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Defence counsel in international criminal law

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VI

REGULATION OF PROFESSIONAL CONDUCT

6.1 INTRODUCTION

At the *ad hoc* Tribunals, proofing witnesses in advance of hearings was common practice for prosecution counsel. At the ICC, the Chamber deemed this practice to be contrary to ‘any general principle of law’.¹ It further noted that this practice, while illegal in most civil law jurisdictions as well as in the common law jurisdiction of England and Wales, may legally be applied in the US.² Probably as a result of this decision, the *ad hoc* Tribunals re-evaluated³ whether or not the standards of professional conduct should allow for this.⁴

When a few defendants at the ICTR participated in a strike, some of their lawyers agreed not to represent them in court in order to support them, while others would have happily appeared in court on their client’s behalf notwithstanding their clients’ wishes. The latter would have decided so, because they consider themselves to be an officer of the court in addition to being a guardian of their client’s interests.⁵

Almost inevitably, judges, prosecutors and defence counsel participating in international criminal proceedings have varying legal backgrounds,⁶ involving differing

¹ ICC Pre-Tr. Ch. I, Decision on the Practices of Witness Familiarisation and Witness Proofing, *Situation in the Democratic Republic of the Congo, Lubanga Dyilo* (Case No. ICC-01/04-01/06), 8 November 2006, § 42.

² Cf *idem*, for instance, § 37. See also Tochilovsky, Vladimir, ‘International Criminal Justice: “Strangers in the Foreign System”’, 15 *Criminal Law Forum* (2004), pp. 319–344, p. 327.

³ In an earlier decision, ICTY Tr. Ch., Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, *Limaj et al.* (Case No. IT-03-66-T), 10 December 2004, the ICTY considered this practice to be admissible, even though the defence argued that prosecution counsel might ask witnesses leading questions prematurely before evidence is given in court, thereby influencing the fairness of the trial. (p.1) It was contended that witness proofing is a widespread practice in jurisdictions with an adversary procedure. Additionally, it was argued that a refreshment of witness memory should benefit the defence. As the events underlying the charges occurred long ago, the evidence will be presented ‘more accurate, complete, orderly and efficient’. (p. 2).

⁴ See ICTR Tr. Ch. III, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing Rule 73(B) of the Rules of Procedure and Evidence, *Karemura, Ngirumpatse, and Nzirorera* (Case No. ICTR-98-44-T), 14 March 2007, §§ 6 and 7. See also ICTY Tr. Ch., Decision on Ojdanić Motion to Prohibit Witness Proofing, *Milutinović et al.* (Case No. IT-05-87-T), 12 December 2006, in which the Trial Chamber held that ‘discussions between a party and a potential witness regarding his/ her evidence can, in fact, enhance the fairness and expeditiousness of the trial, provided that these discussions are a genuine attempt to clarify a witness’ evidence.’ See § 16.

⁵ See ICTR Tr. Ch. II, Minutes of Proceedings, *Ndindiliyimana et al.* (Case No: ICTR-00-56-I), 20 and 21 September 2004. See also ICTR Tr. Ch. III, Trial Day 1, Minutes of Proceedings, *Seromba* (Case No. ICTR-2001-66-I), 20 September 2004, § 2.b. See *infra*, paragraph 6.3.1.

⁶ Cf. also Tochilovsky (2004), *supra* note 2, pp. 319–344.

standards of professional conduct.⁷ Even in countries sharing the same legal tradition, professional standards differ. Both the USA and the UK have a common law tradition. But only in England, solicitors generally need to hire a barrister to plead in court.⁸ An English barrister might therefore identify less with his client's causes than an American defence counsel directly hired by the defendant.⁹

How best to ensure defence counsel's compliance with the same standards of professional conduct in an international criminal court is the key issue in this Chapter. It is vital that professional standards are formulated. The SCSL has drafted one Code of Professional Conduct for defence counsel and prosecution counsel. The *ad hoc* Tribunals and the ICC adopted a separate code of professional conduct for defence counsel. Paragraph 6.2 discusses how to properly establish a code of ethics for defence counsel practising before international criminal courts.

Even if standards of professional conduct are incorporated in a code, situations inevitably arise in which these standards are open to differing interpretations. This is common to every jurisdiction. But the relative novelty of the international criminal law system, in addition to the differing legal backgrounds of the trial participants involved, could produce more of such situations.¹⁰ Paragraph 6.3 discusses several standards of conduct that gave rise to professional dilemmas for defence counsel conducting international criminal cases.

Paragraph 6.4 assesses the most effective approach for international criminal courts dealing with unprofessional behaviour by defence counsel. While appearing before an international criminal court, counsel are still required to comply with his national codes of professional conduct. The extent to which defence counsel's conduct before an international criminal court can have repercussions in his domestic jurisdiction is discussed in paragraph 6.5.

⁷ Cf. also McMorrow, Judith A., 'Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY', 30 *Boston College International and Comparative Law Review* (2007), 13 March 2007, pp. 139-173; Nagorcka, Felicity, *et al.*, 'Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice', 29 *Melbourne University Law Review* (2005), August 2005, pp. 448-477; McCary, M., Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective, in Daly and Goebel (ed), *Rights Liability And Ethics In International Legal Practice* (2nd Edition) (Huntington, NY: Juris, 2004), pp. 407-454.

⁸ Solicitors have higher rights of audience if they have passed a "Higher Courts Advocacy" qualification. See www.sra.org.uk/solicitors/accreditation/higher-courts-rights-of-audience.page.

⁹ See Miller, Karen L.K., 'Zip to Nil? A Comparison of American and English Lawyers' Standards of Professional Conduct', in Daly and Goebel (ed), *Rights Liability and Ethics in International Legal Practice* (2nd Edition) (Huntington, NY: Juris, 2004), pp. 355-396, p. 378.

¹⁰ Cf. Arbour, Louise, 'Legal Professionalism and International Criminal Proceedings', 4 *Journal of International Criminal Justice (JICJ)* (2006), pp. 674-685, p. 677; McMorrow (2007), *supra* note 7, pp. 140-146.

6.2 CODES OF PROFESSIONAL CONDUCT

Roman advisors and advocates already applied professional ethical standards.¹¹ Putting ethical standards of conduct for the legal profession down in writing is not considered necessary in all jurisdictions. Up until 1980, the English Bar's conduct and etiquette were handed down by word of mouth, mainly during pupillage.¹² The *ad hoc* Tribunals did not immediately incorporate standards of professional conduct for defence counsel in a code. In late 1996 the ICTY Registrar decided that a code of conduct for defence counsel should be drafted to govern their behaviour.¹³ The first 'Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal' (ICTY) was promulgated in 1997.¹⁴ The ICTR Code of Professional Conduct came into force 8 June 1998. Since then, the Rules of Procedure and Evidence stipulated that counsel were subject to a code of professional conduct.¹⁵ The Code of Conduct for Counsel before the ICC was presented and adopted at the 3rd Plenary Meeting of the Assembly of States Parties at 2 December 2005.¹⁶

International criminal courts have good reasons for incorporating professional standards of conduct in their legal instruments. The field of international criminal justice is still relatively novel and its procedural system rapidly evolves, more so than most domestic legal systems. Additionally, lawyers appearing before these courts come from various legal systems. Given these circumstances, there is not one prevailing approach regarding professional standards of conduct.¹⁷ In national

¹¹ Rhode, Deborah L. and Luban, David, *Legal ethics* (Third), (New York, N.Y.: Foundation Press, 2001), p. 64.

¹² They were based on tradition, resolutions and specific rulings of the Bar Council, as well as on dicta in judgments raising points of court procedure. Thornton, Anthony, *The Professional Responsibility and Ethics of the English Bar*, in Cranston (ed), *Legal Ethics and Professional Responsibility* (Oxford: Clarendon Press, 1995), pp. 53-97, p. 55. Thus, the English Code of Conduct's first version came into effect in January 1981. See *ibid.*, p. 59. The first American Code of Ethics dates from 1887. Cf. Fox, Lawrence J., *et al.*, 'Ethics: Beyond the Rules', 67 *Fordham Law Review* (1998), November 1998, pp. 691-695, p. 695.

¹³ See ICTY Fourth Annual Report (UN Doc. A/52/375), 7 August 1997, par. 88.

¹⁴ (IT/125), 12 June 1997 (hereinafter: ICTY Code of Conduct).

¹⁵ See Rule 44(B) ICTY RPE (IT/32/REV.11), 15 July 1997; Rule 44(B) ICTR RPE, 8 June 1998. Rule 46(D) ICTR RPE stipulates that the Registrar may set up a code of conduct. Since 1999, it also provides that amendments 'be made in consultation with representatives of the Prosecutor and Defence counsel, and subject to adoption by the Plenary Meeting.' Since 2000, pursuant to Rule 46(C) (later (D)) ICTY RPE the Registrar should publish and oversee the implementation of the Code of Conduct (IT/32/REV.18).

¹⁶ (ICC-ASP/4/Res.1), 2 December 2005. In 2004, the Assembly of States Parties (ASP) approved provisional application of the draft Code, giving the States Parties the opportunity to submit comments for approval of the final version. (Resolution ICC-ASP/3/Res.3), 10 September 2004, par. 11.

¹⁷ Moreover, only the ICC has laid down standards of conduct for judges. See Code of Judicial Ethics

(ICC-BD/02-01-05), 9 March 2005. The ICTY has an unofficial prosecution code of ethics. See Prosecutor's Regulation No 2 (1999) Standards of Professional Conduct Prosecution Counsel, 14 September 1999, signed by Louise Arbour, available at http://69.94.11.53/ENGLISH/basicdocs/prosecutor/pros_2.doc. Only the SCSL has an official code of conduct for prosecution counsel. The same code applies also to defence counsel. See Code

jurisdictions, a code of professional conduct is supposed to reflect that state's prevailing view on lawyer's ethics. Codes of conduct that are drafted for international courts should *set* a common standard for all lawyers practising at these courts.¹⁸ Without such codes, lawyers might resort to their domestic standards of professional behaviour while appearing before an international court. That might lead to confusion.

National codes of conduct and disciplinary regimes set an example for international criminal courts. Arbour argues that in the absence of a tradition of international criminal practice, adopting the standards of one existing legal system could be tempting, as it would provide 'a ready-made answer to everything.'¹⁹ Arbour nonetheless rejects an overall adoption of one domestic system's codes of professional conduct. Given that their procedural system is unique, international courts should develop their own approach to this issue. If the standards from one particular jurisdiction were adopted, some lawyers, especially those from other jurisdictions, could be reluctant to observe such "foreign" standards. If professional standards are drafted anew, some ambiguities are unavoidable. That may cause problems of interpretation.

The SCSL has drafted one Code of Professional Conduct for defence and prosecution counsel.²⁰ The *ad hoc* Tribunals adopted professional standards of conduct for defence counsel alone. The ICC has adopted separate codes for defence counsel²¹ and for judges.²² An important question that arises is *who* should draft standards of professional conduct for defence counsel? The UN Basic Principles on the Role of Lawyers provide that these may be established by the legal profession itself, or by legislators.²³ It has been argued that, '[b]ecause of the far-reaching effects of lawyers' ethical rules - extending as broadly as the administration of justice itself-', legislators should develop lawyers' ethical rules.²⁴ In many jurisdictions, codes of conduct are drafted by the national Bar Association.²⁵ When the *ad hoc* Tribunals were set up, there

of Professional Conduct for Counsel Audience before Sierra Leone with the Right of Audience before the Special Court for Sierra Leone, Adopted on 14 May 2005, Amended on 13 May 2006 (hereinafter: SCSL Code of Conduct), Article 2. The ICC Draft Regulations of the Office of the Prosecutor (annotated, 3 June 2003, Book 2, Part 1) contain a code of conduct for the Prosecution.

¹⁸ Cf. Article 7 ICTY Code of Professional Conduct (IT/125, Rev. 2), 29 June 2006; Article 3 ICTR Code of Conduct. Cf. also Preliminary clauses of the Draft Code of Conduct for Counsel before the ICC (May 2004), available from www.icc-cpi.int/legaltools, under 'Drafts'. This draft code states that it is intended to be 'a common standard of achievement for all counsel practising at the International Criminal Court.' Cf. also Preamble ICTY Code of Conduct (IT/125 Rev. 2): 'Considering that counsel appearing before the Tribunal come from various jurisdictions, and that the interests of justice require all counsel to adhere to the same Code of Professional Conduct'. An almost identical phrase is incorporated in the ICTR Code of Professional Conduct for Defence Counsel, Decision, 8 June 1998.

¹⁹ Arbour (2006), *supra* note 10, p. 684.

²⁰ SCSL Code of Conduct.

²¹ This code also applies to counsel assigned to victims.

²² ICC Code of Judicial Ethics.

²³ See Principle 26 UN Basic Principles on the Role of Lawyers. The same is provided by the Council of Europe, Recommendation No. R(2000)21, Principle VI, par. 1.

²⁴ See Freedman, Monroe H. and Smith, Abbe, *Understanding Lawyers' Ethics* (Third Ed.), (Newark; San Francisco; Charlottesville: LexisNexis, 2004), p. 2.

²⁵ For instance, the French Code ("Règlement intérieur harmonisé des barreaux de France") is framed by its General Assembly of the National Council of Bars (Conseil National des Barreaux),

were no Bar associations for lawyers practising at international criminal courts. Not surprisingly, therefore, the primary responsibility for drafting the codes of conduct for defence counsel was vested in the Registrar. The Judges and the Advisory Panel²⁶ commented on the Registrar's draft. The Code that resulted was based on several national Codes of Conduct and on proposals by international organisations of lawyers.²⁷ The initial ICTR and ICTY Codes of Professional Conduct are almost identical.

The ICC benefited from the rise of international criminal defence lawyers' associations. When the Rome Statute of the ICC came into force in 2002, such associations had been established.²⁸ The ICC RPE prescribe that the Registrar should initiate the drafting of Code of Professional Conduct for counsel, which the Presidency, after consultation with the Prosecutor, presents to the Assembly of States Parties for adoption.²⁹ The ICC's Registrar was obliged to consult independent representative bodies of counsel.³⁰ The Registrar held various consultation rounds.³¹ Numerous NGO's and defence lawyers' organisations, such as the ADC-ICTY, the IBA and the ICB, made suggestions.³² Finally, in 2004, the Presidency submitted the final draft to the Assembly of States Parties.³³ In the drafting process, all possible

March 1999. See *Preamble*. The Dutch Code of Conduct is also issued by the Dutch Bar. See 'The Code of Conduct of Advocates 1992 (*Gedragsregels*)', available from www.advocatenorde.nl/english. In the USA, each state may issue a separate code of professional conduct. Most states have largely adopted the American Bar Association's 1983 Model Rules of Professional Conduct (hereinafter: ABA Model Rules), available from www.abanet.org. This means that legal practitioners developed the standards contained in these codes. Fox *et al.* (1998), *supra* note 12, p. 693.

²⁶ As regards this Panel, cf. *supra*, Chapter III, paragraph 3.2.4.

²⁷ The sources of the Code mentioned in it are codes of ethics from Australia, Belgium, Bosnia & Herzegovina, England, France, Spain, The Netherlands, USA, EU, l'Union Internationale des Avocats, the International Association of Penal Law and the International Commission of Jurists. According to Mark Ellis, the American Bar Association's Model Rules of Professional Conduct has influenced the ICTY Code of Conduct in particular. See Ellis, Mark S., 'The Evolution of Defence Counsel appearing before the International Criminal Tribunal for the Former Yugoslavia', *New England Law Review* (2003), Summer 2003, pp. 949-973, p. 967.

²⁸ The ICDA, for instance, was established in 1997. The ICB in 2002. See *supra*, Chapter III, paragraph 3.3.1.

²⁹ See Rule 8 ICC RPE (ICC-ASP/1/3).

³⁰ See Rules 8(1) and 20(3) ICC RPE.

³¹ Written consultations were held with 'ten international associations', 'more than fifty associations and experts', and 'inter alia associations of lawyers, experts and States Parties'. Seminars on defence issues', and '[m]eetings with representatives of several associations of lawyers' were organized. Cf. www.icc-cpi.int/defence/defconsultations/code_conduct.html, lastly visited 8 April 2007. A questionnaire on this issue that was distributed in July 2003 among experts is on file with the author.

³² See the ICB's 'Code of Conduct and Disciplinary Procedure of the International Criminal Bar' presented to the ICC May 2003, available from www.bpi-icb.org; The IBA's 'Code of Professional Conduct for Counsel before the International Criminal Court', February 2003, available from www.ibanet.org/humanrights/ICC_IBA_Involvement.cfm; ADC-ICTY Report "Draft Code of Conduct for Counsel before the ICC", 15 September 2004, available at www.adcity.org/documents/icc-codeconduct.pdf, lastly visited 9 April 2007.

³³ See Proposal for a draft Code of Professional Conduct for counsel before the International Criminal Court, 27 August 2004, (ICC-ASP/3/11/Rev. 1).

entities were involved, including lawyers' associations and independent experts. As a result, important last minute improvements were made.³⁴

The extent to which defence counsel are involved in the amendments of codes of conduct is a different issue. The Registrar can amend the ICTR Code of Professional Conduct, after consultation with the Judges.³⁵ Although the Registrar should consult 'representatives of the Prosecutor and Defence counsel' concerning any such amendments,³⁶ up until 2005 at least, the Registry never included ADAD in any consultations. Apparently, the Advisory Panel has been consulted.³⁷ ADAD has gone so far as to argue that as a result, the Code of Conduct does not bind defence counsel.³⁸ Nonetheless, as amendments are adopted by the Plenary Meeting, and ADAD has been invited to attend this Meeting since 2004, ADAD may be enabled to comment on future amendments. The ICTY Code of Conduct requires the Registrar to consult with the permanent Judges, the Association of Counsel as well as the Advisory Panel as to amendments.³⁹ States Parties, judges and lawyers' associations may propose amendments to the ICC Code of Conduct to the Registrar.⁴⁰ Overall therefore, defence counsel are more involved in amending the codes of professional conduct than in drafting them. It is to be recommended that upon completion of any consultations as to amendments, representatives of all different parties involved discuss the final version of the Code together.⁴¹

As previously argued,⁴² involvement of defence counsel in drafting and amending their standards of professional behaviour is vital. As "experts by experience", counsel are uniquely aware of the minimum requirements to promote proper professional behaviour. Codes of conduct for international courts must be observed and complied with by lawyers from many different legal systems. The professional standards contained therein should be clear, acceptable and viable for all of them. Therefore, lawyers' organisations that specialize in international criminal defence should be allowed to contribute to amendments of these codes on an official basis.

³⁴ For instance, counsel's duty enshrined in Article 22(3) of the draft Code of Conduct to report any solicitations of his client to fee-splitting to the Registrar was removed. See Kenneth D. Hurwitz, Comments on the Draft Code of Professional Conduct for Counsel before the International Criminal Court, A Human Rights First White Paper, 26 November 2005, available at www.humanrightsfirst.info/pdf/051129-ij-hrf-icc-ethics.pdf, lastly visited 8 April 2007. See also *infra*, paragraph 6.3.5 on fee-splitting.

³⁵ See Article 23 ICTR Code of Conduct. This is equal to Article 23 of the initial version ICTY Code (IT/125).

³⁶ See Rule 46(D) ICTR RPE. ADAD has for instance proposed to change the disciplinary system for defence counsel. See ICTR Tr. Ch. I, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratién Kabiligi, *Bagosora et al.* (Case No. ICTR-98-41-T), 19 January 2005 (hereinafter: Decision on the Defence Motions for the Reinstatement), § 13.

³⁷ Cf. *ibid.*, § 14.

³⁸ See *idem.*

³⁹ See Article 6(A) ICTY Code of Conduct (IT/125 Rev.2).

⁴⁰ See Rule 8(3) ICC RPE; Article 3 ICC Code of Conduct.

⁴¹ Cf. McMorrow, who promotes more 'direct interaction between the judicial, prosecutorial and defense functions as norms are created' at the ICTY. McMorrow (2007), *supra* note 7, p. 146.

⁴² See *supra*, Chapter III.

