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### Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY

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# CREATING NORMS OF ATTORNEY CONDUCT IN INTERNATIONAL TRIBUNALS: A CASE STUDY OF THE ICTY

JUDITH A. McMORROW\*

**Abstract:** Using the International Criminal Tribunal for the Former Yugoslavia (ICTY) as a case study, this Article explores the merger of legal cultures at the ICTY. The ICTY was crafted in a high-stakes international environment and brings together lawyers and judges who have been trained and inculcated typically in a common law/adversarial system or a civil law/non-adversarial system. Lawyers and judges come to the ICTY not only with a distinct understanding of their roles within their home jurisdictions, but also with different skill sets. Merging the legal cultures has not always been smooth. By comparing how attorney-conduct norms are created in the United States—socialization, malpractice, market controls, regulatory processes, and procedural rules—with the practice at the ICTY, it becomes evident that the judges are the dominant source of norm creation in this international court. These norms are created, however, in an environment in which it appears that most of the substantive interaction between the judges, prosecutors, and defense counsel occurs in formal court settings. Future international courts would benefit from additional discussion among the judicial, prosecutorial, and defense functions as norms are created, including shared discussion about codes of conduct for judges, prosecutors, and defense counsel.

## INTRODUCTION

The implementation of international war crimes tribunals in the 1990s provides us an extraordinary laboratory to examine how legal cultures interact in the international arena. The International Criminal Tribunal for the Former Yugoslavia (ICTY) is the most mature of these tribunals. With twelve years of experience, the tribunal has indicted 161

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\* Professor of Law, Boston College Law School. My thanks to the Symposium organizers, particularly Dan Kanstroom for his encouragement, to Philip Weiner for his many insights and for arranging my visit to the ICTY, to the individuals involved with the ICTY who shared their experiences with me, Vlad Perju, and Andrew Dennington (BCLaw '06) and Gregory Burnett (BCLaw '08) for their great research assistance. This work was made possible by the generous financial support provided of the Boston College Law School Fund.

persons for serious violations.<sup>1</sup> The ICTY is a substantial legal community, with over 1000 employees (436 professionals), 200 interns, and 185 consultants and individual contractors.<sup>2</sup> These figures do not include defense counsel, who are treated as distinct from the ICTY—with some positive and negative consequences discussed below.<sup>3</sup> The ICTY budget is around 270 million dollars, with about fifteen percent of that budget devoted to legal aid.<sup>4</sup> Crafted as a blend of the common law/adversarial and civil law/non-adversarial models, it has a predominantly adversarial methodology.<sup>5</sup> The lawyers, judges, investigators, administrators, and support personnel, however, come from a range of backgrounds and training. Some come from a civil law tradition, in which the judge typically has the power to oversee a methodical investigation in a search for truth.<sup>6</sup> Many of the civil law-trained defense

<sup>1</sup> ICTY at a Glance, Key Figures of ICTY Cases, <http://www.un.org/icty/glance-e/index.htm> (last visited Nov. 18, 2006).

<sup>2</sup> See The Secretary General, *Twelfth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶ 247, delivered to the Security Council and the General Assembly (Aug. 15, 2005), <http://www.un.org/icty/rappannu-e/2005/index.htm> [hereinafter *Twelfth Annual Report*]. Through the 2005 budget, the ICTY has cost nearly one billion USD. Dominic Raab, *Evaluating the ICTY and Its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals*, 3 J. INT'L CRIM. JUST. 82, 96 (2005).

<sup>3</sup> See David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 NEW ENG. L. REV. 975, 975 (2003).

<sup>4</sup> ICTY at a Glance, *supra* note 1; see also Tolbert, *supra* note 3, at 982–83.

<sup>5</sup> RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY* 95 (2004) (“[T]he drafters of the statute did not have time properly to consider the amalgamation of common law and civil law systems. Instead, the Statute, drafted primarily by common law experts, was greatly influenced by common law, but tempered with concessions to civil law.”). The heavy use of common law approaches has some interesting political consequences; see PIERRE HAZAN, *JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 99 (James T. Snyder trans., 2004) (“From the beginning, the dominance of the common law system, followed by the Americans’ activism in the tribunal, has France convinced that Washington is ‘dictating’ justice in the former Yugoslavia.”); see also Gregory A. McClelland, *A Non-Adversary Approach to International Criminal Tribunals*, 26 SUFFOLK TRANSNAT’L L. REV. 1, 26–28 (2002) (arguing that ICTY and other international criminal tribunals would be more effective if they adopted procedural features borrowed from the civil law/non-adversary tradition).

Using a comparative law analysis, Maximo Langer examines the procedures of the ICTY and concludes that while the early ICTY procedures were predominantly adversarial, the more recent changes have moved toward a managerial judging model. Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 908 (2005).

<sup>6</sup> Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 139–40 (2004); Langer, *supra* note 5, at 840.

counsel were trained under the former Yugoslavia socialist structure, with its own vision of legal process.<sup>7</sup> Others come from a common law/adversarial model, in which the judge plays a much more passive role, and counsel are charged with developing and presenting facts and often define their role as an aggressive pursuit of that goal.<sup>8</sup>

Creating a new legal system drawn from a variety of traditions along a spectrum of adversarial to inquisitorial also creates a range of related attorney conduct issues. A rich body of literature explores the comparative sociology of lawyers.<sup>9</sup> Because these legal approaches result in strikingly different procedural and evidentiary rules, the lawyers and judges have different roles, resulting in quite different approaches to confidentiality, conflicts of interest, duty to the courts, and the like.<sup>10</sup> For example, prosecutors from a civil law tradition might assume that it is quite appropriate to talk privately with judges about the case, conduct that would be forbidden in an adversarial model. Some U.S.-trained lawyers come with an adversarial aggressiveness that is jarring to lawyers outside the U.S. system (and sometimes jarring to those trained in the

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<sup>7</sup> See Mark S. Ellis, *The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 949, 957 (2003) ("Many of the 'qualified' non-western attorneys were trained in the communist/socialist era, in a system that is antithetical to the Tribunal's substantive and procedural laws."). For example, only recently has a detained person in the former Yugoslavia had the right to speak confidentially to an attorney. LEGAL DEPARTMENT, WORLD BANK, FEDERAL REPUBLIC OF YUGOSLAVIA LEGAL AND JUDICIAL DIAGNOSTIC 12 (2002) [hereinafter WORLD BANK LEGAL REPORT].

<sup>8</sup> See generally, MODEL RULES OF PROF'L CONDUCT (2005) (setting out client-centered model); see also Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. INT'L CRIM. JUST. 585, 594 (2004) ("One should not underestimate the difficulty of getting judges from different legal traditions or with different backgrounds and training to get together and work smoothly, side by side.").

<sup>9</sup> Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463, 479–81 (2005), and articles cited therein. See generally, e.g., LAWYERS IN SOCIETY (Richard L. Abel & Philip S. C. Lewis eds., 1988) (three-volume collection providing a comparative analysis on the legal professions of common and civil law countries); LAWYERS IN THE THIRD WORLD: COMPARATIVE AND DEVELOPMENTAL PERSPECTIVES (C.J. Dias, R. Luckham, D.O. Lynch & J.C.N. Paul eds., 1981); Carlos Wing-Hung Lo & Ed Snape, *Lawyers in the People's Republic of China: A Study of Commitment and Professionalization*, 53 AM. J. COMP. L. 433 (2005).

<sup>10</sup> Mark S. Ellis, *Developing a Global Program for Enhancing Accountability: Key Ethical Tenets for the Legal Profession in the 21st Century*, 54 S.C. L. REV. 1011, 1013–14 (2003) (all codes examined contained principles on professional independence, diligence, conflict of interest, and guidelines governing relations with the court, although specifics differed; there was less commonality on disciplinary measures, guidelines for lawyer/client communication, standards of personal integrity, confidentiality, methods of financial arrangements, and legal training); Langer, *supra* note 5, at 852–68 (discussing internal disposition of lawyers from various systems and emergence of predominantly adversarial methodology at ICTY).

U.S. system as well). Even within common law traditions, expectations vary. For example, a British-trained defense counsel would not prepare a witness in advance of trial because it is forbidden in Great Britain.<sup>11</sup> For U.S.-trained defense counsel, however, it would be considered inappropriate *not* to interview and prepare a witness for the rigors of trial if there were an opportunity to do so.<sup>12</sup> U.S. lawyers cannot directly contact a person who has counsel and must go through the designated counsel,<sup>13</sup> British lawyers do not face that concern. Understanding one's role shapes more subtle issues as well. For example, for U.S. lawyers the client-attorney relationship is shaped by ethical values, including a client-centered model that requires communication and provides the client significant choices.<sup>14</sup>

The merger of legal cultures involves more than merely training lawyers in the ways of the ICTY. The ICTY lawyers are licensed by their home jurisdictions and are required to comply with the obligations of that licensing jurisdiction, whether France, Serbia, Sweden, Canada, the United States, Great Britain, or another country. The shadow of the home licensing requirements is omnipresent for the lawyers and judges. Consequently, if the home jurisdiction forbids preparing witnesses, the lawyer has a momentary choice of law concern: which rules will govern? Quite appropriately, the ICTY proceeds with the understanding that the rules of the tribunal prevail when assessing conduct before the ICTY.<sup>15</sup> While it would be logical for the home jurisdiction

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<sup>11</sup> Colloquy, *Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices*, 7 GEO. J. LEGAL ETHICS 865, 868–73 (1994).

<sup>12</sup> The ICTY has also recognized that it would not be reasonable for defense counsel to compel attendance of a prospective witness without first knowing what the witness would say. Prosecutor v. Krstic, Case No. IT-98-33-A, Decision on Application For Subpoenas, ¶ 8 (July 1, 2003) (forcing an uncooperative witness to testify without knowing the content of the testimony would be “contrary to the duty owed by counsel to their client to act skillfully and with loyalty”).

<sup>13</sup> MODEL RULES OF PROF'L CONDUCT § 4.2 (2006) (governing communication with person represented by counsel).

<sup>14</sup> See, e.g., *id.* § 1.2. The Model Rules of Professional Conduct, which serve as the template for most U.S. codes of conduct for attorneys, speaks of the “client-attorney” relationship instead of the lawyer-centered “attorney-client” relationship to reinforce that the client (not the attorney) is the central actor in the relationship.

