

Dealing with Professional Misconduct by Defence Counsel during International Criminal Proceedings

Gentian ZYBERI*

1. Introduction

This chapter focuses on the motivations and the criminal process' dynamics that might lie at the root of infringements by Defence lawyers of the formal procedural rules and regulations of international criminal courts and tribunals (ICs or tribunals).¹ Although relatively rare, there have been limited instances where Defence lawyers have risked or have become subject to disciplinary proceedings for failing to heed orders from the Bench, or more generally for not complying with the formal rules of the tribunals. This has happened before different tribunals; the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC). Two Defence counsels walked out of court in the SCSL's most high-profile case, for example.² An ICTR Defence counsel refused to proceed with his case, at risk of being found in contempt of court, because the lead Defence counsel in another case had been detained on allegations of genocide denial.³ The

* This chapter is an updated and expanded version of a working paper: ESIL 2013 5th Research Forum: International Law as a Profession Conference Paper No. 3/2013. I'm grateful to Anne van Aaken, Richard Harvey, Colleen Rohan, and Sergey Vasiliev for their comments and suggestions.

¹ See ICTY, Code of Professional Conduct for Counsel Appearing Before the International Tribunal (as amended 22 July 2009), 12 June 1997, Doc. No. IT/125 REV.3; ICTR, Code of Professional Conduct for Defence Counsel, 8 June 1998; ICC, Code of Professional Conduct for Counsel, 2 December 2005, in force 1 January 2006, ICC Doc. ICC-ASP/4/21; SCSL, Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (as amended 13 May 2006), 14 May 2005.

² Karim Khan and Courtenay Griffiths, seasoned Defence lawyers, and lead counsel for Charles Ghankay Taylor at different stages in his case, refused to remain in court and walked out during the hearings. While contempt proceedings were mentioned, no such finding was made nor was any sanction imposed.

³ Peter Erlinder was detained in Rwanda and later released on bail for medical reasons. He was representing Aloys Ntabakuze before the ICTR in what is known as the 'Military I' Trial. For a discussion of issues raised by his detention see inter alia Amanda Pinto, 'Peter Erlinder arrest a blow to international law', *The Guardian*, 30 June 2010, at www.guardian.co.uk/law/2010/jun/29/peter-erlinder-arrest-international-law and Martin Ngoga,

International Criminal Court (ICC) stated that after completing its investigation, it would ensure that anyone from its staff, detained by a Libyan military group during a visit to an accused, found responsible for any misconduct would be subject to appropriate sanctions.⁴ Though quite different, these cases demonstrate that strong tensions arise at times between the activity of a Defence lawyer and that of other parts of the tribunal, such as the Bench, the Registry, or the Office of the Prosecutor (OTP). At times the Defence could also have a strained relationship with State authorities, which might be unsympathetic towards the accused, if not outright hostile. Consequently, these States might withhold cooperation with the Defence counsel, or threaten or even start legal proceedings against them.

The dilemma facing a Defence lawyer is how to resolve the tension which occasionally arises between the duty to assist the client effectively and efficiently and complying with the formal rules and regulations of the tribunals.⁵ Adequately addressing and resolving these occasional tensions which arise between the duty to the client and the duty to the tribunal is important, lest they interfere with the fair administration of international criminal justice, the rights of the accused or the professional standing of the lawyer involved, both internationally and domestically. The administration of international criminal justice over the last 20 years has resulted in the creation of a community of Defence counsel practicing before different ICs, as well as domestically.⁶ A number of cases and situations are used in this chapter to illustrate and emphasize the contours and limits of a Defence lawyer's duty to comply with the client's instructions and the duty to respect the formal rules of the tribunals before which they practice. This discussion will bring to the forefront the complexity

'Why we're prosecuting Peter Erlinder', *The Guardian*, 3 July 2010, at www.guardian.co.uk/law/2010/jul/03/why-prosecute-peter-erlinder.

⁴ See ICC, Press Release, *Statement on the detention of four ICC staff members*, Doc. No. ICC-CPI-20120622-PR815, 22 June 2012. Four ICC staff members were detained for nearly a month (7 June - 2 July 2012) by a Libyan militia in Zintan while visiting ICC indictee, Saif al-Islam Gaddafi, allegedly for passing him prohibited documents. Alexander Khodakov, Esteban Peralta Losilla, Melinda Taylor and Helene Assaf were detained after meeting with Mr. Gaddafi in Zintan during a privileged visit, ordered by the ICC. At the time the ICC's Office of Public Counsel for the Defence, were appointed to represent Mr. Gaddafi at the ICC.

⁵ For review of a number of issues concerning the work of Defence counsel before the tribunals see inter alia Judith A. McMorrow, 'Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY', (2007) 30(1) *Boston College International and Comparative Law Review* 139-174; Jenia Iontcheva Turner, 'Legal Ethics in International Criminal Defense', (2010) 10(2) *Chicago Journal of International Law* 1-62.

⁶ For the list of defence counsel practicing before the ICC, see 'List of Counsel before the ICC' on the ICC website, at www.icc-cpi.int/.

of the legal position, and the dynamics and the politics of the profession of Defence lawyers within the larger framework of the administration of international criminal justice.

This chapter first outlines briefly the professional challenges and the role of Defence counsel in international criminal proceedings. Subsequently, it deals with the question of what constitutes Defence counsel professional misconduct in the form of contempt of court and offences against the administration of justice. Counsel misconduct includes behavior that is offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice.⁷ Misconduct could also encompass failure to meet the standards of professional competence, due to a lack of sufficient understanding of the substantive and procedural framework applicable before a tribunal or negligence in carrying out core duties. After addressing why counsel may fail to heed orders from the bench or more generally to comply with formal rules of international criminal tribunals, it is argued that existing international mechanisms and procedures need to coordinate better with domestic ones. While the existing legal framework within which Defence counsels practice allows them certain leeway in deciding how to best further the interests of the client, every counsel needs to be aware that certain actions might trigger disciplinary proceedings and must be avoided.

2. The challenges and the role of Defence counsel in international criminal proceedings

Many perceive international criminal trials as purely legal processes where the Office of the Prosecutor (OTP), acting on behalf of the international community, investigates and prosecutes those most responsible for international crimes. While adopting the ‘I follow the law’ position might shield the Prosecutor from charges of political bias, it does not negate the political dimensions of prosecutorial decisions to prosecute the leadership of a country for international crimes, such as genocide, war crimes and crimes against humanity. The defendants tried before the tribunals often have a power base and varying degrees of support in the countries from where they originate. Past as well as recent history demonstrates that it

⁷ ICTY, ‘Rules of Procedure and Evidence’ (as amended 24 July 2009), in force 14 March 1994, U.N. Doc. IT/32/Rev.43, Rule 46 and the ICTR, ‘Rules of Procedure and Evidence’ (as amended 10 April 2013), in force 29 June 1995, Rule 46. See also Jarinde Temminck Tuinstra, *Defence Counsel in International Criminal Law* (TMC Asser Press, 2009), p. 223 (footnotes omitted).

is difficult to find another field of human activity where international law and politics are as closely intertwined as the administration of international criminal justice.