6.3 STANDARDS OF PROFESSIONAL CONDUCT

6.3.1 Introduction

Codes of professional conduct generally include fundamental standards such as the duty of confidentiality, the duty to act honestly, independently, and diligently, to be loyal to a client and keep him informed. A novelty in the ICC Code of Conduct, in comparison with the *ad hoc* Tribunals' Codes, is that it obliges counsel to give a solemn undertaking.⁴³ When drafting the ICTY code of conduct for defence counsel, the Defence Counsel Unit of the Registry 'sought to strike a balance between adversarial and inquisitorial legal systems.'⁴⁴ Given the analysis in Part II of this study of the differing role of counsel in proceedings structured as an inquest and those structured as a contest, striking such a balance may not produce a harmonious effect or guarantee a better quality of professional standards. For professional standards to be effective, they should correspond to the procedural system. In a "contest" or adversarial system, standards of professional conduct preventing the defence from interviewing witnesses at an early stage of proceedings could diminish the defence's chances for success in the rest of the proceedings.

The UN Basic Principles on the Role of Lawyers provide that lawyers should 'maintain the honour and dignity of their profession *as essential agents of the administration of justice.*'⁴⁵ Defence counsel have a duty to their client to provide adequate and effective representation. In common law systems, lawyers also have a duty to the court to act as a so-called "officer of the court".⁴⁶ These duties might involve conflicting professional obligations.⁴⁷ As an advocate, counsel should keep his client informed of the developments in the case, safeguard his client's confidences, offer 'competent and diligent services at a reasonable fee, and abide by the client's wishes concerning the purposes of the attorney-client relationship.'⁴⁸ As an officer of the court, counsel should not advise or support his client 'in fraudulent conduct, file frivolous claims or defenses, unreasonably delay litigation, intentionally fail to follow the rules of the tribunal, or unnecessarily embarrass or burden third parties.'⁴⁹ English barristers have

⁴³ 'I solemnly declare that I will perform my duties and exercise my mission before the International Criminal Court with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously, and that I will scrupulously respect professional secrecy and the other duties imposed by the Code of Professional Conduct for Counsel before the International Criminal Court'. Article 5 ICC Code of Professional Conduct for Counsel (ICC-ASP/4/Res.1). Judges, Prosecutors and the Registrar will also have to make solemn undertakings. Cf. Article 45 Rome Statute; Rule 5 ICC RPE.

⁴⁴ ICTY Fourth Annual Report (1997), par. 88.

⁴⁵ Principle 12 UN Basic Principles on the Role of Lawyers. Emphasis added, JTT.

⁴⁶ Paragraph 8 of the Preamble of the ABA Model Rules provides: 'A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious.'

⁴⁷ See, for instance, Gaetke, Eugene R., 'Lawyers as Officers of the Court', 42 *Vanderbilt Law Review* (1989), January 1989, pp. 39-91.

⁴⁸ Wilkins, David B., 'Who Should Regulate Lawyers?' 105 *Harvard Law Review* (1992), February 1992, pp. 799-887, p. 815 (footnotes omitted).

⁴⁹ *Idem*.

an overriding duty to the court rather than to their clients.⁵⁰ In *Aleksovski*, Judge Robinson argued that any defence counsel appearing before the ICTY is an officer of the court. ‘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 court, is accepted as true, unless there is good reason to doubt his *bona fides*.’⁵¹ Generally, the concept of being an officer of the court is difficult to understand for lawyers from civil law systems. They consider this to impinge on their independence.⁵² Those counsel at the ICTR refusing to represent their clients in court, while the latter were on strike, let their duty to observe the wishes of their client, prevail over their duties as an officer of the court. In *Seromba*, defence counsel from Benin and Cameroon (whose legal systems are largely based on the French civil law system) were ordered to demand the accused to attend his trial and to allow his counsel to represent him in the interest of justice.⁵³ The following day, pursuant to Article 4.1 of the Code of Professional Conduct and in the interest of justice, the Chamber ordered defence counsel to continue to represent their client in court, his absence and his wishes to the contrary notwithstanding.⁵⁴ When counsel prematurely left the courtroom, apparently to mark their refusal, they received a warning for behaving disrespectfully and discourteously.⁵⁵ An English barrister in another ICTR case assured the author that, due to his duty as an officer of the court, he would represent his client in court, even if his client would urge him not to attend a particular hearing. When counsel is duly notified of any hearing, not to turn up could amount to “contempt of court”.⁵⁶ While counsel in *Ndindilyimana et al.* wanted to consult their domestic (Canadian and French) Bar associations on this issue, the Trial Chamber orally assigned counsel anew “in the interests of justice” to represent their clients’ interests in their absence.⁵⁷

Not only common law lawyers have a duty to the court. In *Nikula v. Finland*, the ECHR held:

[T]he special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts.

⁵⁰ A barrister ‘must assist the Court in the administration of justice’ and ‘has an overriding duty to the Court to act with independence in the interests of justice’. Section 302 of the Code of Conduct of the Bar of England and Wales (8th version), 31 October 2004, available from www.barcouncil.org.uk/document.asp?documentid=2811, lastly visited 3 April 2007. Cf. Pannick, David, *Advocates* (Oxford: Oxford University Press, 1992), p. 121.

⁵¹ ICTY App. Ch., Judgment on Appeal by Anto Nobile against Finding of Contempt, *Aleksovski* (Case No. IT-95-14/1), 30 May 2001, Separate Opinion of Judge Patrick Robinson, § 2.

⁵² Cf. also Nagorcka *et al.* (2005), *supra* note 7, p. 449.

⁵³ See ICTR Tr. Ch. III, Trial Day 1, Minutes of Proceedings, *Seromba* (Case No. ICTR-2001-66-I), 20 September 2004, § 2.b.

⁵⁴ This provides: ‘Counsel must advise and represent their client until the client duly terminates Counsel’s position, or Counsel is otherwise withdrawn with the consent of the Tribunal.’

⁵⁵ See *Seromba* (Case No. ICTR-2001-66-I), Minutes of Proceedings, 21 September 2004, paras. 2.a, 2.b.

⁵⁶ This concerned Ben Gumpert, lead counsel of Mugenzi. Notes on file with the author. The concept of contempt of court will be explained *infra* in paragraph 6.4.4.

⁵⁷ See ICTR Tr. Ch. II, Minutes of Proceedings, *Ndindilyimana et al.* (Case No: ICTR-00-56-I), 21 September 2004, 2.b.

[...] Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein'.⁵⁸

In *Steur v. The Netherlands* the ECHR argued:

'In their capacity as officers of the court, [lawyers] are subject to restrictions on their conduct, which must be discreet, honest and dignified, but they also benefit from exclusive rights and privileges that may vary from one jurisdiction to another'.⁵⁹

In *Barayagwiza*, the ICTR emphasized that if counsel is assigned to an accused (rather than being privately financed by the latter), he not only has obligations to his client, but also 'represents the interest of the Tribunal to ensure that the Accused receives a fair trial'.⁶⁰ Under the ICTY Code of Conduct 'counsel have a duty of loyalty to their clients consistent with their duty to the Tribunal to act with independence in the administration of justice'.⁶¹ The ICTR Annex to the Code provides: 'Counsel have an overriding duty to defend their client's interests, to the extent that they can do so without acting dishonestly or by improperly prejudicing the administration of justice'.⁶² The ICC Code more generally bestows a duty on counsel to 'be respectful and courteous' in his relations with all those involved in proceedings.⁶³

Counsel's duty to his client and his duty to the court are most likely to clash in case of an imminent conflict of interest, or where counsel's duty of confidentiality is brought in jeopardy. What professional standards should prevail when counsel is placed in such dilemma requires examination. It will first be considered whether counsel or his client makes the final decision as to how the defence will be conducted.

6.3.2 Counsel's Professional Independence

Counsel's professional independence is imperative, equally as an officer of the court and as a safe keeper of his client's interests. Under the ICTY Code of Professional Conduct it is deemed a fundamental principle that 'counsel as advocates in the administration of justice' act independently.⁶⁴ Both the *ad hoc* Tribunals' Codes of Conduct provide that when representing a client, counsel must '[e]xercise independent

⁵⁸ ECHR, *Nikula v. Finland* (Appl. No. 31611/96), 21 March 2002, § 45.

⁵⁹ ECHR, *Steur v. The Netherlands* (Appl. No. 39657/98), 28 October 2003, §§ 36 and 38.

⁶⁰ ICTR Tr. Ch. I, Decision on Defence Counsel Motion to Withdraw, *Barayagwiza* (Case No. ICTR-97-19-T), 2 November 2000, § 21.

⁶¹ See Articles 3(iv) and 14(A) ICTY Code of Conduct (IT/125 REV. 2). Article 14(A) reads: 'Counsel owes a duty of loyalty to a client. Counsel also has a duty to the Tribunal to act with independence in the interests of justice'.

⁶² Annex to the ICTR Code of Conduct, par. 3.

⁶³ More specifically, with the Chamber, the Office of the Prosecutor, the Registry, the client, opposing counsel, accused persons, victims, and witnesses See Article 7(1) ICC Code of Conduct.

⁶⁴ Article 3(iii) ICTY Code of Conduct (IT/125 REV. 2).

professional judgement⁶⁵ and not let his independence 'be compromised by external pressures.'⁶⁶ Under the ICC's Code, counsel must act independently and should refrain from 'anything which may lead to any reasonable inference that his or her independence has been compromised.'⁶⁷ As to the official comments on Article 14(3)(b) of the ICCPR, lawyers should be able to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.⁶⁸ According to the ECHR, being members of "a liberal profession", counsel should act 'in accordance with the dictates of his conscience as a participant in the administration of justice' while conducting a case.⁶⁹

The ECHR considered it an important corollary of defence counsel's independence that 'the conduct of the defence is essentially a matter between the defendant and his representative'.⁷⁰ Problems will occur if an accused dislikes the actions that counsel undertook on his behalf. In case of any disagreement, an important issue is who is to be the primary decision maker or, *dominus litis*, as to the conduct of the defence? Will this be the accused or defence counsel?

Currently, under the ICTY Code of Conduct counsel should 'abide by the client's decisions concerning the *objectives* of representation'. In addition, he should 'consult with the client about the means by which those objectives are to be pursued, *but is not bound by the client's decision*'.⁷¹ The ICTR Code does not stipulate that counsel may disregard the accused's decisions.⁷² The ICC Code prescribes that counsel may only abide by his client's decisions as to his representation in so far 'as they are not inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code'.⁷³

In *Nyiramasubuko & Ntahobali*, the ICTR Trial Chamber argued that counsel should act independently of his client. Some matters of professional judgement fall under counsel's responsibility alone.⁷⁴ While he should obtain instructions about the facts of the case from his client, this does not involve an obligation to consult him as

⁶⁵ Article 10(ii) ICTY Code of Conduct (IT/125 REV. 2); Article 5(b) of the ICTR Code of Conduct, 8 June 1998. Cf. also Article 19(B)(ii) ICTY Code of Conduct; Article 9(4)(b) ICTR Code of Conduct.

⁶⁶ Article 10(v) ICTY Code of Conduct (IT/125 REV. 2); Articles 5(e) and 9(4)(b) ICTR Code of Conduct. This is also provided by Article 6(2) ICC Code of Conduct (ICC-ASP/4/Res.1).

⁶⁷ Article 6 ICC Code of Conduct. Counsel must also declare to perform his tasks independently in his solemn undertaking. See Article 5 ICC Code of Conduct. Pursuant to Article 21(1) ICC Code of Conduct, counsel may only accept remuneration from anyone else than his client, with the consent of his client and where his independence would remain intact.

⁶⁸ See Office of the High Commissioner for Human Rights, CCPR General Comment No. 13 (Article 14), 13 April 1984, available from www.unhchr.ch, par. 9.

⁶⁹ ECHR, *Goddi v. Italy* (Appl. no. 8966/80), 9 April 1984, § 31.

⁷⁰ ECHR, *Imbrioscia v. Switzerland* (Appl. No. 13972/88), 24 November 1993, § 41. Cf. also, *Kamasinski v. Austria* (Appl. No. 9783/82), Judgment, 19 December 1989, p. 27 and 28, § 65 and *Artico v. Italy* (Appl. no. 6694/74), 13 May 1980, §§ 33 and 36.

⁷¹ Article 8(B) ICTY Code of Conduct (Rev. 2). Emphasis added, JTT.

⁷² See Article 4(2) ICTR Code of Conduct.

⁷³ See Article 14(2) ICC Code of Conduct.

⁷⁴ See ICTR Tr. Ch. II, Decision on Ntahobali's Motion for Withdrawal of Counsel, *Nyiramasubuko & Ntahobali* (Case No. ICTR-97-21-T), 22 June 2001, § 22.

to every move in his defence. It suffices to inform the accused which steps were taken to protect his interests and why these were taken.⁷⁵

In *Blagojević*, the Chamber considered that in order in to determine the client's objectives as to his representation, his submissions on this issue cannot solely be relied on. If an accused has pleaded "not guilty", this alone could imply that the objectives of representation 'include a fair trial with a vigorous defence that seeks to achieve a just and favourable result for [the accused].'⁷⁶ If 'counsel, being competent and under professional obligations, genuinely believes that the decision is in the best interests of the client' he may take a decision that the accused dislikes,⁷⁷ as long as there is 'no indication that Counsel failed in their duty to consult with the Accused on means to achieve the objectives of his representation.'⁷⁸ According to the ICTY Appeals Chamber in *Tadić*:

'The unity of identity between client and counsel is indispensable to the workings of the International Tribunal. If counsel acted despite the wishes of the Appellant, in the absence of protest at the time, [...] the latter must be taken to have acquiesced'.⁷⁹

Overall, counsel is considered *dominus litis* in the proceedings of the *ad hoc* Tribunals. He should identify his client's wishes concerning the objectives of the representation and keep his client up to date of his decisions. Ultimately, in order to guarantee the independence of the defence, counsel takes the final decisions regarding his client's representation.

6.3.3 Conflicts of Interest

When a conflict of interest is imminent, it is probably appropriate to let lawyers and their clients settle whether or not to continue the representation. Because, however, any conflict of interest could harm the integrity of court proceedings, courts might prefer to resolve this issue. In *Simić et al.*, where counsel could be called as a witness, a conflict of interest was defined as follows:

'A conflict of interest between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice.'⁸⁰

⁷⁵ See *ibid.*, § 23. Cf. also ICTR Tr. Ch. II, Decision on Nzirorera's Motion for Withdrawal of Counsel, *Nzirorera* (Case No. ICTR-98-44-T), 3 October 2001 (hereinafter: Decision on Nzirorera's Motion), § 15.

⁷⁶ ICTY Tr. Ch. I, Section A, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, *Blagojević*, 3 July 2003, § 107.

⁷⁷ *Ibid.*, § 104.

⁷⁸ *Ibid.*, § 107

⁷⁹ ICTY App. Ch., Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence, *Tadić* (Case No. IT-94-1), 15 October 1998, § 65.

⁸⁰ ICTY Tr. Ch., Decision on the Prosecution Motion to Resolve Conflict of Interest regarding Attorney Borislav Pisarević, *Simić et al.* (Case No. IT-95-9), 25 March 1999 (hereinafter: Decision on the Prosecution Motion).

Those circumstances could be the fact that counsel already represents or has previously represented another accused, or even that counsel might be called as a witness in the case. Conflicts of interests can thus implicate the interests of counsel, those of his client and the interests of a proper administration of justice. The question is as to which interest should prevail. In the common law system of the US, when a conflict of interest arises, counsel may continue the representation, provided that he can still represent each client competently and diligently, that his continued representation is not 'prohibited by law' and that he obtained written consent of the clients concerned.⁸¹ Otherwise, prejudice to the accused will be presumed.⁸² In The Netherlands, a civil law country, a counsel representing more than one person should withdraw if a conflict of interest cannot be solved instantaneously.⁸³ In civil law systems, authorities would argue, for instance, that allowing the same lawyer to represent several co-accused interferes with the search for the truth. Especially if accused are being held incommunicado with the exception of the lawyer, the police may seek to prevent the lawyer from conveying confidential information to all of his clients and thus harming the investigations.

The ICTY requires counsel to be loyal to the client and to observe the duty to the court to act independently in the interests of justice. Counsel 'shall put those interests before his own interests or those of any other person, organisation or State.'⁸⁴ This seems to imply that counsel's duty to his client is as important as his duty to the Tribunal, at least vis-à-vis the interests of others. No clear preference stems from this provision. The ICTR Code merely requires counsel to be loyal to his client and to act in his client's best interests, putting these before his own interests or those of any one else.⁸⁵ The annex to this code however provides that counsel have an *overriding* duty to defend his client's interests only 'to the extent that they can do so without acting dishonestly or by improperly prejudicing the administration of justice.'⁸⁶ This could imply more than a duty to the court. The ICC Code's provision on conflicts of interest is similar to that of the ICTR.⁸⁷

How should counsel deal with a conflict of interest under the law of international criminal courts? By stipulating in its Code of Conduct that counsel may not enter into a defence agreement where a conflict of interest may be imminent, the ICC emphasizes the responsibility of defence counsel to prevent any such conflicts.⁸⁸ Were a conflict to arise during his representation, counsel should immediately inform all potentially affected clients. In addition, he should either withdraw his representation of one or more persons after obtaining the Chamber's consent, or seek these clients' full and informed consent in writing in order to continue their

⁸¹ See Rule 1.7 ABA Model Rules.

⁸² See *Strickland v. Washington*, 466 U.S. 668 (1984), at 692. Cf. also *United States v. Cronin*, 466 U.S. 648 (1984), at 658-662.

⁸³ See Rule 7(2) Dutch Code of Conduct of Advocates 1992.

⁸⁴ Article 14 ICTY Code of Conduct.

⁸⁵ See Article 9 ICTR Code of Conduct.

⁸⁶ Par. 3 of the Annex to the ICTR Code of Conduct.

⁸⁷ See Article 16(1) ICC Code of Conduct.

⁸⁸ See Article 13(2)(a) ICC Code of Conduct.

representation.⁸⁹ Under the initial ICTY Code of Conduct and the current ICTR Code, where a conflict of interest arises, counsel should inform his affected clients and try to resolve the conflict or obtain their consent to continue representation, provided that he can meet his obligations under the Code.⁹⁰ These provisions seem to allow counsel and his clients to determine as to whether or not to continue representation. Under the ICC's Code, if counsel decided he should withdraw, he still needs the Chamber's approval to do so.

In *Simić et al.*, the Chamber considered that as a conflict of interest 'affects the essential fairness of the trial',⁹¹ it first raises the Trial Chamber's obligation to ensure that a trial is fair and, secondly, the accused's right to a fair trial.⁹² In general terms the trial Chamber considered that the Code of Conduct obliges defence counsel 'to act at all times in the best interests of the client and to exercise all care to ensure that a conflict of interest does not arise in the course of representing a client.'⁹³ In this case, which involved five accused, one defence counsel could potentially be called to testify as a prosecution witness or as a witness for one of his client's co-accused. If he did so, that would render his representation of one of the accused 'incompatible with the best interests of justice'.⁹⁴ The Trial Chamber finally ordered counsel to obtain his client's consent to continue the representation, as prescribed, but noted that hereby it 'has given due weight to the right of the accused to counsel of his choice'.⁹⁵

The ICTY Code was eventually amended.⁹⁶ Currently, a client's permission to continue the representation will *not* be deemed sufficient if this 'is likely to irreversibly prejudice the administration of justice'.⁹⁷ This provides more leeway for judges to overrule counsel's and client's wishes as to legal representation.⁹⁸ In *Gotovina et al.*, the ICTY Trial and Appeals Chambers conceded that the ability of an accused to remedy a conflict of interest through his consent has thus diminished.⁹⁹ Even his unconditional consent does not 'have the effect of validating the appointment if the Trial Chamber is convinced that the interests of justice dictates [sic] otherwise'.¹⁰⁰ Under the ICTR

⁸⁹ See Article 16(3) ICC Code of Conduct.

⁹⁰ See Article 9(5) initial ICTY Code; Article 9(5) current ICTR Code.

⁹¹ Decision on the Prosecution Motion, *Simić et al.*, *supra* note 80.