<sup>15</sup> See Int'l Criminal Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, *Code of Professional Conduct for Counsel Appearing Before the International Tribunal*, art. 4, ICTY Doc. IT/125/Rev. 2 (June 29, 2006), available at <http://www.un.org/icty/legaldocce/index.htm> (“If there is any inconsistency between this Code and any other codes of practice and ethics governing counsel, the terms of this Code prevail in respect of counsel’s conduct before the Tribunal.”) [hereinafter ICTY CODE OF CONDUCT].

to defer to the ICTY rules, the home jurisdiction is typically silent on this issue.<sup>16</sup> The move toward having at least two defense counsel for defendants has eased some of these concerns because lawyers can assign tasks within the team based on their individual competence and any residual concerns the lawyers have about home licensing requirements.<sup>17</sup>

These different systems not only have different requirements for attorney conduct, they also develop different skill sets on the part of both lawyers and judges.<sup>18</sup> For example, defense lawyers who come from a civil law tradition typically do not develop skills of cross-examination or aggressive fact development. Most lawyers trained in a civil law tradition have not had as much opportunity to move from prosecutor to the defense role, which allows the lawyer to hone skills. The ICTY procedures are complex, resulting in lengthy and sometimes dull trials, punctuated by painful testimony when victims are allowed to speak (which is not always the case).<sup>19</sup> The ICTY cases also involve complicated historical, forensic, and witness protection issues that require special expertise that needs to be developed by lawyers from all traditions.<sup>20</sup> While the ICTY has developed a very helpful Manual for Practitioners and Practice Directions, this cannot substitute for a full inculcation into the norms and practice of the Tribunal.<sup>21</sup>

The judicial skills are particularly complicated because the ICTY judges fall into three models: the judge-judge, the diplomat-judge, and

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<sup>16</sup> See generally Anne Beck & Sylvia Tonova, Note, *No Legal Representation Without Governmental "Interposition,"* 17 GEO. J. LEGAL ETHICS 597 (2004) (analyzing the U.S. executive order that governs ICTY defense counsel services provided by U.S. attorneys).

<sup>17</sup> See, e.g., Ellis, *supra* note 7, at 959.

<sup>18</sup> *Id.* at 957 ("Often the local Yugoslav attorneys who appear in front of the ICTY lack the skills necessary to undertake a massive international war crimes case.").

<sup>19</sup> HAZAN, *supra* note 5, at 187 ("Caught in their own logic as lawyers, they did not weigh the heaviness of the procedures created. The result: From appeal to appeal, the Tadic case lasts five years; that of General Blaskic, two years with periods of interruption that give the ICTY a sense of judicial self-absorption.").

<sup>20</sup> Richard J. Wilson, *Assigned Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach,* 2 INT'L CRIM. L. REV. 145, 147 (2002) ("The law of war crimes itself is a rapidly developing blend of international and domestic concepts and procedures, requiring unique skills, experience, knowledge, strategic sense and training on the part of defense counsel.").

<sup>21</sup> Ellis, *supra* note 7, at 970 ("Though helpful and very solid, the Manual cannot substitute for trial advocacy experience."). See also Practice Directions, <http://www.un.org/icty/legaldoc-e/index.htm> (last visited Nov. 18, 2006).

the professor-judge.<sup>22</sup> The judge-judge comes to the ICTY with significant experience trying cases in the judge's home jurisdiction, whether in a civil law model, in which the judge would be significantly more active, or in an adversarial model, in which the judge plays a more passive role. The diplomat-judge comes to the ICTY with a strong diplomatic background, but little or no experience managing a courtroom. The academic-judge typically comes to the ICTY with a rich and deep background in international human rights or criminal law, but often with little or no experience managing a courtroom. The early judicial pool was heavily populated with academic judges.<sup>23</sup> Yet management skills are critical in running long and complicated trials, with defendants who may actively challenge the legitimacy of the Tribunal and evidentiary and other issues that require prompt rulings by the court.<sup>24</sup>

Finally, infused throughout these structural and skill differences lies the underlying context of a war crimes tribunal. The ICTY is not a traditional court charged with trying cases that come before it. The ICTY is designed for "the prosecution" of those charged with perpetrating atrocities in the former Yugoslavia.<sup>25</sup> While many of the atrocities were documented, the factual link between the crime and the perpetrators is still in dispute.<sup>26</sup> A series of not guilty verdicts would be a failure of the system, an acknowledgement that the ICTY could not make the link between the horrible crimes and the wrongdoers. While this natural tendency to push toward conviction exists in all criminal tribunals, it may be even stronger at the ICTY in the face of the significant and horrifying human rights abuses during the Balkan conflict.

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<sup>22</sup> Interview with ICTY judge, in The Hague, Netherlands (May 15, 2006) (summary on file with author). This interview was conducted as part of a long-term project interviewing judges to identify how judges address ethical issues within the courtroom.

<sup>23</sup> See KERR, *supra* note 5, at 95.

<sup>24</sup> See Langer, *supra* note 5, at 886. Professor Langer explores "procedure as a device that the court uses with (even involuntary) collaboration and coordination from the parties to process cases as swiftly as possible." *Id.* at 878. This is related to but somewhat distinct from the skill set of controlling a trial under whatever model of judging is being used. *Id.* at 883–84. Cf. Penny J. White, *Judicial Independence: Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URBAN L.J. 1053, 1072–73 (2002) (describing methods to measure judicial management skills).

<sup>25</sup> S.C. Res. 808, pmbl., U.N. Doc. S/RES/808 (Feb. 22, 1993); see also M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 42 (1997).

<sup>26</sup> The Milosevic trial demonstrated this dynamic. Establishing the crimes was relatively straightforward. The challenge was "to demonstrate that the chain of command leads to Milosevic." HAZAN, *supra* note 5, at 168.

The ICTY is also not a typical post-hoc tribunal, but rather was created by the U.N. Security Council, a political body, *while the Balkan conflict was still raging*.<sup>27</sup> The political context is an omnipresent concern.<sup>28</sup> The initial prosecution strategy to indict only second tier offenders, and not commanders and those who appeared to have orchestrated many atrocities, caused serious concern among the judges.<sup>29</sup> Not surprisingly, it was the continental law judges who most aggressively intervened to challenge the prosecutor's decision-making, rather than the common law judges, who traditionally take a more neutral role in the charging process.<sup>30</sup> Eventually the common law judges joined in the criticism.<sup>31</sup> This blending of roles once again demonstrates the complexity of merging legal traditions with different actors having varying visions of their role. Meanwhile, diplomats who were attempting to negotiate a settlement were in communication with the Office of the Prosecutor (OTP).<sup>32</sup> They were sending signals that the interests in seeking justice (the goal of the ICTY) should not jeopardize the interests of a negotiated peace (the goal of the negotiators).<sup>33</sup> Since the worst massacre, the deaths of 6000 to 9000 Muslims after the fall of Srebrenica in 1995, occurred during this period, it was apparent that the cautiousness of the ICTY did not benefit the peace process. (Whether it would have prevented Srebrenica is another question beyond the scope of this Article.) The ICTY chief Prosecutor was presented with a "moral nightmare," a challenge that could be the final exam for a course on prosecutorial ethics.<sup>34</sup>

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<sup>27</sup> KARINE LESCURE & FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA: THE WORKING OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE 3 (1996).

<sup>28</sup> KERR, *supra* note 5, at 3 (noting that "the Tribunal must perform a delicate balancing act at the interface of law and politics, so that it is able to manipulate the political environment in order to serve the judicial function, without the judicial process becoming politicized").

<sup>29</sup> See HAZAN, *supra* note 5, at 56–63.

<sup>30</sup> *Id.* at 58 ("The most active judges are nicknamed the Three Musketeers . . . all representing continental law . . .").

<sup>31</sup> *Id.* at 59; see generally Cassese, *supra* note 8.

<sup>32</sup> For example, while some diplomats were roundly condemning Slobodan Milosevic and Radovan Karadzic, other diplomats were actively negotiating with these same actors for peace. Meanwhile, the ICTY judges were urging more aggressive action against these commanders. HAZAN, *supra* note 5, at 30–34, 61–63.

<sup>33</sup> *Id.* at 61–62.

<sup>34</sup> *Id.* at 63; see generally Eric Blumenson, *The Challenge of Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801 (2006).



What happens when you craft a new system in a high-stake international environment, bring in lawyers trained and inculcated into the norms of their own system, toss them in a salad bowl, and mix them up? A typical ICTY case would involve a three-judge panel that hears evidence and makes both findings of fact and conclusions of law. Each defendant typically has two defense counsel. The prosecutor's office staffs cases with at least two prosecutors. Consequently, each case has a minimum of seven legal professionals and often many more, especially if multiple defendants are tried together. What happens in an individual case—think of it as a single salad plate—where the mix from the salad bowl might include judges and lawyers steeped in a civil law model, a blend of models, or a predominantly adversarially-trained group? What happens when the judges come from one model, the lawyers from another? What happens if you have a panel with predominantly diplomat or academic judges, who lack experience in managing a courtroom? How do you bring disparate systems closer together on the ground? Of course, you will create procedural rules that address some of the specific bottom-line obligations to the court (when do you have to inform the other side of your witnesses, rights to cross examination, etc.), but there are a host of unanswered questions even when you spell out a procedure.

To help frame the inquiry, this Article looks at the multiple ways that attorney-conduct norms are created in the United States—socialization, malpractice, market controls, regulatory processes, and procedural rules—and compares them to what appears to be the legal practice community emerging in the ICTY.<sup>35</sup> With socialization as a weak harmonizing force, malpractice a non-existent factor, and market controls of little effect, the more likely places for norm setting at the ICTY is through regulatory processes (Rules of Conduct) and procedural rules. Both of these methods lead directly to the judges as the dominant source of norm setting within the ICTY. By necessity, the ICTY judges have taken a more active role than their U.S. counterparts have in creating norms of conduct. The experience at the ICTY suggests that future international courts would benefit from more direct interaction

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<sup>35</sup> This Article uses the idea of professional norms to include statements of conduct that have the force of law (such as procedural rules), self regulation rules that have quasi-legal force (such as rules of professional conduct that subject the lawyer to professional sanction if violated), and norms or claims of right behavior that may not be imposed by law, but shape our decision-making. In other words, this article will discuss both the law that directs and prohibits lawyer behavior and the values that help shape our discretionary choices.

between the judicial, prosecutorial, and defense functions as norms are created.<sup>36</sup>

## I. CREATION OF ATTORNEY CONDUCT NORMS

### A. Social Norms

Abraham Lincoln “read” for the law, reading and learning by his own wits, and picking up some insights from more knowledgeable lawyers who passed on the skills and culture of the legal profession.<sup>37</sup> That quaint world has been supplanted by formal legal education, where social norms are transmitted from the beginning of law school.<sup>38</sup> Most students come into U.S. law schools infused with a pop culture understanding of our adversary system shaped by years of television and news exposure. Students develop a more sophisticated perspective as they proceed through law school. Classroom methodology reinforces the role-based approach that dominates the adversary system. This socialization process continues as students move into temporary practice settings as law clerks and interns, observing and picking up the social cues. Through conversations with friends who are practicing in a variety of areas, students begin to construct an understanding of the dynamics of practice and social norms. U.S. law students eventually become steeped in the adversarial model, with a healthy understanding (we hope) of its strengths and weaknesses. Through acculturation, law students slowly learn “best practice” in a variety of settings. This is an incomplete process and rightly criticized for failing to do a better job, but the shared educational experiences creates foundation expectations.<sup>39</sup> After law school, newly minted lawyers move into practice settings that will hopefully continue to inculcate best practices, whether in the role

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<sup>36</sup> In proceeding, I write from the perspective of an American law professor with a strong understanding of U.S. litigation ethics, but without a deep background in international tribunals. This Article has benefited greatly from the emerging and extremely helpful commentaries of practitioners before the ICTY and the many people who agreed to speak with me during my visit to the ICTY.