Our general understanding of what really transpires during international criminal proceedings seems to be hampered by a simplistic perception of international criminal justice as a fight of good versus evil, transferred from the battlefield into a courtroom. Little attention seems to be paid to the dynamics of the interaction and power-relations between different participants in international criminal proceedings. All participants, be they the Defence, the Prosecution, the Judges, the witnesses, the victims, or the State authorities, have different roles in the legal proceedings and often have competing interests. To a large extent, the success of these legal proceedings hinges on the cooperation between the tribunal and the State directly concerned, as well as on the cooperation with third States and the international community in a broader sense, including concerned international and regional organizations. A Defence counsel has to be able to navigate this complex constellation of internal and external factors which may directly or indirectly influence their ability to mount an effective defence case.

Practicing before international criminal courts and tribunals is a challenging and demanding job. Given that a case continues over several years, and other related professional commitments even longer, Defence counsel must make a long-term commitment to the client and to the work of the court. The complexity of the legal proceedings, the institutional relationships between the participants, and the personal relationships which develop in the course of trying a case raise many questions concerning what constitutes proper professional conduct on the part of Defence counsel. The challenges in ascertaining what constitutes such conduct at an international level are complex, since Defence lawyers come from different legal cultures and are subject to different binding and non-binding domestic and international codes of conduct,⁸ and different regulations and disciplinary mechanisms. Moreover, the issue

⁸ See inter alia the International Bar Association International Code of Ethics (first adopted 1956, 1988); UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1; ICCA Congress, International Code of Ethics for Lawyers Practicing before International Arbitral Tribunals (2010); The Council of Bars and Law Societies of Europe, Charter of Core Principles of the European Legal Profession, Brussels, 24 November 2006. For national codes of conduct see inter alia American Bar Association Model Rules for Professional Conduct (as amended 12 August 2002), 2 August 1983; General Council of the Bar of South Africa, Uniform Rules of Professional Conduct (updated July

of professional conduct can be approached from different angles, in terms of the duty towards the client,⁹ the duty towards the court,¹⁰ and the duty to serve the interests of international justice more generally. Some recent scholarly work has addressed in considerable detail the subject of professional conduct and the role of Defence counsel in international criminal proceedings.¹¹

The two *ad hoc* tribunals, the SCSL, the ICC, and the Special Tribunal for Lebanon (STL) have adopted specific Codes of Conduct, which lay down in some detail what is expected of counsel working before these courts.¹² These Codes, together with the regulations concerning Defence counsel qualifications, lay down a number of requirements for counsel practicing before these ICs. Over time, these tribunals have put in place the necessary

2012); Bar Standards Board, Handbook (including 9th edition of Code of Conduct), in force 30 April 2015; New York Lawyer's Code of Professional Responsibility; for rules on professional standards in India see section 49(1)(c) of the Advocates Act, 1961; Law of the People's Republic of China on Lawyers (as revised 28 October 2007), 15 May 1996, in effect 1 June 2008; National Congress of Russian Advocates, Code of Professional Ethics of Advocates in the Russian Federation (as amended 5 April 2007), 31 January 2003; Canadian Bar Association Code of Professional Conduct (first adopted 1920; updated 2009) and so on.

⁹ According to Art. 14 of the ICC Code of Conduct the relationship of client and counsel is one of candid exchange and trust, binding counsel to act in good faith when dealing with the client. Counsel has to abide by the client's decisions concerning the objectives of his or her representation and consult the client on the means by which the objectives of his or her representation are to be pursued. Art. 15 of the ICC Code of Conduct requires counsel to provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation and ensure the confidentiality of communications with the client.

¹⁰ Art. 24 of the ICC Code of Conduct lays down the duties of counsel towards the court. This article provides that counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute; Counsel shall not deceive or knowingly mislead the Court and shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous; Counsel shall not submit any request or document with the sole aim of harming one or more of the participants in the proceedings; Counsel shall represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings. Art. 25(1) of the ICC Code of Conduct provides that Counsel shall at all times maintain the integrity of evidence, whether in written, oral or any other form, which is submitted to the Court. He or she shall not introduce evidence which he or she knows to be incorrect.

¹¹ See inter alia Tuinstra, 'Defence Counsel in International Criminal Law'; Till Gut, *Counsel Misconduct before the International Criminal Court: Professional Responsibility in International Criminal Defence* (Oxford and Portland, Oregon: Hart Publishing, 2012). See also Chapter 2 in this book, C. Rohan, 'Ethical Standards in the Practice of International Criminal Law'.

¹² Codes of Conduct have been developed and adopted for both Prosecution and Defence counsel. However, enforcement mechanisms are generally established only for Defence counsel. See among others ICTR, Code of Conduct; ICC, Code of Conduct; SCSL, Code of Conduct; ICTY, Code of Conduct; ICTY, Prosecutor's Regulation No. 2 (1999): Standards of Professional Conduct for Prosecution Counsel, 14 September 1999; STL, Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, 14 December 2012, STL Doc. STL/CC/2012/03.

disciplinary measures to deal with instances of professional misconduct. Among others, some guidance has been provided by Principles 26 to 29 of the UN Basic Principles on the Role of Lawyers, which deal with the issue of disciplinary proceedings against lawyers, and require that complaints be processed expeditiously and fairly under appropriate procedures before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and be subject to an independent judicial review.¹³ These principles provide for some safeguards for Defence lawyers involved in such disciplinary proceedings.

In examining the ethical issues that arise in the work of Defence counsel practicing before an IC, Rohan has noted the development of relevant ethical standards, while pointing out a number of remaining problems and possible solutions.¹⁴ Notably, legal ethics at these tribunals should accurately reflect the broader normative commitments of the international criminal justice system.¹⁵ Writing on counsel misconduct before international criminal courts and tribunals, Gut has rightly noted that character, personality and individual integrity may ultimately be the key to legal ethics.¹⁶ While ethical standards included in Codes of Conduct lay down a broad array of obligations on Defence counsel, this chapter focuses on those obligations which, when breached, are considered a serious violation of the rules and regulations of the tribunals triggering disciplinary or criminal proceedings. Such violations fall largely under contempt of court and offences against the administration of justice.¹⁷

The Defence counsel's perception of his or her professional duties towards the client and their personal relationship are central to understanding the motivations that lie at the root of infringements by Defence lawyers of the formal rules and regulations of tribunals. While all Defence counsel at the ICC have to give a solemn undertaking that they will perform their duties and exercise their mission before the court with 'integrity and diligence, honorably,

¹³ See UN, Basic Principles on the Role of Lawyers, para. 118.