⁹² See *idem.*

⁹³ *Idem.*

⁹⁴ *Idem.*

⁹⁵ *Idem.*

⁹⁶ The ICTR Code was not amended on this point.

⁹⁷ Article 14(E) ICTY Code of Conduct (Rev. 2).

⁹⁸ That a person's right to counsel of his own choosing may be limited by a conflict of interest has also been acknowledged in the ICTY's case law. See, for instance, ICTY App. Ch., Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, *Mejakić et al.* (Case No. IT-02-65), 6 October 2004 (hereinafter: Decision on Appeal by the Prosecution), § 8.

⁹⁹ See ICTY Tr. Ch., Decision on Finding of Misconduct of Attorney Miroslav Šeparović, *Gotovina et al.* (Case No. IT-06-90), 6 March 2007 (hereinafter: Decision on Finding of Misconduct), p. 4; ICTY App. Ch., Decision on Miroslav Šeparović's interlocutory appeal against Trial Chamber's decisions on conflict of interest and finding of misconduct, *Gotovina et al.* (Case No. IT-06-90), 4 May 2007 (hereinafter: Decision on Miroslav Šeparović's interlocutory appeal), §§ 32-34.

¹⁰⁰ See Decision on Request for Appointment of Counsel, *Prlić et al.* (Case No. IT-04-74), 30 July 2004, § 32; ICTY App. Ch., Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for Appointment of Counsel, *Prlić et al.* (Case No. IT-04-74), 24 November 2004, § 29; cf. also Decision on Finding of Misconduct, *Gotovina et al.*, *supra* note 99, p. 5.

Directive, counsel assigned under the legal aid system cannot be assigned to differing accused at the same time.¹⁰¹ This rule is unnecessarily rigid. When safeguards are in place, the accused's right to counsel of his choice should sometimes prevail over the prevention of a potential conflict of interest. Moreover, a conflict of interest may not necessarily arise where one defence counsel represents more than one accused before an international criminal court. The ICTY does allow counsel to be assigned to more than one suspect or accused simultaneously, provided that the following conditions are met. The Registrar must have given each accused concerned independent legal advice; both accused must have consented in writing; and the Registrar should be 'satisfied that there is no potential or actual conflict of interest or a scheduling conflict, and that the assignment would not otherwise prejudice the defence of either accused, or the integrity of the proceedings.'¹⁰² This furnishes the Registrar with an important role in averting conflicts of interest as to assigned counsel. In *Perišić*,¹⁰³ lead counsel requested the Registrar to appoint a co-counsel who had represented another accused at the ICTY in a case that was substantially related. There was a chance that counsel's former client would be a prosecution witness. But, since there was a remote superior-subordinate relationship at most between these two clients, and the offences charged were different, the Registrar deemed the likelihood of the accused's interests being prejudiced 'acceptably low.' If co-counsel's former client was to be called as a prosecution witness, the Registrar deemed it a sufficient safeguard that co-counsel would not participate in his former client's examination or its preparations.¹⁰⁴

Since the *ad hoc* Tribunals' jurisdiction is limited to certain conflicts that occurred in a limited amount of time in a fixed territory, the cases brought before it generally involve more potential connections than cases brought before a domestic court. Therefore, the ICTR's restrictive approach as to allowing one counsel to represent several accused may be logical. However, the more restrictive the approach to this issue, the less chances an accused will have to engage defence counsel with experience in international criminal proceedings. This could impair the overall quality of defence counsel before international criminal courts. In this respect, the ICTR, as it puts an absolute restriction on assigned defence counsel to represent more than one accused, runs a greater risk of undermining the quality of its legal assistance than the ICTY. It may also prejudice the right of an accused to counsel of choice. The ICC, its jurisdiction not being limited in the same way, will not need similar restrictions on the right to choose defence counsel. It is left to counsel to decide at the outset whether or not his representation may cause a conflict of interest in the future.

On what basis may a Chamber reverse the appointment of an assigned counsel in case of a conflict of interest? In *Mejakić et al.*, the prosecution requested the Chamber to withdraw the representation of a defence counsel because his representation would create a conflict of interest. According to the ICTY Appeals Chamber, there not being any specific procedure for such requests in the legal provisions of the Tribunal, 'the Trial Chamber could rely on its inherent power to

¹⁰¹ Rule 15(A) ICTR Directive on the Assignment of Defence Counsel, 24 April 2004 (hereinafter: ICTR Directive).

¹⁰² Article 16(G) ICTY Directive (Rev 11, 11 July 2006).

¹⁰³ ICTY Dep. Registrar, Decision, *Perišić* (Case No. IT-04-81 PT), 7 April 2006.

¹⁰⁴ See *ibid.*

review the assignment' of counsel by the Registrar where a conflict of interest was imminent.¹⁰⁵ At the ICTR, in *Nyiramasubuko et al*,¹⁰⁶ the son-in-law of the accused had been assigned as an investigator to the defence team. The prosecution deemed that this close personal relationship within the defence team could create a conflict of interest as it could reasonably be expected to adversely affect any professional judgement on behalf of the accused.¹⁰⁷ Family members of an accused should therefore not be appointed to a defence team. The Trial Chamber noted that the relation of the defence investigator with the accused had been clear from the outset, as it was stated on his application form. Had the Registrar considered this to be a problem at the time 'giving rise, *per se*, to a conflict of interest', he would not have allowed it. Furthermore, since this investigator was no longer on the team, no future conflicts were to be expected.¹⁰⁸ Thus, the ICTY and ICTR trust the Registrar to properly assess whether any appointment of a defence team member could *prima facie* give rise to a conflict of interest. Only if the fairness of a trial was at stake, would it reconsider the Registrar's decision on the basis of its inherent powers.

The Code of Conduct of the ICC and the *ad hoc* Tribunals prohibit counsel acting as an advocate in proceedings in which he is likely to become a witness.¹⁰⁹ Exceptions to this rule include, (1) that his testimony concerns an uncontested issue, (2) that it concerns legal representation in the case, or (3) that his withdrawal would cause substantial hardship to his client.¹¹⁰ In *Gotovina et al*, due to counsel's former position as Minister of Justice in Croatia, the risk that he would be called as a witness in a co-accused's case as well as in his own case, made the ICTY determine that counsel should withdraw, whether his client or counsel consented or not. As soon as the potential conflict of interest became evident, counsel was requested to seek his withdrawal.¹¹¹ Upon his refusal, the Appeals Chamber argued that the Trial Chamber could sanction counsel for misconduct for his refusal to withdraw.¹¹² Alternatively, he might be subjected to the Code of Conduct's disciplinary regime.¹¹³ The Trial

¹⁰⁵ Cf. Decision on Appeal by the Prosecution, *Mejakić et al.*, *supra* note 98, § 7. On a Chamber's inherent powers to ensure a fair trial, in relation to the powers of the Registrar and the President as to assigned counsel, see also, for instance, ICTY App. Ch., Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defense Team, *Blagojević* (Case no. IT-02-60-AR73.4), 7 November 2003, § 7.

¹⁰⁶ ICTR Tr. Ch. II, Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel, *Nyiramasubuko et al* (Case No. ICTR-98-42), 10 July 2001 (hereinafter: Decision on the Prosecutor's Allegations of Contempt).

¹⁰⁷ See *ibid.*, § 20. The Prosecution referred to Article 9(3)(c)(ii) of the Code.

¹⁰⁸ Decision on the Prosecutor's Allegations of Contempt, *Nyiramasubuko et al*, *supra* note 106, §§ 20-23.

¹⁰⁹ See Article 26 ICTY Code of Conduct; Article 16 ICTR Code of Conduct; Article 12(3) ICC Code of Conduct.

¹¹⁰ See *idem*.

¹¹¹ See Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder, *Gotovina et al* (Case Nos. IT-01-45 and IT-03-73), 25 October 2006 (hereinafter: Decision on Interlocutory Appeals), § 34; ICTY Tr. Ch. I, Decision on Conflict of Interest of Attorney Miroslav Šeparović, *Gotovina et al* (Case No. IT-06-90-PT), 27 February 2007 (hereinafter: Decision on Conflict of Interest).

¹¹² This would be after issuing a warning under Rule 46 ICTY RPE on misconduct. See Decision on Interlocutory Appeals, *Gotovina et al*, *supra* note 111, § 35.

¹¹³ See *idem*.

Chamber decided to intervene, because it determined that counsel's professional judgement was likely to be affected by his personal interests.¹¹⁴ While counsel maintained that there was no conflict of interest, the Trial Chamber issued him a warning for misconduct. '[B]y persisting in representing the accused [...] in spite of the repeated notices given him [...] [counsel] has jeopardized his client's interests by not withdrawing earlier in the proceedings, and thus, in gross negligence, has failed to meet the standard of professional ethics required in the performance of his duties before this Tribunal.' As a sanction for his misconduct, counsel was refused audience and was held no longer to be eligible to represent his client. Counsel's representation of others was not prohibited. As a measure to ensure a smooth transition, counsel was requested to assist the new counsel until the latter was ready to take over.¹¹⁵ The Appeals Chamber argued that counsel's continued representation 'is likely to irreversibly prejudice the administration of justice'. Unlike the co-accused in *Simić*, the co-accused in this case had not agreed to have counsel continue representation. He considered a conflict of interest to exist and did not waive his right to call counsel as a witness in his case.¹¹⁶

The Trial Chamber in *Gotovina et al.* was concerned that representation by this particular counsel whose professional judgement might be 'adversely affected by divided loyalties' would prevent him from raising 'a potential defence which might be reasonably be raised at trial'. The accused's right to have representation of his choice and to waive any measures to prevent a conflict of interest can be subordinated to 'the interests of justice'. Courts are justified to intervene in the client-counsel relationship if gross negligence on the part of counsel is apparent. The Chamber's intervention in this case was particularly warranted because of the interests of the co-accused involved.

Overall, the approach as to conflicts of interest is more compatible with a conflict-solving style than with a policy-implementing style. If each person directly involved knowingly agrees to counsel's continued representation notwithstanding that a conflict of interest could arise, counsel may continue. The court will only intervene if counsel's representation would be likely to harm the defence of his client or that of any co-accused and, thereby, the integrity of the proceedings.

¹¹⁴ See Decision on Conflict of Interest, *Gotovina et al*, *supra* note 111, p. 4.

¹¹⁵ See Decision on Finding of Misconduct, *Gotovina et al*, *supra* note 99, p. 7. A subsequent request to file appeal has been granted. See ICTY Tr. Ch. I, Decision on request for certification to file interlocutory appeal against trial chamber's decision on conflict of interest of attorney Miroslav Šeparović and on request for certification to file interlocutory appeal against trial chamber's decision on finding of misconduct of attorney Miroslav Šeparović, *Gotovina et al* (Case No. IT-06-90), 13 March 2007, p. 3.

¹¹⁶ See Decision on Miroslav Šeparović's interlocutory appeal, *Gotovina et al*, *supra* note 99, § 33.

6.3.4 Counsel's Duty of Confidentiality¹¹⁷

In order for any defendant to trust his lawyer and to reveal all that is necessary for the preparation of his defence, an accused must be certain that his instructions are kept confidential. This requires that he will be enabled to communicate with his counsel in private.¹¹⁸ Furthermore, counsel is not allowed to reveal the information his client conveys to him, because of counsel's "duty of confidentiality".

The duty of confidentiality is one of the main prerequisites for counsel and the accused to establish a bond of trust and 'a primary and fundamental right and duty of the lawyer.'¹¹⁹ It has also been considered to be 'the foundation of orderly and effective adversarial justice.'¹²⁰ It entails that a lawyer must keep all information regarding his client that becomes known to him in the course of his representation confidential, also after the representation has ended.¹²¹

Closely related to the duty of confidentiality is the doctrine of legal professional privilege. Under this doctrine, counsel cannot be made to disclose information falling under his duty of confidentiality, not even to a judge, since this could be detrimental to his client's interests.¹²² It is considered a cornerstone of the right to a fair trial that the accused can discuss anything with his lawyer, without fearing its disclosure. This is also deemed to be in the general interest of a proper administration of justice. Legal assistance will be most effective if lawyers know all the relevant facts of their client's case. This will allow them to optimally tailor their advice and strategy to the accused's representation. In addition, since it encourages clients to communicate information they would otherwise keep to themselves, 'confidentiality enhances the quality of legal representation and thus helps produce accurate legal verdicts.'¹²³ In most national jurisdictions therefore, the legal professional privilege will yield only under extreme circumstances, such as a life threatening situation.¹²⁴

The duty of confidentiality and the principle of legal professional privilege are included in the Rules of Procedure and Evidence¹²⁵ and in the Code of Conduct¹²⁶ of

¹¹⁷ An earlier version of this sub paragraph and the next was published as a commentary on the relevant decisions in *Nziroveru* and *Nyiramasubuko*. See Jarinde Temminck Tuinstra, Commentary Right to Counsel, Effective Defence, in Sluiter and Klip (ed), *Annotated Leading Cases of International Criminal Tribunals, Vol. X, The International Criminal Tribunal for Rwanda 2001- 2002* (Antwerp-Oxford: Intersentia, 2006), pp. 145-151.

¹¹⁸ Cf. *supra*, Chapter II, paragraph 2.6.

¹¹⁹ See the Code of Conduct for Lawyers in the European Union, promulgated by the Council of the Bars and Law Societies of the European Union (CCBE), par. 2.3.1.

¹²⁰ Richard O'Dair, *Legal Ethics. Text and Materials* (London, Edinburgh, Dublin: Butterworths, 2001), p. 250.

¹²¹ Cf. Article 8(1) ICTR Code of Conduct.

¹²² Cf. O'Dair (2001), *supra* note 120, p. 255 and Spronken, *Taru Defence. A Study into the Regulation of Professional Conduct of Advocates in Criminal Cases* (Verdediging: een onderzoek naar de normering van het optreden van advocaten in strafzaken) (Deventer: Gouda Quint, 2001), pp. 385, 386.

¹²³ *Ibid.*, p. 250.

¹²⁴ See, for instance, the Code of Conduct of the Canadian Bar Association, Resolution 04-01-A — Annex 1, Chapter IV Confidential Information, available at www.cba.org/CBA/resolutions/pdf/04-01-A-Annex1.pdf, lastly visited August 2007.

¹²⁵ See Rule 97 ICTR RPE; Rule 97 ICTY RPE; Rule 73(1) ICC RPE.

¹²⁶ Article 8 ICTR Code of Conduct; Article 13 ICTY Code of Conduct; Articles 8 and 15(3) ICC Code of Conduct.

international criminal courts. Communications between counsel and his client are regarded as privileged, and need not be disclosed. Counsel may share information falling under his duty of confidentiality with his team members to ensure an effective performance of their duties. Notwithstanding his duty of confidentiality however, counsel may reveal confidential information to others when his client knowingly consents to its disclosure. The ICC requires this consent to be in writing. If the client voluntarily informed a third party of the contents of any privileged communications and this party gives evidence of this disclosure, this information is no longer protected. Additionally, counsel's professional privilege may be overruled if disclosing certain information is essential in defending a claim involving disciplinary charges against counsel. Or, to avert an act which counsel reasonably believes to be criminal *and* which 'may result in death or substantial bodily harm to any person unless the information is disclosed.'¹²⁷ This seems to imply that a victimless crime being imminent does not justify revealing any information protected by the privilege.

At the ICTR, in *Nzirorera*, an accused, who had filed a complaint against his defence counsel, contended that his counsel was hiding behind his duty of confidentiality to avoid having to respond to his accusations.¹²⁸ Whereas the accused seemed to waive his right to counsel-client privilege, his counsel observed his professional duty. Is it undesirable if defence counsel appearing before an international criminal court could cover up misrepresentation by invoking the duty to confidentiality. The question therefore arises, whether or not the accused's consent allows or rather compels counsel to disclose confidential information. The answer may depend on the answer to another question: to whom does this privilege belong?¹²⁹

In common law systems, this privilege is primarily meant to protect the rights of the accused. Under the Code of Conduct of the Bar of England and Wales, barristers are obliged to withdraw if information falling under their duty of confidentiality is bound to be disclosed without their client's permission.¹³⁰ This enables a barrister fearlessly to advance his client's interests at all times.¹³¹ He must preserve confidentiality, unless authorised to disclose by his client or by law. Similar to the conflict-solving model of Damaška, the autonomy of the defendant is deemed important.

In civil law oriented systems, similar to Damaška's policy-implementing model, the public interest in the duty of confidentiality overrides the interest of an individual client who consents to disclosure. In these systems, therefore, the legal professional privilege belongs exclusively to the lawyer, not to his client. Notwithstanding his client's authorisation, counsel may be professionally obliged to

¹²⁷ Article 8(2)(c) and (d) ICTR Code of Conduct; Article 13(C) ICTY Code of Conduct.

¹²⁸ Decision on Nzirorera's Motion, *Nzirorera*, *supra* note 75, § 9.

¹²⁹ Cf. Spronken (2001), *supra* note 122, p. 391.

¹³⁰ Pursuant to Section 603 of the Code of Conduct of the Bar of England and Wales, 'A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed: [...] (f) if there is a significant risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent'.

¹³¹ Cf. Michael Brindle and Guy Dehn, Confidence, Public Interest, the Lawyer, in Cranston, *Legal Ethics and Professional Responsibility* (Oxford: Clarendon Press, 1995), pp. 115-130, p. 123.

use his privilege and refrain from disclosing confidential information.¹³² Generally, to avoid a situation where counsel could employ his duty of confidentiality to the detriment of his own client, confidential information should be revealed if this is necessary in view of serious charges of professional misbehaviour.

Considering that the *ad hoc* Tribunals' proceedings are predominantly adversarial, the interpretation of the privilege squaring with that procedural system the most should be the most effective. Therefore, the accused should control whether or not counsel discloses confidential information, unless an imminent death could occur as a result of him withholding this information.

The *Nzirorera* case is rather complicated. Counsel had sent a letter to the Registry accusing his client of trying to extract money from him.¹³³ Hereupon, his client sought his withdrawal alleging that there was a "profound and irreconcilable disagreement" about the defence strategy, counsel lacked 'competence, loyalty, honesty, diligence and a spirit of collaboration', was putting 'the interests of unknown third persons and [...] selfish financial interests' before his defence interests and had allegedly compared the accused to Nazi criminals.¹³⁴

Before revealing the delicate information about his client trying to extract money from him, counsel had not consulted his client. Thus, the accused had not knowingly consented to any disclosure of this confidential information. The Code of Conduct provides that counsel *may* reveal information if this would be justified.¹³⁵ That could imply that even if his client would have consented to its disclosure, counsel would not have been *obliged* to disclose the information. By disrespecting the accused's autonomy, counsel took a policy-implementing approach to his duty of confidentiality in this case.

If counsel discloses information concerning a deterioration in his relation with the accused, particularly to the Registry, this may have serious consequences. An indigent accused is dependent on the Registry for assigning legal assistance to him. When the only individual he is supposed to be able to confide in, his counsel, blows the whistle on him to the Registry, this may prejudice his defence rights.

The majority of the Chamber did not consider whether or not counsel was allowed to disclose this confidential information to the Registry. The accused seems not to have been submitted this as an issue to be considered by the Chamber. In an adversarial system, judges are not necessarily obliged to consider issues that the parties do not raise. The accused did allege that counsel refused to react fully to his allegations of poor representation by hiding behind his duty of confidentiality. It is regrettable that the Chamber did not comment on this either. It is a legitimate point that counsel should not be allowed to hide behind his duty of confidentiality to prevent having to

¹³² Especially in civil law countries, the duty of confidentiality is often laid down in the criminal code (See, for instance, Article 226-13 of the French Penal Code; Article 272 Dutch Criminal Code; Article 622 Italian Penal code; Article 458 Belgian Criminal Code). A violation of this duty would thus constitute a criminal offence. Cf. CCBE Response to SEC proposed rule: "Implementation of Standards of Professional Conduct for Attorneys" (File Nos. S7-45-02; 33-8150.wp), 2002, available at www.ccbe.org/doc/En/ccbe_response_sec_rule_en.pdf, lastly visited on 16 April 2007, pp. 5 and 6, especially footnotes 1-5. See also Spronken (2001), *supra* note 122, pp. 391-393.

