

2012

Legitimizing International Criminal Justice: The Importance of Process Control

Nancy Amoury Combs

William & Mary Law School, ncombs@wm.edu

Repository Citation

Combs, Nancy Amoury, "Legitimizing International Criminal Justice: The Importance of Process Control" (2012). *Faculty Publications*. 1267.

<https://scholarship.law.wm.edu/facpubs/1267>

Copyright c 2012 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/facpubs>

LEGITIMIZING INTERNATIONAL CRIMINAL JUSTICE: THE IMPORTANCE OF PROCESS CONTROL

Nancy Amoury Combs*

INTRODUCTION	321
I. THE PROCEDURAL EVOLUTION	329
II. THE EVOLUTION IN THE REGULATION OF LAWYER SELECTION AND DISCHARGE	332
A. <i>Selecting Counsel</i>	333
1. Qualifications Requirements	334
2. Conflicts of Interest	340
B. <i>Firing Counsel</i>	344
C. <i>Self-Representation</i>	347
D. <i>Summary</i>	358
III. EVOLVING TOWARDS LEGITIMACY	359
CONCLUSION	380

INTRODUCTION

The last two decades have witnessed an astounding transformation of the international legal landscape as the international community has created a series of courts and tribunals to prosecute those accused of genocide, war crimes, and crimes against humanity. As a consequence of this international institution building, prosecutions are currently underway for crimes committed across the globe: in the former Yugoslavia, Bosnia, Sierra Leone, the Democratic Republic of the Congo, and Cambodia, among other places. These international criminal tribunals and particularly the first modern tribunal—the International Criminal Tribunal for the former Yugoslavia (ICTY)—have undergone two significant evolutions. One of these is widely known; the other, little known. The widely known evolution concerns the procedural and evidentiary rules governing tribunal proceedings. Whereas the ICTY's initial rules of procedure and evidence were almost exclusively adversarial in character, the tribunal later added a number of nonadversarial elements.¹ Subsequent tribunals have incorporated nonadversarial features from their outsets, so that international criminal procedure—to the extent

* Cabell Professor of Law, William & Mary Law School. I am grateful to Mark Drumbl and Peter Robinson for their comments on an earlier draft. Any mistakes are my own.

1. I prefer the term *nonadversarial* over *inquisitorial* because the latter, particularly in the past, “conjure[d] up the excesses of the Star Chamber or the haunting memories of the Spanish Inquisition.” G.E.P. Brouwer, *Inquisitorial and Adversary Procedures—A Comparative Analysis*, 55 AUSTL. L.J. 207, 208 (1981); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 93–94 (1988) (remarking that “[t]he label ‘inquisitorial’ . . . evokes images of the auto-da-fé and the Iron Maiden, the Pit and the Pendulum”).

such a body of law can be said to exist across tribunals—is now considered to be something of a blended procedural system.² The lesser-known evolution concerns the rules governing the initiation and termination of defense representation. At the ICTY's inception, little regulation of those matters existed. Early ICTY defendants were given broad discretion to select the defense counsel of their choice, to fire the defense counsel they had previously selected, and to refuse the assistance of defense counsel entirely. Current defendants retain much discretion, but in recent years the ICTY and the later tribunals have adopted rules restricting defendants' choices in several important respects.

These two evolutions are seemingly unrelated, and the motivations giving rise to them are seemingly simple to discern. Early trials at the ICTY and its sister tribunal—the International Criminal Tribunal for Rwanda (ICTR)—were extraordinarily lengthy and expensive.³ Because Continental trials featuring nonadversarial procedures typically give rise to shorter, more efficient proceedings than their common law adversarial counterparts,⁴ the tribunals adopted some nonadversarial procedures in the hopes of reducing the length and cost of their trials.⁵ Some of the restrictions lately imposed

2. Kai Ambos, *International Criminal Procedure: "Adversarial," "Inquisitorial" or Mixed?*, 3 INT'L CRIM. L. REV. 1, 5–6 (2003).

3. Numerous scholars and practitioners have commented on the slow pace and high cost of tribunal trials. See, e.g., INT'L CRISIS GRP., AFRICA REP. NO. 30, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: JUSTICE DELAYED, at ii (2001) [hereinafter JUSTICE DELAYED], available at <http://www.crisisgroup.org/en/regions/africa/central-africa/rwanda/030-international-criminal-tribunal-for-rwanda-justice-delayed.aspx>; John E. Ackerman, *Assignment of Defense Counsel at the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 167, 170 (Richard May et al. eds., 2001) [hereinafter ESSAYS ON ICTY PROCEDURE]; Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 622–23 (1998); Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT'L L. 759, 759 (2000); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 368–69 (1999); Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT'L L. 569, 584 (2000); Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 536 (2001).

4. See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 627 (1990); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1562 (1978).

5. Vladimir Tochilovsky, *Legal Systems and Culture in the International Criminal Court: The Experience from the International Criminal Tribunal for the Former Yugoslavia*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 627, 632 (Horst Fischer et al. eds., 2001); Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 886–905 (2005); Máximo Langer & Joseph W. Doherty, *Managerial Judging Goes International but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms*, 36 YALE J. INT'L L. 241, 242–52 (2011) (noting the ICTY's attempts to expedite proceedings by imple-

on the defendant's ability to hire and fire counsel also were motivated by efficiency concerns, but an additional factor driving the adoption of those restrictions was the desire to improve the quality of defense representation.⁶ Many early defendants, particularly at the ICTY, received inadequate representation because they selected counsel who were unfamiliar with international criminal law, unfamiliar with the tribunal's adversarial procedures, and were not even fluent in the tribunal's working languages.