¹⁴ See Chapter 2 in this book, by C. Rohan. See also United Nations Interregional Crime and Justice Research Institute, War Crimes Justice Project, *Manual on International Criminal Defence: ADC-ICTY Developed Practices* (UNICRI, 2011), pp. 65-66, 191, 207.

¹⁵ Iontcheva Turner, 'Legal Ethics', 13.

¹⁶ Gut, 'Counsel Misconduct', p. 3.

¹⁷ Other possible violations which attract disciplinary measures *stricto sensu* as for example warning, informing the domestic bar association, refusal of fees or refusal of audience, are not dealt with here.

freely, independently, expeditiously, and conscientiously’,¹⁸ there are significant differences in the style of advocacy between Defence lawyers coming from common law jurisdictions and those coming from a civil law background. Also, there are different understandings with regard to the autonomy of the Defence counsel from the client when deciding on the ends and means of representation which serve the client’s best interests.

The general attitude of trial lawyers trained in the adversarial system is encapsulated in the words of Lord Brougham:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.¹⁹

This approach has been reflected in the adoption of a confrontational and sometimes even aggressive trial advocacy by Defence counsel, which has included asking witnesses such questions as ‘you are a liar, aren’t you?’ By contrast, lawyers coming from a civil law background pursue less aggressive advocacy tactics and traditionally rely on the judges leading the proceedings for establishing and maintaining the necessary balance between the parties and ensuring respect for the rights of the accused.

The accused tried before the international tribunals have different backgrounds. Thus, the educational background of the accused varies from sometimes having little education to being well-read and highly educated; occasionally, even having a law degree. Also, while most of the accused are indigent, some have the resources to pay for their own Defence teams. The involvement of the accused in their cases has varied from trusting their lawyers to run the case to taking the exact opposite position and choosing instead to conduct their own defence.²⁰ Only rarely has an accused in an international court claimed misconduct on the part of

¹⁸ ICC, Code of Conduct, Art. 5.

¹⁹ Anonymous, *Trial of Queen Caroline*, 3 vols. (New York: James Cockcroft & Co, 1874), vol. II, as cited in Iontcheva Turner, ‘Legal Ethics’, 2-3.

²⁰ For a detailed discussion of self-representation and the role of stand-by counsel see Chapter 3 in this book by R. Harvey, ‘Who Needs a Lawyer Anyway? Self-Representation and Standby Counsel in International Criminal Trials’.

Defence counsel, as occurred, for example, in *Akayesu*, for allegedly failing to advise properly, for absence from court, and for failing to share the objectives and strategy of the defence pursued.²¹ Ineffective assistance of counsel was one of the grounds of appeal in the *Krajišnik* case.²² Another sensitive area where conflicts could potentially arise between Defence counsel and the accused is that of plea-bargaining.²³ Defence counsel has an important duty and role to play in ensuring that the defendant is properly and fully informed about the legal consequences involved in plea-bargaining.²⁴ Notably, many of the defendants at the ICTY have had lawyers from their own ethnic group representing them, or serving as co-counsel.

3. Formal and informal means for addressing professional misconduct

There are different ways of addressing professional misconduct by Defence counsel, which can be described as formal or informal. Gut refers to ‘reliable gossip’ as a means of non-legal regulation, which suffers from non-transparency, offers no procedural regularity and has no organized sanctions.²⁵ These are the stories told about a Defence counsel’s conduct *vis-à-vis* the client, the Defence team and other participants in the legal proceedings. These stories create an individual profile, which can potentially influence the practice and standing of a Defence counsel before a tribunal or more generally within the international criminal law community of practitioners and academics. The formal methods of addressing professional misconduct include the internal disciplinary mechanisms of international tribunals, as well as relevant domestic mechanisms.

Before analyzing in more detail the reasons why some Defence counsel have chosen to disregard orders from the Bench or have failed to follow the formal rules and regulations of

²¹ ICTR, *Prosecutor v. Akayesu*, *Appeals Chamber Judgment*, Case No. ICTR-96-4, 1 June 2001, paras. 67-84, especially para. 73.

²² ICTY, *Prosecutor v. Krajišnik*, *Appeals Chamber Judgment*, Case No. IT-00-39-A, 17 March 2009, paras. 28-72, pp. 12-26.

²³ There have been twenty guilty pleas entered at the ICTY so far. For more information see <http://www.icty.org/en/cases/guilty-pleas>. See especially the cases of *Erdemović* and *Kambanda*, respectively before the ICTY and the ICTR.

²⁴ See inter alia Rodney Dixon and Alexis Demirdjian, ‘Advising Defendants about Guilty Pleas before International Courts’, (2005) 3(3) *Journal of International Criminal Justice* 680-694; Nancy Amoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford University Press, 2007).

²⁵ Gut, ‘Counsel Misconduct’, p. 3.

the tribunals, it should be noted that Defence counsel misconduct has been quite rare. Only one case was deemed grave enough for the lawyer concerned to be removed from the list of assigned Defence counsel in the over twenty years of the existence of the ICTY.²⁶ However, there have been several cases of withdrawing the right to practice before the ICTR, mostly based on serious financial irregularities. Generally speaking, the requirements for practicing as Defence counsel before an international criminal court or tribunal are comparably stricter than those applicable to Prosecution counsel or the Judges. A considerable number of Defence counsel have practised before many of the enforcement mechanisms of international criminal justice. Some have acted not only as Defence counsel, but also have worked in other capacities, such as Prosecution counsel or even as Judges.

Serious violations of the rules governing the conduct of counsel must be dealt with institutionally, through the mechanisms established for this purpose at each tribunal. As an important development and a sign of the system of international criminal justice entering the phase of maturity, the ICC Statute and the RPE establish clearly the difference between offences against the administration of justice and those of contempt of court. The ICC RPE devotes a full chapter to offences and misconduct against the court, separated into two sections; offences against the administration of justice under article 70, and misconduct before the Court under article 71.²⁷ The following subsections describe those two categories of conduct in more detail.

3.1. Contempt of court at the *ad hoc* tribunals and less serious misconduct at the ICC

The *ad hoc* tribunals have held Defence lawyers in contempt of court on the basis of their inherent power to deal with conduct interfering with the administration of justice. More generally, the offence of contempt of court has been used by the *ad hoc* tribunals to address all conduct affecting negatively the proceedings and the administration of justice in a general

²⁶ Namely Milan Vujin, in ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A-R77; for more information see the ICTY case information sheet entitled ‘Contempt of Court Case Proceedings: (IT-94-1-A-R77) Milan Vujin’ at www.icty.org/x/cases/contempt_vujin/cis/en/cis_vujin_en.pdf.