¹³³ See Decision on Nzirorera's Motion, *Nzirorera*, *supra* note 75, §§ 4 and 5.

¹³⁴ See *ibid.*, § 1.

¹³⁵ Article 8(2) ICTR Code of Conduct.

defend himself against his client's allegations. It seems that counsel considered that the legal professional privilege primarily belonged to himself, not to his client. The fact that the majority of the Chamber did not pay any attention to this precarious matter may indicate its agreement with the policy-implementing attitude of counsel.

The Chamber finally determined that the accused's disappointment in his counsel did neither amount to exceptional circumstances nor good cause to warrant counsel's withdrawal.¹³⁶ The Chamber let the general interest in continuing the trial without delay prevail over the individual autonomy of the accused and his interest in a relationship of trust with his counsel. It takes a lot of time for new lawyers to become familiar with a new case of such magnitude as most international criminal cases. Therefore, this decision is not surprising. But it shows that policy-implementing concerns do bring about tensions for the defence of an accused.

It has been suggested that a separate organ evaluating the issue of allegations of improper representation is preferable over a Chamber involved in the case in order to properly balance the accused's rights with his counsel's obligations. This could better enable counsel to provide confidential information without affecting his client's position.¹³⁷ The only allegations of the accused against his counsel that the Registry seems to have seriously investigated as a consequence of the Chamber's decision were counsel's "selfish financial interests", not any abuse of his duty of confidentiality. Counsel was withdrawn from the case by the Registrar for inflating his bills.¹³⁸ Thus, the ICTR in this case found it legitimate to discharge a lawyer where his professional behaviour affected the administration of justice, but not where it affected the individual interests of his client.

6.3.5 Fee-splitting

At the *ad hoc* Tribunals, counsel's duty of confidentiality has been under pressure as a result of the alleged practice of fee-splitting. A fee-splitting arrangement is an arrangement in which the accused requests his lawyer or another member of the defence team to share his fees with him or his family members. However, where counsel has provided his client with a computer or other materials that may be indispensable for him to prepare his defence effectively, this has also been labelled fee-splitting.

Obviously, this only plays a role in the context of assigned legal assistance. And it is a problem particular to the administration of international criminal justice. Fee-splitting may be attractive to counsel because each counsel assigned under the legal aid system of an international criminal court – whatever their home jurisdiction – receives equal fees. The payment system is merely based on the years of experience of

¹³⁶ Cf. Decision on Nzirorera's Motion, *Nzirorera*, *supra* note 75, §§ 13-24.

¹³⁷ Spronken, T.N.M.B., 'Commentary', in Klip and Sluiter (ed), *Annotated Leading Cases of International Criminal Tribunals Vol. VI. The International Criminal Tribunal for Rwanda 2000-2001* (Antwerp - Oxford - New York: Intersentia, 2003), pp. 296-302, p. 300. This argument is further elaborated in paragraph 6.4.

¹³⁸ Cf. ICTR Pres., 'The President's Decision on Review of the Decision of the Registrar Withdrawing Mr. Andrew McCartan as Lead Counsel of the Accused Joseph Nzirorera, *Nzirorera* (Case No. 98-44-T), 13 May 2002.

counsel.¹³⁹ The wages earned at an international criminal court could differ substantially from counsel's domestic income. As a result, it may be far more lucrative to practice as counsel before an international criminal court, than at home. But it may also be less profitable.¹⁴⁰ Counsel could also be tempted to enter into fee-splitting agreements as it may be a matter of prestige to represent an individual before these courts. A few accused allegedly abused this situation, by demanding their counsel to share their earnings with them.¹⁴¹ Whatever may be true of these allegations, it has been argued that the very idea of accused financially benefiting from being tried for horrendous crimes may have affected the credibility of the *ad hoc* Tribunals.¹⁴²

The issue of "fee-splitting" played an important role in the cited case of *Nzirorera*. Counsel reported his client's fee-splitting solicitations to the Registry without his client's consent, or even informing him of this plan. Even though it did not seem to worry the majority of the judges, it may be debated whether his duty of confidentiality allowed him to do this under the applicable law of the Tribunal¹⁴³ at that time.¹⁴⁴ According to Judge Matanzima Maqutu, counsel was "duty bound" under the Code of Conduct¹⁴⁵ to report the fee-splitting solicitation,¹⁴⁶ but counsel should also have informed the accused of his reporting and should not have continued representing his client as if 'everything was in order between them'.¹⁴⁷ Although Judge Matanzima Maqutu was right to conclude that counsel breached the Code of Conduct, in my view, it did not justify, but rather prohibited counsel implicating his client. Article 8(2)(d) allows disclosure of confidential information to *prevent* an act which may be criminal *and* may result in death or substantial bodily harm unless disclosed. It may be doubted whether reporting on fee-splitting is a deterrence and thus prevents it from happening again. A more effective way to prevent fee-splitting would be for counsel to refuse to enter into any such agreement with his client. But, even if reporting might prevent fee-splitting, assuming fee-splitting is unlawful, it should not be overlooked that Article 8(2)(d) contains two cumulative limbs. Given the second limb, it is impossible to

¹³⁹ See Article 22 ICTR Directive.

¹⁴⁰ For this reason, a Dutch lawyer referred to his international criminal law practice as a "hobby". See Bart van Oosterhout, Het interview. Wladimiroff, 34 *Intermediair*, 21 August 2003, p. 29. Cf. also Ackerman, John E., 'Assignment of Defence Counsel at the ICTY', in Richard May *et al.* (ed), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001), pp. 167-176, pp. 174, 175; Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (UN Doc. A/54/634), 22 November 1999 (hereinafter: Expert Report), par. 206.

¹⁴¹ See also, for instance, ICTY Reg., Decision, *Kvočka et al.* (Case No. IT-98-30/1), 8 July 2002, in which the assignment of counsel and legal aid to one of the accused was withdrawn as he seemed to have obtained a considerable amount of money from the defence team and would be able 'to remunerate the cost of his defence for the remainder of the appeal'.

¹⁴² See McMorrow (2007), *supra* note 7, p. 155.

¹⁴³ One should bear in mind that Article 8(2) explicitly refers to Article 19 of the Code of Conduct which provides that the Tribunal's Code prevails over any other code that binds counsel.

¹⁴⁴ The current law of the Tribunal stipulates that this is justified. See *infra* note 152 *et seq.*

¹⁴⁵ Article 8(2)(d) ICTR Code of Conduct.

¹⁴⁶ ICTR, Separate and Dissenting Opinion of Judge W.C. Matanzima Maqutu on the Request of Accused for Change of Assigned Counsel, *Nzirorera* (Case no. ICTR-98-44-T), 3 October 2001 (hereinafter: Separate and Dissenting Opinion), § 19.

¹⁴⁷ *Ibid.*, § 8.

maintain that keeping the fee-splitting solicitation a secret between counsel and his client would have resulted in any bodily harm, let alone, death. Unless, *in extremis*, the accused would threaten to kill his counsel upon a refusal to share his wages with him.

Obviously, the notion of a person accused of genocide who is blackmailing his freely assigned defence counsel is unattractive. Nonetheless, no matter how “evil”¹⁴⁸ fee-splitting may be considered to be,¹⁴⁹ according to the then applicable standards of professional behaviour, it did not permit counsel to break his duty of confidentiality. Moreover, a breach of this duty may have warranted counsel’s withdrawal by the Registrar.¹⁵⁰

The current law of both *ad hoc* Tribunals however, compels counsel to report fee-splitting solicitations. This probably resulted from both *Nzirorera* as well as two reports of the Office of Internal Oversight Services (OIOS) on the alleged practice of fee-splitting at the Tribunals.¹⁵¹ Fee-splitting between assigned defence counsel and their clients is now expressly prohibited.¹⁵² The ICTR even complemented its confidentiality Rule in the RPE by adding: ‘Nothing in this rule shall be interpreted as permitting the use of confidentiality between Counsel and Client to conceal the participation of Counsel in illegal practices such as fee-splitting with client.’¹⁵³ Upon a fee-splitting solicitation, counsel shall inform his clients of the unlawfulness of this practice, and he must immediately report to the Registrar.¹⁵⁴ However, the *ad hoc* Tribunals’ fee-splitting provisions also provide that with leave of the Registrar, ‘Counsel may provide their clients with equipment and materials necessary for the preparation of their defence.’ The ICTR demands that exceptional circumstances be demonstrated in such a case.¹⁵⁵

If there is proof that counsel has entered into a fee splitting arrangement with his client, ‘the Registrar shall take action in accordance with Article 19 (A) (iii) of the Directive on Assignment of Defence Counsel’, which enables him to withdraw counsel.¹⁵⁶ The Registrar thus plays an important role in countering fee-splitting. He

¹⁴⁸ Cf. *ibid.*, § 11.

¹⁴⁹ According to Judge Matanzima Maqutu: ‘A person does not have to be a lawyer to know that fee-splitting is unlawful, unethical and improper.’ *Ibid.*, § 26.

¹⁵⁰ See Article 19(A)(iii) ICTR Directive (1999). It provides that the Registrar may withdraw counsel in case of a serious violation of the Code of Conduct. Nevertheless, unlike Judge Matanzima Maqutu’s presumption (see § 31), it should be noted that Article 19(A) does not oblige the Registrar to withdraw counsel. It is explicitly stated that he *may* do so. In other words, the Registrar is given considerable discretion.

¹⁵¹ 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 (2001), U.N. Doc. A/55/759; Follow-up investigation into possible fee-splitting arrangements between defence counsel and indigent detainees at the International Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia. Office of Internal Oversight Services (2002), U.N. Doc. A/56/836.

¹⁵² See Article 5*bis* ICTR Code of Conduct. This provision was added at the ICTR’s twelfth Plenary Session in 2002. A similar provision was adopted at the ICTY. See Article 18 ICTY Code of Conduct (IT/125/Rev 1), 12 July 2002.

¹⁵³ This was done in 2003, at the thirteenth Plenary Session. See Rule 97(B) ICTR RPE. Rule 97 of the ICTY RPE (IT/Rev 32) remained untouched.

¹⁵⁴ Article 5*bis*(2) ICTR Code of Conduct.

¹⁵⁵ See Article 5*bis*(6) ICTR Code of Conduct and Article 18(F) ICTY Code of Conduct.

¹⁵⁶ Article 5*bis*(5) ICTR Code of Conduct.

has responsibility over investigations as to this matter and may sanction counsel if fee-splitting has occurred.¹⁵⁷ The Code of Conduct of the *ad hoc* Tribunals does not provide what measures the Registrar should take against an accused who has persuaded his counsel to enter into fee-splitting with him, or has submitted such a request to his counsel. One option could be for the Registrar to temporarily toughen the detention regime of the accused while in pre-trial detention. However, as this is a drastic measure, it would require a review mechanism. It may take much time to prove that any fee-splitting solicitation has been made. Therefore, such measures may absorb too much time, effort and finances and become undesirable for international criminal courts. Another difficult issue might arise where a lawyer did not instantly turn in his client, but only after indications that his client was trying to get rid of him. As Judge Matanzima Maqutu held, when the request of an accused to withdraw his counsel resulted from a refusal of counsel to enter into a fee-splitting agreement with him, it is unacceptable to keep counsel assigned to an accused solely as a punishment.¹⁵⁸

The accused's rights should only be curtailed to the extent necessary for the due administration of justice. Whether one considers it justifiable and proportionate to make an exception to the duty of confidentiality and oblige counsel to disclose his client's requests for fee-splitting, depends on how one balances the accused's rights against the interests of justice. However, should such an important principle as the duty of confidentiality be restricted to the extent envisaged by the new provisions on this issue? An accused's right to have privileged communication with his counsel is not only a vital component of his right to legal assistance, but this principle also serves the interests of justice. An important function of counsel-client confidentiality is that it enables counsel to "discover improprieties that the client plans, advise against them, and ultimately stop the misconduct."¹⁵⁹ The necessity for counsel to disclose fee-splitting solicitations on the part of his client is not obvious. Obliging counsel to report his client's fee-splitting solicitations is obliging him to act against his client's best interests. It may be considered an unseemly situation where counsel induces his client to be frank with him and subsequently reports on him.¹⁶⁰ This duty to report unethical behaviour by a client will be likely to damage the client-counsel relationship, as it affects the bond of mutual trust between them.¹⁶¹ In the end, counsel's duty of confidentiality is in essence for counsel 'to refrain from preventing any harm their clients may cause.'¹⁶²

During the drafting stage of the ICC Code of Professional Conduct, including a similar duty to report fee-splitting was considered. Even though a majority of defence experts voiced their objections against it in a questionnaire,¹⁶³ this duty was

¹⁵⁷ See Article 19(A)(iii) ICTR Directive.

¹⁵⁸ Separate and Dissenting Opinion, *Nzirorera*, *supra* note 146, § 32.

¹⁵⁹ O'Dair (2001), *supra* note 120, p. 250.

¹⁶⁰ *Ibid.*, p. 253.

¹⁶¹ Cf. as to the importance of this bond, for instance, *supra*, Chapter II, paragraphs. 2.5 and 2.6.

¹⁶² Donald Nicolson and Julian S. Webb, *Professional legal ethics: critical interrogations* (Oxford, New York: Oxford University Press, 1999), p. 249.

¹⁶³ Cf. ICC, Defence Counsel Unit, Responses submitted to the Registry on issues regarding the Code of Conduct for counsel and legal assistance. Executive Summary (DCU/2003/133), 20 October 2003, available at www.icc-cpi.int/library/defence/executive_summary_20031020.doc, lastly visited 16 April 2007, Question 9.

included in the Draft that was submitted to the ASP. It was removed again in the final version.¹⁶⁴ Under Article 22(4) of the ICC Code of Conduct, when he is requested, induced or encouraged to enter into any sort of fee-splitting agreement, ‘counsel shall advise the client of the prohibition of such conduct.’

In the context of an international criminal court, considering the role that nationalistic, ethnic and political considerations may play,¹⁶⁵ it may be difficult enough for the accused and his counsel, coming from different (legal) cultures, to establish a bond of mutual trust. Counsel’s duty of confidentiality is generally deemed such an important fair trial guarantee that it should only be set aside to prevent substantial bodily harm. Therefore, making this duty subordinate to the general interest of preventing the alleged practice of fee-splitting is disproportionate. Such a far-reaching approach that prejudices the accused should be regarded as policy-implementing. The final solution of the ICC, requiring counsel to inform his client of the illegality of any fee-splitting proposal, is by far more palatable. Since it does not interfere more than necessary, this is compatible with a conflict-solving attitude.

6.4 ENFORCEMENT MECHANISMS

6.4.1 Introduction

Disciplinary mechanisms administer sanctions in order to deter future misconduct.¹⁶⁶ Inadequate representation or misconduct by defence counsel may not only harm the private interests of his client, but also the public interest in a proper exercise of the lawyers’ profession and in the administration of justice.¹⁶⁷ Even though cases of serious misconduct of defence counsel before the *ad hoc* Tribunals have been rare,¹⁶⁸ these courts must deal effectively with inappropriate professional behaviour. The *ad hoc* Tribunals and the ICC have implemented several disciplinary mechanisms. These involve disciplinary proceedings incorporated in the Code of Conduct, misconduct proceedings and contempt of court proceedings which are enshrined in the Rules of Procedure and Evidence and in the Statute. This paragraph examines whether counsel’s professional conduct is properly monitored through each of these particular mechanisms.

An important issue to determine is what organ should have disciplinary powers over defence counsel at international criminal courts. According to the UN Basic Principles on the Role of Lawyers, appropriate organs include ‘an impartial disciplinary committee established by the legal profession’, ‘an independent statutory authority’, or ‘a court’.¹⁶⁹ These organs may be composed of a mix of counsel and

¹⁶⁴ Cf. *supra*, note 34.

¹⁶⁵ Cf. Orié, Alphons, ‘Commentary’, in Sluiter and Klip (ed), *Annotated Leading Cases of International Criminal Tribunals, Vol. II*, The International Criminal Tribunal for Rwanda 1994-1999 (Antwerp-Oxford: Intersentia, 2001), pp. 302-305.

¹⁶⁶ See Simon, William H., *The Practice of Justice. A Theory of Lawyer’s Ethics* (Cambridge, Massachusetts, London, England: Harvard University Press, 1998), p. 198.

¹⁶⁷ See Roos de, Th.A., Het tuchtrecht voor advocaten, in *Handboek Straffzaken* (Deventer: Gouda Quint), § [2.1]-2.

¹⁶⁸ Cf., for instance, Expert Report, *supra* note 140, par. 217.

¹⁶⁹ Principle 28 UN Basic Principles on the Role of Lawyers.

judiciary.¹⁷⁰ A disciplinary system for lawyers should comprise the opportunity of ‘independent judicial review’.¹⁷¹

In most national jurisdictions, disciplinary procedure is a law of its own kind, neither falling under private law, nor under criminal law. These proceedings can involve serious punishment, but counsel generally has no privilege against self-incrimination, he must co-operate with the investigations against him and he may not at all times invoke his duty of confidentiality to withhold information concerning his behaviour. However, he is entitled to a fair hearing, and to be assisted by a lawyer of his choosing.¹⁷² Whether the necessary safeguards apply to disciplinary proceedings concerning counsel at international criminal courts will be examined.

Another issue is whether or not to conduct these proceedings behind closed doors to protect the interests of the lawyer involved or to hold them in public which enhances transparency and could benefit other lawyers facing similar situations.¹⁷³ The sanctions to be imposed in disciplinary proceedings should depend on the gravity of the misconduct and on the organ that disciplines counsel. Imprisonment has been considered an appropriate sanction for lawyers who disrupting proceedings of war crimes trials.¹⁷⁴ As sanctions should be proportionate to the offence,¹⁷⁵ a warning, a fine, counsel’s suspension or his disbarment may be more appropriate.

6.4.2 *Disciplinary Proceedings Incorporated in Codes of Professional Conduct*

One disciplinary mechanism for counsel practising before the ICTY is the *Disciplinary Regime* included in the Code of Professional Conduct.¹⁷⁶ This regime was implemented in the firstly revised Code to protect suspects, accused and witnesses, to ensure compliance with the standards of conduct of the Tribunal and to guarantee procedural fairness in disciplinary proceedings.¹⁷⁷ A Disciplinary Panel consisting of two counsel and a Registry official¹⁷⁸ will at first instance ‘deal with all matters relating to counsel ethics.’¹⁷⁹ Complaints concerning alleged misconduct of defence counsel may be filed by any person or organisation whose ‘interests could be substantially affected by an

¹⁷⁰ For instance, the Dutch Disciplinary Board consists of counsel-members and a chairman and deputy chairmen from the judiciary. See Dutch Act on Advocates, Section 46(a), pars. 1 and 2.

¹⁷¹ Principle 28 UN Basic Principles on the Role of Lawyers. Cf. also Council of Europe, Recommendation No. R(2000)21, Principle IV(3).

¹⁷² Principle 27 UN Basic Principles on the Role of Lawyers.

¹⁷³ In The Netherlands, the proceedings are held in public. See Dutch Act on Advocates, Section 48(1). If decisions are published, they do not include the name of the lawyer involved. In the USA and in England, these proceedings are behind closed doors and any decisions will not be published, in order to prevent tarnishing the lawyer’s professional reputation and to respect the privacy of the complainant who might otherwise refrain from filing a complaint. See Miller (2004), *supra* note 9, pp. 368, 369.

¹⁷⁴ See Scharf, Michael, ‘Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials’, *Case Legal Studies Research Paper No. 07-9*, Available at SSRN: <http://ssrn.com/abstract=967431>, February 2007, p. 12.

¹⁷⁵ Cf. Council of Europe, Recommendation No. R(2000)21, Principle VI(4).

¹⁷⁶ See Part Three of the Code (IT/125 Rev.2).

¹⁷⁷ See Article 37 ICTY Code of Conduct.

¹⁷⁸ This will be the Registrar or a senior legal Registry official.