Although the above explanations do in fact explain at a superficial level the evolutions I have just summarily described, I argue here that these evolutions reflect an underlying and far more fundamental evolution in international criminal justice as a whole—the evolution from a novel, vulnerable, and distrusted criminal justice system to a rapidly maturing criminal justice system that possesses considerable credibility and legitimacy. Consider the first modern international tribunal: the ICTY. Established while the Balkans wars were in full swing by an international community that wanted to do something but not too much, the ICTY was, at its inception, an extraordinarily fragile and weak institution.⁷ It did not have sufficient funding;⁸ it did not have enough employees;⁹ it did not have the ability to gain custody over its indictees;¹⁰ and it most certainly did not have the respect (or fear) of the leaders of the former Yugoslavia,¹¹ as evidenced

menting nonadversarial procedures, but concluding that the reforms did not have their desired effect).

6. See *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defence, ¶ 21 (Int'l Crim. Trib. for the Former Yugoslavia [ICTY] May 9, 2003), <http://www.icty.org/x/cases/seselj/tdec/en/030509.htm>; U.N. Secretary-General, *Comprehensive Report on the Progress Made by the International Criminal Tribunal for the Former Yugoslavia in Reforming Its Legal Aid System*, ¶¶ 51, 54, delivered to the General Assembly, U.N. Doc. A/58/288 (Aug. 12, 2003) [hereinafter *Comprehensive Report*]; KARIM A.A. KHAN & RODNEY DIXON, ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE & EVIDENCE §§ 20-85, 20-94 (Sir Adrian Fulford ed., 3d ed. 2009); Mark S. Ellis, *The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 949, 950-57 (2003); Sonja B. Starr, *Ensuring Defense Counsel Competence at International Criminal Tribunals*, 14 UCLA J. INT'L L. & FOREIGN AFF. 169, 188-89 (2009).

7. PIERRE HAZAN, *JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 43-64 (James Thomas Snyder trans., 2004).

8. See *infra* text accompanying note 254.

9. For instance, it took more than a year for the Security Council to agree on a prosecutor. MICHAEL P. SCHARF, *BALKAN JUSTICE* 75-79 (1997); M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 210-12 (1996); RICHARD J. GOLDSTONE, *ON HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 20-24 (2000); Bernard D. Meltzer, *War Crimes: The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 VAL. U. L. REV. 895, 908 (1996) (noting the ICTY's "serious underfunding and understaffing").

10. For a discussion of the ICTY's difficulties in obtaining custody over defendants, see Gabrielle Kirk McDonald, *Problems, Obstacles and Achievements of the ICTY*, 2 J. INT'L CRIM. JUST. 558, 559-67 (2004).

11. HAZAN, *supra* note 7, at 47.

by their perpetration of the Srebrenica massacre two years after the tribunal was established. Indeed, the ICTY was initially so weak and vulnerable that many feared it would never get off the ground¹² or that the Dayton Peace Accords, which spelled the end to the Bosnian War, would also spell the end to the ICTY.¹³

As it happened, the ICTY not only survived but developed into a credible institution that set in motion an international criminal justice revolution. The tribunal's internal transformation stemmed primarily from an infusion of resources and enforcement support. Whereas the tribunal's budget in 1996 was a paltry \$35.4 million,¹⁴ by 2004, the ICTY had 1180 employees¹⁵ and a yearly budget of approximately \$150 million.¹⁶ As for enforcement, whereas early tribunal indictments were routinely ignored both by the states of the former Yugoslavia as well as by United Nations (U.N.) peacekeepers,¹⁷ by 2004 the international community was making a credible effort through various mechanisms to assist the ICTY in obtaining custody over its indictees.¹⁸ Consequently, by mid-2011, all of the ICTY's indictees had been apprehended.¹⁹ Concededly, the ICTY is still subject to criticism—for the length and cost of its trials and for its limited success in reconciling the peoples of the former Yugoslavia,²⁰ among other

12. *Id.* at 43–52.

13. Payam Akhavan, *The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUM. RTS. Q. 259, 267–70 (1996); HAZAN, *supra* note 7, at 67–69. For other predictions of failure, see Anthony D'Amato, Editorial Comment, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 501–02 (1994).

14. ICTY President, *Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, transmitted by Note of the Secretary-General, ¶ 132, U.N. Doc. A/51/292-S/1996/665 (Aug. 16, 1996).

15. ICTY President, *Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, transmitted by Note of the Secretary-General, ¶ 383, U.N. Doc. A/59/215-S/2004/627 (Aug. 13, 2004).

16. *Id.* ¶ 382. The tribunal's 2004–2005 biennium budget was \$298,226,300. *Id.*

17. *See infra* text accompanying notes 254–260.

18. *See, e.g.*, CARLA DEL PONTE, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 316–20 (2009); DIANE F. ORENTLICHER, OPEN SOC'Y JUSTICE INITIATIVE, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA, 33–35 (2008).

19. Press Release, Office of the Prosecutor, Statement of the Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia on the Arrest of Goran Hadžić, OTP/MOW/PR1428e (July 20, 2011), <http://www.icty.org/sid/10734>.

20. *See, e.g.*, ERIC STOVER, THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE 117–25 (2005); Marie-Benedicte Dembour & Emily Haslan, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151, 172–75 (2004); Laurel Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 597–601 (2002); Geoffrey Nice & Philippe Vallières-Roland, *Procedural Innovations in War Crime Trials*, 3 J. INT'L CRIM. JUST. 354, 355 (2005).

things²¹—but it has developed into a credible judicial institution that will have continuing and significant influence in the states of the former Yugoslavia and in the development of international criminal law.