²⁷ ICC, ‘Rules of Procedure and Evidence’, 9 September 2002, ICC-ASP/1/3 (Part.II-A). See Chapter 9 of the ICC RPE entitled ‘Offences and misconduct against the Court’, Section I ‘Offences against the administration of justice under article 70’ (Rules 162-169) and Section II ‘Misconduct before the Court under article 71’ (Rules 170-172).

sense, including instances of professional misconduct by Defence counsel. A number of cases based on this charge have been brought also against witnesses for giving false testimony or for refusing to testify, against journalists and former staff members for publishing confidential information, and against the accused for disrupting the proceedings.²⁸ Evidently, a tribunal has to be able to safeguard the integrity of its legal proceedings and their decorum against unlawful interference and obstruction. The ICTY may impose a sentence of up to seven years of imprisonment or a fine not exceeding 100,000 euros, whereas the ICTR may impose a maximum sentence of five years or a fine not exceeding 10,000 US Dollars.²⁹ Such interference which obstructs, prejudices, or abuses the tribunal's administration of justice, is mainly expressed in the intimidation of witnesses or in instructing them to make false statements, or in disclosing confidential information during the proceedings. There have been a number of cases also at the ICTR and the SCSL.

Article 71 of the ICC Statute enables that court to sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the ICC RPE. Under the ICC RPE the punishment for misconduct includes an order to leave or be removed from the courtroom, the interdiction of that person from the proceedings for a period not exceeding 30 days or, if the misconduct is of a more serious nature, a fine not exceeding 2,000 euro.³⁰ A limited number of cases have been brought before the ICC Disciplinary Board. One involved failure to inform the Registrar about being

²⁸ See Milan Vujin (submitting false documents and manipulating witnesses – convicted); Jelena Rasić (procuring false statements – convicted); Branislav Avramović (intimidation of a witness together with the accused – acquitted); Anto Nobile (identifying a protected witness – acquitted). For the 28 contempt cases before the ICTY see <http://icty.org/action/contemptcases/27>. A contempt case before the ICTR is the *GAA* (ICTR-07-90-R77) and *Nshogoza* (Case No. ICTR-2007-91-A). See also generally the discussion in Tuinstra, 'Defence Counsel in International Criminal Law' and Gut, 'Counsel Misconduct'. The STL has two contempt cases namely STL-14-05 and STL-14-06; for more information see www.stl-tsl.org/en/the-cases/contempt-cases.

²⁹ See ICTY, 'Rules of Procedure and Evidence' (as amended 24 July 2009), in force 14 March 1994, UN Doc. IT/32/Rev.43, Rule 77(G); ICTR, 'Rules of Procedure and Evidence' (as amended 10 April 2013), in force 29 June 1995, Rule 77(G).

³⁰ See ICC RPE, Rule 170 'Disruption of proceedings', Rule 171 'Refusal to comply with a direction by the Court', Rule 172 'Conduct covered by both articles 70 and 71'. The last rule provides that if conduct covered by Art. 71 also constitutes one of the offences defined in Art. 70, the ICC shall proceed in accordance with Art. 70 and Rules 162 to 169.

suspended by the National Bar from practicing for a year;³¹ and the other case involved a breach of the duty of confidentiality by providing unauthorized individuals with access to sensitive and confidential material in a confidential case before the ICC.³² The reasons behind these violations seem to relate to a lack of proper understanding of what is required under the Code of Professional Conduct for Counsel. Simply put, these cases show that being added to the ICC List of Counsel does not necessarily entail familiarity with the various professional obligations imposed under the Code of Professional Conduct for Counsel at the ICC and the Regulations of the Court and the Registry. The vague wording of some of these provisions and insufficient training in ethical obligations are factors which seem to contribute to such breaches.

3.2. Offences against the administration of justice

Article 70 of the ICC Statute vests the court with jurisdiction over a number of offences against the administration of justice, when committed intentionally.³³ Clearly, procuring false statements and interfering with witnesses seriously affects the legal proceedings before a tribunal and public confidence in them. It must be noted also that there is a growing tendency

³¹ See ICC, *Case of the Registrar v. Mr. Hervé Diakiese, Decision of the Disciplinary Board*, Case No. DO-01-2010, 9 July 2010. The Disciplinary Board found that failure to inform the Registrar under Reg. 69(3) of the Regulations of the Court constituted misconduct within the meaning of Art. 31(A) of the Code of Professional Conduct for Counsel and imposed a public reprimand to be entered in counsel's personal file.

³² See ICC, *In the Case of Trial Chamber I v. Mr. Joseph Keta, Decision of the Disciplinary Board*, Case No. DO/2012/003/MMT/JK, 18 June 2012. The Disciplinary Board found that the misconduct on the grounds of a breach of confidentiality alleged against Mr. Joseph Keta had been established and ordered a penalty of three months suspension.

³³ Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 90, Art. 70, para. 1, provides as follows:

The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged;
- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
- (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
- (e) Retaliating against an official of the Court on account of duties performed by that or another official;
- (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

in such proceedings to rely on written witness statements in lieu of *viva voce* testimony.³⁴ Interfering with witnesses and presenting false or forged evidence are prime examples of serious violations of the formal rules of the tribunals.³⁵ Such conduct seriously compromises the administration of international justice. Not all cases, however, are straightforward. What about a situation where Defence counsel inadvertently reveals the name or details of protected witnesses during court proceedings or in public documents filed with the court? In practice, such cases have been dealt with through a procedure whereby the record is corrected through a decision of the court prompted by the Prosecution or the Defence or by withdrawing the document where such information is inadvertently released and re-filing a corrected version. Other measures used for protecting witnesses during the proceedings are conducting private or closed sessions and the use of voice and face distortion.³⁶ Importantly, for sanctions to be imposed, Article 70 of the ICC Statute includes the requirement that Defence counsel commit such offences intentionally. This requirement ensures that counsel is not subjected to disciplinary proceedings for inadvertent mistakes.

The ICC's work is based on the principle of complementarity, which requires that the ICC's jurisdiction be triggered only when national jurisdictions are unable or unwilling to genuinely investigate and prosecute a person concerned. In operationalizing this principle, Rule 162 of the ICC RPE provides that before deciding on whether to exercise jurisdiction, the court may consult with States Parties that may have jurisdiction over the offence. In deciding whether or not to exercise jurisdiction, the ICC can take into account a number of factors, including the availability and effectiveness of prosecution in a State Party, the seriousness of the offence, the need to expedite proceedings, links with an on-going investigation or a trial before the court, and evidentiary considerations.³⁷ Rule 162 of the ICC

³⁴ See ICTY RPE, Rule 92*bis*, 92*ter*, 92*quater*, 92*quinquies*; ICTR RPE, Rule 92*bis*; ICC RPE, Rule 111, 112. For a detailed discussion of evidentiary issues see Chapters 13 and 14 in this book, by W. Jordash and L. Kulinowski.