¹⁷⁹ See Article 40(A) ICTY Code of Conduct.

alleged misconduct.¹⁸⁰ The Panel may also *proprio motu* conduct investigations if it has reasonable grounds to suspect a counsel of misconduct. Counsel must cooperate with the investigations and produce any document in his possession relating to the subject-matter of the complaint, or he will be fined.¹⁸¹ When there are reasonable grounds to believe that counsel committed the alleged misconduct, the Panel may formulate charges.¹⁸² Panel hearings will be held in public, unless decided otherwise.¹⁸³

Professional misconduct must be proven beyond a reasonable doubt. The sanctions that the Disciplinary Panel can impose include, either alternatively or cumulatively, to admonish counsel, to give him advice as to his future conduct, to publicly reprimand him, to fine him for a maximum amount of € 50 000, to suspend him for a maximum of two years, or to expel him.¹⁸⁴ Even if there are reasonable grounds, the Panel may suspend or dismiss a complaint against counsel, if this would be in the interests of justice.¹⁸⁵ This provides the Panel with some discretionary power.

Both the respondent and the Registrar may lodge an appeal against the decisions of the Disciplinary Panel with the Disciplinary Board. This Board consists of three judges appointed by the President, who should not belong to the Trial Chamber before which the alleged misconduct took place and two members of the ADC-ICTY.¹⁸⁶

Instead of stipulating the possibility of reporting alleged misconduct of another counsel to a judge (Article 21 old), the current Article 36 compels counsel to report professional misconduct of other counsel to the Disciplinary Panel. This obligation may prevent a lawyer from discussing a professional dilemma with his colleague. That would be an unfortunate consequence considering that such discussions among counsel could stimulate ethical behaviour. Under the ICTR Code of Conduct counsel *may* report violations of the Code by another counsel to the Judge or Trial Chamber before which counsel is appearing. He is not obliged to do so.¹⁸⁷ At the ICTR in *Bikindi*, lead counsel suspected that his co-counsel had influenced a prosecution witness. He did not just report this to the Chamber, but also to the President of the Tribunal and even to the prosecution.¹⁸⁸ This led to an irretrievable breakdown in communication with the accused, who requested that lead counsel be withdrawn. According to Registrar, counsel had not violated his professional obligations. Even so, it would have been preferable if he had discussed his suspicion

¹⁸⁰ Article 41 ICTY Code of Conduct.

¹⁸¹ See Article 44 ICTY Code of Conduct.

¹⁸² See Article 46(A) ICTY Code of Conduct.

¹⁸³ See Article 46(D) ICTY Code of Conduct.

¹⁸⁴ Article 47(C) ICTY Code of Conduct.

¹⁸⁵ Article 47(B) ICTY Code of Conduct.

¹⁸⁶ See Article 48 ICTY Code of Conduct.

¹⁸⁷ See Article 21(1) ICTR Code of Conduct.

¹⁸⁸ Upon his investigations into lead counsel's allegations, the Registrar found no clear evidence that co-counsel had breached any ethical standards. Counsel should however take great care when interviewing potential witnesses and avoid the appearance of impropriety. See ICTR/INFO-9-2-516.EN, Arusha, 20 March 2007, available at <http://69.94.11.53/ENGLISH/PRESSREL/2007/516.htm>, lastly visited 26 March 2007. The Decision of the Registrar itself is not public.

within the defence team.¹⁸⁹ Counsel argued that his professional and ethical duties compelled him to report his suspicion to the prosecution.¹⁹⁰ The Registrar believed that counsel may not have purported to undermine the accused's case, but his actions nevertheless 'affected the necessary trust which must exist between counsel and his client.'¹⁹¹ Counsel was therefore withdrawn. Even though it is exceptional for counsel to report misbehaviour of another counsel directly to the prosecutor, this case is a good example of how reporting misconduct of other counsel may affect an accused's defence.

The ADC-ICTY (association of defence counsel before the ICTY) has its own Disciplinary Council, which functions separately from the Disciplinary Panel. Its decisions are generally not made public. In the previously mentioned case *Gotovina et al*, which concerned the issue of a conflict of interest, this Disciplinary Council sent an advisory opinion to the Trial Chamber. Parts hereof were made public, because the parties had incorporated these in their motions.¹⁹²

A special feature of the Disciplinary Regime incorporated in the ICC's Code of Conduct is that it applies the principle of complementarity in a similar way as Article 17 of the ICC Statute.¹⁹³ If a domestic authority has initiated a disciplinary procedure concerning counsel's misconduct before the ICC, this will suspend the procedure before the ICC Disciplinary Board until it has reached a final decision.¹⁹⁴

If the national body refuses to or has not sufficiently or timeously addressed the complaint, the ICC Disciplinary Board will initiate a procedure.¹⁹⁵ Its three members should have 'established competence in professional ethics and legal matters' and will be elected for a four year term 'by all counsel entitled to practise before the Court'.¹⁹⁶ Investigations will be conducted by a "Commissioner" experienced in dealing with professional ethics and legal matters who is appointed by the Presidency for a four year term.¹⁹⁷ Counsel must cooperate in providing information or even evidence, gathered against him in a national disciplinary procedure concerning his alleged misconduct at the ICC.¹⁹⁸ But once he will be subjected to a procedure of the Disciplinary Board, counsel has the right to remain silent.¹⁹⁹ Appeals may be lodged with the Disciplinary Appeals Board,²⁰⁰ which comprises three Judge-members (not involved in the underlying case) and two members elected by counsel.²⁰¹ Hearings will

¹⁸⁹ ICTR Reg., Decision Withdrawing the Assignment of Mr. Wilfred N. Nderitu as Lead Counsel for the Accused Simon Bikindi, *Bikindi* (Case No. ICTR-01-72-T), 29 March 2007, p.3.

¹⁹⁰ *Ibid.*, p. 2.

¹⁹¹ *Ibid.*, p.3.

¹⁹² Cf. ICTY Tr. Ch. I, Decision on Conflict of Interest of Attorney Miroslav Šeparović, *Gotovina et al* (Case No. IT-06-90-PT), 27 February 2007, p. 2.

¹⁹³ See Article 38 ICC Code of Conduct (ICC-ASP/4/32). See also Jann K. Kleffner, 'Complementarity in the Rome Statute and National Criminal Jurisdictions', (Oxford: Oxford University Press, forthcoming in 2008).

¹⁹⁴ See Article 38(4) ICC Code of Conduct.

¹⁹⁵ See Article 38(4) and (5) ICC Code of Conduct.

¹⁹⁶ See Article 40(4) ICC Code of Conduct.

¹⁹⁷ Articles 33 and 39 ICC Code of Conduct.

¹⁹⁸ See Article 38(3) and (6) ICC Code of Conduct.

¹⁹⁹ See Article 40(3) ICC Code of Conduct.

²⁰⁰ See Articles 38(7) and 43 ICC Code of Conduct.

²⁰¹ See Article 44(4) and (5) ICC Code of Conduct.

be held in public, unless the protection of victims and witnesses or of confidential information requires otherwise.²⁰² Disciplinary Board decisions should be reasoned, in writing and made public. In addition, it will be sent to the national authorities.²⁰³

No disciplinary mechanism has been included in the ICTR Code of Professional Conduct. The Code does provide that counsel should ‘abide by and voluntarily submit to any enforcement and disciplinary procedures’ that the Tribunal will establish.²⁰⁴ In *Bagosora et al.*, the Chamber took notice of this lacuna in the Code of Conduct. But, it did not consider the ICTR’s system to be inadequate.²⁰⁵ Under the ICTR Directive on the Assignment of Defence Counsel, the Registrar may withdraw the assignment of counsel in the case of a serious violation of the Code of Conduct.²⁰⁶ This confers a broad discretionary power on the Registrar to address counsel’s professional conduct. The ICTY Directive, on the contrary, allows the Registrar to withdraw counsel if the Chamber orders the Registrar to do so because counsel was found guilty of misconduct or contempt of court.²⁰⁷

In *Bagosora et al.*, the ICTR Registrar dealt with a severe case of fraudulent behaviour of defence counsel.²⁰⁸ Counsel had claimed that his legal assistant, who later became his co-counsel, was a member of the Bar, while he knew this not to be true. In addition, he systematically inflated bills for the undertakings of his defence team under the legal aid system. Co-counsel finally informed the Registrar that she had never been called to the Bar and demanded her own withdrawal. The Registry requested a special division of the UN²⁰⁹ to investigate the matter. After the parties concerned had been heard, and lead counsel received a summary of the investigations report, his assignment was withdrawn and he was removed from the list of eligible counsel under the legal aid scheme. Although the Directive does not stipulate this as an option, the Registrar also informed counsel’s national Bar Associations of this measure.²¹⁰

The accused who lost his lead counsel demanded the President to suspend the Registrar’s decision to withdraw his counsel. The President informed him that all four defence teams in his case had filed a joint motion for determination by the Chamber to challenge this decision, raising similar arguments. Therefore, he would not intervene. The affected counsel took the matter to the UN Secretary-General.²¹¹ The Chamber’s reasoning for having jurisdiction over this matter, and not the President, is

²⁰² See Article 39(6) ICC Code of Conduct.

²⁰³ See Article 41 ICC Code of Conduct.

²⁰⁴ Article 22 ICTR Code of Conduct.

²⁰⁵ See Decision on the Defence Motions for the Reinstatement, *Bagosora et al.*, *supra* note 36, § 42.

²⁰⁶ See Article 19(A)(iii) ICTR Directive (2003).

²⁰⁷ See Article 20(C) ICTY Directive. Furthermore, in consultation with the Chamber, the ICTY Registrar may temporarily suspend the assignment of counsel when disciplinary proceedings or contempt proceedings have been initiated. See Article 19(B) ICTY Directive (IT/73/REV. 9), 12 July 2002. It should be noted that the Directives only apply to counsel assigned to the accused by the court, not to counsel retained by the accused.

²⁰⁸ Apart from a disciplinary regime, a tort system could also apply to a lawyer committing fraud, to establish the damage to be compensated.

²⁰⁹ The Investigations Division of the Office of Internal Oversight Services of the United Nations.

²¹⁰ See ICTR Reg., Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratién Kabiligi, *Bagosora et al.* (Case No. ICTR-98-41), 26 October 2004 (hereinafter: Decision to Withdraw the Assignment), § 20 *et seq.*

²¹¹ See Decision on the Defence Motions for the Reinstatement, *Bagosora et al.*, *supra* note 36, § 3.

at one point very unconvincing. The Chamber argues that Article 19(E) provides that decisions made by the Registrar under 19(A) should be reviewed by the President. Because it concerns a decision made under 19(A)(iii), the Chamber is satisfied that it may consider the motion and that it does not appropriate power that has been conferred on the President.²¹² This may be symptomatic of the lack of adequate mechanisms to deal with misconduct of counsel at the ICTR.

The defence and ADAD²¹³ as *amicus curiae*²¹⁴ contested the Registrar's authority to initiate this disciplinary procedure against counsel.²¹⁵ The Trial Chamber reasoned that because the Registrar is primarily responsible for administering the legal aid system, he 'has particular interest in the conduct of assigned Defence counsel'.²¹⁶ Rule 45 of the ICTR RPE and the Directive allow the Registrar to take independent action.²¹⁷ The Chamber considered it sufficient that counsel received a summary of the investigative report to reply to and not the original.²¹⁸ It hereby referred to two ICTY cases. In *Šljivančanin*, the ICTY considered that the Registrar 'cannot be required to conduct a mini-trial each time a defendant seeks assignment of a particular lawyer'.²¹⁹ This case concerned the issue whether the accused could be assigned counsel of his own choosing notwithstanding that counsel did not meet the necessary requirements.²²⁰ In *Kvočka*,²²¹ the ICTY Appeals Chamber ruled that the Directive does not require the Registrar to hold a formal hearing if he decides to withdraw the assigned legal assistance from an accused who seems capable of privately funding his legal assistance. Neither of these cases concerned withdrawal of counsel because of unprofessional behaviour. The UN Basic Principles on the Role of Lawyers require that the right to a fair hearing applies to disciplinary proceedings against lawyers.

The allegations against counsel in this case were very serious. His withdrawal would inevitably have consequences for the trial of his client who had no part in the fraud scheme. The accused would lose his lead counsel in the middle of his trial. His knowledge of the case was 'unmatched after having been involved in the case for seven years'.²²² It was even contended that all four defence teams had a "highly integrated" joint defence. This experienced counsel's withdrawal would therefore significantly disrupt their strategies and cause significant delay. Important defence

²¹² See *ibid.*, § 25.

²¹³ The ICTR's association of defence counsel. See *supra*, Chapter III, paragraph 3.3.

²¹⁴ The Chamber considered that 'ADAD should be granted leave to make submissions in connection with the current procedures to withdraw and discipline counsel at the Tribunal and comparative remedies in place in national jurisdictions and in the ICTY.' See Decision on the Defence Motions for the Reinstatement, *Bagosora et al.*, *supra* note 36, § 26.

²¹⁵ See *ibid.*, §§ 9 and 14.

²¹⁶ *Ibid.*, § 35.

²¹⁷ See *ibid.*, § 33. For instance, Rule 45ter(B) allows the Registrar to withdraw counsel for not appearing at a hearing.

²¹⁸ See *ibid.*, § 40.

²¹⁹ ICTY Pres., Decision on Assignment of Defence Counsel, *Šljivančanin* (Case No. IT-95-13/1-PT), 20 August 2003, § 23.

²²⁰ Cf. *supra*, Chapter II, paragraph 2.5.3.

²²¹ See ICTY App. Ch., Decision on Review of Registrar's Decision to withdraw Legal Aid from Zoran Žigić, *Kvočka et al.* (Case No. IT-98-30/1), 7 February 2003, §§ 39-40.

²²² Decision on the Defence Motions for the Reinstatement, *Bagosora et al.*, *supra* note 36, § 11.

witnesses would be reluctant to appear because of this particular counsel's absence.²²³ The Chamber agreed with the defence that counsel's withdrawal could 'potentially affect the position of all four Accused, including their right to be tried with undue delay and to have adequate time and facilities to prepare for their defence.'²²⁴ This also justifies the other defence teams challenging the Registrar's decision to withdraw counsel of a co-accused.

Even though the Registrar may have had the best intentions, the Chamber was, arguably, too easily satisfied as to the fairness of the disciplinary proceedings administered by the Registrar. The most important piece of evidence against counsel, the original report, was kept from counsel for no other reason than that it was intended for UN decision makers only.²²⁵ For disciplinary proceedings to be fair, counsel should be confronted with the evidence against him. The Registrar in this case contended that he 'simply administers the legal aid system in a contractual manner and does not discipline counsel in the same way that a national bar would do. A lawyer removed from the list is still entitled to practice law elsewhere until his national bar states otherwise.'²²⁶ This does not show a particular sensitivity to, or awareness of, the safeguards that are required to apply to disciplinary proceedings of counsel. The ICTR should, it seems, therefore reconsider the Registrar's responsibility for monitoring defence counsel's professional conduct and conducting disciplinary proceedings. A more desirable procedure would be to have a separate hearing administered by an independent disciplinary organ with an appeal possibility rather than a mere check as to "the propriety of the procedure" that was followed to render the decision.²²⁷ The disciplinary regime of the ICTY could be used as an example. The participation of at least one defence counsel in any disciplinary organ for defence counsel is arguably an essential ingredient for a fair hearing.

6.4.3 Misconduct

Under Rule 46 of the ICTY and ICTR RPE a Chamber can address counsel's misconduct in the performance of his duties. Misconduct includes behaviour that is offensive or abusive, obstructs the proceedings,²²⁸ or is otherwise contrary to the interests of justice.²²⁹ It could also encompass counsel's failure 'to meet the standard of professional competence and ethics in the performance of his duties',²³⁰ for instance, because of negligence. According to Article 71 of the ICC Statute, misconduct could entail a disruption of the Court's proceedings,²³¹ or a deliberate refusal to comply with the Court's directions.²³² Article 71 applies to all persons

²²³ See *Idem*.

²²⁴ See *ibid.*, § 23.

²²⁵ See Decision to Withdraw the Assignment, *Bagosora et al.*, *supra* note 210, § 16, p. 5, footnote 1.

²²⁶ *Ibid.*, § 20.

²²⁷ This is the standard of judicial review of Registry decisions. See *supra* Chapter II, note 235.

²²⁸ See Rule 46(A) ICTY RPE and 46(A) ICTR RPE.

²²⁹ See Rule 46(A) ICTR RPE.

²³⁰ Rule 46(A) ICTY RPE.

²³¹ Accused may be removed from the courtroom for continuous disruption of their own trial on the basis of Article 63 ICC RPE.

²³² Articles 46 and 47 ICC Statute and Rule 24 *et seq.* ICC RPE deal with disciplinary measures in case of misconduct of Judges, Prosecutors, Deputy Prosecutors, the Registrar or the Deputy Registrar.

appearing before the ICC. It may therefore even include victims. Although the Rule was originally designed for defence counsel alone, the scope of Rule 46 of the ICTY and ICTR RPE was expanded to include prosecution counsel.²³³

Only judges can impose sanctions on counsel under Rule 46, which also provides the legal basis of the Code of Professional Conduct.²³⁴ At the ICTR alone, Rule 46(D) allows the Registrar to report serious violations of the Code of Conduct for appropriate action under this Rule. Rule 46 of the ICTY RPE lacks this construction, probably because the ICTY Code of Conduct contains a separate disciplinary procedure. At both *ad hoc* Tribunals, before imposing any sanctions, the Chamber should give due warning.²³⁵ If counsel's misconduct nonetheless persists, sanctions can be imposed. Sanctions include refusal of audience.²³⁶ Rule 46 of the ICTY RPE also provides for the Chamber to consider counsel no longer eligible to represent any individual before the Tribunal. Should the Chamber consider this sanction, counsel should be given the opportunity to be heard.²³⁷ With the President's approval, counsel's misconduct may be communicated to the professional body regulating his conduct in his domestic jurisdiction.²³⁸ Article 71 of the ICC Statute excludes imprisonment as a sanction.²³⁹ But a fine, not exceeding 2000 euros, may be issued. This maximum amount can be surpassed if the misconduct persists.²⁴⁰ In addition, counsel's temporary or permanent removal from the courtroom or another administrative measure can be imposed.²⁴¹ Rules 170 *et seq.* of the ICC RPE further stipulate the procedures to be followed to impose the measures envisaged in Article 71. An important safeguard is the 30-day limit that Rule 171 sets on the amount of days that a counsel may be precluded from attending proceedings or from exercising his function. It therefore limits the severity of the punishment for misconduct, whereas the *ad hoc* Tribunals leave this to the discretion of the judges.

²³³ Rule 46(A) ICTR RPE stipulates that it also applies to prosecution counsel. Although the ICTY Rule does not articulate this, this provision has been applied to prosecution counsel. Cases in which this Rule was applied to the prosecution include ICTR Tr. Ch. II, Warning to the Prosecutor's Counsel pursuant to Rule 46 (A), *Nyitegeka* (Case No. ICTR-96-14-T), 27 February 2001; ICTR Tr. Ch. II, Warning to the Prosecutor's Counsels pursuant to Rule 46 (A), *Kajelijeli* (Case No. ICTR-98-44A-T), 25 January 2001; Decision on the Prosecutor's Allegations of Contempt, *Nyiramasubuko et al*, *supra* note 106, §§ 30-33; ICTY App. Ch., Judgement, *Krstić* (Case No. IT-98-33-A), 19 April 2004, §§ 211 and 215. In *Furundžija*, an ICTY Trial Chamber issued a formal complaint against prosecution counsel. See, ICTY Tr.Ch., 'The Trial Chamber's Formal Complaint to the Prosecutor concerning the Conduct of the Prosecution, *Furundžija* (Case No. IT-95-17/1), 5 June 1998. This has been criticised as there was no procedure arranged in the RPE at that time for prosecution counsel to respond. See Arbour (2006), *supra* note 10, p. 679.

²³⁴ See Rule 46(D) ICTR RPE; Rule 46(C) ICTY RPE.

²³⁵ See Rule 46(A) ICTY RPE; Rule 46 (A) ICTR RPE.

²³⁶ Rule 46(A)(i) ICTY RPE; Rule 46(C) ICTR RPE. Upon a refusal of audience to counsel, counsel will be withdrawn by the Registrar. Rule 46(C) ICTR RPE. Cf. also Article 19(B)(i) ICTR Directive (2003).