Outside of the tribunal's walls, the ICTY has been a progenitor of "one of the more extensive waves of institution-building in modern international relations."²² International criminal law (if such a discipline could be said to have existed at all) had fallen into desuetude during the nearly fifty years that followed the establishment of the Nuremberg and Tokyo Tribunals, and it was the ICTY that revived it. Providing both ideological inspiration and practical guidance, the ICTY spawned the creation of numerous other bodies to prosecute international crimes, and in doing so effected a sea change in prevailing views about the need and desirability for criminal accountability following mass atrocities. Admittedly, the field of international criminal law continues to face myriad challenges, but it is now unquestionably a field and one that is expected to endure. The International Criminal Court (ICC) is in full swing, having survived the early and vehement opposition of the United States. The Special Court for Sierra Leone (SCSL) is successfully completing its trials, having gained custody of virtually all of those it labeled most responsible for the Sierra Leonean violence, including former Liberian President Charles Taylor.²³ The Extraordinary Chambers in the Courts of Cambodia (ECCC) have just convicted their first defendant,²⁴ and the most recent international tribunal to be established—the Special Tribunal for Lebanon (STL)—has just issued its first indictment.²⁵

These developments, occurring both within the ICTY and outside it, were the necessary conditions for the procedural and defense counsel evolutions that I will explore in more detail below. In particular, I will show that, as a consequence of the ICTY's initial, highly vulnerable status, the tribunal had no choice but to adopt adversarial procedures and to grant defendants virtually free rein in selecting the lawyers who would advocate on their behalf. In 1993, when the ICTY was established, it was not only novel, weak, and vulnerable, but it was also deeply distrusted by the people of the former Yugoslavia. The Serbs considered the tribunal a politically driven court

21. See Ivan Simonović, *Dealing with the Legacy of Past War Crimes and Human Rights Abuses*, 2 J. INT'L CRIM. JUST. 701, 706–07 (2004) (addressing other problems with the ICTY, including getting states to fulfill their mandates, diminished media coverage, and the reduced psychological impact from holding distant trials).

22. MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 10 (2007).

23. See *About the Special Court for Sierra Leone*, SCSL, <http://www.scs-l.org/ABOUT/tabid/70/Default.aspx> (last visited Feb. 17, 2012).

24. Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 559 (Extraordinary Chambers in the Courts of Cambodia [ECCC] July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdec/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

25. *Hariri Tribunal: UN Prosecutor Issues Sealed Indictment*, BBC (Jan. 17, 2011, 8:54 PM), <http://www.bbc.co.uk/news/world-middle-east-12209122>.

established to unfairly target them for prosecutions.²⁶ The Bosnian Muslims considered it the empty gesture of an international community that was unwilling to take truly effective measures to end the war.²⁷ No one knew exactly what the ICTY would do, but no one had confidence that it would do the right thing. Under these circumstances, the tribunal had no choice but to adopt adversarial procedures.

I will contrast adversarial with nonadversarial procedural systems in some detail in Part III, but suffice it to say here that adversarial systems are largely party driven whereas nonadversarial systems are largely judge driven. Because adversarial systems are party driven, they are understood to provide criminal defendants the “fullest voice possible” in their cases.²⁸ Affording this participation is thought to advance litigant dignity and autonomy²⁹ and largely explains why adversarial procedures are considered better suited than their nonadversarial counterparts to criminal justice systems that feature a large proportion of minority defendants or defendants who otherwise have reason to distrust the state.³⁰

ICTY defendants—along with entire populations of their supporters—were extraordinarily distrustful of the ICTY, and as a consequence, the tribunal had no choice but to adopt procedures that acknowledged this distrust and permitted defendants to give voice to it. The very fact that

26. See, e.g., DIANE F. ORENTLICHER, OPEN SOC’Y JUSTICE INITIATIVE & INT’L CTR. FOR TRANSITIONAL JUSTICE, THAT SOMEONE GUILTY BE PUNISHED: THE IMPACT OF THE ICTY IN BOSNIA 50 (2010); Rodney Dixon, *New Developments in the International Criminal Tribunal for the Former Yugoslavia: Prominent Leaders Indicted and Jurisdiction Established*, 8 LEIDEN J. INT’L L. 449, 452 (1995); Elizabeth Sullivan, *Expert Charges War Crimes Often Escape Prosecution*, CLEV. PLAIN DEALER, Aug. 20, 1994, at 11A; *War Crimes: International War Crimes Tribunal Built on Shaky Justice*, BBC SUMMARY OF WORLD BROADCASTS, Nov. 25, 1994.

27. See ORENTLICHER, *supra* note 26, at 24; Steve Coll, *In the Shadow of the Holocaust*, WASH. POST, Sept. 25, 1994, at J8; see also ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE 112 (1998) (arguing that creation of the ICTY “was a substitute for effective action to halt Serb depredations in Bosnia-Herzegovina”).

28. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 317–18 (1989). Lon Fuller believed, for instance, that according litigants “a participation in the decision that is reached” constituted “the essence of the adversary system.” Lon Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30, 41 (Harold Joseph Berman ed., 1961).

29. MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 3, 8 (1975); LUBAN, *supra* note 1, at 85; Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 459 (2009); Sward, *supra* note 28, at 302, 310, 318, 324.

