情况下，法院要的仅仅是鉴定人而不是有专门知识的人，这造成了倾斜的鉴定人使用比率。最高人民法院也立法规定了只有在无鉴定人或官方司法鉴定机构的情况下才能使用有专门知识的人，²⁸ 这也是法院更喜欢使用鉴定人而不是有专门知识的人的一个原因。此外，因为有专门知识的人是一个比较新的专家类型，法院和从业者仍不确定他们的作用。另一个导致偏好鉴定人的问题是对有专门知识的人有认知上的偏见。因为有专门知识的人通常是受雇于诉讼一方当事人的第三方并且不隶属于任何官方司法鉴定机构，一些法官可能认为他们的证言是较无效力的，甚至是偏向于雇佣他们的那一方当事人的。²⁹

第四个问题是让鉴定人或有专门知识的人出庭。尽管《刑事诉讼法》在特定情况下为专家证人提供了保护措施，要让鉴定人和有专门知识的人出庭，仍然需要经济补偿或交通补贴这些额外的动力。而且，尽管依据《刑事诉讼法》第187条，法院可通知鉴定人或有专门知识的人出庭，但法院事实上不大可能像依据《刑事诉讼法》第188条强制其他证人出庭一样有权强制专家出庭。³⁰

最后一个是交叉询问的技巧。总体而言，中国的律师在庭审交叉询问证人方面没有很多经验，所以就专业话对专家证人进行交叉询问这一附加的困难可能会产生另外的问题。³¹ 律师可能不具备专业技能或知识去掌握询问应当遵循什么样的主线。一个能提供帮助的改进方法是允许律师使用有专门知识的人来帮助交叉询问。尽管存在这些问题，中国一直努力在法律和实践上改进其专家证人制度。

IV. 结论

专家证人可以提供意见和解释，这些意见和解释能帮助法官更好地判决以及帮助各方当事人提出他们的论据。他们是刑事诉讼的重要组成部分。中国创立了规范鉴定人和有专门知识的人的法律框架，但它并非不存在问题。随着中国继续发展其刑事法律，其也会继续改进对专家的使用和规制。

²⁷ 刘百军和石飞，《涉家庭暴力刑事案件专家证人制度研讨会在滇举行》，法制网，2016年3月17日，available at <https://knews.cc/zh-cn/news/b5n4a9.html>.

²⁸ 最高法院解释，第87条

²⁹ 宋莹文章

³⁰ See fn. 20.

³¹ 对在中国交叉询问专家证人的问题的深入分析，参见张旭涛先生关于该话题的博客文章，张旭涛，《对鉴定人（专家证人）的交叉询问技术》，张旭涛律师的Sina博客，2016年12月11日，available at http://blog.sina.com.cn/s/blog_53b316df0102wwf2.html.

Expert Witness Systems in Chinese Criminal Proceedings

Jacob Clark, Research Associate, Yale Law School Paul Tsai China Center

I. Introduction

Experts are no ordinary type of witness. They are not witnesses to a crime or usually connected in any way to the case. Rather, they are people who possess certain professional qualifications, education and experience in specialized areas of knowledge, and may be called upon to analyze and help the parties understand specialized facts involved in a case. Like many countries and the international system, China's Criminal Procedure Law and related regulations carve out specific rules surrounding experts. This memo will explore China's legal framework and discuss some current issues surrounding expert witnesses in criminal proceedings.

II. Legal Framework

A. Types of Experts and Who Can Be an Expert

Under the Chinese criminal system, there are two types of expert: 1) The Expert Evaluator (鉴定人); and 2) The PEK (有专门知识的人; "PEK"). The Expert Evaluator is an evaluator employed by an official forensic evaluation body (司法鉴定机构). It can be a coroner, medical examiner, psychologist, engineer, or forensic technician. The PEK is a third-party expert who is brought in through application by any party to the criminal proceeding. The PEK is not a part of any official forensic evaluation body, or other professional assessment organization, and usually appears in his or her own individual capacity.¹ They can be someone like an independent specialized psychologist, scientist, academic, engineer or analyst.

i. Expert Evaluator v. PEK - Differences

It is most important to note that the Expert Evaluator and PEK are distinct types of experts. The Expert Evaluator was established as the first kind of expert in Chinese criminal proceedings. The Supreme People's Court has codified a preference for an Expert Evaluator over a third-party PEK,² and courts have historically limited the use of experts to the Expert Evaluator. The PEK is a new type of expert that was added into the revised Criminal Procedure Law in 2012³ and has greatly increased the use of experts in court proceedings. The PEK is not required to meet the same high professional

¹宋莹, 《对专家证人参与刑事诉讼相关问题的思考》, 人民法院报, 2016年4月6日, available at http://rmfyb.chinacourt.org/paper/html/2016-04/06/content_110474.htm?div=-1. (宋莹文章)

² Supreme People's Court, "SPC Interpretation on the Application of the Criminal Procedure Law," Art. 87, January 1, 2013, available at <http://www.chinalawtranslate.com/%E6%9C%80%E9%AB%98%E4%BA%BA%E6%B0%91%E6%B3%95%E9%99%A2%E5%85%B3%E4%BA%8E%E9%80%82%E7%94%A8%E3%80%8A%E5%88%91%E4%BA%8B%E8%AF%89%E8%AE%BC%E6%B3%95%E3%80%8B%E7%9A%84%E8%A7%A3%E9%87%8A/>, ("SPC Interpretation"), which states that a PEK can be used to help with specialty issues only where there is no official forensic evaluation body or other legal body to conduct the evaluation.