²³⁷ See Rule 46(A)(ii) ICTY RPE. This sanction is only articulated in Rule 46 ICTY RPE, not in Article 46 ICTR RPE.

²³⁸ Rule 46(B) ICTY RPE; Rule 46(B) ICTR RPE.

²³⁹ Article 71(1) ICC Statute.

²⁴⁰ Rule 171(4) ICC RPE.

²⁴¹ Article 71(1) ICC Statute.

Chambers gave warnings for misconduct to defence counsel in a number of cases. In *Delalić et al.*, one defence counsel received several warnings. His Response to the Chamber's Scheduling Order was deemed 'inappropriate and insufficient in fulfilling the obligations of the Defence'. Due to 'the quality of its language, its attacks on the Office of the Prosecutor and its impugning of the proceedings of the International Tribunal itself', it was deemed "unacceptable".²⁴² In addition, counsel failed to timeously file the required witness lists.²⁴³ In light of its duty to ensure a fair and expeditious trial to each accused involved in the proceedings, the Chamber considered that counsel's obstructive conduct could adversely affect the rights of the other accused persons involved in the trial.²⁴⁴ In *Kolundžija*, the ICTY Trial Chamber gave counsel a warning for his absence during a hearing. By leaving his client unrepresented, counsel had caused "grave inconvenience".²⁴⁵ In *Akayesu*,²⁴⁶ the ICTR Trial Chamber gave lead counsel and co-counsel a Rule 46 warning because they came late at a hearing, purportedly due to problems with the Registry. According to the Chamber, this was 'not only contemptuous and disrespectful to the Tribunal, but also an obstruction to the proceedings and contrary to the interests of justice'.²⁴⁷

Misconduct of counsel was also a ground of appeal in *Akayesu*. The accused contended that counsel had failed to advise him properly, had been absent from court, did not follow his instructions, did not prepare his trial and the examinations of witnesses together with him, and left him in the dark as to the objectives and strategy of the defence he pursued.²⁴⁸ According to the Appeals Chamber however, the accused failed to show 'any tangible example of gross professional misconduct by his Counsel such as resulted in a miscarriage of justice'.²⁴⁹ For misconduct to be a successful ground of appeal, the accused should be able to illustrate that it has led to a miscarriage of justice. Only gross professional conduct would be likely to lead to such a serious conclusion.

For a limited period, Rule 46 of the ICTY RPE contained a separate sanction against the filing of 'frivolous motions' or motions that constitute 'an abuse of process', amounting to the fees associated not being reimbursed.²⁵⁰ This issue was readressed in Rule 73(D) ICTY RPE, which now reads: 'Irrespective of any sanctions which may be imposed under Rule 46 (A), when a Chamber finds that a motion is frivolous or is an abuse of process, the Registrar shall withhold payment of fees associated with the production of that motion and/ or costs thereof.' The ICTR has

²⁴² ICTY Tr. Ch., Order, *Delalić et al.* (Case No. IT-96-21-T), 18 May 1998.

²⁴³ ICTY Tr. Ch., Order, *Delalić et al.* (Case No. IT-96-21-T), 16 June 1998.

²⁴⁴ See *idem*.

²⁴⁵ See ICTY Tr. Ch., Transcript, *Kolundžija* (Case No. IT-95-8-PT), 28 September 1999, pp. 135-136 and 144. Cf. Oosthuizen, Gabriël, 'Of Misconduct, False Testimony, Rule Mutations and other Interesting Powers: a Potpourri of Questions and Notes', in May and al. (ed), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001), pp. 387-402, p. 392.

²⁴⁶ ICTR Tr. Ch. I, Issuance of Warning against Defence Counsels, *Akayesu* (Case No. ICTR-96-4-T), 19 March 1998.

²⁴⁷ See *idem*.

²⁴⁸ See ICTR App. Ch., Judgement, *Akayesu* (Case No. ICTR-96-4-A), 1 June 2001, § 73.

²⁴⁹ *Ibid.*, § 80.

²⁵⁰ Neither the ICTR RPE, nor the current version (2006) of the ICTY RPE contains such a clause.

contained this measure in Rule 73(F) RPE.²⁵¹ The ICTR Appeals Chamber argued that ‘although Trial Chambers should use the power to impose sanctions cautiously, a decision to impose monetary sanctions on counsel for frivolous motions or abuse of process pursuant to Rule 73(F) of the Rules is not subject to appeal under the Statute of the International Tribunal or the Rules’.²⁵² A Trial Chamber may only grant certification for appeal if a decision concerning a motion ‘involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings’.²⁵³ At the ICTR in *Nzitorera et al.*, defence counsel attempted to circumvent this lacuna by having the President review the Registrar’s implementation of the Order of the Chamber not to remunerate three motions of counsel. Counsel argued that sanctions for filing frivolous motions should involve a review possibility, ‘as it impacts on Counsel’s professional standing, reputation and remuneration’.²⁵⁴ According to the President, however, under the provisions of the Tribunal, the Registrar has no discretion to decide whether or not to implement a Chamber’s decision. If directed to refrain from paying counsel the fees and costs associated with a particular motion, the Registrar must implement the Chamber’s decisions, without exercising any discretion that could be subject to review of the President under Rules 19 and 33(A) of the ICTR RPE.²⁵⁵

Even though it serves expedience and efficiency, the absence of an appeal where allegedly frivolous motions are concerned is prejudicial to the defence. It may prevent defence counsel from zealously defending the interests of an accused to avoid receiving monetary sanctions for allegedly frivolous motions that cannot be appealed. Given the novelty of international criminal justice, motions of the defence should not be labelled frivolous without due consideration and an appeal possibility should not be excluded *per se*. Caution is especially warranted, as this measure has been argued to be “the most frequently employed means of discipline” at the ICTR.²⁵⁶

6.4.4 Contempt of Court

Another issue that addresses professional misbehaviour is the contempt of court procedure, which originates from the common law system and is unknown to the civil law system.²⁵⁷ According to the ICTY Appeals Chamber in *Aleksovski*, the seriousness of a contempt allegation is manifest from the substantial maximum penalty attached to

²⁵¹ This provision is almost identical to Rule 73(D) ICTY RPE.

²⁵² See ICTR App Ch., Decision on Interlocutory Appeals Regarding Participation of Ad Litem Judges, *Karemera et al.* (Case No. ICTR-98-44-AR73.4), 11 June 2004.

²⁵³ Rule 73(B) ICTY RPE; Rule 73(B) ICTR RPE.

²⁵⁴ ICTR Pres., The President’s Decision on Lead Counsel’s Applications for Review of Sanctions Imposed under Rule 73 (F), *Nzitorera et al.* (Case No. ICTR-98-44-I), 26 January 2004, p.3.

²⁵⁵ *Ibid.*, p. 4.

²⁵⁶ See Boed, Roman, ‘Professional Ethics’, in Bohlander, Boed and Wilson (ed), *Defense in International Criminal Proceedings. Cases, Materials and Commentary* (Ardsley, NY USA: Transnational Publishers, 2006), pp. 229-276, p. 275.

²⁵⁷ Cf. ICTY App. Ch., Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, *Tadić* (Case No. IT-94-1-A-R77), 31 January 2000 (hereinafter: Judgment on Allegations), §§ 16, 18 and Judgment on Appeal by Anto Nobile against Finding of Contempt, *Aleksovski*, *supra* note 51, § 41.

it.²⁵⁸ Thus, an allegation of contempt is reserved for the most serious misconduct.²⁵⁹ Its scope is not limited to counsel, but it applies to anyone who interferes with proceedings, including witnesses, prosecution counsel, the accused or even journalists.²⁶⁰ The procedure is incorporated in Rule 77 ICTY RPE and Rule 77 ICTR RPE. Without it being called contempt of court,²⁶¹ Article 70 of the ICC Statute provides the Chamber with jurisdiction over offences committed against its administration of justice.²⁶² This provision and the one governing misconduct in the ICC Statute contain more details and leave less room for interpretation than the relevant ICTY and ICTR provisions.²⁶³

The *ad hoc* Tribunals' Rules governing contempt are virtually identical.²⁶⁴ Only the maximum sanctions differ. Before the ICTY seven years of imprisonment, or a fine not exceeding €100.000 may be imposed.²⁶⁵ The maximum term of imprisonment at the ICTR is five years, which corresponds to the maximum at the ICC.²⁶⁶ The maximum fine at the ICTR is USD10.000.²⁶⁷ At the ICC, the amount of the fine will be established on the basis of the assets of the contemnor.²⁶⁸ Both sanctions, fine and imprisonment, can also be imposed cumulatively.²⁶⁹ Alternatively, the fine can be converted to a term of imprisonment.²⁷⁰ If counsel is assigned by the court, unpaid fines can be deducted from "any outstanding fees" the Tribunal owes to counsel. This will undoubtedly be effective in ensuring that the fine will be collected. However, it is potentially unfair as it discriminates against counsel vis-à-vis other contemnors. A general seizure proceeding or substituting a fine for imprisonment, applying to everyone, would be more appropriate. Another sanction particularly designed for contemptuous counsel at the *ad hoc* Tribunals is to be considered 'no longer eligible to represent a suspect or accused before the Tribunal' or for his conduct to be qualified

²⁵⁸ Judgment on Appeal by Anto Nobile against Finding of Contempt, *Aleksovski*, *supra* note 51, § 45.

²⁵⁹ Cf. McMorrow (2007), *supra* note 7, p. 167.

²⁶⁰ ICTY contempt cases involving journalists were, for instance, ICTY App. Ch. Judgement, *Marjačić and Rebić* (Case No. IT-95-14R77.2-A), 27 September 2006. In this case, a journalist and a former security officer were found guilty of contempt; ICTY Tr. Ch. III, Trial Judgement, *Josip Jović*, (Case Nos. IT-95-14 & IT-95-14/2-R77), 30 August 2006; ICTY App. Ch., Judgement, *Josip Jović* (Case Nos. IT-95-14 & 14/2-R77-A), 15 March 2007.

²⁶¹ In its legal instruments, the ICC seems to avoid legal terms that are connected in any sense to one particular legal system. Thus, each term can acquire its unique ICC interpretation.

²⁶² Cf. Article 70(1) ICC Statute. Rules 162 to 169 ICC RPE provide the particularities of this procedure.

²⁶³ Cf. Oosthuizen (2001), *supra* note 245, p. 402.

²⁶⁴ Cf. Rule 77 ICTR RPE and Rule 77 ICTY RPE.

²⁶⁵ See Rule 77 (G) ICTY RPE (2006). The ICTY RPE contain a particular provision for the payment of a fine: Rule 77*bis* ICTY RPE (2006). Until early 1998, the maximum penalty for contempt before the ICTY was considerably lower: a term of imprisonment not exceeding six months, or a fine of roughly 9.000 euros (20,000 Dutch guilders).

²⁶⁶ See Rule 77(G) ICTR RPE (2006) and Article 70(3) ICC Statute.

²⁶⁷ See Rule 77(G) ICTR RPE (2006).

²⁶⁸ It may not be more than half the value of someone's assets, minus the amount reasonably satisfying his financial needs and those of his dependants. See Rule 166(3) ICC RPE.

²⁶⁹ See Rule 77(G) ICTR RPE (2006), Rule 77(G) ICTY RPE (2006) and Article 70(3) ICC Statute. At the ICTY, in addition to a finding of contempt, fines can be put on top of contempt fines, if the contemnor fails to pay them duly. See Rule 77*bis*(D) ICTY RPE.

²⁷⁰ For a maximum of twelve months. See Rule 77*bis*(C) (iv) ICTY RPE.

as misconduct under Rule 46, or even both.²⁷¹ This means that counsel could be punished cumulatively for the same conduct under different procedures. This appears to violate the principle of *ne bis in idem* or double jeopardy. Contempt proceedings involve drastic measures against counsel upon conviction and therefore cumulative action under Rule 46 is arguably unwarranted. If conduct could be covered by both articles 70 and 71 of the ICC Statute, the procedure concerning offences against the administration of justice pursuant article 70 takes precedence.²⁷² This may appear to be an improvement vis-à-vis the situation at the *ad hoc* Tribunals. However, because this provision involves a more severe sanction than Article 71, it seems it would have been more proportionate to let judges decide which provision to apply on case-by-case basis.

Although substantial fines and measures have been imposed on contemptuous counsel, the *ad hoc* Tribunals have not sentenced any defence counsel to prison. In *Tadić*, counsel was fined roughly 7000 EUR.²⁷³ The Registrar was urged to consider striking counsel off the list of counsel and to report his conduct to his national Bar.²⁷⁴ In *Aleksovski*, the Trial Chamber held lead counsel in contempt for stating the name of a protected witness at a public hearing. As it concerned an expert witness, counsel had assumed he was not protected. His poor English had prevented him from properly checking the transcript. The Trial Chamber fined counsel €4.500²⁷⁵ since counsel's "deliberate failure to ascertain the circumstances under which a witness testified" constituted a knowing violation.²⁷⁶ On appeal, the fine was reimbursed.²⁷⁷

ICTY Rule 77*bis* (E) requires states to co-operate when an arrest warrant has been issued to a person who fails to comply with sanctions imposed on him under Rules 77 or 91. However, considering Article 29 of the ICTY Statute which compels states to cooperate with the Tribunal 'in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law', it is doubtful whether a state must co-operate with the Tribunal where it does not concern an accused of a serious violation of international humanitarian law.²⁷⁸ Article 70 of the ICC Statute provides that domestic laws shall govern the conditions for states to cooperate with the ICC in proceedings concerning offences against the ICC's administration of justice.²⁷⁹ State Parties should include offences committed against the ICC's administration of justice, when committed on its territory, or by one of its nationals, in their national criminal laws governing such offences.²⁸⁰ Moreover, at the request of the ICC, State Parties must prosecute and try these offences.²⁸¹ As

²⁷¹ Rule 77(I) ICTR RPE (2006), Rule 77(I) ICTY RPE (2006).

²⁷² See Rule 172 ICC RPE.

²⁷³ 15.000 Dutch guilders.

²⁷⁴ In addition, certain decisions were ordered to be made public. Judgment on Allegations, *Tadić*, *supra* note 257, § 174.

²⁷⁵ 10.000 Dutch guilders. Counsel had to pay three-fifths of this sum on a provisional basis.

²⁷⁶ Judgment on Appeal by Anto Nobile against Finding of Contempt, *Aleksovski*, *supra* note 51, § 20. Cf. ICTY Tr. Ch., Décision portant condamnation pour outrage au Tribunal (in French), *Aleksovski* (Case No. IT-95-14/1-T), 11 December 1998, p. 4: 'la violation [...] correspond [...] à l'abstention délibérée de s'assurer des circonstances dans lesquelles un témoin a déposé.'

²⁷⁷ Judgment on Appeal by Anto Nobile against Finding of Contempt, *Aleksovski*, *supra* note 51, § 57.

²⁷⁸ See Oosthuizen (2001), *supra* note 245, pp. 400-401.

²⁷⁹ Article 70(2) ICC Statute.

²⁸⁰ See Article 70(4)(a) ICC Statute.

²⁸¹ See Article 70(4)(b) ICC Statute.

countries with a civil law tradition generally lack separate proceedings to deal with offences against the administration of justice, the ICC should be cautious before compelling such states to conduct these proceedings. It could not be guaranteed that these countries will conduct adequate hearings.

According to the ICTY in *Aleksovski*, the purpose and scope of the contempt procedure is to punish conduct that may obstruct, prejudice or abuse its administration of justice. It should ensure that a court's exercise of its jurisdiction is 'not frustrated and that its basic judicial functions are safeguarded.'²⁸² Under Rule 77 of the ICTY RPE and Rule 77 of the ICTR RPE, the *ad hoc* Tribunals may hold someone in contempt who 'knowingly and wilfully' interferes with their administration of justice.²⁸³ The Chambers' power to hold persons in contempt is derived from their inherent jurisdiction.²⁸⁴ It is not incorporated in the Statutes of the *ad hoc* Tribunals. In *Tadić*, when the issue of contempt of court was addressed for the first time, the Appeals Chamber held: 'The Tribunal does [...] possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction [...] is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which interferes with its administration of justice.'²⁸⁵ Lead counsel had allegedly influenced witnesses.²⁸⁶ Although counsel denied all allegations,²⁸⁷ the Appeals Chamber found him guilty.²⁸⁸ Counsel in *Tadić*, coming from a country with a civil law tradition to which the concept of contempt of court is unknown, was unlikely to have been familiar with the concept. He tried to escape the contempt conviction by arguing that his rights had been prejudiced by the amendments to Rule 77 in the course of proceedings. As they had widened the scope of the conduct covered by the provision and introduced the concept of inherent jurisdiction, he maintained that they should be disregarded.²⁸⁹ According to the Appeals Chamber, the amended more comprehensive clauses of Rule 77 'did not increase the nature of the conduct which amounts to contempt' as that conduct had always fallen under the Tribunal's inherent jurisdiction.²⁹⁰

²⁸² Judgment on Appeal by Anto Nobile against Finding of Contempt, *Aleksovski*, *supra* note 51, § 36(1). Cf. Judgment on Allegations, *Tadić*, *supra* note 257, § 18.

²⁸³ See Rule 77 (A)(i)–(v) ICTY RPE; Rule 77 (A)(i)–(v) ICTR RPE. Initially, the scope of these Rules was more confined. They mainly applied to witnesses or persons interfering with witnesses. Cf. Rule 77(A) and (C) ICTY RPE (Rev. 6), 6 October 1995.

²⁸⁴ This is stipulated in Rule 77 ICTY RPE since Revision 12 (end 1997).

²⁸⁵ Judgment on Allegations, *Tadić*, *supra* note 257, § 13.

²⁸⁶ Allegedly, counsel instructed witnesses to lie, signalled to a witness how to answer, and paid witnesses for useful testimony. *Ibid.*, § 2. The witness who had stated that counsel signalled to him, denied this later on. *Ibid.*, § 61.

²⁸⁷ Counsel argued that he had used certain witness statements the correctness of which he was not entirely sure of. That was for the Tribunal to determine, because they were in his client's interest. *Ibid.*, § 50.

²⁸⁸ Counsel had 'put forward [...] a case which was known to him to be false', and had manipulated two witnesses. See, *ibid.*, § 160.

²⁸⁹ *Ibid.*, § 27.

²⁹⁰ *Ibid.*, § 28.

In *Tadić*, the ICTY Appeals Chamber dealt with the contempt case of defence counsel Vujin in first instance as well as in second instance.²⁹¹ According to Judge Wald, the Statute and RPE did not provide the Appeals Chamber with jurisdiction to deal with this case a second time.²⁹² As a solution, Rule 77 now provides that should the Appeals Chamber sit in a contempt case in the first instance as well as in second instance, five different judges should be assigned to the appeal case.²⁹³

The ICC has jurisdiction over offences against its administration of justice when these are committed “intentionally”.²⁹⁴ The *ad hoc* Tribunals can hold in contempt those who “knowingly and wilfully” interfere with their administration of justice. Requiring a considerable degree of culpability is appropriate because of the gravity of the punishment involved. According to the ICTY Appeals Chamber in *Aleksovski* negligence, unless it amounts to wilful blindness,²⁹⁵ ‘could never justify imprisonment or a substantial fine even though the unintended consequence of such negligence was an interference with the Tribunal’s administration of justice.’²⁹⁶ Such conduct requires a less punitive enforcement mechanism.²⁹⁷ If a person never realized that an order might exist, [t]here can be no wilful blindness to the existence of an order’.²⁹⁸ No “specific intention” needs to be proven. It needs to be established that the act constituting the violation was deliberate rather than accidental. It would amount to a deliberate violation if the ‘alleged contemnor acted with reckless indifference as to whether his act was in violation of the order.’²⁹⁹ Judge Robinson argued that, absent a substantial basis to attribute *mala fides* to counsel, defence counsel being an officer of the court, ‘he should be given the benefit of the doubt, and the prosecutorial discretion should be exercised in his favour.’ After all, every lawyer wants ‘to present his evidence in the most advantageous way.’³⁰⁰ Judge Robinson plainly understood the fact that defence counsel may or even should push the limits of what is legally permissible to conduct a vigorous defence on their client’s behalf. As defence counsel are generally aware of their duty as an officer of the court, they should be trusted to act within those limits. Or at least not to have the *intention* to go beyond them.