<sup>37</sup> FREDERICK TREVOR HILL, *LINCOLN THE LAWYER* 27–34, 50–51, 70–81 (Fred B. Rothman & Co. 1986) (1906).

<sup>38</sup> Since the 1970s, the field has heard critiques that law school is a dominant actor in the socialization of lawyers. See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591–615 (1982).

<sup>39</sup> See, e.g., Deborah L. Rhode, *The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 732–35 (1994); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 38–41 (1992).

of prosecutor, defense counsel, or state attorney general. Social norms are a small but important part of creating expectations of behavior.

Compare this acculturation process to the ICTY, which has twenty-five judges from twenty-three different countries.<sup>40</sup> The defense bar of the ICTY has 257 members, drawn from multiple legal traditions, with roughly half of the defense bar from the former Yugoslavia, which has a civil law tradition.<sup>41</sup> Prosecutors come from variety of jurisdictions, although their background and experience are not readily ascertainable from the public record. While all ICTY lawyers have access to the procedural rules, they bring quite divergent socialization experiences. However flawed we believe our U.S. adversarial system to be, actors have some basic understanding of the role they should play, even if they have different views of how to execute that role.

In the ICTY, all of the norms were created from scratch. Civil and common law lawyers had to understand this new hybrid trial model and their role within that model. Judges were faced with challenging questions, ones that U.S. judges face and continue to struggle with, but often without the background or experience in how to address the issues. For example, what should judges, prosecutors, or defense counsel do when it appears that one lawyer is of questionable competence? When and to what degree should a judge intervene? How should a lawyer proceed when representing an uncooperative defendant?<sup>42</sup> When is a conflict of interest present? What norms should a judge refer to when assessing these questions?<sup>43</sup> One can imagine that some of the earliest judges and lawyers felt like deer caught in the headlights, frozen with uncertainty about how to proceed. There was no shared history, background, or culture to help determine the best course of action.

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<sup>40</sup> *Twelfth Annual Report*, *supra* note 2, at 3.

<sup>41</sup> See Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia, Members List, <http://www.adcicty.org> (last visited Oct. 1, 2006). The composition of the defense bar has changed somewhat over time. As of 1999, sixty-six percent of the defense bar came from the former Yugoslavia. Michael Bohlander, *International Criminal Defence Ethics: The Law of Professional Conduct for Defence Counsel Appearing Before International Criminal Tribunals*, 1 SAN. DIEGO INT'L L.J. 75, 78 (2000).

<sup>42</sup> This issue was particularly challenging in the trial of Slobodan Milosevic, who maintained a strategy "not of disruption, but of perversion" by using the court's own rules to serve as a bully pulpit to put forth his view of history. HAZAN, *supra* note 5, at 161.

<sup>43</sup> This challenge of what norms or rules should govern attorney conduct has an interesting parallel in the United States, where judges in federal courts generally, but not always, rely on the rules of conduct of the state in which the court sits. See Judith A. McMorow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 6 (2005).

Even as norms slowly emerged, as discussed below, there was a steady turnover of judges and counsel. At any one time there are fourteen permanent judges, who are elected by the U.N. General Assembly for a four-year term and eligible for re-election.<sup>44</sup> The judge pool can also include up to nine *ad litem* judges drawn from a pool of judges elected by the General Assembly.<sup>45</sup> They may serve for only a single four-year term. This system assures that at least one-third of the judges turn over every four years. There is no systematic requirement for turnover of prosecutors or defense counsel, but there appears to have been a regular movement of lawyers in and out of those roles. For example, four individuals have served as the chief prosecutor.<sup>46</sup> The pool of defense counsel has also turned over.<sup>47</sup> Each time there are new prosecutors, defense counsel, or judges, self-education begins anew. Because of both the disparate legal cultures and turnover, socialization through shared norms could not act as a *strong* harmonizing force at the ICTY.

Shared educational experience has more subtle effects. In the United States, the prosecution and defense counsel may have gone to the same school and had the same professors. Even if they did not share that common bond, they still had similar educational experiences. In addition, they might live in the same community, vote in the same political election, and be exposed to the same pop culture. They often belong to the same bar association or Inns of Court, which provides opportunities to interact outside the courtroom. If they talk outside of the office, they can sometimes build bonds of connection so that they do not see the opposing counsel as just a “hack,” the usual disparaging caricature for defense counsel, or “zealot,” the usual disparaging caricature of a prosecutor.<sup>48</sup>

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<sup>44</sup> Int’l Criminal Trib. for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, art. 13 *bis* (2006), available at <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf>.

<sup>45</sup> *Id.* at 13 *ter*.

<sup>46</sup> ICTY REGISTRY, ICTY 1994–2004: A UNIQUE DECADE 49 (2004). The ICTY summary of the first ten years did not provide a summary of defense counsel.

<sup>47</sup> See Martha Walsh, *The International Bar Association Proposal for a Code of Professional Conduct for Counsel Before the ICC*, 1 J. INT’L CRIM JUST. 490, 494 (2003) (noting of the ICTY that “appearances before the tribunal are more irregular compared with either national bars or indeed more established international tribunals, thus lessening ‘gentleman’s peer pressure’ to comply” with a Code of Conduct).

<sup>48</sup> The World Bank’s Legal and Judicial Diagnostic of the Federal Republic of Yugoslavia identified the value of conversation:

Too much cozy interaction of the prosecution and defense sometimes raises a question of collusion—that the legal system is just a big club of insiders.<sup>49</sup> This is a special danger in the war crimes tribunals, which require credibility in the world community if the decisions of the war crimes tribunals are to have long-term effect. The ICTY is creating important human rights law that will help shape international norms *if the legal standard applied, and the factual findings on which it is based, are deemed credible*.<sup>50</sup> The ICTY decisions are further developing the jurisprudence of crimes against humanity,<sup>51</sup> law of genocide,<sup>52</sup> command responsibility,<sup>53</sup> and rape as a war crime.<sup>54</sup> The ICTY already faces a high hurdle in maintaining credibility as it survives political pressures, diplomatic exigencies, increased demands for efficiency, conflicting goals, and ambivalent support.<sup>55</sup> If the ICTY is seen as an insider's club, then the legal determinations will have less credibility in the world community. Creating sharp separations among judges, prosecutors, and defense counsel helps assure that each unit functions independently and without collusion. Providing a mix of lawyers from a variety of legal traditions also prevents the appearance of capture from any one or two nationalities. The ICTY has the additional challenge of establishing credibility within the former Yugoslavia. This lack of credibility can flow not just from perceived victor's justice, but also from a perception (and,

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An association of the entire legal profession, including lawyers in private practice, the government, the judiciary and the academia, should effectively promote the interests of the entire profession and improve legal culture through facilitating communication and cooperation among jurists, providing a forum for discussion of topical issues in legislation, legal practice and legal reform, and organizing educational and public information initiatives.

WORLD BANK LEGAL REPORT, *supra* note 7, at 54.

<sup>49</sup> See generally Abraham Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15 (1967) (describing collusion between prosecutors and defense counsel).

<sup>50</sup> See McClelland, *supra* note 5, at 10.

<sup>51</sup> GUENAELE METTRAUX, INTERNATIONAL CRIMES AND THE *AD HOC* TRIBUNALS 147 (2005) ("The [ad hoc] Tribunals have had an immense influence on the law of crimes against humanity, turning a set of abstract concepts into a fully fledged and well-defined body of law.")

<sup>52</sup> *Id.* at 199–202.

<sup>53</sup> See McClelland, *supra* note 5, at 5–10.

<sup>54</sup> See generally Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30 (2003) (discussing the evolution of rape as a war crime).

<sup>55</sup> See HAZAN, *supra* note 5; Patricia M. Wald, *Recent Books on International Law*, 99 AM. J. INT'L L. 720 (2005) (reviewing Pierre Hazan's *Justice in a Time of War* (2004)).

even worse, the reality) that the Tribunal is directly or indirectly protecting State leadership from prosecution.<sup>56</sup>

Too little interaction among prosecutors, defense, and judges, however, risks demonization of those playing a different role.<sup>57</sup> The ICTY appears to be a system of relatively little *professional* interaction with prosecutors, defense, and judges outside of the courtroom. In addition to the cultural divides that might exist, there is no common bar association.<sup>58</sup> Prosecutors, judges, and defense counsel must be fluent in either English or French, with some leeway for defense counsel.<sup>59</sup> Particularly where defense counsel is primarily skilled in the language of the accused, language barriers may impair the ability to communicate outside the courtroom. Yet in some ways, the ICTY work setting might unintentionally cause insufficient respect for boundaries between roles. Many of the lawyers at the ICTY are young expatriates who are living in a relatively small community, which raises a concern that information might not be as secure as one would wish.<sup>60</sup>

The structure of the ICTY encourages the separation of roles, at least between prosecutor and defense counsel. The ICTY is organized as a three-legged stool with a Registrar who oversees the administration of the tribunal, judges, and prosecutors. Individuals who work in

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<sup>56</sup> The contempt judgment against Milan Vujin sets out accusations by a journalist that the Serbian legal profession was protecting state leadership at the expense of individual defendants at the ICTY. Prosecutor v. Tadic, Case No. IT-94-I-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶¶ 111–112 (Jan. 31, 2000). That two of the most prominent defendants, Ratko Mladic and Radovan Karadzic, are still at large eleven years after the massacres at Srebrenica reinforces this perception that the world community is not truly committed to bringing perpetrators to justice. Yet another dimension is concern by Dutch authorities “about attempts by Bosnian, Croat, and Serb spies to infiltrate the tribunal.” HAZAN, *supra* note 5, at 181.