³⁵ For a relevant case in this regard see ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute*, Case No. ICC-01/05-01/13, 11 November 2014. As of the date of this writing the trial in this case is ongoing. For more information see the case information sheet at www.icc-cpi.int/iccdocs/PIDS/publications/Bemba-et-alEng.pdf.

³⁶ See ICTY/ICTR RPE, Rule 75; ICC RPE, Rule 87, 88.

³⁷ Rule 162(2) of the ICC RPE provides 'In making a decision whether or not to exercise jurisdiction, the Court may consider, in particular:

(a) The availability and effectiveness of prosecution in a State Party;

RPE gives significant discretionary powers to the court to proceed with a case on offences against the administration of justice, depending on the seriousness of the offence and other relevant factors. This rule reflects the principle of positive complementarity, whereby the availability and effectiveness of prosecution in a State Party are considered and national proceedings encouraged.³⁸ The cooperation of the ICC with State authorities for these purposes finds support in Article 70, which requires each State Party to extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals.³⁹ Proper coordination between the ICC and the relevant authorities of the States Parties is necessary in order to ensure that offences with regard to the administration of justice be appropriately addressed.

4. Balancing competing obligations to the client and to the court

Let us turn to the motivations and the criminal process' dynamics that lie at the root of serious breaches by Defence lawyers of the formal rules and regulations of international tribunals. If we were to categorize such breaches as either non-intentional or intentional, then non-intentional breaches, as for example when counsel inadvertently mentions the name or details about a protected witness, would not be punishable. Some unintentional breaches can be attributed also to the vagueness of the relevant rules and regulations and misunderstandings on the part of Defence counsel. In contrast, procuring false or forged evidence and tampering with witnesses stand out among intentional serious breaches. A limited amount of breaches, committed mostly in the early stages of the activity of the *ad hoc* tribunals, have concerned financial irregularities. Although the ICC Statute provides that in order to be punishable the offence must be committed intentionally, the degree of intent and knowledge necessary for

(b) The seriousness of an offence;

(c) The possible joinder of charges under article 70 with charges under articles 5 to 8;

(d) The need to expedite proceedings;

(e) Links with an ongoing investigation or a trial before the Court; and

(f) Evidentiary considerations.'

³⁸ This rule is based on Art. 70(4)(B) of the ICC Statute which provides that 'Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.'

³⁹ ICC Statute, Art. 70(4)(A).

Defence counsel's conduct to amount to a breach of the formal rules of tribunals remains largely unclear.

Some important practical issues which could represent significant challenges for international criminal Defence lawyers, and which might result in disciplinary proceedings if not handled properly, are:

- 1) how to approach the examination of victim-witnesses;
- 2) how to deal with a client who wants to testify falsely;
- 3) how to deal with Prosecution offers in exchange of a guilty plea and advising the client in that regard; and
- 4) whether to follow the client's instructions to boycott or disrupt the proceedings.⁴⁰

Defence counsel has an affirmative duty to represent the accused to the best of her or his abilities and to that end must effectively test the strength of the Prosecution's case. Practice generally shows major differences between the purported strength of the prosecution's case at the beginning of the trial and its strength after having been duly tested in the courtroom by experienced Defence counsel.

4.1 Interference with the administration of international criminal justice and other instances of non-compliance

Among others, interference with the proper administration of international justice by procuring false or forged evidence and tampering with witnesses could be attributable to a strong identification of Defence counsel with the client, a desire to support a favored narrative for the armed conflict, a perception of the tribunal as illegitimate, or of the trial as unfair or politically motivated. The expectation of not being caught and, arguably, the potential for lenient penalties,⁴¹ besides pressure or possible promises of monetary or other gains, could also play a role. Given the different combinations of motivations and 'incentives', no disciplinary system could potentially dissuade all Defence counsel from engaging in breaches

⁴⁰ For a detailed discussion see inter alia Iontcheva Turner, 'Legal Ethics', 6 *et seq.*

⁴¹ Punishment may not be lenient, however, depending on the case. For offences against the administration of justice the ICC may impose a term of imprisonment of up to five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

of the formal rules and regulations of international tribunals. That said, besides character, personality and individual integrity, as rightly noted by Gut,⁴² legal training in professional ethics and consultation with colleagues or professional bodies in case of doubt provide additional, important means for Defence counsel to ensure compliance with professional ethical standards.

What motivations underlie other less serious instances of counsel's non-compliance with the formal rules of a tribunal which are not aimed at diverting the course of justice? Only in a very limited number of instances have Defence counsel failed to comply with the rules, mainly in situations where strict adherence to these rules would not have properly served the interests of their client. Should Defence counsel refuse to examine a witness in trial proceedings, because his or her co-counsel is detained by national authorities on charges which undermine the defence and curtail a Defence counsel's freedom of speech?⁴³ And, could such a course of action by Defence counsel be condoned if taken in order to show solidarity with other colleagues facing similar difficulties? Can a halt to trial proceedings in such circumstances be seen as just a measure of self-help, when there are few other remedies available? Such methods, bordering on the extreme, can potentially force or mobilize powerful external actors to find or negotiate a solution to a potential deadlock. What about a situation where Defence counsel are hindered in the process of preparing the defence case by being denied privileged communication with the client?⁴⁴ The decision of Defence counsel to quit in a case where privileged communication was at stake seems to have forced the Registry to finally ensure such communication between the next appointed counsel and the accused.

Should a Defence counsel be subjected to disciplinary proceedings for not filing the Defence final brief when the judges have failed to give rulings on a number of outstanding

⁴² Gut, 'Counsel Misconduct', p. 3

⁴³ For a detailed discussion of the immunity of Defence counsel see Chapter 6 in this book by G. Zyberi and S. Sali. For a critical analysis of the detention by Rwandan authorities of Peter Erlinder, Lead Counsel for Aloys Ntabakuze, see Klaus Bachmann and Aleksandar Fatić, *The UN International Criminal Tribunals: Transition Without Justice?* (Routledge, 2015), p. 57; see also ICTR, *Aloys Ntabakuze v. The Prosecutor, Appeals Judgment*, Case No. ICTR-98-41A-A, 8 May 2012, Annex A: Procedural History.