³林青, 《“有专门知识的人”之地位及诉讼程序》, 法制日报, 2012年, available at http://article.chinalawinfo.com/ArticleHtml/Article_70072.shtml.

qualifications threshold as the Expert Evaluator.⁴ Moreover, the PEK system is still developing and has uncertainty surrounding its use. Although both can issue a written expert opinion on the specialized matters they were asked to consult on (referred to as a “Written Opinion”), a PEK can only be appointed to do so where there is no forensic evaluation body that exists for such an evaluation.⁵

ii. Expert Evaluator v. PEK - Similarities

Despite these differences, Expert Evaluators and PEKs have many similarities. For example, Expert Evaluators and PEKs are subject to similar rules regarding appearing in court,⁶ standards of recusal,⁷ and being required to testify separately and be barred from attending the testimony of other witnesses.⁸ Additionally, Expert Evaluators and PEKs can both hold similar professional posts. Both can issue Written Opinions and be called to discuss their findings, or help interpret the findings of another Expert Evaluator or PEK. However, even though the PEK is subject to some of the regulations of the Expert Evaluator, they should still be considered as distinct types of experts.

B. When and How an Expert Can Be Used and By Which Parties

An Expert Evaluator or PEK can be used by an investigative body or the prosecution during the investigative phase, and can be used by the prosecution, defense, or other party to the litigation during the trial phase to issue a Written Opinion or appear in court to testify where there exists a need to clarify “specialized” facts in a case.⁹ At this point, the expert issuing the initial Written Opinion is usually an Expert Evaluator. If a party objects to the contents of the Written Opinion, that party may submit an application to the court stating a necessity for the Expert Evaluator (or PEK) to appear in court and testify and be cross-examined about their findings.¹⁰ In practice, judges usually weigh three factors when determining whether an appearance is necessary: 1) High relationship between specialty issues and facts in the case; 2) Whether those facts may impact conviction and sentencing; and 3) Whether a fair ruling is only possible with the help of an expert.¹¹ When an Expert Evaluator or PEK appears, they may be asked to give another Written Opinion, provide their own testimony on the original Written Opinion, and/or be cross-examined.¹² Additionally, the judge may also question them.¹³ One big

⁴ 宋莹文章

⁵ SPC Interpretation, Art. 87.

⁶ SPC Interpretation, Art. 213; National People’s Congress, “People’s Republic of China Criminal Procedure Law”, Art. 192, March 14, 2012, available at <http://www.chinalawtranslate.com/criminal-procedure-law/?lang=en>, (“CPL”),

⁷ CPL, Arts. 28, 31; *See also* SPC Interpretation, Art. 193(1), which requires the judge to inform all parties to the litigation that they may apply for the recusal of an expert. It should also be noted that although the same rules govern recusal for the PEK and Expert Evaluator, the PEK does not necessarily have to recuse themselves. *See* 宋莹文章

⁸ SPC Interpretation, Art. 216.

⁹ CPL, Arts. 144-146, 192; Supreme People’s Procuratorate, “Supreme People’s Procuratorate Rules of Criminal Procedure, Rules 209, 368, January 1, 2013, available at <http://www.chinalawtranslate.com/spp-rules-of-criminal-procedure/>, (“SPP Rules”).

¹⁰ CPL, Art. 187.

¹¹ 宋莹文章

¹² CPL, Arts. 146, 189, 192.

¹³ CPL, Art. 189; SPC Interpretations, Art. 215.

difference in the use of an Expert Evaluator versus a PEK is that the PEK may also be used to cross-examine an Expert Evaluator on the specialized facts or the Written Opinion. This can be helpful for defense attorneys who may lack the expertise to properly and effectively question an expert on their Written Opinion or other testimony.

C. How to Get an Expert to Court

There are several ways for an Expert Evaluator or PEK to appear in court. The first is where a party to the litigation (defense or prosecution) objects to the Written Opinion produced by the Expert Evaluator or PEK.¹⁴ In that case, if the judge finds it necessary, then the court may notify the Expert Evaluator or PEK to appear in court to testify and be cross-examined on their Written Opinion.¹⁵ The second is to submit an application for re-evaluation or to have a PEK appear to give an opinion on the initial Written Opinion.¹⁶ The judge makes a decision as to whether or not it will approve the application,¹⁷ and the application must state a reason for wanting the PEK to appear.¹⁸ The number of PEKs appearing cannot exceed two.¹⁹ Once they are approved to appear, an Expert Evaluator or PEK may also be provided with protection measures,²⁰ and the court may issue a notice to the Expert Evaluator or PEK to appear.²¹

D. When Can The Expert's Opinion Be Used in Conviction and Sentencing

In general, the Written Opinion can be considered as evidence in conviction and sentencing.²² During the investigative phase, the investigative body can use that Written Opinion as evidence after notifying the suspect and victim; but the suspect and victim also have the ability to apply for a supplemental or new evaluation, which is subject to approval by the court.²³ During the trial phase, if a party intends to use Written Opinions as evidence, the court will review the opinion to ensure that a qualified expert wrote it pursuant to the proper procedures.²⁴ Furthermore, if a party has an objection to the Written Opinion, the Expert Evaluator or PEK who issued the opinion must appear in court to testify and be subject to cross-examination, otherwise their Written Opinion cannot be used as evidence for conviction or sentencing.²⁵ Other ways the Written Opinion cannot be used as evidence for conviction and sentencing include improper evaluation process, lack of a signature or seal, or not possessing the proper credentials.²⁶

¹⁴ CPL, Art. 187.