<sup>57</sup> Dominic Raab, Legal Advisor to the British Embassy in The Hague, has argued that independent functioning also “has undermined the development of any coherent and collective responsibility within the ICTY.” In his critique he focuses on “the three organs of the Tribunal—the Chambers, Registry and [Office of the Prosecutor].” This structural choice places the defense function as a subset of the Registry rather than as an independent and coequal concern. Raab, *supra* note 2, at 98.

<sup>58</sup> A natural tendency would be for those ICTY lawyers with a shared language (English, French, or Serbian, for example) to gravitate toward similar social settings. Anecdotal evidence suggests this is true.

<sup>59</sup> Int’l Criminal Trib. for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, *Rules of Procedure and Evidence*, Rule 3 (Languages), ICTY Doc. IT/32/Rev. 39 (Sept. 22, 2006), available at <http://www.un.org/icty/legaldoc-e/index.htm> [hereinafter R. P. & EVID.].

<sup>60</sup> Interview with ICTY prosecutor #4, in The Hague, Netherlands (May 15, 2006) (notes on file with author).

these three branches are all U.N. employees and work in the same building. This structure is vintage civil law model, in which you would expect close interaction between judges and prosecutors. Since the procedural rules are heavily adversarial, however, the ICTY has created separation of the judge and prosecutor function within the building.

Defense counsel are separate and are not officially recognized as part of the ICTY. As such, the ICTY annual report has no section discussing the defense function. Any defense issues are filtered through the Registrar, who has primary responsibility for assuring a defense function. Because most defendants cannot afford lawyers, legal fees for indigent defendants—who make up ninety percent of all defendants—are paid by the Registrar.<sup>61</sup> Defense counsel are housed away from the main ICTY building and are provided small offices in the ICTY building to use during trial.<sup>62</sup> Only in the last few years have defense counsel had access to the ICTY cafeteria without requiring a security escort. These issues reflect the growing pains of a new tribunal. They also reinforce a social isolation of defense counsel.

The ICTY professionals do not appear to have systems of talking to each other concerning professional issues on neutral territory—no international court bar association and no regular in-house conferences. The relentless pressure of high-stakes litigation appears to absorb the energy of all participants, keeping them in their respective roles during long workdays. There are conferences around the world about war crimes, but as one defense counsel stated, “[W]e don’t usually get invited to the table.”<sup>63</sup> You can understand how easily the defense function gets marginalized. The nobility in prosecuting a war criminal is evident. You have to believe fundamentally in the rule of law to see the nobility of giving vigorous defense to people charged with war crimes.<sup>64</sup> A passionate justification of the defense function is beyond the scope of

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<sup>61</sup> R. P. & EVID., *supra* note 59, at 44, 45, 45(c).

<sup>62</sup> See Tolbert, *supra* note 3, at 976 (“[F]or those who have visited the ICTY, one can hardly fail to notice that in its very physical layout, with the Prosecutor and Court located ‘cheek by jowl’ and defense counsel situated generally offsite, there is perhaps a metaphor where the defense fits into the scheme of things.”).

<sup>63</sup> Telephone Interview with ICTY defense counsel #2 (Mar. 23, 2006) (interview on file with author).

<sup>64</sup> This challenge to representation is particularly difficult for lawyers with a strong faith, political, social, or gender identity. For a fascinating analysis of the challenges of being a Jewish lawyer representing a Muslim defendant charged with terrorism, see Amy Porter, *Representing the Reprehensible and Identity Conflicts in Legal Representation*, 14 TEMP. POL. & CIV. RTS. L. REV. 143 (2004) (exploring the question of “why you?”).

this Article. Nevertheless, it is necessary to note that history is replete with scapegoats—people who were assumed to be bad because they were too close to the bad actors or were socially undesirable.<sup>65</sup> You need full processes that test the facts to make sure that we have not fallen into the same wrong. Without a credible and vigilant defense, there is a risk that war crimes tribunals become victor's justice and a predominantly political rather than legal body. Indeed, eight defendants have been acquitted at ICTY trials.<sup>66</sup>

The disparate legal backgrounds of the legal actors at the ICTY and the need for strict separation of functions means that socialization—the creation of shared norms through common background and reinforced through social interactions—does not appear to be a strong source of norms at the ICTY. There are too many different actors from too many different legal cultures, and it is not clear how much they are talking across roles (i.e., defense talking to prosecutors, prosecutors to defense, etc.).

### B. *The Market*

In the United States, the market also serves as a source of norms for attorney conduct. Client selection gives preference to certain kinds of lawyering services or styles, although we can concede it is an imperfect market. In other words, lawyers who offer certain kinds of services and behave in certain ways will attract certain kinds of clients.<sup>67</sup> Certain practices will thrive, others not. As with social norms, the market serves like a sheep dog, setting the outer boundaries for lawyering.

A market analysis of client choice obviously does not work as we consider prosecutorial ethics because the chief prosecutor hires prosecutors.<sup>68</sup> While in theory the defense side could have market

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<sup>65</sup> Flaws in the adjudication process have made some of these cases legendary. See generally HAYWOOD PATTERSON & EARL CONRAD, SCOTTSBORO BOY (1950).

<sup>66</sup> See ICTY at a Glance, *supra* note 1 (follow "Key Figures" hyperlink).

<sup>67</sup> See generally John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83 (2000) (arguing for a multidisciplinary approach to legal services in the United States). Market theories do not necessarily lead to more ethical lawyering. Some have noted that lawyers who act in an ethical manner may be at a competitive disadvantage. See James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2494 (2003).

<sup>68</sup> During the early years of the ICTY the Tribunal received very little financial support from the United Nations for its work. To fill the gap, for a two year period beginning in 1994, the United States placed twenty-two high-level functionaries (analysts, specialists, and lawyers) at the disposal of the Tribunal. This group served as the core of the Office of the Prosecutor. HAZAN, *supra* note 5, at 52.



forces shaping attorney conduct, the ICTY defense practice is not an open market where client selection can trump. Over ninety percent of the defendants have appointed counsel, which generally limits their choice to counsel on an approved list.<sup>69</sup> Qualifications to be placed on the list are relatively low. Counsel must be admitted to practice in any country (or have a position as a university professor), and be proficient in English or French, the two official languages of the tribunal.<sup>70</sup> Language proficiency can be waived with approval of the court in the interests of justice.<sup>71</sup> In addition, defendants can request lawyers from the list—so a certain market thrives—and those requests appear to be honored as long as a conflict is not present.<sup>72</sup> The ICTY tribunal sits in The Hague, however, remote from the former Yugoslavia and from centers with pools of highly trained advocates. Initial compensation for assigned counsel was too low to provide even subsistence to defense counsel, but it has improved significantly.<sup>73</sup>

This small, closed market did give rise to a serious attorney conduct issues in the early days of the ICTY, when there were some instances of fee sharing by lawyers and clients.<sup>74</sup> Because defense fees are set based on a world market, legal fees paid to U.S. lawyers might be seen as fairly modest, while the same fees paid to a lawyer from a less affluent country could be huge financial benefit to the defense lawyer. As a result, some clients requested a certain lawyer if the lawyer agreed to kick back some of the legal fees, either through direct payment or by hiring a member of the defendant's family to serve on

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<sup>69</sup> Ellis, *supra* note 7, at 972.

<sup>70</sup> R. P. & EVID., *supra* note 59, at 44 (Appointment, Qualification and Duties of Counsel).

<sup>71</sup> See, e.g., Prosecutor v. Kupreskic, Case No. IT-95-16-T, Decision on Defence Requests for Assignment of Counsel (Mar. 10, 1998) (authorizing the Registrar to allow counsel of choice even though counsel does not speak the languages of the Tribunal, on condition that counsel seek co-counsel who speaks one of the working languages).

<sup>72</sup> Ellis, *supra* note 7, at 963. The minimum qualifications drew David Tolbert, former Chef de Cabinet to the President and Senior Legal Adviser to the Registrar at the ICTY, to state that, "in practice, the right to choose counsel has reigned supreme for all accused." Tolbert, *supra* note 3, at 978.

<sup>73</sup> Ellis, *supra* note 7, at 951–54.

<sup>74</sup> The Secretary-General, *Report of the Office of Internal Oversight Services on the Investigation into Possible Fee-Splitting Arrangements Between Defence Counsel and Indigent Detainees at the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia*, ¶ 2, U.N.Doc A/55/759 (Feb. 1, 2001), available at [http://www.un.org/Depts/oios/reports/a55\\_759.pdf](http://www.un.org/Depts/oios/reports/a55_759.pdf) [hereinafter *Fee Splitting Report*].

the legal team.<sup>75</sup> Fee splitting, and the perception of the practice, had a very negative effect on the credibility of the Tribunal when the accused flourished financially from the trial. In addition, fee splitting was identified as prolonging ICTY proceedings and encouraging bill padding.<sup>76</sup> In the short term, the problem was addressed on a case-by-case basis by judges, who penalized lawyers for submitting frivolous motions.<sup>77</sup> In the long term, the issue was addressed by forbidding the practice in the Defense Counsel Code of Conduct, discussed below. In effect, this intervention served as a market correction.

As with U.S. tribunals, the ICTY has limited a defendant's ability to change counsel once assigned.<sup>78</sup> In particular, claims of breakdown in communication and lack of trust in counsel alone does not justify removal of counsel.<sup>79</sup> While the ICTY has a clear interest in preventing manipulation of the process by defendants, this issue presents a challenge to all involved. Trust is a long-standing and legitimate aspect of the attorney-client relationship in the United States, and a breakdown in trust is of serious concern. This issue is particularly acute where the defendant denies the legitimacy of the Tribunal. For example, Slobodan Milosevic was initially allowed to represent himself.<sup>80</sup> Due to Milosevic's ill health, the Trial Chamber assigned counsel, who had previously acted as *amici curiae* for Milosevic. When Milosevic refused to cooperate with the assigned counsel, they moved to withdraw, but the Tribunal denied their motion. The President of the ICTY, who affirmed the denial to withdraw, was rather curt in advising counsel: "Representing criminal defendants is not an easy task. Assigned Counsel would do well to recognize that fact, to realize the breadth of activities that they can carry out . . . and continue making the best professional efforts on his behalf that are possible under the

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<sup>75</sup> *Id.* ¶¶ 16-44; see also *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Decision (July 8, 2002) (withdrawing legal aid to Zoran Zigic after investigation revealed that defendant had received substantial means by cash transfers from defense team).

<sup>76</sup> See *Fee Splitting Report*, *supra* note 74, ¶ 42.