⁴⁴ This concern was raised in a Defence motion in SCSL, *The Prosecutor v. Charles Ghankay Taylor, Urgent and public corrigendum to the second Defence motion requesting cessation of video surveillance of legal consultations*, Case No. SCSL-2003-01-PT, 19 December 2006; and in the opening hearings on 4 June 2007 by Karim Khan, Defence Counsel for Charles Taylor, *Court Transcript*, p. 250, paras. 7-9, available at www.scsldocs.org/transcripts/Charles_Taylor/2007-06-04/21212.

motions on different important legal issues which need to be decided? Should the counsel file this brief when explicitly instructed by the client not to do so? While the Defence can potentially address issues arising from any outstanding motions after filing the final brief, in the normal course of events the latter should be the final written document filed with the court. Refusing to accept a final brief of the Defence on formal grounds, because it is filed after the deadline, or because it exceeds the allocated number of pages, seems to place procedural rules above substantive rights of the accused, and in particular, the right to a fair trial.⁴⁵ At the same time, fair trial considerations cannot be construed as a license for Defence counsel to disregard procedural rules, as opposed to creating an obligation on the relevant tribunal to accommodate legitimate concerns and demands of the Defence.

4.2 The examination of victim-witnesses, defendant's testimony, and plea-bargaining

There are five critical questions a Defence counsel must consider with regard to witness testimony, which include internal consistency, factual consistency, consistency with other witnesses, trustworthiness, and plausibility.⁴⁶ A significant challenge for Defence counsel is how to approach the examination of victim-witnesses. Defence counsel must tread carefully when examining victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled, since even if not legally or ethically wrong, being overly confrontational might be perceived as callousness and result in instilling animosity from the bench, if not attract formal reprimands.⁴⁷ As Turner rightly points out, the clash between the adjudicative and political goals pursued before these tribunals can deepen tensions between attorneys' duties to their clients and their duties to the court.⁴⁸ While Defence counsel must

⁴⁵ See SCSL, *Prosecutor v. Charles Ghankay Taylor, Decision on Defence notice of appeal and submissions regarding the decision on late filing of Defence final trial brief*, Case No. SCSL-03-01-T, 3 March 2011, paras. 48-51; SCSL, *Prosecutor v. Charles Ghankay Taylor, Decision on Defence motion seeking leave to appeal the decision on late filing of Defence final brief*, Case No. SCSL-03-01-T, 11 February 2011, p. 4.

⁴⁶ See Douglas Walton, *Witness Testimony Evidence: Argumentation, Artificial Intelligence, and Law* (Cambridge: Cambridge University Press, 2008) pp. 60-61.

⁴⁷ Rule 88(5) of the ICC RPE provides that 'a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.' Rule 75(D) of the ICTY and the ICTR RPE provides that 'A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.'

⁴⁸ Iontcheva Turner, 'Legal Ethics', 8.

pursue their client's cause forcefully, they must be aware that especially judges with a civil law background may be quite uncomfortable with overly zealous or aggressive advocacy, if the chosen line of questioning is perceived as derogatory to the dignity of the witness. A Presiding Judge could even admonish Defence counsel if he or she perceives that certain questions posed undermine important goals of international criminal trials, such as truth-seeking and respecting a victim-witness's dignity.

Defence counsel must determine whether to impeach victim-witnesses when there is a basis for doing so and how confrontational to be during examination without appearing callous or overstepping what is perceived as acceptable. This particular challenge also highlights the tension between the duty to the client and the rules relating to the examination of witnesses and victims.⁴⁹ The situation brings to the fore the differences between advocacy styles of lawyers with a common law background and those with a civil law background. In an adversarial trial system it is for the Defence counsel to test the evidence and to undermine the credibility of a prosecution witness when there is a good cause to do so. In canvassing a possible middle ground between overzealous and unduly timid trial advocacy, Iontcheva Turner has suggested that an explanation by the ICC regarding lawyer's duties to the court under Article 24(3) of the ICC Code of Conduct and relations with witnesses under Article 29(1) to the effect that impeachment of truthful witnesses, while not absolutely prohibited, is neither required nor encouraged, would promote an ethical standard that is more consistent with the structure and purposes of international courts than the aggressive adversarial standard that a number of international criminal Defence attorneys currently employ.⁵⁰ This explanation is impractical, however, as no one, including Defence counsel, can possibly know beforehand whether a witness is telling the truth or not. In addition, 'truthful' witnesses are sometimes not reliable witnesses. What they honestly believe to be true—for example, their identification of the accused as the perpetrator—may in fact be incorrect. The judges are entrusted with maintaining and where necessary restoring the balance between the rights and

⁴⁹ Article 29 of the ICC Code of Conduct for Counsel on 'Relations with witnesses and victims' provides that:
1. Counsel shall refrain from intimidating, harassing or humiliating witnesses or victims or from subjecting them to disproportionate or unnecessary pressure within or outside the courtroom.
2. Counsel shall have particular consideration for victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled.

⁵⁰ Turner, 'Legal Ethics', 37.

duties of the participants in the proceedings. The primary duty of Defence counsel is to test both the credibility and reliability of the evidence against the accused.

What about a situation where Defence counsel represents a client who wants to testify falsely, or wants to put forward a false alibi? Iontcheva Turner has argued that if counsel knows that a client intends to testify falsely, counsel should first attempt to persuade the client to testify truthfully or refrain from testifying. If that fails, counsel should suggest that the client give an unsworn statement, rather than one under oath.⁵¹ The ICC Statute allows for an accused to make an unsworn oral or written statement,⁵² and a similar, though fairly restricted right, is available for the accused tried at the ICTY, the ICTR and the SCSL.⁵³ If the defendant insists on testifying falsely after being cautioned about the consequences by counsel, counsel should consider withdrawing. Knowingly advancing a false alibi whether or not instructed by the client, is as wrong as assisting the client to testify falsely. Since it is highly unlikely that an international court would accept a Defence counsel's withdrawal at an advanced stage of the proceedings in view of the delay and other negative consequences, counsel's only choice must be to refrain from relying on the false aspects of such testimony in the closing arguments and final brief. Codes of professional conduct at different ICs impose a standing positive legal obligation on Defence counsel not to knowingly mislead the court.

How should Defence counsel deal with offers by the Prosecution in the context of plea-bargaining and in advising the client in this regard?⁵⁴ In the *Erdemović* case, the ICTY

⁵¹ *Ibid.*, 41.

⁵² See ICC Statute, Art. 67(1)(H).

⁵³ See Rule 84*bis* of the ICTY RPE which explicitly allows for a statement of the accused. While no unsworn statements from the dock are explicitly allowed under the ICTR and RSCSL RPE, in practice sometimes the accused were allowed that opportunity. Rule 84 of the ICTR RPE and RSCSL RPE concern opening statements which can be made by the accused before the presentation of the evidence by the prosecution or before the presentation of the evidence by the defence. ICTY Rule 84*bis* reads "(A) After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement. (B) The Trial Chamber shall decide on the probative value, if any, of the statement." See Residual Special Court for Sierra Leone, 'Rules of Procedure and Evidence of the Residual Special Court for Sierra Leone' (as amended 4 December 2013), 16 January 2002.