¹⁵ *Id.*

¹⁶ CPL, Art. 192.

¹⁷ *Id.*

¹⁸ SPC Interpretations, Art. 217.

¹⁹ *Id.*

²⁰ CPL, Art. 62.

²¹ *See* CPL, Art. 187.

²² CPL, Art. 48(6).

²³ CPL, Art. 146.

²⁴ SPC Interpretation, Art. 84.

²⁵ CPL, Art. 187; SPC Interpretation Art. 86, 87.

²⁶ For complete list, see SPC Interpretation, Art. 85.

III. Issues in China's Expert Witness System

Although China has worked to improve the structure and use of experts in its criminal procedure, many practitioners and academics have pointed to areas of possible improvement. First is a lack of clarity in determining qualifications for both experts, in particular PEKs. Although the judge is required to review the credentials and qualifications of each expert, the law does not have a unified set of standards and is unclear on what standards an each Expert Evaluator or PEK must meet.²⁷

Second is the issue of leaving approval of experts to the court. By leaving it to the court to determine whether an Expert Evaluator or PEK appearance is necessary, it allows the court to limit the parties' ability, in particular the defense, to bring in the expert of their choice, or even bring in an expert at all. One example that can illustrate the first and second areas of improvement is in the field of domestic violence, where Judge Song Ying of the Supreme People's Court 4th Criminal Court has discussed whether a domestic violence expert may be considered an Expert Evaluator or PEK under Chinese law.²⁸ Because standards for expert qualifications are vague combined with the fact that each judge has discretion in determining when an appearance is necessary, different decisions between courts can be made on whether domestic violence experts qualify as experts, and negatively impact both the prosecution and defense ability to present a full argument.

Third is the tendency by the court to use Expert Evaluator more than a PEK. In many instances, the court simply requires an Expert Evaluator rather than a PEK, and that has created the skewed use of Expert Evaluators over PEKs. The Supreme People's Court has also codified that a PEK should only be used where there is no Expert Evaluator or official forensic evaluation body,²⁹ which has partially contributed to the court's preference Expert Evaluators over PEKs. Additionally, because the PEK is a relatively new type of expert, courts and practitioners are still unsure about their use. Another issue contributing to the tendency for an Expert Evaluator is the perceived bias of PEKs. Because a PEK is usually a third party hired to assist one party to the litigation and does not belong to an official evaluation body, some judges may view their testimony as less effective, or even slanted towards the party that hired them.³⁰

Fourth is the issue of getting Expert Evaluator or PEK to court. Although the Criminal Procedure Law provides for protection measures for experts in certain cases, Expert Evaluator or PEK still may need some added motivation in the form of economic compensation or travel subsidies in order to appear in court. Moreover, although the court may notify an Expert Evaluator or PEK to appear under Criminal Procedure Law Article 187, the court likely does not have the power to actually compel appearance as it does with other witnesses under Criminal Procedure Law Article 188.³¹

²⁷ See 宋莹文章 ; see also 胡文丽, 《谁是鉴定意见中“有专门知识的人”》, 检察日报, 2013年11月6日, available at http://www.spp.gov.cn/llyj/201311/t20131106_64177.shtml.

²⁸ 刘百军和石飞, 《涉家庭暴力刑事案件专家证人制度研讨会在滇举行》, 法制网, 2016年3月17日, available at <https://kknews.cc/zh-cn/news/b5n4a9.html>.

²⁹ SPC Interpretation, Art. 87.

³⁰ 宋莹文章

³¹ See fn. 21.

Finally is the issue of cross-examination skills. In general, attorneys in China do not have much experience conducting cross-examinations on witnesses during the trial, so the added difficulty of cross-examining an expert on specialized topics could create additional problems.³² The attorney may not have the technical skill or knowledge to understand what line of questioning to pursue. One helpful improvement is that an attorney may use a PEK to help with cross-examination. Despite these issues, China is constantly working to improve its expert witness system both in law and in practice.

IV. Conclusion

Experts can provide insight and clarification that can help judges make better decisions, and help parties argue their position. They are a critical part of the criminal process. China has created a legal framework governing both Expert Evaluators and PEKs, but it is not without issues. As China continues to develop its criminal laws, its use and regulation of experts will continue to improve as well.

³² For a more in-depth analysis of cross-examination issues with expert witnesses in China, please see Mr. ZHANG Xutao's blog post on the subject, 张旭涛, 《对鉴定人（专家证人）的交叉询问技术》, 张旭涛律师的Sina博客, 2016年12月11日, available at http://blog.sina.com.cn/s/blog_53b316df0102wwf2.html.

关于国际刑事法专家证人制度

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I. 导言

虽然各个国际刑事法庭之间并没有一个完全相同的专家证人制度，但大多数法庭在设计专家证人制度时都采用了相似的原则。为了概括介绍国际刑法中的专家证人制度，本文将探讨两个国际刑事法庭的法律框架和基本程序以及其他围绕专家证人存在的问题。这两个国际刑事法庭分别为：联合国前南斯拉夫问题国际刑事法庭（“前南法庭”）和国际刑事法院。

II. 前南法庭的专家证人制度

前南法庭将专家证人定义为“为军事理论，政治体制，前南斯拉夫法律，人口统计，金融交易和法医证据等领域提供专家意见的专业人士。他们帮助法官确定犯罪行为的情况、被告指使或命令下属的行为或权利、大型墓地中遇难者的身份和数量、在一个地区内被杀害的受害人人数量等。”¹ 专家证人不会是直接接触所调查的罪行的人，其构成包括军事政治分析家、非政府组织调查员以及其他合格的专业人士。