<sup>77</sup> See *id.* ¶ 68.

<sup>78</sup> See *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojevic's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, ¶¶ 115-121 (July 3, 2003) (denying accused's request to force withdrawal of counsel).

<sup>79</sup> See *id.* ¶ 120.

<sup>80</sup> *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 11 (Nov. 1, 2004) (holding "defendants have a presumptive right to represent themselves before the Tribunal").

circumstances.”<sup>81</sup> The accused’s preferences played no role and without the ability to act upon preferences, there can be no market factor in regulating attorney conduct.

### C. *Malpractice*

In the United States, malpractice lawsuits are an additional source of norms as courts identify specific fiduciary obligations of attorneys. Malpractice is an omnipresent concern for solo practitioners and lawyers who practice in large firms.<sup>82</sup> For example, it only took a few malpractice suits arising from a lawyer serving the board of director of clients, or the fear of such suits, to cause many firms to forbid lawyers from being both lawyer for a corporation and serving on that corporation’s board of directors.<sup>83</sup> Some malpractice insurers have also imposed “best practices” on the law firms they insure as part of a loss-prevention program.<sup>84</sup>

Malpractice, however, has never been a vibrant source of attorney conduct norms in criminal cases. Prosecutors in the United States are generally immune from suit.<sup>85</sup> For most criminal defendants, malpractice does not offer a meaningful source of norms.<sup>86</sup> We would anticipate the same problems for ICTY defendants who had poor counsel. If it would be hard in the United States for a criminal defendant to bring and win a malpractice claim against his or her attorney, imagine someone accused of war crimes coming into court and complaining about inadequate representation. They would not make very sympathetic tort defendants. Jurisdiction and choice of law issues would be painfully complex. Not surprisingly, there does not appear to have been any malpractice claims brought against a defense counsel practicing before

<sup>81</sup> *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw, ¶ 13 (Feb. 7, 2005).

<sup>82</sup> Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client Is Safe*, 47 FLA. L. REV. 1, 3, 43 (1995).

<sup>83</sup> See SUSAN P. SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* 236–39 (2002).

<sup>84</sup> See *id.* at 38 (describing Attorney’s Liability Assurance Society’s vigorous loss prevention program).

<sup>85</sup> See *Imbler v. Pachtman*, 424 U.S. 409, 427–31 (1976).

<sup>86</sup> Criminal defendants seek reversals of convictions as their first remedy. See JUDITH A. McMORROW & DANIEL R. COQUILLETTE, *THE FEDERAL LAW OF ATTORNEY CONDUCT, MOORE’S FEDERAL PRACTICE* § 813.01 (3d ed. 2006). Malpractice is a poor substitute if the conviction is not overturned. The ICTY limits a defendant’s ability to introduce new evidence on appeal to circumstances in which the evidence could not have been discovered through the exercise of due diligence. R. P. & EVID., *supra* note 59, 115 (Additional Evidence).

the ICTY.<sup>87</sup> As in the United States, malpractice is a source of norms only in civil cases.

#### D. *Self Regulation—Codes of Conduct*

##### 1. Overview

Codes of conduct for attorneys imposed as part of a licensing system are another important source of norms. Jurisdictions have varying regulatory frameworks for lawyers. Foreign lawyers are often surprised to learn that the United States maintains a long-standing, decentralized state-based licensing of lawyers. U.S. lawyers must pass a state bar exam, demonstrate that they meet the requirements for the character and fitness threshold, and be sworn into the bar. As a requirement to practice, the lawyer is required to abide by the Rules of Professional Conduct of the state in which the lawyer is admitted. Because over forty states base their Rules of Conduct on a Model version, there is strong commonality among the lawyer codes, with some subtle variations.<sup>88</sup> These rules of conduct have significant force since failure to abide by them can cause the lawyer to lose his or her license to practice law. This is a powerful sanction, but as a practical matter is used only for rogue actors. Data on disbarment suggests that rates of suspension from practice and disbarment have increased somewhat in recent years, but still represents a very small percentage—far less than one percent—of licensed lawyers.<sup>89</sup> Experience of other countries, including the bar dis-

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<sup>87</sup> Telephone Interview with Gregor Guy-Smith, President, Ass'n of Def. Counsel of ICTY (ADC) (Mar. 23, 2006) (notes on file with author) (stating he was not aware of any malpractice suits). The ADC opposed a draft provision in the International Criminal Court's proposed Code of Conduct that would require liability insurance. They noted:

Finally, the obligation with regard to professional liability insurance is clearly misplaced in a Code of Conduct. In addition, as a practical matter, it has to be taken into consideration that professional liability insurance is extremely expensive in some States (e.g. in the United States), and in many other countries is impossible to obtain. Therefore such a provision would be an impediment to representation by people from many countries and be prohibitively expensive for many criminal practitioners.

ADC, REPORT: "DRAFT CODE OF CONDUCT FOR COUNSEL BEFORE THE ICC" 7 (1994), available at <http://www.adcicty.org/documents/icc-codeconduct.pdf>.

<sup>88</sup> See Margaret C. Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 442 (2002).

<sup>89</sup> See Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U.L. REV. 785, 800 (2004) (studying serious disciplinary actions in 2000, comparing 857,931 licensed attorneys in 1995 and finding 3493 orders of attorney discipline decided in calendar year 2000).

disciplinary process of the former Yugoslavia, is similar.<sup>90</sup> Nevertheless, codes of conduct serve as a theoretical floor for lawyer conduct.

The ICTY requires that counsel be licensed in their home jurisdiction, but initially did not require their lawyers to conform to any additional codes of conduct. It took more than ten years for the ICTY to create an enforceable code of conduct.<sup>91</sup>

## 2. Defense Counsel

The first movement toward a code of conduct for ICTY attorneys emerged on the defense side. The impetus for a code of conduct, and a body to enforce it, is fascinating. The Registrar initially created a Code of Conduct for defense counsel in 1997, with the assistance of an advisory panel. It initially functioned as largely precatory.<sup>92</sup> In addition, the Code of Conduct was drafted by the judges,<sup>93</sup> which meant that the Code drafting process itself did not become a strong source of norm creation.

It is not surprising that the Registrar took on the initial role of creating a code of conduct for defense counsel since the Registrar is impliedly authorized under the rules of procedure to ensure that only qualified practitioners appear before the court.<sup>94</sup> Defense counsel have serious challenges to collective action at the ICTY. While prosecutors work full-time for the Tribunal, defense counsel are hired on a case-by-case basis, and many maintain a legal role in their home jurisdiction. Defense counsel may not have the time, travel flexibility, or financial resources to invest in improving the community of defense counsel when they are intensely involved, but often for only one or two cases. Certainly in the waning days of the ICTY, with its express

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<sup>90</sup> WORLD BANK LEGAL REPORT, *supra* note 7, at 52 (describing regulatory framework, noting that “many attorneys believe the disciplinary system to be very weak”).

<sup>91</sup> It is interesting to note that the early efforts to create a code of conduct at the International Criminal Court (ICC) were criticized as “premature.” See Walsh, *supra* note 47, at 500. The ICC process had the benefit of two modern criminal courts—the ICTY and the International Criminal Court for Rwanda—to draw upon.

<sup>92</sup> Tolbert, *supra* note 3, at 985. Rule 46(c) now establishes the authority of the registrar: “Under the supervision of the President, the Registrar shall publish and oversee the implementation of a Code of Professional Conduct for Defence counsel.” R. P. & EVID., *supra* note 59, at 46(c); see also Walsh, *supra* note 47, at 492–96.

<sup>93</sup> Ellis, *supra* note 7, at 966–67.

<sup>94</sup> See Bohlander, *supra* note 41, at 82.

and controversial “completion strategy” underway, such a community of interest is unlikely to emerge.<sup>95</sup>

In 2002, nine years into the work of the ICTY, the Association of Defense Counsel Practicing Before the ICTY was born.<sup>96</sup> Most intriguing is the impetus for this organization. It was the *judges* who created this entity. As the Association of Defence Counsel-ICTY states:

The Judges felt that there was a need to have an association which could first ensure a higher quality for defense counsel and make collective representations to the organs of the Tribunal on behalf of all Defence Counsel involved in cases. Moreover, it was necessary to have such an association in the context of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal the Judges adopted and its associated Disciplinary mechanism.

The Judges adopted modifications to the Rules of Procedure and Evidence, making membership of a recognized association of counsel a necessary requirement to be put on the so-called Rule 45 List (list of qualified counsel). This requirement can be found in Rule 44.<sup>97</sup>

This Association of Defense Counsel (ADC) was intended to facilitate collective action by defense and serve as a regulatory body to identify and expel rogue actors who failed to comply with the Code of Professional Conduct for Counsel Appearing Before the ICTY.<sup>98</sup> The ADC has a disciplinary committee and a procedural apparatus to determine if a lawyer has violated the Code of Conduct. Like the U.S. experience, there have not been a flood of cases. Since inception, three cases have been brought to the ADC disciplinary committee.<sup>99</sup> The cases are confidential, so we do not know the facts, circumstances, or outcomes. Without public disclosure of the resolution, or at least disclosure

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<sup>95</sup> See generally Raab, *supra* note 2 (explaining and evaluating the ICTY completion strategy).

<sup>96</sup> See Association of Defence Counsel: Practicing Before the International Criminal Tribunal for the Former Yugoslavia, <http://www.adcicty.org> (follow “History” hyperlink under “ADC-ICTY”) (last visited Oct. 10, 2006).

<sup>97</sup> *Id.*

<sup>98</sup> A similar model exists in the United States in states with an integrated bar, where the state “bar association” also serves as the licensing body for lawyers. CHARLES W. WOLF-RAM, *MODERN LEGAL ETHICS* 36–38 (1986).

<sup>99</sup> Email from Peter Murphy, Chair of Disciplinary Committee of ADC to Judith McMorrow, Professor of Law, Boston College Law School (Mar. 22, 2006 18:33 EST) (on file with author).

among the ICTY practitioners, the findings will not be a strong source of norms.