At the ICC, the Prosecutor may initiate investigations into a breach of Article 70, on the basis of a Chamber’s recommendation or on the recommendation ‘of any

²⁹¹ See *ibid*; ICTY App. Ch., Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, *Tadić* (Case No. IT-94-1-A-AR77), 27 February 2001 (hereinafter: Appeal Judgement on Allegations).

²⁹² See Appeal Judgement on Allegations, *Tadić*, *supra* note 291, Separate Opinion of Judge Wald Dissenting from the Finding of Jurisdiction.

²⁹³ See Rule 77(K) ICTY RPE; Rule 77(K) ICTR RPE.

²⁹⁴ Article 70(1) ICC Statute.

²⁹⁵ Wilful blindness is ‘sufficiently culpable conduct to be more appropriately dealt with as contempt,’ and ‘as culpable as *actual* knowledge.’ Judgment on Appeal by Anto Nobile against Finding of Contempt, *Aleksovski*, *supra* note 51, §§ 45 and 52.

²⁹⁶ *Ibid.*, § 45.

²⁹⁷ *Ibid.*, § 45.

²⁹⁸ *Ibid.*, § 51.

²⁹⁹ *Ibid.*, § 54. The reckless indifference mentioned here is directed to the consequences of the act that violated the order, rather than to the existence of this order. See Footnote 104.

³⁰⁰ Separate opinion of Judge Patrick Robinson in *ibid*, § 4. Cf. *supra* note 51.

reliable source'.³⁰¹ Once the Chamber deems that there are sufficient grounds, the Prosecutor, or the Chamber, or *amicus curiae* may prosecute the alleged contempt.³⁰² At the *ad hoc* Tribunals, the Chamber before which the alleged contempt has occurred will in principle deal with the contempt case itself. Like other disciplinary proceedings, the contempt procedure resembles criminal proceedings. Where a person is suspected of being in contempt, he can be prosecuted and tried in a separate procedure. To prevent a conflict of interest, depending on the circumstances, investigations concerning the contempt case will either be conducted by the prosecutor, or *amicus curiae* who will be especially appointed for this purpose, or the Chamber itself.³⁰³ The procedural guarantees from the Rules of Procedure and Evidence apply *mutatis mutandis* to persons accused of contempt.³⁰⁴ This includes the right to be assigned counsel if one cannot afford one.³⁰⁵ In *Aleksovski*, the Appeals Chamber criticized the contempt proceedings.³⁰⁶ A Chamber could be both prosecutor and judge regarding contempt charges. As a result, the usual safeguards for the parties could be overlooked.³⁰⁷ Such proceedings should proceed 'by way of indictment, with the prosecution bearing the onus of establishing the charge.' Where a Chamber initiates these proceedings, it should quickly and precisely formulate the nature of the contempt charge, and enable the parties 'to debate what is required to be proved.' Otherwise, contempt proceedings will not be fair.³⁰⁸ The Appeals Chamber in *Aleksovski* argued that, regarding the investigation stage, more proper proceedings were followed in *Simić et al.*³⁰⁹ The allegations against two defence counsel and an accused in *Simić et al* came from the prosecution. With regard to one counsel, at an early stage the Trial Chamber considered that it had no good reason to believe that he might be in contempt. The particulars of the allegations against the others made the Chamber believe that they might be and proceedings were initiated against them.³¹⁰ Finally, grave suspicions notwithstanding, there was no substantial evidence to prove that counsel was guilty of contempt of court. According to the Chamber: 'Not even the gravest of suspicions can establish proof beyond reasonable doubt'.³¹¹

At the ICTR in *Nyiramasubuko et al.*,³¹² the prosecutor suspected four defence team members of contempt of court.³¹³ Allegedly, they had knowingly and falsely

³⁰¹ See Rule 165(1) ICC RPE.

³⁰² See Rule 77(D) ICTY RPE; Rule 77(D) ICTR RPE.

³⁰³ See Rule 77(C) ICTY RPE; Rule 77(C) ICTR RPE.

³⁰⁴ See Rule 77(E) ICTY RPE; Rule 77(E) ICTR RPE.

³⁰⁵ See Rule 77(F) ICTY RPE; Rule 77(F) ICTR RPE.

³⁰⁶ No specific charge identifying the nature of the contempt allegation was formulated, neither in the order summoning counsel to appear, nor during the hearing. In addition, there had been no discussion on what constituted a "knowing" violation of an Order.

³⁰⁷ See Judgment on Appeal by Anto Nobile against Finding of Contempt, *Aleksovski*, *supra* note 51, § 56.

³⁰⁸ *Idem.*

³⁰⁹ See *ibid.*, footnote 108.

³¹⁰ See ICTY Tr. Ch., Scheduling Order in the Matter of Allegations Against Accused Milan Simić and his Counsel, *Simić et al* (Case No. IT-95-9-R77), 7 July 1999, pp. 3-6.

³¹¹ ICTY Tr. Ch., Judgement in the Matter of Contempt Allegations Against an Accused and His Counsel, *Simić et al* (Case no. IT-95-9-R77), 30 June 2000, §§ 99 and 100.

³¹² Decision on the Prosecutor's Allegations of Contempt, *Nyiramasubuko et al*, *supra* note 106.

³¹³ *Ibid.*, §§ 2 and 3.

presented themselves as investigators acting on behalf of the OTP, intimidated potential prosecution witnesses and attempted to tamper with evidence. The ICTR Trial Chamber reiterated the ICTY's findings in *Simić* and *Aleksovski*, especially concerning the onus on the prosecution to establish the charge and the danger of a chamber being both prosecution and judge in a contempt case.³¹⁴ Given the gravity of the allegations and the presumption of innocence, it was argued that the prosecution should justify its request to conduct investigations into the alleged contempt, and should disclose *prima facie* reasonable grounds for its allegations 'on the basis of properly prepared and substantiated submissions.'³¹⁵ Allegations which are solely supported by hearsay and double hearsay evidence lack precision. The Prosecutor's withdrawal of the accusations against one alleged contemnor because of an error, not further explained, raised substantial doubt on the overall reliability of the allegations.³¹⁶ Additionally, the Prosecutor barely challenged the counter-evidence put forward by counsel.³¹⁷ Therefore, the Trial Chamber refrained from taking any precautionary measures against counsel, such as taking in their passports while investigations would be pending.³¹⁸ Holding that the prosecution's unsubstantiated allegations of contempt affected their reputation and professional credibility and jeopardised the safety of their defence investigators, defence counsel issued counterclaims against the prosecution. According to the Chamber, the Prosecutor generally acted in good faith in dealing urgently with any possible threat to the security of its witnesses. It was improper and reckless of the prosecution to make an allegation that a defence investigator was a former member of the militia group "Interahamwe" public.³¹⁹ It could have jeopardised the investigator's life and security and could have hampered the defence investigations. For this, the prosecution received a warning for misconduct under Rule 46(A).³²⁰ It should not be underestimated how damaging public allegations as to contempt of court may be for defence counsel's reputation and practice. Such allegations should not be made public until they have been properly investigated and substantiated. It might also justify holding contempt proceedings behind closed doors.

6.4.5 Conclusion: Appropriate Disciplinary Enforcement Mechanisms

The ICTR, the ICTY and the ICC each adopted a code of ethics for defence counsel. At the ICTY and the ICC, disciplinary bodies were established under the Code of Conduct to address complaints involving professional misbehaviour. The Registrar has particularly important responsibilities in monitoring counsel's professional conduct at the ICTR where no independent disciplinary organ to deal with counsel's misconduct has been established. If counsel's conduct obstructs the proper conduct of proceedings or interferes with the court's administration of justice under the Rules of

³¹⁴ See *ibid.*, § 7.

³¹⁵ *Ibid.*, § 6. Cf. also § 12.

³¹⁶ *Ibid.*, § 8.

³¹⁷ For instance, one alleged contemnor was not in Rwanda when the events supposedly occurred. See *ibid.*, § 10.

³¹⁸ The Prosecutor had requested the Registrar to do so. See *ibid.*, §§ 10 and 11.

³¹⁹ This allegation was picked up by the Rwandese and international media, but was later withdrawn by the Prosecution for being erroneous.

³²⁰ See Decision on the Prosecutor's Allegations of Contempt, *Nyiramasubuko et al*, *supra* note 106, §§ 29-33.

Procedure and Evidence of the *ad hoc* Tribunals and the ICC Statute, judges can impose sanctions on counsel for misconduct and contempt of court.

The question as to what organ should regulate lawyers' conduct is not unique to international criminal law, but has also arisen in the context of domestic legal systems.³²¹ Should this be counsel's peers, or outsiders of his profession, such as judges, or, in the context of international criminal justice, the Registry? Simon argues that courts, regulatory agencies, as well as specialized Bar associations are each appropriate regulators of lawyers' professional conduct.³²²

The contempt of court and misconduct procedures mean that the judges of the same Trial Chamber judging the criminal responsibility of counsel's client, also judge counsel's behaviour in this case. This could affect their impartiality and independence. If counsel is compelled to reveal confidential information as to what has occurred in the course of his representation in front of the adjudicators of the case, this may hurt the interests of his client. Accordingly, such proceedings may interfere with a lawyer's duty of confidentiality which would be an undesirable consequence.

According to the International Criminal Bar, lawyers should, in principle, be overseen by their own peers.³²³ It is the view of the Council of Europe that professional lawyers' organisations, such as Bar associations, should conduct or at least contribute to disciplinary proceedings against lawyers.³²⁴ The enforcement mechanisms incorporated in the ICTY and ICC Codes of Conduct provide for the substantial involvement of counsel's peers in the disciplinary proceedings, especially at first instance. Because a disciplinary procedure is generally applicable to the behaviour of a specific group, be it doctors, lawyers or another profession, poor professional behaviour will be optimally recognisable as such for group members. Participation of defence counsel members is therefore desirable. Furthermore, where norms as to what constitutes proper professional behaviour are not very specific, other defence counsel may have the most accurate notion of what standard of professional behaviour should prevail. The judiciary might not be sufficiently familiar with defence counsel's professional ethics, particularly if they come from different legal cultures, to judge specific conduct.³²⁵ Considering that in international criminal proceedings, standards of professional conduct for counsel and other trial participants are still not fully crystallized, the participation of peers in disciplinary proceedings is indispensable. Moreover, their participation will enhance the likelihood of counsel involved accepting the outcome of these proceedings without dispute.

A distinction should be made between counsel fulfilling their mandate by making optimal use of professional standards that give them discretion and counsel clearly acting beyond the boundaries of what is appropriate professional behaviour. If

³²¹ Cf., for instance, Wilkins (1992), *supra* note 48, p. 802.

³²² Simon considers the ABA, the umbrella Bar association of all lawyers practising in the United States, less appropriate as an enforcer as it might use its 'authority to shear off the aspirational aspects of the professional vision'. See Simon (1998), *supra* note 166, p. 196.

³²³ See Code of Conduct and Disciplinary Procedure of the International Criminal Bar, 2003, prepared by the Sub-committee on Ethics chaired by Giuseppe Battista and David Levy for the International Criminal Bar under the Direction of Elise Groulx, Article 59(1).

³²⁴ Council of Europe, Recommendation No. R(2000)21, Principle VI(2).

³²⁵ Cf. Bitter, J.B., 'Tuchtrecht', in *Het beroep onder de loep. Jonge Balie Congres 1983. Congresbundel* (Zwolle: W.E.J. Tjeenk Willink, 1983), pp. 55-66.

counsel explore the limits to their mandate thereby staying (just) within the boundaries to zealously defend the client, there may be a fine line between what is considered acceptable and what is not. It has been argued that selective use of “aggressive defence tactics” is justifiable whereas reckless use of such tactics is not.³²⁶ In an adversarial system, the parties should have sufficient scope to pursue their strategies. If lawyers in international criminal cases routinely file motions that appear frivolous, it is warranted that appropriate corrective measures be taken. But if counsel occasionally file a motion that might be considered frivolous, he should be given the benefit of the doubt. Discretion and judgement are vital.

Where counsel exploits the limits of his mandate and unintentionally violates the Code of Conduct, it is desirable that his peers participate in judging his behaviour. However, when the disciplinary proceedings of the ICTY's and ICC's Codes of Conduct are the only disciplinary enforcement mechanisms, some problems may remain unaddressed. In jurisdictions where the Bar rules over ethical behaviour of its members, judges may feel helpless facing ‘defence counsel who string cases out by continuous motions for recusal and new evidence’.³²⁷ As a remedy, they can only curtail defence rights generally, thereby also affecting accused.³²⁸ In a jurisdiction where contempt of court is unknown, judges may lack the power to sanction counsel who are acting unprofessionally and unethically.³²⁹ A code of ethics should be a lawyer's guide as to how to use his discretion.³³⁰ Therefore, disciplinary regimes should leave the discretion to individual lawyers as to how to conduct a defence. Plainly, lawyers have no discretion to engage in any criminal behaviour. Counsel who were convicted for contempt of court at the ICTY, clearly acted beyond the limits of their mandate. The same is true for the counsel at the ICTR who engaged in fraud and was therefore compelled to stop representing his client. With regard to the latter case, although the outcome may have been inevitable, the proceedings conducted by the Registrar in this matter lacked an important safeguard because counsel had no full disclosure of the evidence against him.

Judges observe counsel in court. The Registrar, a special Disciplinary Board or a court's President will never have the same oversight as to what actually takes place in proceedings. For instance, in *Nzirorera*, the ICTR President considered that the Trial Chamber would be in a better position than herself to judge whether or not the accused's allegations as to his counsel's integrity, competence and diligence were founded and whether the standard of his representation was satisfactory.³³¹

However, trial judges may not at all times be able to distinguish between tolerable behaviour according to lawyers' professional standards and intolerable

³²⁶ See Simon (1998), *supra* note 166, p. 194.

³²⁷ Bohlander, Michael, 'A silly question? Court sanctions against defence counsel for trial misconduct', 10 *Criminal Law Forum* (1999), pp. 467-504, p. 476. Minkjan agrees that rather than special disciplinary organs, the judiciary should discipline counsel. See Minkjan, E.E., 'Commissie Herziening Gedragsregels geïnstalleerd', *Advocatenblad* (1990), p. 174.

³²⁸ Bohlander (1999), *supra* note 327, p. 476.

³²⁹ See *idem*.

³³⁰ See Simon (1998), *supra* note 166, p. 195.

³³¹ See Decision on Nzirorera's Motion, *Nzirorera*, *supra* note 75, § 11 and ICTR Pres., The President's Decision on Review, in Accordance with Article 19 (E) of the Directive on Assignment of Defence Counsel, *Nzirorera* (Case No. ICTR-98-44), 13 June 2001.

behaviour.³³² In consequence, they might hold lawyers to higher standards than originally envisioned to be necessary under the rules of professional conduct. It has been argued that '[a]ll members of a culture, including lawyers, learn ethics from their culture, and cultures and communities can have a profound impact on the morals of lawyers.'³³³ This could have significant implications in international criminal justice. If a judge's legal background differs from defence counsel's background, a judge may hold this lawyer to his own domestic standards which may not amount to what may reasonably be demanded.

The ICTR has no separate disciplinary mechanism under its Code of Conduct. The Registrar is involved in disciplinary proceedings concerning defence counsel's professional conduct. There is no compelling reason for this state of affairs. Being an outsider to proceedings, the Registrar is no better equipped to deal with a counsel's misbehaviour than a Bar association's disciplinary organ.³³⁴ In addition, the Registrar, not necessarily being a legally trained person, may not be competent to assess whether or not counsel's conduct has been unprofessional. Lastly, considering the level of involvement of the Registry in assigning legal assistance, its independence may not be guaranteed, or at least not obvious.

Each enforcement mechanism has its advantages and disadvantages. Most importantly, charges and complaints against lawyers should be 'processed expeditiously and fairly under appropriate procedures.'³³⁵ To achieve maximum compliance with international criminal courts' norms of conduct, a combination of different enforcement mechanisms might be most effective to challenge the widest range of inappropriate professional behaviour. Plainly, more than one enforcement regime should not apply at the same time to the same conduct. Unhappily, the *ad hoc* Tribunals do not apparently consider it a problem that misconduct, disciplinary proceedings and contempt proceedings may be instituted simultaneously. Whereas the ICTY Code of Conduct's *non bis in idem* clause³³⁶ prevents a lawyer from being subject to proceedings before the Disciplinary board for the same complaint more than once, Article 38 of its Code of Conduct's clears the path for the Tribunal to deal with misconduct of counsel in addition to disciplinary proceedings instituted by the Board. While the *ad hoc* Tribunals left room to apply both misconduct and contempt and disciplinary proceedings and sanctions at the same time – thus making these different procedures interconnected – the ICC has prevented this by allowing contempt proceedings to take preference over misconduct proceedings in respect of conduct which could be covered by both articles 70 and 71 of the ICC Statute.

³³² See Wilkins (1992), *supra* note 48.

³³³ Cf., for instance, Miller (2004), *supra* note 9, p. 358.

³³⁴ Cf., for instance, Wilkins (1992), *supra* note 48.

³³⁵ Principle 27 UN Basic Principles on the Role of Lawyers.

³³⁶ See Article 50 ICTY Code of Conduct (Rev. 2).

6.5 COLLISION BETWEEN NATIONAL AND INTERNATIONAL CODES OF CONDUCT

Lawyers practising before international criminal courts will also be bound by standards of conduct belonging to their domestic jurisdictions.³³⁷ As these standards may involve different views on what is professionally appropriate behaviour, this may create a dilemma as to which standards lawyers should observe. Arbitrarily choosing one standard over the other could lead to disciplinary measures. There is no unequivocal answer to the question as to how international criminal courts or domestic disciplinary bodies should deal with this matter. Clearly, it is a problem that requires recognition.

Initially, the codes of conduct of the *ad hoc* Tribunals were silent as to the issue of any conflict between a counsel's national standards of professional conduct and those of the Tribunals. In *Barayagwiza*, while their client was on strike, two defence counsel found themselves in a position where observing the ICTR's standards of conduct would amount to a violation of their domestic standards³³⁸ and *vice versa*.³³⁹ The Trial Chamber did not allow counsel to be absent from further court meetings, their client's instructions notwithstanding.³⁴⁰ The lawyers requested to be withdrawn, because their national standards of professional conduct left them no other choice, because their client's instructions and the orders of the court were in direct conflict. The Chamber, however, ordered them to continue to actively defend the interests of their client in court. The Chamber argued that particularly because counsel were assigned under the court's legal aid system, next to their obligations to their client, they had a duty to assist the court in rendering fair trials.³⁴¹ The Chamber argues that "several jurisdictions" would allow counsel to deviate from his client's instructions not to act in court. Therefore, whatever conduct counsel's national rules would require in this situation is insignificant according to the Chamber. While appearing before the ICTR, the ICTR's provisions regulating counsel's professional conduct prevail over other standards.³⁴² The majority of the Chamber considered the accused's instructions not to represent him in court to be "an attempt to obstruct judicial proceedings". Thus, counsel were not required to abide by such instructions and had no legitimate ground upon which to withdraw.³⁴³ In a separate but concurring opinion, Judge Gunawardana, arguing that 'it would be difficult to force counsel to appear for Mr. Barayagwiza, as assigned counsel',³⁴⁴ presented a different solution to solve the dilemma. He deemed it 'in the interests of justice' that the accused would be legally represented in court and that delay should be avoided. Given the accused's confidence in counsel, he suggested that rather than being withdrawn, they should be appointed

³³⁷ See Rule 44(C) ICTY RPE and Rule 44(B) ICTR RPE that provide that counsel are subject to the Tribunals' Code of Conduct as well as 'the codes of practice and ethics governing their profession.' Cf. also initial version ICTY Code of Conduct, Article 1(4).

³³⁸ Of Quebec (Canada) and Washington State (USA).