30. See, e.g., STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 51 (1984); KARL LLEWELLYN, JURISPRUDENCE 444 (1962); Craig M. Bradley, *The Convergence of the Continental and the Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471, 472, 482 (1996); Nico Jörg et al., *Are Inquisitorial and Adversarial Systems Converging?*, in CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY 47, 48, 54 (Phil Fennell et al. eds., 1995); cf. Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 300 (2004) (contrasting “the civil law tradition [that] was not forged in an abiding distrust of centralized authority”).

nonadversarial procedures are thought to be premised on the notion that "the state is the benevolent and most powerful protector and guarantor of public interest and can . . . be trusted to 'police' itself"³¹ shows just how ill fitting and discordant nonadversarial procedures would have been for the early ICTY given the distrust that pervaded its proceedings.

Adversarial procedures not only proved to be a far better ideological fit for the ICTY in its early years as it sought to gain credibility and legitimacy, but they also helped the tribunal to gain credibility and legitimacy. In recent decades, social psychology research has shown that litigants who believe their cases to be decided pursuant to fair procedures are both more inclined to accept and obey negative decisions and also to hold more positive views about legal officials and the judicial system as a whole.³² Even more importantly for the ICTY, studies also show that "people decide how legitimate authorities are, and how much to defer to those authorities and their decisions primarily by assessing the fairness of their decision-making procedures."³³ Thus, it is crucial for fledgling courts and other institutions that are seeking to enhance their legitimacy to use decision-making procedures that are considered fair.³⁴

That, then, requires us to ask: What decision-making procedures are considered fair? Studies show a number of factors to be particularly influential in individual assessments of fairness,³⁵ but key among these is litigant participation in the proceedings. Specifically, "procedures that vest process control in those affected by the outcome of the procedure are viewed as more fair than are procedures that vest process control in the decision maker."³⁶ These fairness assessments might be relevant to any criminal justice system, but to the ICTY, they were crucial: to be considered fair and to thereby gain credibility and legitimacy, the ICTY had to adopt procedures that would allow for significant defendant participation.

Because adversarial procedures allow for considerably more party participation than nonadversarial procedures, it seems obvious that adversarial procedures have greater potential to legitimate a fledgling and vulnerable court such as the ICTY. This conclusion follows, however, only if party participation can be equated with lawyer participation, for most criminal cases

31. Jörg et al., *supra* note 30, at 44; see also MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO LEGAL PROCESS* 173 (1986).

32. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 70–71 (1988).

33. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 120 (2000); see also E. Allan Lind et al., *Individual and Corporate Dispute Resolution*, 38 ADMIN. SCI. Q. 224, 226, 240, 246 (1993).

34. RICHARD SPARKS ET AL., *PRISONS AND THE PROBLEM OF ORDER* 87–90 (1996); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 109–12 (1990); Tyler, *supra* note 33, at 120–21.

35. Lind et al., *supra* note 33, at 226; Tyler, *supra* note 33, at 121.

36. LIND & TYLER, *supra* note 32, at 35.

are presented not by the criminal defendant himself but by his lawyer.³⁷ In the domestic context, equating the goals of the defendant with those of the lawyer is usually unobjectionable: although a lawyer's financial incentives can sometimes cause her goals to diverge from those of her clients,³⁸ most domestic defendants seek either an acquittal or a low sentence upon conviction, and most criminal defense lawyers steadfastly pursue those ends on behalf of their clients. Indeed, the role of the lawyer constructed by the adversarial system—as a fiercely partisan, unerringly loyal advocate—is the means through which the defendant's "voice" is heard during the proceedings.

At the outset of the ICTY, however, one could not reasonably equate the goals of ICTY defendants with those of their lawyers. ICTY defendants were far less likely than their domestic counterparts to seek the "best possible outcome" as defined by acquittals and sentences, and, even when they did, they were far more likely than their domestic counterparts to seek those goals through means that traditional defense counsel would be unwilling to pursue. Consequently, merely assigning a competent lawyer to an ICTY defendant would not necessarily result in the defendant's being heard or feeling heard. And it is this likely goal divergence that underpinned the ICTY's initial failure to regulate defense counsel. Because an identity of interest could not be presumed between ICTY defendants and their counsel, the ICTY provided defendants maximum possible choice in the hiring, firing, and eschewing of defense counsel. Some of the lawyers that early ICTY defendants selected may not have been competent in the traditional sense of the term, but they did espouse their clients' worldview, and by allowing defendants to select them, the ICTY enhanced its legitimacy. Only later, when the ICTY was a stronger, more credible institution could it begin both to impose reasonable restrictions on the defendants' choice of counsel and to introduce nonadversarial elements that limited the overall role of counsel.

Part I of this Article traces the evolution in ICTY procedures from the purely adversarial to a blended system in which adversarial procedures still dominate but are mediated by various nonadversarial elements. This evolution has been treated at length elsewhere, so my description will be summary. By contrast, the evolution in the regulation of defense counsel has received little scholarly attention, so Part II explicates that phenomenon in more detail. As noted, these evolutions can be understood as stemming from mundane, easy-to-understand motivations: the desire to expedite proceed-

37. Of course, in keeping with their enhanced concern for litigant autonomy, adversarial systems typically bestow on defendants broad rights of self-representation, and these I will discuss *infra* Part II.

38. See, e.g., Frank H. Stephen et al., *Incentives, Criminal Defense Lawyers and Plea Bargaining*, 28 INT'L REV. L. & ECON. 212 (2008); Peter W. Tague, *Guilty Pleas and Barristers' Incentives: Lessons from England*, 20 GEO. J. LEGAL ETHICS 287, 287 (2007) (comparing British barristers to their American counterparts who are, it is argued, more likely to pursue their own narrow self-interest in the plea process).

ings and to improve the quality of defense representation. Part III, however, looks beneath those surface explanations to explore the far more fundamental evolution that constituted the necessary precondition for the procedural and regulatory evolutions described in the earlier parts: an evolution that saw the maturing and legitimating of both the ICTY and international criminal justice as a whole.