Because the Code of Conduct reinforces the counsel's role, it is infused with the value judgments of the procedural system adopted by the ICTY, which is heavily adversarial. The Code of Conduct creates a client-centered relationship that requires the lawyer to counsel the client and abide by the client's decisions concerning the objectives of the representation (unless they would otherwise violate the Code).<sup>100</sup> The lawyer retains the power to determine the means by which the objectives are pursued.<sup>101</sup> The Code of Conduct contains express provisions on confidentiality, conflict of interest, conduct before the Tribunal, responsibility of supervisory and subordinate counsel, and the like. The U.S. influence on the ICTY Code of Conduct is apparent, and not surprising given the adversarial model that predominates at the ICTY.<sup>102</sup>

We can garner some insights into the Defense Counsel's view of the Code of Conduct by their comments to the International Criminal Court's proposed Code of Conduct. The ADC embraces the concept of a statement of norms and appears to embrace the core content of the Code. At the margins, they disagree with specific issues, including the obligation to inform the Registrar if a client requests fee splitting.<sup>103</sup> The obligation to the client's interest above all still does not sit well for the ADC, suggesting an adversarial excess.<sup>104</sup>

In the end, however, the ICTY has already confronted the problem that U.S. courts have discovered. A Code of Conduct often has general norms that require courts and context to bring them to life. Consider Article 27 on Obligations of Counsel to Others:

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<sup>100</sup> ICTY CODE OF CONDUCT, *supra* note 15, art. 8 (defining the scope of representation).

<sup>101</sup> *Id.*

<sup>102</sup> See generally Bohlander, *supra* note 41 (explaining the U.S. influence on the ICTY Code of Conduct).

<sup>103</sup> ICTY CODE OF CONDUCT, *supra* note 15, art. 18 (when client requested, induced, or encouraged fee splitting "[Counsel] shall advise their clients on the prohibition of such practices and shall report the incident to the Registrar forthwith"). A similar provision of the ICC Code imposing an obligation to inform the Registrar is criticized as "absolutely inconsistent with Counsel's duty to act loyal and to respect the confidentiality of all information that becomes known to him in the course of his professional activity." STEFAN KIRSCH, DRAFT CODE OF CONDUCT FOR COUNSEL BEFORE THE ICC 12 (2004), <http://www.adcity.org/documents/icc-codeconduct.pdf>.

<sup>104</sup> In criticizing the conflict of interest provision of the ICC draft code of conduct, the ADC commented that "[i]t is submitted that it might be excessive to require putting the client's interests before counsel's own interests or those of any other person, organization or State from Counsel." KIRSCH, *supra* note 103, at 13.

C. Counsel shall recognise the representatives of the parties as professional colleagues and shall act fairly, honestly and courteously towards them.<sup>105</sup>

What does this mean? It requires specific circumstances to be interpreted. The judges are the actors in the position to provide an interpretation, or at a least a reminder to the counsel that these values are required.<sup>106</sup>

The open-textured nature of the Code of Conduct is demonstrated by a 2003 decision from the Trial Chamber on a motion to replace counsel. The ICTY Code contains an obligation to represent the client “diligently and promptly” and “keep a client informed about the status of a matter before the Tribunal.”<sup>107</sup> The provision on Scope of the Representation states, among other requirements, that counsel shall (i) “abide by the client’s decision concerning the objectives of representation” and (ii) “consult with the client about the means by which those objectives are to be pursued, but is not bound by the client’s decision.”<sup>108</sup> Vidoje Blagojevic (the accused) initially became dissatisfied with the appointment of co-counsel and eventually sought removal of his chief counsel.<sup>109</sup> The Registrar declined to remove counsel and provided a written justification for the decision. The Trial Chamber then appointed an independent counsel to bring a motion to review the Registrar’s decision. The Trial Chamber’s opinion runs forty-two pages long and, in a detailed analysis unlikely to be seen from a U.S. courtroom, delves into the foundation of the right to counsel, including the relationship between the accused and his appointed counsel. The Trial Chamber evaluated whether counsel had met the obligations as required by the Code of Conduct. The Trial Chamber concluded that no act of misconduct or manifest negligence

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<sup>105</sup> ICTY CODE OF CONDUCT, *supra* note 15, art. 27.

<sup>106</sup> *See, e.g.*, Prosecutor v. Oric, Case No. IT-03-68-T, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, part IV (Oct. 21, 2004).

<sup>107</sup> ICTY CODE OF CONDUCT, *supra* note 15, art. 11 (Diligence), art. 12 (Communication).

<sup>108</sup> *Id.* art. 8.

<sup>109</sup> This decision leaves a lurking concern about what role the gender of the co-counsel played, since the accused complained that co-counsel was not a “strong person.” Prosecutor v. Blagojevic, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojevic’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, ¶ 36 (July 3, 2003). The Accused also sought to have a third person assigned as counsel, but lead counsel interviewed that third person and found that he lacked the necessary qualifications. *Id.* ¶ 84.



had occurred.<sup>110</sup> Additionally, the Trial Chamber concluded that a client's decision "to cease communication with counsel is not equivalent to counsel breaching their obligation to communicate and consult with their client."<sup>111</sup> The Trial Chamber also recognized that defense counsel "have an ethical obligation to promote trust and to build trust."<sup>112</sup> Rather than remove counsel, whom the Court concluded had not acted improperly, the Court appointed a legal representative for a fixed period to help improve relations between the accused and counsel.<sup>113</sup> The Court was breathing life and context into the Code of Conduct.

Not just the interpretation but also the content of the Code of Conduct ultimately rests in part on the judges. Initially drafted under the auspices of the Registrar, Article 6 of the Code of Conduct states, "[u]nder the supervision of the President, amendments shall be promulgated by the Registrar after consultation with the permanent Judges, the Association of Counsel and the Advisory Panel."<sup>114</sup> This provision assures that the judges continue to play a central role in defining proper attorney conduct.

### 3. Prosecutors

The OTP issued Standards of Professional Conduct for Prosecution in 1999,<sup>115</sup> under the leadership of Louise Arbour, then the Chief Prosecutor of the ICTY. The standards consist of a three page document, with fifteen statements, such as a duty to: "serve and protect the public interest;" "be consistent, objective and independent, and avoid all conflicts of interest;" "demonstrate respect and candor before the Tribunal;" "assist the Tribunal to arrive at the truth and to do justice for the international community, victims and the accused;" "preserve professional confidentiality;" and "avoid communication with a Judge . . . about the merits of a particular case, except within the proper context of the proceedings in the case."<sup>116</sup> This document has been

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<sup>110</sup> *Id.* ¶ 120.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* ¶ 121.

<sup>113</sup> *Id.* ¶ 114, Disposition ¶¶ 1-3.

<sup>114</sup> ICTY CODE OF CONDUCT, *supra* note 15, art. 6 (Amendment).

<sup>115</sup> Prosecutor's Regulation No. 2 (1999), Standards of Professional Conduct for Prosecution Counsel, available at [http://69.94.11.53/ENGLISH/basicdocs/prosecutor/pros\\_2.doc](http://69.94.11.53/ENGLISH/basicdocs/prosecutor/pros_2.doc). At the time this Regulation was issued the Office of the Prosecutor directed prosecutions both at the ICTY and for the Rwanda Tribunal.

<sup>116</sup> *Id.* ¶ 2.

noted a few times in ICTY opinions, to serve as a frame of reference or to reinforce what would constitute good practices.<sup>117</sup> For example, the Standards have been cited to suggest that the prosecution could use its own resources and persuasive power to facilitate an interview between defense counsel and a prospective uncooperative witness.<sup>118</sup> Unlike the Code of Conduct for Defence Counsel, however, it is not an officially embraced document of the ICTY.

The OTP is a powerful body whose actions reflect a vision of professional conduct. There appears to be little public discussion about a need for a more developed and publicly distributed prosecutorial code of conduct. The individual prosecutors are part of a unit—a bureaucratic structure that implements a more detailed screening of assistant prosecutors, periodic review, and term contracts—which perhaps provides more internal sanctioning and control of errant behavior than is available for defense counsel.<sup>119</sup> This is difficult to assess, however, because the internal functioning of the OTP is not transparent.

From my discussions with prosecutors, there is every indication that prosecutors care deeply about professional responsibility and discuss issues internally as they arise. The challenge for prosecutors, as with defense counsel, is that many structural choices have ethical consequences. Some prosecutorial issues overlap with political issues: what priority to give to prosecutions, indicting lower-level actors first as an effort to squeeze higher-level actors, individual charging decisions (such as charging only those items that are most likely to be proved), and plea bargaining and all its cultural and adversarial notions. The chief prosecutor of an international tribunal holds a very powerful po-

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<sup>117</sup> Section one addresses the considerations used by the prosecutor in setting out the regulation. The important substantive comments include a statement that prosecutors “represent the international community” and that the standards “should promote principles of fairness and professionalism.” *Id.* In addition, the considerations state that “the duties and responsibilities of the Prosecutor differ from, and are broader than, those of defense counsel.” *Id.*

<sup>118</sup> Prosecutor v. Krstic, Case No. IT-98-33-A, Decision on Application for Subpoenas, ¶ 13, n.19 (July 1, 2003); *see also* Prosecutor v. Hadzihasanovic, Case No. IT-01-47-PT, Decision on the Prosecutor’s Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura (Mar. 24, 2002) (examining the Standards and refraining from answering the conflict issue presented to the court); Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant’s Briefs (May 11, 2001) (citing Prosecutor’s Regulation No. 2 in describing prosecutor’s duty to assist in the administration of justice).

<sup>119</sup> Interview with prosecutor #3, in The Hague, Netherlands (May 15, 2006) (notes on file with author).

sition with comparatively little oversight.<sup>120</sup> These decisions have not been immune from public criticism by commentators.<sup>121</sup>

Even excluding issues that overlap directly with the political and legal goals of the Tribunal, there are still legitimate ambiguities that need to be addressed when merging legal cultures. As noted above, prosecutors should be concerned about how and when they can communicate with judges, issues of confidentiality, providing timely discovery, conduct during plea bargaining, trial conduct, and conflicts of interest (particularly when shifting roles from prosecutor to defense counsel).<sup>122</sup> For example, in 2001 the Registrar allowed a former prosecutor to join a defense team, even though the lawyer “during his assignment with the Office of the Prosecutor . . . had provided advice, drafted documents on legal issues and assisted with two cases against accused relating to the central Bosnia region.”<sup>123</sup> The Registrar placed the burden on the OTP to come forward with evidence of a conflict. The former prosecutor agreed to “respect the confidentiality of any information to which he had had access whilst working with the Office of the Prosecutor . . . .”<sup>124</sup> While the Registrar and the lawyers involved agreed that the representation could not proceed if a conflict was present, that term was never defined. Under a U.S. understanding of conflict, the prosecutor would be prohibited from representing a defendant when the prosecutor had worked personally and substantially on the matter, unless the government agency involved gave its informed consent in writing.<sup>125</sup> We do not have sufficient information from the public record to fully critique this decision. Certainly, the Registrar would have benefited from more detailed criteria on what constitutes an impermissible conflict of interest when a prosecutor moves to the defense function.