³³⁹ See Decision on Defence Counsel Motion to Withdraw, *Barayagwiza*, *supra* note 60, § 19.

³⁴⁰ See Transcript, *Nabimana et al* (Case No. ICTR-99-52), 25 October 2000, p. 9. Cf. also Decision on Defence Counsel Motion to Withdraw, *Barayagwiza*, *supra* note 60, § 17.

³⁴¹ See *ibid.*, § 22.

³⁴² See *ibid.*, § 22.

³⁴³ See *ibid.*, § 24.

³⁴⁴ *Ibid.*, Concurring and Separate Opinion of Judge Gunawardana.

anew as the accused's standby counsel. In his view, this would not conflict with their national standards of professional conduct.³⁴⁵

At present, probably as a result of cases such as *Barayagwiza*, the *ad hoc* Tribunals' Codes of Conduct and the ICC's Code provide that in case of inconsistencies between these courts' standards and any other standards to which counsel is subject, the former will prevail with regard to counsel's conduct while practising before them.³⁴⁶ It has not been firmly established how national disciplinary bodies should deal with complaints about defence counsel's behaviour before international criminal courts, or whether they should take those complaints into consideration at all.

Slobodan Milošević filed a complaint against his "court assigned counsel"³⁴⁷ – who was a British lawyer – before the Dutch disciplinary body. He objected to counsel being assigned to him and acting as a lawyer on his behalf, his wishes to the contrary notwithstanding. The ICTY did not consider this to be a problem. On the contrary, its President even encouraged counsel to 'realize the breadth of activities' that could be undertaken without the accused's cooperation.³⁴⁸ The Dutch disciplinary bodies, both in first instance and on appeal, deemed that they lacked jurisdiction in this matter. The jurisdiction, organisation and procedure of the ICTY are matters of international law. A lawyer practising before the Tribunal does not necessarily enter the Dutch jurisdiction. Therefore, a Dutch Disciplinary Body has no power to judge his professional behaviour.³⁴⁹ From a practical viewpoint too, it would be unfeasible if, in addition to the Tribunal's and counsel's national standards of conduct, counsel should be bound by the standards of the Tribunal's host country.

In 2004, the Dutch disciplinary bodies did proceed on a complaint concerning a Dutch Bar member's behaviour before the ICTY and even admonished this lawyer. It concerned counsel's acting as *amicus curiae*, not as defence counsel, in the Milošević trial. He had a special mandate to safeguard the defence interests. Again, the Tribunal had dealt with the issue itself and had discharged the lawyer.³⁵⁰ Nonetheless, the Dutch Disciplinary Appeals Tribunal considered that if his misbehaviour discredited the confidence in defence counsel in general, the lawyer's acting as *amicus curiae* fell within the scope of disciplinary examination of defence counsel.³⁵¹ It can only be guessed at, whether, in fact, the lawyer's Dutch nationality was decisive to claim jurisdiction over him. Judging from this example, lawyers appearing before an international criminal court on behalf of the defence and even *amici curiae* that assist

³⁴⁵ See *idem*. The issue of appointing standby counsel is discussed *infra*, in Chapter VII, paragraph 7.4.3.

³⁴⁶ See Article 4 ICTY Code of Conduct (Rev. 2); Article 19 ICTR Code of Conduct; Article 4 ICC Code of Conduct (ICC-ASP/4/32).

³⁴⁷ The concept of "court assigned counsel" in *Milošević* will be explained in Chapter VII, paragraph 7.4.5.

³⁴⁸ See ICTY Pres., Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw, *Milošević* (Case No. IT-02-54), 7 February 2005, § 13. Counsel's position in this case will be enlarged upon in Chapter VII.

³⁴⁹ See Dutch Disciplinary Appeals Tribunal, Case No. 4383, 8 May 2006, summary available from the Dutch section of www.advocatenorde.nl.

³⁵⁰ See ICTY Tr. Ch., Decision Concerning an Amicus Curiae, *Milošević* (Case no. IT-02-54), 10 October 2002.

³⁵¹ See Dutch Disciplinary Appeals Tribunal, Case No. 3884, 12 March 2004.

the judges on defence issues should meet the expectations of national disciplinary bodies for defence counsel. Nevertheless, it is doubtful whether a national body is, or could be, sufficiently abreast of the subtleties of standards of professional conduct of international criminal courts, let alone the dilemmas of the defence in this unique context.

The ICC Code of Conduct gives national disciplinary bodies ample room to address counsel's professional misconduct while practising at the ICC. The ICC Disciplinary Board will suspend its procedure if a national disciplinary body has already initiated a procedure against counsel.³⁵² This is in line with the ICC's complementarity principle³⁵³ and should prevent counsel being subjected to different disciplinary proceedings. It will also save resources. However, lawyers are not necessarily safeguarded from double intervention. The ICC Board can intervene if the national authority has not adequately addressed the complaint. In the author's view, it is more appropriate for the ICC Disciplinary Board to deal with counsel's misconduct in the first place. Because it is affiliated to this international court, it is better equipped to make a proper determination concerning the effect of counsel's conduct. Moreover, whenever the professional conduct of a lawyer in an international criminal case has been scrutinized by the international court or a disciplinary body affiliated to it, his conduct ought not to be judged by his national authorities on the same issue again. Once unprofessional behaviour has been examined pursuant to the law and standards of an international court, national bodies should refrain from interfering. An exception to this rule could be envisaged where flagrant misbehaviour is concerned, such as an intentional interference with the contents of witness testimony or serious cases of fraud. Bestowing international disciplinary bodies with primary jurisdiction over complaints against counsel avoids counsel's professional conduct being dealt with in varying ways. The involvement of national bodies could hinder the development of uniform and transparent standards of conduct for defence counsel. The abovementioned case, concerning the *amicus curiae*, is a typical example of a delicate case. It required that the precise role and obligations of an *amicus curiae* with a unique mandate should be better defined. The Dutch disciplinary organs simply adopted the ICTY's pronouncements on this matter. It is doubtful whether these proceedings were meaningful in any other way than to provide an example as to why national authorities should refrain from making determinations regarding the most delicate dilemma's lawyers may face while conducting international criminal cases, when a more specialized authority has already done so.

The ICC approach fails to take into account that national disciplinary bodies are likely to be ill-equipped to judge counsel's professional behaviour in the course of his practising before an international criminal court. If findings of misconduct and official warnings are communicated to national disciplinary authorities,³⁵⁴ this is damaging if it concerns behaviour that would not constitute misconduct in the

³⁵² See Article 38(4) ICC Code of Conduct.

³⁵³ See *supra*, Chapter III, note 9.

³⁵⁴ See Rule 46(B) ICTR RPE; Rule 46(B) ICTY RPE; Articles 22(5) and 41(4) ICC Code of Conduct.

lawyer's national jurisdiction. It could harm his professional reputation at his local Bar³⁵⁵ and could make it more difficult for counsel to regain their national practice.

In the specific context of international criminal courts, disciplinary procedures serve the public interest of the international community. Disciplinary matters involving professional conduct before these courts should therefore be their primary responsibility, not that of national authorities.

Notwithstanding the fact that the small number of counsel appearing in international criminal courts means that these issues are going to arise infrequently, guidelines need to be established to help domestic disciplinary authorities determine whether or not to intervene once an international organ has examined allegations concerning counsel's professional misbehaviour in an international case. National authorities should only intervene regarding cases of straightforward and blatant misbehaviour, which is both punishable under the domestic standards of conduct as well as under the applicable international standards.³⁵⁶ In addition, a lawyer's behaviour should warrant a serious punishment such as disbarment or a substantial fine. If, at worst, an admonishment would be at stake, national authorities should leave the lawyer concerned alone. Inevitably, conduct which would lead to disbarment in counsel's national jurisdiction warrants action by national disciplinary authorities.

In the *Darfur Situation*, an ICC Pre-trial Chamber appointed an "ad hoc counsel" to enable the defence to react to a Rule 103(1) ICC RPE *amicus curiae* report on the protection of victims and the preservation of evidence, in addition to the prosecution. Both parties should be enabled to react to *amicus curiae* observations.³⁵⁷ Ad hoc counsel was appointed 'to represent and protect the general interests of the defence in the situation in Darfur, Sudan during the proceedings pursuant to rule 103'.³⁵⁸ It was envisaged that to guard the interests of the defence, his mandate was confined to reacting to the *amici curiae* observations under Rule 103 ICC RPE. Ad hoc counsel, however, considered his duties to be similar to those of regular counsel,³⁵⁹ and also filed motions on the admissibility of the case before the ICC. It is not particularly surprising that counsel assumed these activities, having been selected from the Registrar's list of eligible counsel³⁶⁰ and being told to represent the interests of the defence in general. Counsel appeared to be aware that there were limits to his mandate. He specifically requested the Chamber to become more involved in the

³⁵⁵ This was argued by counsel in *Karemera et al.*, as he could not appeal the sanction applied to him under Rule 73(F) ICTR Code of Conduct for filing frivolous motions. See ICTR App. Ch., Decision on Counsel's Appeal from Rule 73(F), *Karemera et al.* (Case No. ICTR-98-44), 9 June 2004. Cf. also Boed (2006), *supra* note 256, p. 275.

³⁵⁶ For instance, in a case of plain fraud such as in *Bagosora et al.* Cf. paragraph 5.2.1 of this Chapter.

³⁵⁷ This is required under Rule 103(2) ICC RPE. See ICC Pre-Tr. Ch., Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, *Situation in Darfur, Sudan* (Case No. ICC-02/05-10), 24 July 2006, pp. 4-6.

³⁵⁸ See *idem*, p. 6; ICC Reg., Decision of the Registrar Appointing Mr. Hadi Shalluf as ad hoc Counsel for the Defence, *Situation in Darfur, Sudan* (Case No. ICC-02/05-12), 25 August 2006 (hereinafter: Decision of the Registrar), p. 3; ICC Pre-Tr. Ch. I, Decision on the Request for Review of the Registry's decision of 13 February 2007. *Situation in Darfur, Sudan* (Case No. ICC-02/05), 15 March 2007 (hereinafter: Decision on the Request for Review), p. 4.

³⁵⁹ That is, those as prescribed by Articles 5 and 6 ICC Code of Conduct. Cf. *ibid.*, p.3.

³⁶⁰ See Decision of the Registrar, *Situation in Darfur, supra* note 358.

proceedings.³⁶¹ His request was rejected a month and a half later, because he would otherwise be acting beyond ‘the parameters of his legally assigned responsibilities’.³⁶² According to the Chamber, ‘the task of representing and protecting the rights of the Defence during the initial stages of an investigation’ belongs to the Office of Public Counsel for the Defence (OPCD) rather than to *ad hoc* Counsel.³⁶³ According to the Chamber, ‘Ad hoc Counsel’s reliance on Articles 5 and 6 of the Code of Conduct is misconceived as it is in flagrant disregard of the provisions of the Statute, the Rules of Procedure and Evidence and the Regulations of the Court’.³⁶⁴ Thereby counsel attempted ‘to extrapolate the specificity, the limits and the scope of his mandate’.³⁶⁵ The Chamber seems to disregard that *ad hoc* Counsel, just like any other counsel, had been required to undertake a solemn undertaking under Article 5 of the ICC Code of Conduct declaring that he shall perform his duties with integrity and diligence, freely, independently and conscientiously and did so accordingly.³⁶⁶ Finally, the Chamber ended the Rule 103 proceedings, and on this basis discharged counsel of his duties. Additionally, the Chamber ordered that his fees would *not* be reimbursed from the moment that he requested to broaden his mandate. His claims since that period were considered ‘vexatious and frivolous’.³⁶⁷ According to the Chamber, *ad hoc* counsel had ‘completely disregarded the precise and clear scope of his mandate by adopting his own interpretation of the mandate’.³⁶⁸ Counsel himself considered these motions challenging the admissibility of the case before the ICC and to take part in the Prosecution’s investigations proceedings to fall within the limits of his mandate and the ICC’s Code of Professional Conduct for counsel.³⁶⁹ No review possibility was granted.³⁷⁰

The period as to which the Chamber decided to withhold counsel’s fees is arguably unfair. It would have been more appropriate not to reimburse fees from the moment in which he learned that his mandate remained restricted. The refusal to reimburse counsel, in spite of his efforts to do the very best he could based on his

³⁶¹ See *Ad hoc* Counsel, Application requesting the presence and participation of the *Ad Hoc* Counsel for the Defence during the proceedings that the Office of the Prosecutor will undertake in Sudan, *Situation in Darfur, Sudan* (Case No. ICC-02/05-41), 18 December 2006, p. 3.

³⁶² See ICC Pre-Tr. Ch. Decision on the Ad hoc Counsel for Defence Request of 18 December 2006, *Situation in Darfur, Sudan* (Case No. ICC-02/05-47), 2 February 2007 (hereinafter: Decision on the *ad hoc* Counsel Request), pp. 5-6.

³⁶³ ICC Pre-Tr. Ch., Decision on the Ad hoc Counsel for the Defence's Request for leave to Appeal the Decision of 2 February 2007, *Darfur Situation* (Case No. ICC-02/05-52), 21 February 2007, p. 7.

³⁶⁴ *Idem*.

³⁶⁵ Decision on the Request for Review, *Situation in Darfur, Sudan*, *supra* note 358, p. 4. His mandate was ‘strictly restricted to those [Rule 103] proceedings and does not extend automatically to other proceedings at the pre-trial stage set out in the Statute and the Rules’. Decision on the *ad hoc* Counsel Request, *Situation in Darfur, Sudan*, *supra* note 362, p. 5.

³⁶⁶ See Prestations de serment par Maître Hadi Shalluf (in French), *Situation in Darfur, Sudan* (Case No. ICC-02/05-15), 8 September 2006.

³⁶⁷ See Decision on the Request for Review, *Situation in Darfur, Sudan* *supra* note 358, pp. 7-8.

³⁶⁸ See *ibid.*, p. 6 and 7.

³⁶⁹ See *Ad hoc* Counsel for the Defence Mr Hadi Shalluf, Recours a l'encontre de la décision du greffe du 13 février 2007 (in French), *Situation in Darfur, Sudan* (Case No. ICC-02/05), 27 February 2007; Decision on the Request for Review, *Situation in Darfur, Sudan* *supra* note 358, pp. 7 and 8.

³⁷⁰ ICC Pre-Tr. Ch. I, Decision on the Request for Leave to Appeal to the Decision Issued on 15 March 2007, *Situation in Darfur, Sudan* (Case No. ICC-02/05), 27 March 2007.

view of what “guarding the interests of the defence” amounted to, is disproportionate. Counsel’s fees are not a reward, but a compensation for his genuine efforts. Counsel’s *bona fides* should not have been set aside so easily.

Within the unique context of international criminal justice, the *amicus curiae* in *Milošević* and the *ad hoc* counsel in the *Darfur Situation* had a special mandate. When fulfilling a unique mandate, it is inevitable that the limits of this mandate will be put to the test. Until such limits are clearly established, lawyers should receive appropriate discretion to explore the boundaries of these limits. Unfair sanctions will do little to attract the best candidates to practise in this field which would be to everyone’s disadvantage.

6.6 CONCLUSION

In a common law system, in particular, irrespective of who formulates the rules, the enforcer of the rule, *i.e.* the individual who determines whether or not a particular rule is observed, may interpret the rule and give it practical meaning.³⁷¹ Codes of Conduct normally provide general norms the interpretation of which depends on the context and circumstances of each case.³⁷² Broad standards will leave considerable room for interpretation.³⁷³ If a lawyer’s legal background is decisive in his interpretation of standards of conduct, the enforcer of these standards has a substantial impact on the development of the interpretation of such standards. The judges and the Registrar, being the main enforcers of standards of conduct in the context of international criminal courts, will therefore significantly influence those basic standards as to the conduct of defence counsel.³⁷⁴

In national jurisdictions, a Code of Conduct for counsel is a reflection of the prevailing approach to lawyer’s ethics. In the field of international criminal law however, a code of conduct is not the standard of a long established practice. Accordingly, a standard of professional conduct for all practising lawyers at international criminal courts, regardless of their home jurisdiction should be set and monitored. Even though many parties are actively involved in the pragmatic shaping of codes of conduct of international criminal courts, the Registrar remains the most important influence on the drafting and amending of these codes. As enforcers, judges are equally important in giving meaning to standards of conduct, especially where these are broadly formulated.

Having clear and fair standards of conduct laid down in codes of conduct serve many different interests. First of all, such standards should assist in safeguarding an effective defence to suspects and accused. Secondly, it should help counsel abide by the norms of conduct set by international criminal courts. Thirdly, it will enable others (disciplinary bodies, judges, the Registrar, clients, the prosecution) to address unprofessional behaviour of counsel.

³⁷¹ Cf. Wilkins (1992), *supra* note 48, p. 810.

³⁷² Cf. also McMorrow (2007), *supra* note 7, p. 160.

³⁷³ Cf. Wilkins (1992), *supra* note 48, p. 810.

³⁷⁴ Cf. McMorrow, who considers the judges ‘the dominant source of norm setting within the ICTY’. McMorrow (2007), *supra* note 7, p. 146.

Standards of professional conduct may leave room for a broad margin of interpretation. Where defence counsel deem that their behaviour is warranted, but nevertheless apparently prohibited at international criminal courts, they should continue pushing the limits and, if necessary, file motions that may be deemed frivolous, to get a review of what is acceptable professional behaviour. Considering the ever changing composition of the Appeals Chamber, and the fact that more and more (semi)international criminal courts are being established, a decision by one of those courts may influence the formulation in another.

Much effort has been made to counter the practice of fee-splitting. Serious investigations have been conducted by the UN, resulting in reports, the code of conduct and, at the ICTR, also the RPE have been correspondingly amended. The importance of the reputation of international criminal courts cannot be underestimated. Doing whatever may be necessary to prevent alleged war criminals from making a profit out of their being indicted, is important. Therefore, providing in the code of conduct that fee-splitting agreements are illegal removes any uncertainty for counsel about this. His agreement to any such solicitations on the part of his client constitutes professional misbehaviour. The *ad hoc* Tribunals compel counsel to report any such solicitations to the Registrar for him to investigate these allegations. However, there may be more desirable options. The accused and his defence team will remain dependent on the Registrar throughout proceedings. Therefore, informing him of undesirable behaviour of an accused can harm his rights. It is undesirable that a mere intention on the part of the accused to engage in illegal behaviour must be reported to the Registrar. It impinges upon counsel's duty of confidentiality and the importance of his client trusting his lawyer. Defence counsel should in principle be trusted not to engage in such conduct. It may also be a more appropriate solution to bestow more responsibilities over these issues to Bar associations.

Paragraph 6.4 illustrated that a broad range of unprofessional behaviour can be most effectively challenged by having multiple regimes of enforcement. That might help ensure that lawyers observe high professional standards while conducting international criminal cases. However, the application of different enforcement systems simultaneously is disproportionate. If counsel's conduct can be addressed both under the misconduct provisions and under contempt provisions, letting the most serious procedure, the latter, take preference (like the ICC does) is unsatisfactory. An analysis on a case-by-case basis would be more appropriate.

It is undesirable and unduly cumbersome to counsel, if his conduct in an international criminal case will be examined by national disciplinary authorities after it has already been examined by an international court. A body established by an international criminal court is better able to examine counsel's behaviour, because it will be familiar with the unique context of international criminal justice. International criminal courts' codes of conduct ought to prevail over national standards of professional conduct. For national bodies it may be difficult to make any more than an estimated guess of what would constitute appropriate conduct of a lawyer before an international criminal court.

The *bona fides* of defence counsel should be presumed, just as the presumption of innocence as to an accused, until there is irrefutable proof to the contrary. The ICC, given that it just commenced functioning, might better have been more liberal with regard to the *ad hoc* counsel in the Darfur situation, his function being a novelty. It was

difficult for the ICC to find counsel with adequate qualifications for this particular position.³⁷⁵ To ensure that high quality counsel will appear before the ICC, it should not discourage counsel to independently explore the scope of their particular duties. Next Chapter more extensively explores the difficulty of fulfilling a special defence mandate which is not well conceived in advance.

³⁷⁵ See *supra* Chapter II, paragraph 2.5.