前南法庭对专家证人做出规定的主要条款是前南法庭《程序和证据规则》第94bis条。该条规定：任何一方希望使用专家报告或陈述的，必须披露这种意图。在披露后30日内，另一方应提交通知，说明是否接受报告，或者是否希望对专家进行质询，是否对证人的资格或证人陈述、报告的相关性提出质疑。² 当对方提交通知后，前南法庭审判分庭或预审分庭将举行听审，以确定专家证人陈述和/或报告的可受理性。如果对方表示要对证人进行交叉询问，可以在庭审时进行。³ 在判断可受理性时，前南法庭设定了四项必须满足的要求：1) 拟议的证人是专家；2) 专家陈述/报告符合最低可靠性标准；3) 专家陈述/报告具有相关性和证明价值；以及4) 专家陈述/报告是在专家证人的专业领域范围之内。⁴

证人必须具备一定的“专业知识、技能或培训”，并可以协助法官了解特定事实，才可以被认定为专家证人。⁵ 为了审定证人能否成为专家证人以及审定专家资格，前南法庭将审查专家的过往和现在的职业经历和经验、推荐人、简历和出版作品等。

¹ICTY Registry, <http://www.icty.org/en/about/registry/witnesses>.

²ICTY Rules of Evidence and Procedure, Rule 94bis(B), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf, (“ICTY Rules”).

³对方都会表示是否想对专家的报告进行交叉询问。如果专家陈述/报告被认定为证据，那么对方将在正式庭审中进行交叉询问，而不是在听审期间确定专家证人陈述/报告的可受理性。

⁴*Prosecutor v. Periši*, Case No. IT-04-81-T, Decision on Expert Report by Richard Phillipps, 10 March 2009, para.6, (“Phillipps Decision”), available at https://www.icc-cpi.int/CourtRecords/CR2013_05258.PDF.

⁵Phillipps Decision, para.7.

⁶ 此外，专家证人不应就其专业领域之外的事项发表陈述，也不应就被告的刑事责任提出意见。⁷ 最后，专家陈述/报告必须符合一般的可受理性标准，即必须具有相关性并具有证明价值，并且该证明价值不能“实质性地低于”确保公平审判的必要性。⁸ 如果法庭认定专家证人陈述/报告符合四项要求加上可受理性的一般要求，则陈述/报告将被接纳为证据。

前南法庭的专家证人制度并非毫无破绽。问题之一就是使专家证人出庭的困难。前南法庭有几项条款允许法庭向专家证人提供旨在提供经济激励的补偿，包括差旅/住宿、经济补贴等。⁹ 然而，如果专家的时间特别宝贵，这些经济激励可能会仍显不足。此外，前南法庭没有强制传唤的权力。¹⁰ 法庭可以签发传票或“强制命令”，以使专家出庭，但这类命令只有在专家证人的本国愿意执行的情况下才具有约束力。¹¹ 问题之二是保护愿意出庭的专家证人的困难。前南法庭提供的一些保护措施包括允许证人（包括专家证人）以封闭（非公开）的方式作证、将证人的姓名从公开记录中删除以及让证人使用假名。¹² 鉴于许多专家在公开场合作证，目前尚不清楚有多少专家证人实际使用了证人保护措施。但是，一旦使用保护措施，该专家证人所提供的绝大部分信息都会保密，这可能对被告的公开审判权产生不利影响。¹³ 此外，判决的作用应当是为庭上发生的事件保留一份公开记录，而使用假名和进行非公开的庭审则让书写判决和阅读判决变得复杂。¹⁴ 尽管存在着各种问题，前南法庭的专家证人制度提供了一个强有力的法律框架，使专家证人能够参与前南法庭的工作。

III. 国际刑事法院的专家证人制度

国际刑事法院将专家证人定义为“由于某些专门知识，技能或训练可以协助（法院）理解或确定有争议的技术性质的问题的人”。¹⁵ 国际刑事法院书记官处负责创建和维持正式专家名录。¹⁶ 根据国际刑事法院书记官处，要加入专家名录的专家至

⁶ *Id.*

⁷ Phillipps Decision, para. 8.

⁸ Phillipps Decision, para. 10; *See also*, ICTY Rules Rule 89(C) and (D).

⁹ *See Directives on Allowances for Witnesses and Experts*, Rules 17-19, 10 March 2011, available at http://www.icty.org/x/file/Legal%20Library/Miscellaneous/it200_rev1_corr2_en.pdf

¹⁰ Wald, Patricia M., "Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal," *Yale Human Rights and Development Journal*: Vol. 5: Iss. 1, Article 6, 2002, at p. 4, available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1032&context=yhrdlj>, ("Wald Article").

¹¹ *Id.*

¹² *See* ICTY Rules 75 and 79; *See also* ICTY Website, "Witness Protection Measures", available at <http://www.icty.org/en/about/registry/witnesses>; *See also* Wald Article, pp. 5-6.

¹³ Wald Article, p. 8.

¹⁴ Wald Article, p. 7.

¹⁵ *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on Defense Preliminary Challenges to Prosecution's Expert Witnesses, 9 February 2016, para. 7, ("Ntaganda Decision"), available at https://www.icc-cpi.int/CourtRecords/CR2016_01026.PDF.

¹⁶ *See* ICC Regulations of the Court, Regulation 44(1), ("ICC Court Regs"), available at https://www.icc-cpi.int/resource-library/Documents/RegulationsCourt_2017Eng.pdf; *See also* ICC Regulations of the Registry, Regulation 56, ("ICC Registry Regs"), available at <https://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/282891/RegulationsRegistryEng.pdf>.