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<sup>120</sup> See Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633, 1651 (2003) (arguing that the broad prosecutorial discretion of the U.S. independent counsel scheme is not a good foundation to reflexively object to the ICC); see also Danner, *infra* note 127.

<sup>121</sup> See HAZAN, *supra* note 5; Timothy Williams Waters, *Unexploded Bomb: Voice, Silence, and Consequence at the Hague Tribunals; A Legal and Rhetorical Critique*, 35 N.Y.U. J. INT'L L. & POL. 1015, 1018 (2003).

<sup>122</sup> See generally R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS (2005).

<sup>123</sup> Prosecutor v. Hadzihasanovic, Alagic and Kubura, Case No. IT-01-47-PT, Decisions of Nov. 26 and Dec. 19, 2001 (Supp. 29–Nov./Dec. 2001), available at <http://www.un.org/icty/Supplement/Supp29-e/hadzihasanovic.htm>.

<sup>124</sup> *Id.*

<sup>125</sup> MODEL RULES OF PROF'L CONDUCT § 1.11(a)(2) (2002).

The OTP is in the process of crafting a new code to set expectations about behavior.<sup>126</sup> This process, however, is currently entirely an internal process. The prosecutor's role is not crafted in isolation, however, but benefits from informed discussion. For example, significant policy issues arise from switching sides, and all those interested in a well-functioning Tribunal should at least have an opportunity to comment on these policy choices. The defense function can be enriched by employing individuals who understand the prosecutorial process, yet the prosecutor has a keen interest in assuring the integrity and confidentiality of its internal deliberations. Greater transparency and more input in rule development would itself aide the dialogue about roles.<sup>127</sup>

#### 4. Judges

While much has been written about the Code of Conduct for defense counsel at both the ICTY and the emerging International Criminal Court, very little has been written on the need for a code of judicial conduct. Judges would also benefit from written norms that clarify their role. As with both defense and prosecutor codes of conduct, this is no panacea, but a written code of judicial conduct would give new judges a common ground for discussion. It would help clarify what constitutes judicial independence<sup>128</sup> and serve as a check on abuses and mistakes.<sup>129</sup> A publicly developed document would allow both the prosecutors and defense to see more vividly how the roles of each of the three key units—prosecution, defense, and judges—are defined. The need is more acute because the actors are coming from a variety of legal cultures. With a completion strategy underway, it is probably too late for the ICTY to develop a code of judicial conduct, but the next tribunals may benefit from the simultaneous development of defense, prosecution, and judicial codes.

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<sup>126</sup> Interview with prosecutor #4, in The Hague, Netherlands (May 15, 2006) (notes on file with author).

<sup>127</sup> Cf. Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 511 (2003) (suggesting that "for the Prosecutor, good process should include the public articulation of prosecutorial guidelines that will shape and constrain his discretionary decisions").

<sup>128</sup> Cf. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (arguing against judicial independence in international tribunals).

<sup>129</sup> Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 361 (2005).

## E. *Rules of Procedure and Inherent Powers*

### 1. Overview

The ICTY Rules of Procedure and Evidence, crafted and modified by the Tribunal judges, have several provisions that provide express or implied power to address attorney conduct issues. This is part of what Judge Patricia Wald identifies as the “soft law” of the Tribunal.<sup>130</sup> Some rules establish the Registrar and judge’s control over entry into the ICTY defense function. Yet other rules deal with courtroom behavior, including the specific power to address obstructive behavior and contempt of court. A catchall concept of “inherent powers” also serves as a basis for addressing attorney conduct issues. Each of these powers is addressed below. They all have in common the dominant power of the judges to shape, directly or indirectly, the contours of attorney conduct.

### 2. Control over Entry

The judges and the Registrar hold the power of entry. Rule 44 governs the appointment, qualifications, and duties of defense counsel.<sup>131</sup> Under Rule 44, the baseline requirements are minimal. Lawyers who appear before the ICTY must be licensed to practice in a state or be a university professor of law, have written and oral proficiency in English or French (or obtain a waiver), be a member in good standing of the ADC, have no disciplinary findings or criminal convictions, and not have provided false or misleading information in relation to his or her qualifications and fitness to practice.<sup>132</sup> In addition, there is a catch-all provision stating that counsel “has not engaged in conduct . . . which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal . . . .”<sup>133</sup> This latter provision was one of several of the qualifications that was added in 2004.<sup>134</sup> These requirements allow the Registrar to exclude counsel with a history of misconduct. Even without express rules, the ICTY has also interpreted

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<sup>130</sup> Patricia M. Wald, *Tribunal Discourse and Intercourse: How the International Courts Speak to One Another*, 30 B.C. INT’L & COMP. L. REV. 15, 20–26 (2007).

<sup>131</sup> R. P. & EVID., *supra* note 59, at 44(A) (“a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she . . .”).

<sup>132</sup> *Id.* at 44(A) (i)-(v), (vii).

<sup>133</sup> *Id.* at 44(vi).

<sup>134</sup> See IT/231, Amendments to the Rules of Procedure and Evidence, Aug. 5, 2004, available at <http://www.un.org/icty/cases-e/index-e.htm>.

its inherent power to allow the Court to deny audience to an attorney who engages in significant misconduct.<sup>135</sup> ICTY judges also have the ability under Rule 46 to “refuse audience to counsel for acting in an offensive, abusive, or otherwise obstructive manner.”<sup>136</sup> Rule 46 provides an independent basis to deny counsel the right to practice.

Once an attorney has met the minimum standards to be eligible to practice before the ICTY, actually being assigned to an indigent defendant is a separate step.<sup>137</sup> The ten percent of defendants who have means to pay for their own counsel do so. The remaining ninety percent of defendants are appointed counsel from an approved list. To be eligible for assignment, the lawyer must demonstrate additional qualifications, including competence in criminal law, international humanitarian law, or international human rights law, possess at least seven years of relevant experience, and be readily available for assignment.<sup>138</sup>

As noted above, the defendant’s requests for appointment of counsel are typically honored, but once appointed the defendant will have less influence. Just as in the United States, barriers to entry do not attempt to harmonize values; entry requirements set a floor of behavior.

### 3. Contempt (Rule 77) and Inherent Powers

ICTY judges have express contempt power under Rule 77 and have used it against attorneys. Rule 77 contempt power is penal in nature and requires a beyond-a-reasonable-doubt standard of proof.<sup>139</sup> Consequently, it is used only for the most egregious misconduct of “knowingly and wilfully interfering with the administration of justice.”<sup>140</sup> The jurisprudence of contempt initially appears to be code-based. In its application to attorneys, however, the Tribunal has read this statutory contempt power through the lens of its inherent power

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<sup>135</sup> Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1, Decision on the Request of the Accused Radomir Kovac to Allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro Bono, ¶ 13 (Mar. 14, 2000).

<sup>136</sup> See R. P. & EVID., *supra* note 59, at 46; see also Bohlander, *supra* note 41, at 83.

<sup>137</sup> See generally International Criminal Tribunal for the Former Yugoslavia, Directive on Assignment of Defence Counsel, IT-073-REV11-e, Aug. 4, 2004, available at <http://www.un.org/icty/legaldoc-e/basic/counsel/IT073-rev11-e.htm>.

<sup>138</sup> *Id.* art. 14.

<sup>139</sup> Tribunal Statute, art. 15, cited in Prosecutor v. Tadic, Case No. IT-94-1-A-AR77, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶¶ 16, 22 (Feb. 27, 2001); R.P. & EVID., *supra* note 59, at 77(E) & 87(A).

<sup>140</sup> Prosecutor v. Tadic, Case No. IT-94-1-A-AR77, Judgment, ¶ 5 (Feb. 27, 2001).

to control the proceedings before it. As such, the emerging doctrine is judge-made and fluid.

The idea of the inherent power of the court is a well established doctrine in the United States, where the court's inherent power is significant, although not unlimited.<sup>141</sup> In the United States, the inherent power doctrine has been used to sanction attorneys for conduct even when there is a specific rule in place that addresses the same conduct.<sup>142</sup> The ICTY has also recognized the inherent power necessary to assure the proper administration of justice. This power exists even in the absence of a procedural rule addressing this power, a conclusion that is startling to lawyers from a civil law tradition.<sup>143</sup> It also appears that the ICTY is developing a strong doctrine of inherent powers similar to the doctrine as it has emerged in the United States.

Contempt proceedings have been initiated against three attorneys at the ICTY. In its seminal case on contempt, *Prosecutor v. Tadic*, the Court created the framework for its contempt jurisdiction, while at the same time it sent a strong message that attorney misbehavior will be addressed. Vujin was accused of manipulating witnesses, putting forth evidence known to be false, as well as bribing witnesses. He was co-counsel for Dusko Tadic, the first defendant to appear before the Tribunal. Consequently, the underlying trial was a test of legitimacy for the Tribunal itself. The Court needed to clarify norms of conduct promptly. The Tribunal found attorney Milan Vujin's conduct to be so egregious that it recommended the Registrar strike his name from the list of assigned counsel in accordance with Rule 45 of the Tribunal's Rules of Procedure and Evidence, along with a further recommendation that his misconduct be reported to his national bar association. The Court expressly relied on a desire to both punish Vujin and deter other attorneys from similar conduct.<sup>144</sup>

The other two cases of contempt against attorneys were more factually ambiguous situations. In *Prosecutor v. Simic, Simic, Tadic, Todorovic*,

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<sup>141</sup> See THE FEDERAL LAW OF ATTORNEY CONDUCT, *supra* note 86, ch. 807 (The Inherent Power of Federal Courts to Regulate the Conduct of Attorneys); see generally Fred A. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003) (describing the power of the courts to regulate attorneys).

<sup>142</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991).

<sup>143</sup> *Prosecutor v. Tadic*, Case No. IT-94-I-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶ 28 (Jan. 31, 2000).

<sup>144</sup> *Id.* ¶ 168 ("The contempt requires punishment which serves not only as retribution for what has been done but also as deterrence of others who may be tempted to do the same.").