⁵⁴ For the legal framework see ICTY RPE Rule 62*ter*; ICC Statute, Arts. 64(8)(A), 65. See inter alia Sarah Williams, 'The Completion Strategy of the ICTY and the ICTR' in Michael Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May Ltd., 2007), pp. 217-224; Janine Natalya Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation', (2009) 20(2), *European*

Appeals Chamber found that the plea was uninformed and involuntary, and thus remanded the case for trial.⁵⁵ At the ICTR, Jean Kambanda tried to withdraw his guilty plea after receiving a life sentence.⁵⁶ These examples show that Defence counsel has the affirmative duty to properly advise the accused at all stages of the proceedings, including plea negotiations. By entering a guilty plea, a defendant waives certain fundamental rights, including the right to remain silent, the right against self-incrimination, the right to require the Prosecution to prove its charges beyond a reasonable doubt, and the right to put forward a defence against those charges.⁵⁷ In discussing plea-bargaining practices at the ICTY, Dixon and Demirdjian have pointed out that Defence counsel will need to be especially resourceful and creative in their advice to defendants, teasing out the various grounds for mitigation, and always with a keen sense of the trial chambers' wide discretion.⁵⁸ The Defence counsel must explain to the accused that, given the seriousness of the crimes charged, the possibility of a reduced sentence remains small, although Trial Chambers have generally followed prosecution's recommendations for lowered sentences. The accused's own assessment of the wrongful conduct and genuine admission of guilt, as well as the expectation of a reduced sentence which would accompany an admission of guilt prior to trial, alongside other considerations relating to protecting the interests of the victims and the efficient use of the resources of the tribunal, are mitigating circumstances and are among the central considerations in a plea bargaining process.

4.3 Balancing competing duties and professional relationships

A good working relationship between Defence counsel and the defendant, based on trust and mutual respect, is very important for preparing and mounting a proper defence case. In one case the accused were brought to the courtroom under circumstances which were denigrating

Journal of International Law 415-436; William A. Schabas, Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law* (Routledge, 2010), pp. 276-78.

⁵⁵ ICTY, *Prosecutor v. Dražen Erdemović*, *Appeals Chamber Judgment*, Case No. IT-96-22-A, 7 October 1997, paras. 16-21.

⁵⁶ ICTR, *Prosecutor v. Jean Kambanda*, *Appeals Chamber Judgment*, Case No. ICTR-97-23-A, 19 October 2000, paras. 49-95.

⁵⁷ Janine Natalya Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation', (2009) 20(2) *European Journal of International Law* 418.

⁵⁸ Rodney Dixon and Alexis Demirdjian, 'Advising Defendants about Guilty Pleas before International Courts', (2005) 3(3) *Journal of International Criminal Justice* 680-694.

to them, that is, in blindfolds. The Defence counsel brought this situation to the attention of the Chamber, including the accused intention to boycott the proceedings if the blindfolding continued, which resulted in these unnecessary measures being lifted by the security detail.⁵⁹ Defence counsel can never affirmatively advise the client to boycott or disrupt the proceedings. Even in the extreme and rare circumstances where a tribunal refuses to take steps to address a situation which undermines or violates the rights of the accused, counsel is nonetheless required to try all available legal remedies, as boycotting the proceedings is an extreme form of procedural disobedience which could attract punishment for contempt.

Article 24(5) of the ICC Code of Conduct requires counsel to represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings. The same article states that counsel are personally responsible for the conduct and presentation of the client's case and shall exercise personal judgment on the substance and purpose of statements made and questions asked.⁶⁰ The complexity of cases tried before international courts means that there are no easy answers to the various challenges faced in practice and much depends on the circumstances and the attitude of the Defence counsel concerned. Obviously, the course of action that Defence counsel should take when faced with challenges in preparing and presenting the Defence case depends on the gravity of the situation and the surrounding circumstances. The final decision, informed by legal and practical considerations, is based on a personal evaluation of the circumstances and the lawyer's individual compass.

Practitioners, scholars, and others have started asserting more frequently that a Defence counsel is an 'officer of the court'. From an institutional perspective, in contrast to its status at the Special Tribunal for Lebanon (STL), the Defence is not a constitutive part of the international judicial mechanism at the *ad hoc* tribunals, the ICC, or the SCSL.⁶¹ Does that

⁵⁹ See ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Pre-Trial Conference*, Case No. IT-03-66-T, transcript of 15 November 2004, especially p. 242: paras. 19-25 and p. 243: paras. 1-4, at <http://icty.org/x/cases/limaj/trans/en/041115IT1.htm>.

⁶⁰ ICC Code of Conduct, Art. 24(2).

⁶¹ Article 34 of the ICC Statute, entitled 'Organs of the Court', provides as follows: 'The Court shall be composed of the following organs: (a) The Presidency; (b) An Appeals Division, a Trial Division and a Pre-Trial Division; (c) The Office of the Prosecutor; (d) The Registry. Article 11 of the ICTY Statute, entitled 'Organization of the International Tribunal' provides as follows: 'The International Tribunal shall consist of the following organs: (a) the Chambers, comprising three Trial Chambers and an Appeals Chamber; (b) the Prosecutor; and (c) a Registry, servicing both the Chambers and the Prosecutor.' Article 10 of the ICTR Statute,

mean that Defence counsel owes a primary duty to the client or to the court? While Defence counsel must see the interests of the client as primary, on some issues Defence counsel has a co-extensive duty to the court and the client. Defence counsel must be aware of their professional obligations and try to solve differences which might arise through the various procedures and venues available.

4.4 Complying with national and international standards of professional conduct

Defence counsel practicing before ICs come from different countries and have to comply with one or more domestic codes of professional conduct, in addition to the specific legal framework applicable at each IC.⁶² Because of legal training and legal culture affinity, Defence counsels naturally gravitate towards complying with their own domestic standards of professional conduct. The possibility of potential conflicts between domestic and international standards of professional conduct has been recognized and solved in favor of international standards, as laid down in the relevant codes of conduct for counsel before ICs.⁶³ Despite that, it is not easy for Defence lawyers, trained in the usually more developed domestic standards of their country of origin, to interpret the more open-ended international standards of professional conduct. In touching upon the relationship between the different participants in the legal proceedings, Tuinstra notes that if a judge's legal background differs from a Defence counsel's background, a judge may hold the lawyer to his or her own domestic standards

entitled 'Organisation of the International Tribunal for Rwanda', provides as follows: 'The International Tribunal for Rwanda shall consist of the following organs: (a) The Chambers, comprising three Trial Chambers and an Appeals Chamber; (b) The Prosecutor; (c) A Registry.' Article 11 of the SCSL Statute, entitled 'Organization of the Special Court', provides as follows: 'The Special Court shall consist of the following organs: a. The Chambers, comprising one or more Trial Chambers and an Appeals Chamber; b. The Prosecutor; and c. The Registry.' Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 7 July 2009), 25 May 1993, UN Doc. S/RES/808/1993 and 827/1993; Statute of the International Criminal Tribunal for Rwanda (as amended 16 December 2009), 8 November 1994, UN Doc. S/RES/955 (1994); Statute of the Special Court for Sierra Leone, (16 January 2002,) UN Doc. S/RES/1315, 2178 UNTS 138.