少应有9年的相关经验（若有高等学历则为7年）、流利的英语或法语语言能力以及具有一个或多个领域的专业知识。¹⁷ 在国际刑事法院负责管理专家名录的同时，国际刑事法院《程序与证据规则》也允许审判庭¹⁸接受专家名录之外的专家提供的专家证据。¹⁹ 此外，在被告人的医疗检查问题上，虽然《程序与证据规则》倾向于使用书记长官认可的专家名录中的专家证人，但预审分庭和审判分庭可以应一方当事人的请求，自行任命专家名录之外的专家证人。²⁰

在调查阶段，如果检察官认为某项调查可能是“日后无法获得的获取证言的独特机会”，预审分庭可以指派专家证人协助调查。²¹ 在预审和审判阶段，如果控方或辩方若想提交专家报告或陈述作为证据使用，则必须经过严格的程序。首先，提交方必须通知对方，并告知专家的姓名和拟用的陈述。²² 其次，对方可以提交通知，声明是否接受提出的专家报告或陈述、是否想对专家证人进行交叉询问、是否质疑专家证人的资质或者是否质疑全部或部分专家报告/陈述的相关性。²³ 如果对方有异议，国际刑事法院有关审判庭将就专家报告或陈述的可受理性举行听审。此外，受害者代表可以向审判庭提出申请对专家证人进行交叉询问。²⁴ 最后，专家证人还可以帮助确定对受害者的赔偿，²⁵ 并监督被判刑者的财务状况。²⁶

在确定专家报告或陈述的可受理性时，审判庭必须确认该报告或陈述满足以下要素：²⁷

- 1) 拟议的专家证人事实上是合格的专家。在审议时，审判庭应对一个问题给予“适当考虑”，这个问题就是专家是否包括在国际刑事法院《法院条例》第44(1)条的国际刑事法院书记官处的专家名录上。²⁸
- 2) 拟议的报告或陈述对法庭有帮助。审判庭将考虑专家证人是否有“足够的专门知识”从而有助于案件的判决。²⁹

专家名录的例子, *see* ICC Registry List of Experts Before the ICC as of 18 August 2015, available at <https://www.icc-cpi.int/iccdocs/PIDS/other/180815-List-of-Experts-Eng.pdf>.

¹⁷ *See* ICC Registry Website “Experts” Page, available at <https://www.icc-cpi.int/get-involved/Pages/experts.aspx>. 该网站还列举了一些专业领域，例如弹道学、金融学、法医学、笔迹学、心理学、赔偿学、语言学、政治学、军事科学、司法制度和历史。

¹⁸ “审判庭”指国际刑事法院审判庭部门，包括预审分庭、审判分庭以及上诉分庭。 *See* ICC Registry Regs, Reg. 2 and ICC Court Regs, Reg. 2; *see also* ICC Chambers of the Court page, available at <https://www.icc-cpi.int/about/judicial-divisions>.

¹⁹ ICC Court Regs, Reg. 44(1).

²⁰ *See* ICC Rules of Procedure and Evidence, Rules 113(2), 135(3), (“ICC Rules”), available at <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>.

²¹ Rome Statute, Arts. 56(1)(c) and (2)(c).

²² *See* ICC Rules, Rules 76, 79, 84.

²³ Ntaganda Decision, para. 2, 当国际刑事法院审判分庭收到检方拟用的专家证人名单后，分庭指示辩护方提交通知，声明是否对控方拟用的专家存有任何异议。

²⁴ ICC Rules, Rule 91(3)(a).

²⁵ ICC Rules, Rule 97(2).

²⁶ ICC Court Regs, Reg. 117.

²⁷ *See* Ntaganda Decision, paras. 8 and 10

²⁸ *Prosecutor v. Ruto and Sang*, Case No. ICC-01/09-01/11, Decision on Sang Defense Application to Exclude Expert Report of Mr. Hervé Maupeu, 7 August 2013, para. 12, (“Sang Decision”), available at https://www.icc-cpi.int/CourtRecords/CR2013_05258.PDF.

- 3) 专家报告或陈述的内容在其专业范围之内。专家证人在提供其专业范围内的意见时通常被赋予很大的自由度。³⁰
- 4) 专家报告或陈述的内容不会破坏审判庭的职能。可能被认为破坏审判庭职能的内容包括专家对被告的刑事责任提出意见，或被告行为是否满足犯罪要件发表的意见。³¹
- 5) 满足《罗马规约》第 64(9)(a)条和第 69(4)条的可否受理标准。审判庭将评估专家报告或陈述的相关性、确定其证明价值以及作为证据使用后对公正审判和证言评估产生的任何不利影响。³²

如果专家报告或陈述被审判庭判定符合上述的要求，则可以作为证据。此外，审判庭可以自己动议 (*proprio motu*) 就专家报告的课题和内容、所需委托专家的人数、专家证人命令方式、其证据的提交方式及其报告准备和通知的时限对专家发布命令。³³