⌘ *Zaric*, the Court conducted an extensive hearing to determine whether defendant Milan Simic and his counsel, Branislav Avramovic, had knowingly and willfully interfered with the administration of justice (i.e., committed contempt) by threatening and bribing a witness.<sup>145</sup> Witness intimidation is an ongoing and serious concern at the ICTY. The Court took evidence and ultimately concluded that the uncorroborated evidence of a witness, who ultimately was found to lack the necessary credibility, did not support proof beyond a reasonable doubt.<sup>146</sup>

In *Prosecutor v. Aleksovski*, defense counsel Anto Nobile was found in contempt and fined for having revealed the identity of a protected witness.<sup>147</sup> The Appeals Chamber ultimately overturned that finding on the grounds that Mr. Nobile did not have actual knowledge that there was a witness protection order applicable to the witness and did not act with willful blindness to the fact that the witness was protected.<sup>148</sup> While clarifying the legal requirements for knowing violation of a court order, two other dimensions of the *Aleksovski* opinion are worthy of comment. First, a concurring opinion by Judge Patrick Robinson gave advice to the prosecutor, stating that “unless there is evidence of *mala fides*, counsel should be given the benefit of the doubt, and the prosecutorial discretion should be exercised in his favour” and stating that contempt proceedings should not have been brought. Whether the prosecutor gave weight to that view is not known. The Appeals Chamber’s main opinion is also interesting for what it did *not* address. The Court did not delve into the underlying structural pressures that made such errors more likely to occur. Mr. Nobile testified that “because of the prosecution’s practice of revealing the identity of its witnesses only forty-eight hours in advance, he was obliged to research everyone who might be a witness, and that he relied upon a number of sources for that information.”<sup>149</sup> Inadequate

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<sup>145</sup> *Prosecutor v. Simic*, Case No. IT-95-9-R77, Judgment in the Matter of Contempt Allegations Against An Accused and His Counsel (June 30, 2000).

<sup>146</sup> *Id.* ¶¶ 91–100.

<sup>147</sup> *Le Procureur c/ Aleksovski*, Case No. IT-95-14/1 (Dec. 11, 1998). The Trial Chamber opinion is only in French. Consequently, details of the Trial Chamber findings are taken from the Appeals Chamber opinion of May 30, 2001 *infra* note 147.

<sup>148</sup> *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt (May 30, 2001). See generally Fatema E. Fallahenejad Burkey, Recent Development, *Prosecutor v. Aleksovski*, 30 May 2001, Judgment Appela By Anto Nonilo Against Finding of Contempt: A Critical Analysis of the ICTY Appeals Chamber’s Abandonment of Witness Protection Measures, 82 WASH. U. L.Q. 297 (2004).

<sup>149</sup> *Aleksovski*, Case No. IT-95-14/1-AR77, ¶ 12.



time to prepare for and obtain full information on witnesses is certainly a contributing factor to errors such as inadvertent disclosure of a witness' identity.<sup>150</sup>

#### 4. Response to Courtroom Activity

The ICTY judges also have the full range of power to consider counsel's conduct at every stage of a proceeding and can communicate their concerns by direct order or gentle reminder. While finding that attorney Vujin's payments to a witness were not intended as a bribe, the Court gave advice to future counsel that "it is unwise for any lawyer to give gifts to a prospective witness, for whatever reason, because such a gift can so easily be misinterpreted—either by the witness or by others."<sup>151</sup> The Tribunal has also suggested that fees be withheld for frivolous motions.<sup>152</sup> Like their U.S. counterparts, the ICTY judges have a distaste for broad accusations of misconduct by opposing counsel. They do not like ethics wars. As a result, lawyers have been admonished for making frivolous claims of prosecutorial misconduct<sup>153</sup> and have been urged to have open communication and ascertain the facts before making claims of professional misconduct.<sup>154</sup> The ICTY judges also must consider whether claims of misconduct are made for strategic advantage.<sup>155</sup>

Through these court pronouncements, judges indicate what constitutes appropriate or inappropriate behavior. But the ICTY judges have relatively little guidance on how to refine attorney conduct norms beyond inferences from the rules of procedure and whatever guidance is available from codes of conduct. Even within the U.S. adversarial system, judges have different levels of tolerance for adversar-

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<sup>150</sup> Later procedural changes now require prosecutors to provide a list of witnesses six weeks prior to the pre-trial conference. R.P. & EVID., *supra* note 59, at 65 *ter* (E).

<sup>151</sup> Prosecutor v. Tadic, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶¶ 157(a), 158 (Jan. 31, 2000).

<sup>152</sup> Prosecutor v. Kupreskic, Case No. IT-95-16-A, Decision on Motions by Zoran Kupreskic, et al., for Leave to Appeal the Decision of the Appeals Chamber dated 29 May 2001 (June 18, 2001), *available at* <http://www.un.org/icty/Supplement/supp25-e/kupreskic.htm> ("The Registrar is requested to consider withholding payment of any fees or costs involved in the preparation of manifestly ill-founded and frivolous Motions which constitute an abuse of the court process.")

<sup>153</sup> Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, Decision on Motion to Seek Leave to Respond to the Prosecution's Final Brief, ¶ 16 (Sept. 28, 2004).

<sup>154</sup> Prosecutor v. Delalic, Mucic, Delic, and Landzo, Order Disposing of Defence Motion Pursuant to Rule 46 and for Disclosure of Document (Oct. 8, 1997), *available at* <http://www.un.org/icty/celebici/trialc2/order-e/71008de2.htm>.

<sup>155</sup> *See, e.g., Tadic*, Case No. IT-94-1-A-R77, ¶¶ 117–118.

ial behavior of lawyers. Only through both case-by-case experience in litigation and conversation in professional settings outside the courtroom can a shared understanding of good practice be developed.

## II. THE JUDGES AS NORM SETTERS

When analyzing how norms of attorney conduct are established in international tribunals, all roads lead back to the judges.<sup>156</sup> As with U.S. courts, the judges at the ICTY have been the dominant source of creating norms of attorney conduct at the tribunal. Judges ultimately control the Code of Conduct for defense counsel. Indeed, they will likely control any Code of Judicial Conduct that might be created. While they do not control any incipient code of conduct for prosecutors, they also have no obligation to give deference to a solely internal document from the OTP. Judges control the procedures, which shape the institutional pressures that push lawyer conduct in certain directions. This inherent power allows the judges to fill in the blanks left in attorney conduct issues. In addition, judges signal lawyers through their rulings on motions and other interactions within the courtroom.

From the U.S. experience, this is obvious and almost inevitable. Despite the U.S. regime of fairly well-developed state schemes of regulation, litigation ethics has been overwhelmingly shaped by what judges will accept in their courtrooms. U.S. judges typically do not see themselves as the guardian of legal ethics—but rather as the guardian of a fair proceeding in the case before them.<sup>157</sup> U.S. judges tend to be concerned about ethics issues if they affect the integrity of the proceeding before them. Efficiency is also a concern.

The ICTY judges appear to have a broader view of their role to assure legitimacy of the ICTY tribunal. The ICTY judges have captured their goals in a variety of cases, describing their role as “to guarantee and protect the rights of those who appear as accused before it”<sup>158</sup> and “first and foremost [an] interest in an outcome that is just, accurate, and reasonably expeditious.”<sup>159</sup> Their decision to intervene to question

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<sup>156</sup> See generally Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 39–41 (2005); McMorrow, *supra* note 43, at 19–48.

<sup>157</sup> See generally Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions*, 32 HORSTRA L. REV. 1425 (2004).

<sup>158</sup> Prosecutor v. Tadic, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶ 19 (Feb. 27, 2001).

<sup>159</sup> Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw, ¶ 11 (Feb. 7, 2005).

prosecutorial charging discretion, their willingness to create the ADC (rather than leave the issue solely to the Registrar), and sanctioning of attorneys all support a broader role. Some issues, such as fee splitting between defendants and counsel, may not directly affect the quality of the advocacy except to the extent that defendants are choosing counsel on their willingness to share fees rather than on their legal skill. The practice seriously undermines the integrity of the war crimes process by allowing defendants to benefit financially from being charged with a war crime. For that reason, the judges intervened.

Much of the judicial norm-setting reinforces some basic requirements of an adversary system, including an obligation not to present false statements, intimidate witnesses, or fail to protect the client's interests in a legally appropriate manner. In the lengthy opinion on contempt charges against attorney Milan Vujin, the Court sent a clear signal that it will treat credible claims of misconduct—in that case intimidating witnesses—seriously. It demanded credible evidence and disregarded many pieces of evidence as hearsay. The Court was not hesitant to make findings of fact against an attorney. In assessing the credibility of an attorney, issues of character were clearly relevant.<sup>160</sup> While character and virtue ethics may not be a dominant theme in the judicial discussions of attorney conduct, it percolates up in cases, such as *Vujin* and the separate opinion of Judge Jackson in the contempt proceeding against attorney Nobulo. Judge Jackson writes succinctly that:

No court can function efficiently without a relationship of trust between counsel and the judges. Counsel is an officer of the court, and in judicial proceedings quite often a court must act on counsel's word, which, given as an officer of the

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<sup>160</sup> Prosecutor v. Tadic, Case No. IT-94-I-A-AR77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶ 130 (Jan. 31, 2000). The Court wrote:

[T]he appeals Chamber has also taken into account as relevant to the guilt or innocence of the Respondent the evidence which was given as to his character. Such evidence is relevant because it bears on the questions as to whether the conduct alleged to constitute contempt was deliberate or accidental, and whether it is likely that a person of good character would have acted in the way alleged.

court, is accepted as true, unless there is good reason to doubt his *bona fides*.<sup>161</sup>

Trust can be demanded, but ultimately must be earned by all the professional actors in this drama—prosecutors, defense counsel, and judges.

### CONCLUSION

A judge's power is awesome. A claim of misconduct is deeply personal to most lawyers. It is interesting that having spoken with both prosecutors and defense counsel on this issue—hardly an empirical base, but worthy of some weight—both sides expressed frustration that judges seemed to come down hard on *their* side. This suggests that the judges have drawn a correct balance (no one is happy), or that perhaps there is room for further conversation.

It is striking that in the ICTY's annual report, the Rules Committee consists of five judges and six non-voting members: two representatives each from the prosecutor's office, the Registry, and the Association for Defense Counsel. Other than this Rules Committee, there appear to be no structural methods by which the major role actors—judge, prosecutor, and defense counsel—sit down and talk to each other about larger goals, issues, and tensions inherent in this system. Even supposedly structural enemies, like labor and management, get together on neutral turf periodically to talk with each other and humanize the enterprise.

What would happen if each of the three groups—judges, prosecutors, and defense counsel—brought in their top five most compelling structural issues and heard what the other side thought? What if each was to develop a series of “best practices” and obtain critiques from the opposing side? It is inefficient. It is risky (especially if you do not come to agreement). It needs to be done with great caution because of the concern that the ICTY might “capture” defense counsel. But the ICTY is furrowing the ground for future tribunals and it may be worth the enterprise. The impetus for such action is likely to be the judges because, in the end, the judges in litigation are the true gatekeepers of fairness.

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<sup>161</sup> Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobile Against Finding of Contempt, Separate Opinion of Judge Patrick Robinson, ¶ 2 (May 20, 2001).