I. THE PROCEDURAL EVOLUTION

The ICTY's first set of procedural rules was substantially adversarial in character. Largely modeled on a draft provided by the U.S. Department of Justice,³⁹ the initial ICTY rules created a neutral, largely passive role for the judges and bestowed on the parties primary authority for developing their cases and presenting their evidence at trial. In particular, the rules adopted a "two-case" system in which the prosecution and defense each presented their best arguments and evidence to the judges and each challenged the other side's evidence.⁴⁰ The initial rules did permit tribunal judges to take some active fact-finding steps by authorizing them to summon their own witnesses,⁴¹ ask their own questions,⁴² and alter the order of evidence presentation "in the interests of justice."⁴³ However, the judges were expected to, and did in fact, use these powers sparingly. As Máximo Langer summarized: "The judges conceived of themselves, and generally behaved, as passive umpires. . . . [And] the Rules generally made the parties the most active actors in the criminal proceedings."⁴⁴

Early tribunal proceedings under these rules were lengthier and costlier than anyone considered optimal,⁴⁵ and many commentators placed a large share of the blame on the adversarial nature of ICTY proceedings.⁴⁶ More specifically, ICTY judges, along with a United Nations Expert Group, identified the judges' failure to adequately control proceedings as causing

39. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 384 (2003); VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS* 177 (1995); Theodor Meron, *Procedural Evolution in the ICTY*, 2 J. INT'L CRIM. JUST. 520, 522 (2004).

40. See Langer & Doherty, *supra* note 5, at 248–49; see also CHRISTOPH J.M. SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* 223 (2001).

41. ICTY R. P. & EVID. 98, U.N. Doc. IT/32/Rev. 2 (Oct. 4, 1994) (as amended) [hereinafter ICTY RPE 1994].

42. *Id.* R. 85(B).

43. *Id.* R. 85(A).

44. Langer, *supra* note 5, at 858–59; see also 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, ¶ 77, U.N. Doc A/54/634 (Nov. 22, 1999) [hereinafter U.N. Expert Report].

45. CASSESE, *supra* note 39, at 385.

46. Eg., *id.* at 442; Langer, *supra* note 5, at 872–74.

substantial delay.⁴⁷ Consequently, the Expert Group advised the chambers “to take a more active role in trials by questioning counsel and witnesses, cutting off irrelevant or repetitive testimony and excluding witnesses whose testimony is cumulative or of no material assistance with respect to disputed issues.”⁴⁸

The ICTY followed the Expert Group’s recommendations. In particular, between 1998 and 2003, the ICTY introduced into its proceedings pretrial judges, status conferences, and pretrial conferences, all of which both streamlined the proceedings and armed the Trial Chambers with information, enabling them to exercise greater control over their cases. The pretrial judges, for instance, coordinate communication between the parties, prepare the case for a fair and expeditious trial, and ensure that no party unduly delays the proceedings.⁴⁹ Pursuant to rules authorizing them to conduct status conferences⁵⁰ and to order the parties to file pretrial briefs, witness lists, and exhibits lists, among other documents,⁵¹ pretrial judges gather information that enables them to record the points of agreement and disagreement over facts and law and then present that information to the Trial Chamber.⁵² Later amendments to the ICTY’s procedural rules have required pretrial judges also to establish a work plan that sets forth the parties’ obligations and the dates upon which they must be met.⁵³ Still later rule amendments permitted the Trial Chamber to exercise considerable control over the shape and substance of the case by authorizing them to limit the number of witnesses a party can call, to limit the amount of time a party can use at trial, and even to limit the “number of crime sites or incidents comprised in one or more of the charges.”⁵⁴

Many commentators have described these new procedural elements as nonadversarial,⁵⁵ although Máximo Langer has convincingly argued that

47. U.N. Expert Report, *supra* note 44, ¶¶ 76–77.

48. *Id.* ¶ 76.

49. ICTY R. P. & EVID. 65ter (B), U.N. Doc. IT/32/Rev. 17 (Dec. 7, 1999) (as amended) [hereinafter ICTY RPE 1999].

50. *Id.* R. 65bis (A).

51. *Id.* R. 65ter (E)–(G); see also ICTY R. P. & EVID. 90(G), U.N. Doc. IT/32/Rev. 28 (July 28, 2003) (as amended) [hereinafter ICTY RPE 2003] (authorizing a Trial Chamber to “refuse to hear a witness whose name does not appear” on the witness list).

52. ICTY RPE 1999, *supra* note 49, R. 65ter (H), (K).

53. ICTY RPE 2003, *supra* note 51, R. 65ter (D).

54. *Id.* R. 73bis (C)(i), (ii).

55. See, e.g., CASSESE, *supra* note 39, at 386–87; SALVATORE ZAPPALÁ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 2 (2003) (observing that “practice evidenced the drawbacks of applying a purely accusatorial model to international criminal proceedings” so that in amending the ICTY’s procedural rules “some inquisitorial elements were upheld, thereby diluting the originally adversarial imprint”); Gideon Boas, *Creating Laws of Evidence for International Criminal Law: ICTY and the Principle of Flexibility*, 12 CRIM. L.F. 41, 57–58 (2001); Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A

they in fact constitute a move toward managerial judging.⁵⁶ Labels aside, the relevant point for our purposes is that the amendments redistributed some process control from the ICTY's parties to its judges. Following the reforms, the parties had less control over which witnesses to call and how much time to spend questioning them. Moreover, the parties had to contend with a better informed judiciary that had been strongly encouraged to take charge of the proceedings in a variety of ways.