⁶² For a detailed discussion see the Chapter 2 in this book, by C. Rohan. Respectively, the ICTY Code of Conduct and ICTY RPE, Rule 44(C); ICTR Code of Conduct and ICTR RPE, Rule 44 (B)); see also ICC Code of Conduct and ICC RPE, Rule 22(3). For a detailed discussion of the relationship between the different regimes see Gut, 'Counsel Misconduct', pp. 286-310.

⁶³ See Article 4 of the ICTY and the ICC Code of Conduct and Article 19 of the ICTR Code of Conduct which require that in case of inconsistency between the IC's Code and any other codes of practice and ethics governing Counsel, the Code would prevail in respect of Counsel's conduct before the relevant IC.

which may not amount to what may reasonably be demanded.⁶⁴ Defence counsel must be aware of the judges and the prosecutor's legal background, since that may play a role in their assessment of what constitutes acceptable professional conduct.

With the exception of certain issues such as fee-splitting, the relationship with the client and other participants in the proceedings, and conflicts of interest, the international standards of professional conduct leave a wide margin of appreciation to Defence counsel. Addressing professional misconduct in a timely and efficient manner requires a good level of cooperation between the existing disciplinary mechanisms and practices at different ICs and relevant domestic mechanisms (e.g. the bar organization). Such cooperation would avoid duplication of work and double jeopardy, while addressing cases of professional misconduct. It must be noted, however, that disciplinary measures by the ICs are generally unenforceable at the domestic level. Gut pointedly notes that disciplinary fines handed down by the ICC bodies would be unenforceable in Germany and German authorities would be unable to assist the ICC in pending disciplinary matters.⁶⁵ If such disciplinary fines are not paid, however, Defence counsel will likely be removed from the list of counsel and can no longer practice before that IC. Moreover, in several cases an IC (ICTY, ICTR and ECCC) has referred counsel to their domestic bar requesting disciplinary proceedings and the latter has agreed to hold such proceedings. More generally, the issue of disciplinary measures for professional misconduct before ICs could potentially be addressed through bilateral agreements between the relevant IC mechanism and the national bars of Defence counsel accepted to practice before that IC.

5. Concluding remarks

Practicing as Defence counsel is a challenging and demanding job. The issue of professional conduct of the Defence in international criminal proceedings has several aspects and lacunae which are in need of further clarification. The challenges in ascertaining what exactly constitutes proper professional conduct are manifold, partly because Defence lawyers come from different legal cultures and partly because different international codes of conduct, regulations and disciplinary mechanisms are employed at each of the ICs. The vagueness of

⁶⁴ Tuinstra, 'Defence Counsel in International Criminal Law', p. 235.

⁶⁵ Gut, 'Counsel Misconduct', p. 298.

some of the professional conduct rules at the tribunals may complicate counsel's ability to determine what conduct is acceptable and what is not. Professional conduct can be viewed from different angles, e.g. as the duty towards the client, duty towards the court, and the duty towards the legal profession and society more generally. Balancing these competing interests might be a difficult exercise at times.

The rules and regulations governing international criminal proceedings entail a balancing of interests of the different participants and stakeholders. Looked at from a general perspective, these rules and regulations entail a balancing of the interests of the persons investigated, accused and tried, on the one hand, and the international community's interest to ensure accountability for the most serious crimes, on the other hand. The authority for ensuring and maintaining that balance and punishing any professional misconduct on the part of the participants in the proceedings, including Defence counsel, is vested with the relevant judicial mechanism itself. At times, Defence counsel's conduct has collided with the administration of international criminal justice. Improper conduct has ranged from measures of self-help such as walking out during the hearing, to offences against the administration of justice such as interfering with the course of justice by procuring false statements and interfering with witnesses. While the former conduct might be understood and appreciated as an extreme means to enforce the rights of the accused, the latter is and should be subject to disciplinary and criminal proceedings.

Professional misconduct on the part of Defence counsel might be motivated by different reasons, including financial gain, poor judgment, or close identification with the accused. Other additional factors encouraging professional misconduct might be the expectation of not being caught and the lack of specific punishment or the perceived relative mildness of such punishment. It is impossible to create a disciplinary system which could deter all individuals from engaging in wrongful conduct. However, at times such misconduct might be simply a by-product of the clash of different legal cultures competing for priority in a system of law which does not yet reflect shared values among all its participants. International criminal proceedings involve lawyers coming from different legal cultures and subcultures. This means that for certain issues, for example, the examination of victim-witnesses and other evidentiary issues, Prosecution offers in exchange for guilty pleas, and the question whether to follow clients' instructions to boycott or disrupt the proceedings, Defence counsel might have to tread a middle path between the rules and regulations of the tribunals and his or her own ethical standards.

Professional misconduct on the part of Defence counsel, be it in the form of contempt of court or interference with the administration of justice, needs to be addressed. At times it may not merit disciplinary proceedings, and a simple cautioning by the Bench will be a better option. But when actions carry the potential to pervert the course of justice, the institutional disciplinary mechanisms need to fully address the problem. That might mean adopting measures of punishment which would potentially deter others from engaging in similar wrongful behavior. For these measures to have effect, it is necessary for the international criminal courts to work closely with the national bar associations and with each other. The most efficient means of deterring breaches of professional standards of conduct, however, is to require training about the rules of conduct at the ICs.

Finally, it should be recalled that although occurring in different forms, Defence counsel misconduct has been quite rare. Only one case was deemed grave enough for the lawyer concerned to be removed from the list of assigned Defence counsel in the over twenty years of the existence of the ICTY. Considerations of legitimacy and effectiveness require that international criminal proceedings be conducted in accordance with the highest standards. In light of these considerations, lawyers practicing before the ICs must maintain a consistent level of awareness of the standards of conduct which apply to them at any given time, and the ICs must insure that Defence counsel are provided with adequate training and support so as to insure that those standards are applied in their day-to-day work.