最后如果是如果专家被要求作证的话，专家证人出庭作证的问题。国际刑事法院将负责专家证人的交通费用，并向专家证人提供每日生活津贴。³⁴ 但是，尚不清楚专家证人是否可以因出庭作证而获得工资损失赔偿，因为国际刑事法院《书记官处条例》没有明确提到“专家证人”可以获得这种津贴。³⁵ 补偿的缺乏可能使愿意出庭的专家证人越来越少。此外，《罗马规约》要求各国合作，以促进居住在其管辖范围内的专家的“自愿出庭”。³⁶ 对于专家证人的保护措施，《罗马规约》允许在履行其职务的范围内向专家证人提供“特权和豁免”。³⁷ 此外，《罗马规约》第 100(1)(a)条似乎暗示国际刑事法院将支付专家证人保护措施的有关费用。在证人保护方面，专家证人是否可以获得具体的安全和保护措施、地方保护措施、持续保护计划或其他保护措施，例如假名、声音/面部失真、非公开审讯等，这些都没有被专门提及，因此尚存疑问。³⁸ 但是，法律规定又确实提到“因作证面临危险的人”，所以专家证人可能属于该类别，因此可能可以获得保护措施。³⁹ 最后，国际刑事法院有权确保同意出庭的专家证人不被起诉、扣留或受到限制人身自由。⁴⁰

²⁹ See Ntaganda Decision, para.9.

³⁰ *Id.*

³¹ Sang Decision, para. 13.

³² See Ntaganda Decision, para. 10; See also Sang Decision, para. 14; See also Rome Statute, Arts. 64(9)(a) and 69(4).

³³ ICC Court Regs, Regs. 44(2)-(5).

³⁴ Rome Statute, Art. 100(1)(a); ICC Registry Regs, Reg. 87.

³⁵ See ICC Registry Regs, Regs. 85, 86.

³⁶ Rome Statute, Art. 93(1)(e).

³⁷ Rome Statute, Art. 48(4).

³⁸ See ICC Rules, Rule 87(1); See also ICC Registry Regs, Regs. 92-96.

³⁹ See *Id.* 虽然这些规定没有明确提及专家证人，但因为在国际刑事法院发表的证言而被认定为“因作证面临危险的人”都可能可以接受这些保护措施。专家证人完全可能因为其报告、陈述或出庭而成为“因为作证面临危险的人”。

⁴⁰ Rome Statute, Art. 93(2); ICC Rules, Rule 191.

IV. 结论

虽然本文仅分析了两个国际刑事法庭的专家证人制度，但前南法庭和国际刑事法院仍然为国际刑事诉讼程序中专家证人制度的现状提供了很好的概述。国际法庭关于专家证人的法规不断改进从而更加适应普通法和民法体系的传统，同时也为国内法院提供了一个良好的范例，促进国内的专家证人制度的发展。专家证人将继续发挥其重要作用，帮助国际法庭进行公正审判、做出公正判决。

Expert Witness Systems in International Criminal Law

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I. Introduction

No one international criminal tribunal has exactly the same expert witness system, but many incorporate similar principles in building the legal system governing the use of experts. In order to give a general overview of the expert witness systems in international criminal law, this memorandum will explore the legal frameworks and basic process, as well as issues surrounding expert witnesses in two international criminal tribunals: The U.N. International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Court (“ICC”).

II. Expert Witness System at the ICTY

The ICTY defines an expert witness as “professionals who provide their expert opinion on topics such as military doctrine, political structures, former Yugoslav law, demographics, financial transactions, and forensic evidence. They help the judges to determine the circumstances in which crimes were committed, the accused’s authority over their subordinates, the identity and number of victims found in mass graves, the number of victims killed in an area, among others.”¹ These experts were not directly involved in the events and can include military and political analysts, NGO investigators, and other qualified professionals.

The main provision governing experts at the ICTY is the ICTY Rules of Evidence and Procedure Rule 94*bis*, which provides that any party that wants to use an expert report and/or statement must disclose such intention. Within 30 days of disclosure, the opposing party should file a notice indicating if it accepts the report or wishes to cross-examine the expert, and/or whether it challenges the qualifications of a witness or relevance of the statement/report.² When the opposing party files a notice, the ICTY Trial Chamber or Pre-Trial Chamber will hold a hearing to determine the admissibility of the expert witness statement and/or report. If the opposing party indicates that they would like to cross-examine the witness, they will be given an opportunity to do so during the trial.³ In determining the admissibility, the ICTY has established four requirements that must be met: 1) The proposed witness is classified as an expert; 2) The expert statement/reports meet the minimum standard of reliability; 3) The expert

¹ ICTY Registry, <http://www.icty.org/en/about/registry/witnesses>.

² ICTY Rules of Evidence and Procedure, Rule 94*bis*(B), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf, (“ICTY Rules”).

³ Essentially, the opposing party will indicate that they wish to cross-examine an expert about their report. If the expert statement/report is admitted into evidence, then the opposing party will be given that opportunity at the normal trial, and not during the hearing to determine the admissibility of the expert witness statement/report.

statement/reports are relevant and of probative value; and 4) The content of the statement/report falls within the expert's accepted area of expertise.⁴

In order to be classified as an expert, the witness must have some "specialized knowledge, skill or training" and can assist the judge in understanding specialized facts for an issue at hand.⁵ To make this determination, the ICTY looks at the expert's former and present professional positions/experience, references, CV, and other publications.⁶ Moreover, experts should not be offering statements outside of their area of expertise, and should not offer their opinion on the criminal liability of the accused.⁷ Finally, the expert statement/report must also meet general standards of admissibility, namely that it must be relevant and have probative value, and the probative value cannot be "substantially outweighed" by the need to ensure a fair trial.⁸ If the court finds that the expert witness statement/report meets the four requirements plus the general requirements of admissibility, then the statement/report will be admitted into evidence.