Also relevant for our discussion is that this trend toward greater judicial control accelerated with the creation of subsequent international tribunals. ICC and STL procedures contain far more nonadversarial elements than appear even in the reformed ICTY procedures, and ECCC procedures are based almost entirely on the French nonadversarial system; consequently, ICC, STL, and ECCC judges are authorized to exercise far greater control over their proceedings. The ICC's Pre-Trial Chamber, for instance, is not limited to streamlining its cases and facilitating communication between the parties, but also has some investigative authority that is reminiscent of pre-trial judges in certain Continental jurisdictions.⁵⁷ Moreover, ICC Trial Chambers are authorized to "give directions for the conduct of proceedings;"⁵⁸ thus, the Presiding Judge can adopt either a civil-law style trial in which judicial questioning dominates or a common-law style trial in which party questioning dominates.⁵⁹ The STL Statute goes further, establishing as a default presumption a nonadversarial mode of hearing witnesses in which the judges take the lead in witness questioning,⁶⁰ so long as "the Trial Chamber is provided with a complete file" that would enable it to be

COMMENTARY 1439, 1492–93 (Antonio Cassese et al. eds., 2002) [hereinafter ICC COMMENTARY]; Tochilovsky, *supra* note 5, at 631–32.

56. For Langer's discussion of the many differences between managerial judging and nonadversarial judging, see Langer, *supra* note 5, at 877–85. One key difference is that whereas "the inquisitorial system presumes an official investigation that impartial officials conduct to find the truth, the managerial judging system conceives of procedure as a device that the court uses with (even involuntary) collaboration and coordination from the parties to process cases as swiftly as possible." *Id.* at 878.

57. For instance, the Pre-Trial Chamber can issue an order on its own initiative to preserve evidence that would be essential for the defense at trial but is at risk of becoming unavailable. Rome Statute of the International Criminal Court art. 56(3), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; see also *id.* art. 57 (delineating additional investigative powers).

58. *Id.* art. 64(8)(b).

59. Rule 140(2)(c) of the ICC's *Rules of Procedure and Evidence* reflects this flexibility by permitting a Trial Chamber "to question a witness before or after a witness is questioned" by a party. ICC R. P. & EVID. 140(2)(c), Assembly of States Parties, 1st Sess., Sept. 3–10, 2002, ICC-ASP/1/3 (Sept. 9, 2002) [hereinafter ICC RPE].

60. Statute of the Special Tribunal for Lebanon art. 20(2), S.C. Res. 1757, Attachment, U.N. Doc. S/RES/1757, at 19 (May 30, 2007) [hereinafter STL Statute]. Article 20(2) of the STL Statute provides that "[u]nless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence." *Id.*

familiar with the facts and evidence.⁶¹ Finally, ECCC procedures are almost exclusively nonadversarial, so ECCC judges are responsible for calling witnesses and conducting the bulk of the questioning at trial.⁶² Thus, whereas international criminal procedures began at the ICTY with a “strong adversarial orientation,”⁶³ the recent introduction of substantial nonadversarial elements into the procedures of all of the international tribunals has transformed international criminal procedure law into a “truly mixed” system.⁶⁴

II. THE EVOLUTION IN THE REGULATION OF LAWYER SELECTION AND DISCHARGE

The procedural evolution just described is relatively well known. By contrast, the focus of this Part—the evolution in the regulation of the lawyer-client relationship at the international tribunals—has escaped scholarly attention. My primary focus here is the ICTY because its practice is the most developed, but I also discuss the law and practice of the other international tribunals as available. I show here that in the ICTY’s early days, the tribunal offered defendants an almost limitless choice regarding who, if anyone, would represent them. It did so by imposing virtually no qualifications requirements on counsel who wished to practice before the ICTY, by permitting defendants to fire their lawyers virtually at will, by allowing defendants to consent to even the most troubling conflicts of interest, and by accommodating defendants’ desires to self-represent despite considerable disruption to trial proceedings. In recent years, however, the ICTY has imposed restrictions in each of these areas. Subsequent tribunals have followed this trend, either by adopting more restrictive policies at their outsides or by imposing similar or more robust restrictions than the ICTY.

61. STL PRESIDENT, RULES OF PROCEDURE AND EVIDENCE (AS OF 10 NOVEMBER 2009): EXPLANATORY MEMORANDUM ¶ 28 (2009), available at <http://www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence/rules-of-procedure-and-evidence-explanatory-memorandum-by-the-tribunal-s-president-10-november-2009>; see also STL R. P. & EVID. 145, STL/BD/2009/01/Rev. 3 (Nov. 29, 2010) (as amended) [hereinafter STL RPE].

62. See, e.g., ECCC INTERNAL R. 87(4) (Rev. 8) (Aug. 3, 2011) (as amended), [http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20\(Rev.8\)%20English.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20(Rev.8)%20English.pdf) [hereinafter ECCC INTERNAL RULES] (giving the Trial Chamber broad authority to “summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth”); *id.* R. 93 (allowing the Trial Chamber to “at any time, order additional investigations” whenever the Trial Chamber “considers that a new investigation is necessary”); *id.* R. 80(1)–(2) (entitling the parties to submit to the Trial Chamber a list of witnesses they would like to summon); *id.* R. 84 (giving the accused the absolute right to have summoned “witnesses against him . . . whom the Accused had no opportunity to examine during the pre-trial stage”); *id.* R. 80bis (2) (acknowledging, however, that with respect to other witnesses, the Trial Chamber can determine that “the hearing of a proposed witness or expert would not be conducive to the good administration of justice” and for that reason “reject the request that such person be summoned”).