The expert witness system at the ICTY is not totally without fault. One issue is the difficulty of actually getting an expert to court. The ICTY has several provisions that allow the court to provide the expert with compensation, travel/lodging subsidies, etc. that are designed to provide an economic incentive to appear.⁹ However, economic incentives may still fall short if the expert's time is particularly valuable. Additionally, the ICTY has no subpoena power to compel appearance.¹⁰ It may issue a summons or "binding order" for an expert to appear, but those orders are only binding so far as the expert's native country is willing to enforce it.¹¹ A second issue is the difficulty of protecting that expert if/once they decide to appear in court. Some protection measures offered by the ICTY include allowing witnesses (including experts) to testify in a closed (non-public) setting, removing the witness' name from the public record, and assigning the witness a pseudonym.¹² Given that many experts testify in open court, it is unclear how many experts have actually utilized witness protection measures. However, when witness protection measures are issued, much of the information given by that witness is kept confidential, which could have a negative impact on the accused person's right to a public trial.¹³ Additionally, using pseudonyms and closed sessions also complicate the composition and reading of the judgment, which is supposed to keep a public record of

⁴ *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Expert Report by Richard Phillipps, 10 March 2009, para. 6 ("Phillipps Decision"), available at <http://www.icty.org/x/cases/perisic/tdec/en/090310.pdf>.

⁵ Phillipps Decision, para. 7.

⁶ *Id.*

⁷ Phillipps Decision, para. 8.

⁸ Phillipps Decision, para. 10; *See also*, ICTY Rules Rule 89(C) and (D).

⁹ *See Directives on Allowances for Witnesses and Experts*, Rules 17-19, 10 March 2011, available at http://www.icty.org/x/file/Legal%20Library/Miscellaneous/it200_rev1_corr2_en.pdf

¹⁰ Wald, Patricia M., "Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal," *Yale Human Rights and Development Journal*: Vol. 5: Iss. 1, Article 6, 2002, at p. 4, available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1032&context=yhrdlj>, ("Wald Article").

¹¹ *Id.*

¹² *See* ICTY Rules 75 and 79; *See also* ICTY Website, "Witness Protection Measures", available at <http://www.icty.org/en/about/registry/witnesses>; *See also* Wald Article, pp. 5-6.

¹³ Wald Article, p. 8.

what occurred during the trial.¹⁴ Despite these issues, the expert witness system at the ICTY has provided a strong framework to allow experts to participate in the ICTY's work.

III. Expert Witness System at the ICC

The ICC considers an expert witness a “person who, by virtue of some specialized knowledge, skill or training can assist the (court) in understanding or determining an issue of a technical nature that is in dispute.”¹⁵ The Registrar of the ICC Registry is tasked with creating and maintaining a list of qualified experts.¹⁶ According to the ICC Registry, an expert looking to qualify for the list should have at least 9 years of relevant experience (7 with an advanced university degree), be fluent in English or French, and have expertise in one or more of several fields.¹⁷ Although the ICC Registry is required to maintain a list of experts, the ICC Regulations of the Court (“ICC Court Regs”) allow for the Chambers¹⁸ to admit expert evidence from experts not on that list.¹⁹ Moreover, in respect to medical evaluations of the accused, although the ICC Rules of Procedure and Evidence (“ICC Rules”) specify a preference to use experts from the ICC Registry list, the Pre-Trial and Trial Chambers have discretion to approve other experts outside of that list at the request of a party.²⁰

During the investigation phase, an expert can be appointed if the prosecutor believes that the investigation poses a “unique opportunity” to get testimony from such an expert.²¹ During pre-trial and trial phases, if the prosecution or defense would like to submit an expert report or statement for admission into evidence, it must go through a rigorous process. First, the submitting party must notify the other party and disclose names and intended statements of the experts.²² Then, the non-submitting party will have the opportunity to file a notice of whether it accepts the proposed expert report or statement,

¹⁴ Wald Article, p. 7.

¹⁵ *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on Defense Preliminary Challenges to Prosecution's Expert Witnesses, 9 February 2016, para. 7, (“Ntaganda Decision”), available at https://www.icc-cpi.int/CourtRecords/CR2016_01026.PDF.

¹⁶ See ICC Regulations of the Court, Regulation 44(1), (“ICC Court Regs”), available at https://www.icc-cpi.int/resource-library/Documents/RegulationsCourt_2017Eng.pdf; See also ICC Regulations of the Registry, Regulation 56, (“ICC Registry Regs”), available at <https://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/282891/RegulationsRegistryEng.pdf>. For an example of a list of experts, see ICC Registry List of Experts Before the ICC as of 18 August 2015, available at <https://www.icc-cpi.int/iccdocs/PIDS/other/180815-List-of-Experts-Eng.pdf>.

¹⁷ See ICC Registry Website “Experts” Page, available at <https://www.icc-cpi.int/get-involved/Pages/experts.aspx>. This site also lists several fields of expertise, including ballistics, finance, forensics, graphology, psychology, reparations, linguistics, politics, military science, judicial systems, and history.

¹⁸ “Chambers” refers to the ICC Chamber of the Court, which may be the Pre-Trial, Trial or Appeals chamber. See ICC Registry Regs, Reg. 2 and ICC Court Regs, Reg. 2; see also ICC Chambers of the Court page, available at <https://www.icc-cpi.int/about/judicial-divisions>.

¹⁹ ICC Court Regs, Reg. 44(1)

²⁰ See ICC Rules of Procedure and Evidence, Rules 113(2), 135(3), (“ICC Rules”), available at <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>.

²¹ Rome Statute, Arts. 56(1)(c) and (2)(c).