63. Langer & Doherty, *supra* note 5, at 245.

64. Ambos, *supra* note 2, at 34–37.

A. Selecting Counsel

The vast majority of international criminal defendants do not have the means to pay for retained counsel,⁶⁵ so virtually every defense lawyer appearing before the tribunals has been appointed at the tribunals' expense.⁶⁶ Although human rights law does not require the tribunals to provide indigent defendants with a choice of counsel,⁶⁷ the tribunals have endeavored to do so in most cases.⁶⁸ Typically, the Registry (or the Defense Office, where one exists) will provide defendants with a list of approved counsel from which the defendant may make a selection.⁶⁹ The Trial Chambers have held

65. E.g., ICTR Financial Rep. and Audited Financial Statements for the Biennium Ended 31 December 2005 and Rep. of the Board of Auditors, ¶ 54, U.N. Doc. A/61/5/Add.11 (SUPP); GAOR, 61st Sess., Supp. No. 5K (July 28, 2006); KHAN & DIXON, *supra* note 6, § 20-32 (describing the indigency of ICC defendants and suspects); Christian Rohde, *Legal Aid and Defense Matters*, in ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE 543-44 (Rodney Dixon et al. eds., 1st ed. 2003) ("About 95 percent of all persons represented before the ICTY have been assigned legal counsel on the basis of legal aid . . ."); David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 NEW ENG. L. REV. 975, 978 (2003) ("[O]ver 95% of the defendants who have appeared before the ICTY have been compensated under the legal aid system."); Richard J. Wilson, *Assigned Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach*, 2 INT'L CRIM. L. REV. 145, 170 (2002) ("The Rwandan Tribunal reports that every defendant appearing before that court has asserted legal indigence.").

66. Tribunal defendants are entitled to free legal assistance if they do not have the means to pay for it. See Rome Statute, *supra* note 57, art. 55(2)(C); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 21(4)(d), *originally established by S.C. Res. 827*, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute], available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; STL Statute, *supra* note 60, art. 16(4)(d); Statute of the Special Court for Sierra Leone, art. 17(4)(d), U.N. Doc. S/2002/246, App. II Attachment, at 29, 39 (Mar. 8, 2002) [hereinafter SCSL Statute]; Statute of the International Tribunal for Rwanda, art. 4, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 35(d), ECCC Doc. No. NS/RKM/1004/006 (Council of Jurists & the Secretariat of the Task Force trans., Oct. 27, 2004) (amended Aug. 26, 2007) [hereinafter ECCC Statute], available at http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

67. See *Croissant v. Germany*, 237 Eur. Ct. H.R. (ser. A) ¶ 29 (1992); Human Rights Comm., Views of the Human Rights Committee Under Article 5 Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, Forty-Third Session Concerning Communication No. 283/1988, ¶ 8.4, U.N. Doc. CCPR/C/43/D/283/1988 (Nov. 19, 1991); Human Rights Comm., Views of the Human Rights Committee Under Article 5 Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, Forty-Third Session Concerning Communication No. 459/1991, ¶ 10.5, U.N. Doc. CCPR/C/55/D/459/1991 (Nov. 8, 1995).

68. Steven Kay & Bert Swart, *The Role of the Defence*, in ICC COMMENTARY, *supra* note 55, at 1421, 1430-31.

69. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, ¶ 62 (June 1, 2001); Prosecutor v. Delalić, Mucic, Delic & Landzo, Case No. IT-96-21-T, Decision on Request by Accused Mucić for Assignment of New Counsel, ¶ 2 (ICTY June 24, 1996); Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10-T & ICTR-96-17-T, Decision on the Motions of the Accused for Replacement of Assigned Counsel/Corr. (June 11, 1997). The

that the registrar is not required to appoint the defendant's chosen counsel,⁷⁰ but so long as that counsel is either on the list or eligible to be placed on the list, then he or she should ordinarily be appointed "unless the Registrar has reasonable and valid grounds" for denying the defendant's request.⁷¹ These appointment practices have not changed significantly over the years, so defendants remain entitled to be represented by the counsel they select from the registrar's list so long as the registrar has no valid grounds for denying the defendant's selection. What has changed markedly, however, is the criteria for being placed on the registrar's list and the conflict of interest rules that now supply new grounds for a denial of the defendant's selection.

1. Qualifications Requirements

Each of the tribunals, except for the ICC, applies sets of qualifications requirements to counsel who are retained by a defendant that are different from those applied to counsel who are appointed by the tribunal for an indigent defendant.⁷² However, because virtually every international defendant

ICTY Trial Chambers have spoken approvingly of the registrar's practice, observing that, as a general matter, "the choice of any accused regarding his Defence Counsel . . . should be respected unless there exist well-founded reasons not to assign Counsel of choice." *Prosecutor v. Martić*, Case No. IT-95-11-PT, Decision on Appeal Against Decision of Registry (ICTY Aug. 2, 2002).

70. *Akayesu*, Case No. ICTR-96-4-A, ¶ 61; *Prosecutor v. Bagosora, Kabiligi, N'Tabakuze & Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign Him as Lead Counsel for Gratien Kabiligi, ¶ 21 (Mar. 24, 2005); *Kambanda v. Prosecutor*, Case No. ICTR-97-23-A, Judgement, ¶ 33 (Oct. 19, 2000); *Prosecutor v. Sesay, Kallon & Gbao (Revolutionary United Front (RUF) Case)*, Case No. SCSL-04-15-T, Written Reasons for Decision on Application of Third Accused to Dispense with the Mandate of Court Appointed Counsel, Mr. Andreas O'Shea, ¶ 20 (Dec. 6, 2007).