²² See ICC Rules, Rules 76, 79, 84.

would like to cross-examine the expert, and/or wishes to challenge the credentials of the expert or the relevance of all or part of the expert report or statement.²³ If the non-submitting party has an objection, the relevant ICC Chamber will hold a hearing on the admissibility of the expert report or statement. Moreover, the representatives for the victims may submit an application to the Chamber to question an expert.²⁴ Finally, an expert can also be appointed to help determine reparations for victims²⁵ and monitor the financial situation of a sentenced person.²⁶

When determining the admissibility of the expert report or statement, the Chamber must be convinced that the following elements are satisfied:²⁷

- 1) *The proposed expert is in fact a qualified expert.* When looking at this, the Chamber should “give due consideration” as to whether the expert is included on the Registry’s List of Experts under ICC Regulations of the Court, Regulation 44(1).²⁸
- 2) *The proposed report or statement would be of assistance.* Here, the Chamber is looking as to whether the expert has “sufficient expertise” that would be helpful to their adjudication of the case.²⁹
- 3) *The content of the report or statement is within the expert’s area of expertise.* Experts are usually given wide latitude to offer opinions within their expertise.³⁰
- 4) *The content of the report or statement does not undermine the functions of the Chamber.* Content that may qualify as undermining the functions of the Chambers may include the expert expressing an opinion as to the accused’s criminal liability, or whether an element of a crime has been satisfied.³¹
- 5) *General admissibility standards under Rome Statute Articles 64(9)(a) and 69(4).* Namely, the Chamber will assess the relevance of the expert report or statement, determine its probative value, and any prejudice caused to a fair trial or the evaluation of the witness testimony if admitted.³²

If the Chamber finds that the expert report or statement meets those elements, then it may be admitted into evidence. Additionally, the Chamber may, even on its own motion (*proprio motu*), issue instructions to an expert on the subject of their report, how the evidence is presented, time limits for preparation, number of experts instructed, mode of instruction, and notification of the report.³³

²³ Ntaganda Decision, para. 2, where the ICC Chamber, after receiving the Prosecution list of expert witnesses it intended to call, instructed the Defense to file notice indicating any objection to the Prosecution experts.

²⁴ ICC Rules, Rule 91(3)(a).

²⁵ ICC Rules, Rule 97(2).

²⁶ ICC Court Regs, Reg. 117.

²⁷ See Ntaganda Decision, paras. 8 and 10

²⁸ *Prosecutor v. Ruto and Sang*, Case No. ICC-01/09-01/11, Decision on Sang Defense Application to Exclude Expert Report of Mr. Hervé Maupeu, 7 August 2013, para. 12, (“Sang Decision”), available at https://www.icc-cpi.int/CourtRecords/CR2013_05258.PDF.

²⁹ See Ntaganda Decision, para. 9.

³⁰ *Id.*

³¹ Sang Decision, para. 13.

³² See Ntaganda Decision, para. 10; See also Sang Decision, para. 14; See also Rome Statute, Arts. 64(9)(a) and 69(4).

³³ ICC Court Regs, Regs. 44(2)-(5).

Lastly is the issue of getting an expert to court to testify (if called to testify). The ICC will cover the costs of an expert's transportation, and provide the expert a daily subsistence allowance.³⁴ However, it is unclear if experts may receive compensation for lost wages due to attendance, as the ICC Regulations of the Registry do not explicitly mention "experts" as being eligible for such an allowance.³⁵ A lack of compensation may make it more difficult to find willing experts to attend. Additionally, the Rome Statute requires that States cooperate to facilitate the "voluntary attendance" of experts that reside in its jurisdiction.³⁶ As for protection for experts, the Rome Statute allows for experts to be provided "privileges and immunities" to the extent necessary to fulfill their purpose.³⁷ Moreover, Rome Statute Article 100(1)(a) seems to imply that the ICC will cover costs for protection measures for experts. As for protection, it is somewhat unclear if experts are eligible for specific security and protection arrangements, local protection measures, continuing protection programs, or other protective measures like pseudonyms, voice/facial distortions, closed sessions, or other relevant measures, as they are not specifically mentioned.³⁸ However, those regulations do mention "person(s) at risk", so it is possible that an expert may fall under that category and therefore be eligible for the aforementioned protections.³⁹ Finally, the ICC has the authority to assure that an expert will not be prosecuted, detained or subjected to a restriction of personal freedom for agreeing to appear before the ICC.⁴⁰

IV. Conclusion

Although this memorandum only breaks down the use of experts in two international criminal tribunals, the ICTY and ICC give a good overview of how expert witnesses are regulated and used in international criminal procedures. International tribunal regulation of experts has been developed to fit both common and civil law traditions, and provides national-level courts with a good reference point to develop its own system of using experts in domestic practice. Experts will continue to play an important role in helping international tribunals administer fair trials and issue just decisions.

³⁴ Rome Statute, Art. 100(1)(a); ICC Registry Regs, Reg. 87.

³⁵ See ICC Registry Regs, Regs. 85, 86.

³⁶ Rome Statute, Art. 93(1)(e).

³⁷ Rome Statute, Art. 48(4).

³⁸ See ICC Rules, Rule 87(1); See also ICC Registry Regs, Regs. 92-96.

³⁹ See *Id.* None of these provisions explicitly mention experts, but they all allow for "persons at risk" due to testimony before the ICC to be eligible. It is possible that an expert may be a "person at risk" due to their report, statement or appearance.

⁴⁰ Rome Statute, Art. 93(2); ICC Rules, Rule 191.