71. *Ntakirutimana*, Case Nos. ICTR-96-10-T & ICTR-96-17-T, at 6; *see also* *Prosecutor v. Brima, Kamara & Kanu (Armed Forces Revolutionary Council (AFRC) Case)*, Case No. SCSL-2004-16-AR73, Decision on Brima-Kamara Defense Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Reappointment of Kevin Metzger and Wilbur Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, ¶ 89 (Dec. 8, 2005); *Ntakirutimana*, Case Nos. ICTR-96-10-T & ICTR-96-17-T, ¶¶ 5-6 (separate and dissenting opinion of Ostrovsky, J., on the request of the accused for change of assigned counsel); *Sesay*, Case No. SCSL-04-15-T, ¶ 20; Reasons for the "Decision on the 'Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel,'" ¶ 24, ICC Doc. No. ICC-Pres-RoC72-01-8 (July 10, 2008); Decision on the "Demande urgente en vertu de la Règlement de procédure et de preuve" and on the "Urgent Request for Appointment of Duty Counsel" Filed by Thomas Lubanga Dyilo Before the Presidency on 7 May and 10 May Respectively, ¶¶ 24-25, ICC Doc. No. ICC-01/04-01/06-937 (June 29, 2007).

72. For the differing ICTY rules, *compare* ICTY R. P. & EVID. 44(A) (Dec. 8, 2010) (as amended) [hereinafter ICTY RPE 2010], *with id.* R. 45(B), *and* ICTY Directive on the Assignment of Defence Counsel, art. 14(A), Directive No. 1/94, *as amended*, U.N. Doc. IT/73/Rev. 11 (July 11, 2006) [hereinafter ICTY Directive 2006]. For the differing ICTR rules, *compare* ICTR R. P. & EVID. 44(A) (Oct. 1, 2009) (as amended) [hereinafter ICTR RPE 2009], *with id.* R. 45(A). For the differing SCSL rules, *compare* SCSL R. P. & EVID. 44(A) (May 28, 2010) [hereinafter SCSL RPE], *with id.* R. 45(C), *and* SCSL Directive on the As-

is indigent, my discussion will center on the qualifications for appointment to represent indigent defendants.

In its early years, the ICTY required defense counsel assigned to represent indigent defendants to possess only the most minimal qualifications. In particular, a lawyer was eligible for assignment so long as the lawyer was either a university professor of law or admitted to the practice of law and could speak one of the tribunal's working languages.⁷³ Moreover, the ICTY soon reduced even these negligible requirements by authorizing the assignment of a defense counsel who was unable to speak one of the tribunal's working languages so long as counsel spoke the language of the accused.⁷⁴ ICTY defense counsel John Ackerman pointedly described these requirements as, "perhaps, the least stringent . . . that could conceivably be imposed."⁷⁵ ICTY defense counsel Michael Greaves concurred, observing that the ICTY's qualifications standards served to provide an accused with a virtually "uninhibited choice, regardless of experience or suitability, as to who [would] represent him at trial."⁷⁶

In recent years, however, the ICTY has imposed additional, more burdensome entry requirements. It revised its language proficiency requirement, for instance, to make it more stringent and to apply more broadly. Initially, the tribunal's language proficiency requirement applied only to counsel appointed for indigent accused, and such counsel could satisfy the requirement if they were able to "speak" one of the tribunal's official languages.⁷⁷ The language proficiency requirement now applies both to counsel appointed for indigent accused as well as counsel retained by nonindigent accused, and it requires both "written *and* oral proficiency" in

signment of Counsel, art. 13(B), Doc. SCSL-6-72, (Oct. 3, 2003) [hereinafter SCSL Directive]. For the differing STL rules, compare STL RPE, *supra* note 61, R. 58, with *id.* R. 59. For the differing ECCC rules, compare ECCC INTERNAL RULES, *supra* note 62, R. 11(2)(c), with *id.* R. 11(4). The ICC, by contrast, requires the same qualifications of all counsel appearing before it. See KHAN & DIXON, *supra* note 6, § 20-89; ICC RPE, *supra* note 59, R. 21(2), 22(1); ICC REGULATIONS OF THE COURT, Reg. 67, ICC-BD/01-01-04 (Dec. 18, 2007) (as amended) [hereinafter ICC COURT REGULATIONS].

73. ICTY RPE 1994, *supra* note 41, R. 45.

74. ICTY R. P. & EVID. 45(A)(ii), U.N. Doc. IT/32/Rev. 11 (July 25, 1997) (as amended) [hereinafter ICTY RPE 1997].

75. John E. Ackerman, *Assignment of Defense Counsel at the ICTY*, in ESSAYS ON ICTY PROCEDURE, *supra* note 3, at 167, 170.

76. Michael Greaves, *The Right to Counsel Before the ICTY and the ICTR for Indigent Suspects: An Unfettered Right?*, in ESSAYS ON ICTY PROCEDURE, *supra* note 3, at 177, 179. Greaves went on to argue that the tribunal's willingness to waive the language requirement could "fatally harm the client's interests" because counsel who did not speak French or English had little access to international criminal law rules and case law, particularly in the ICTY's early years, when few legal materials had been translated into Bosnian, Croatian, or Serbian. *Id.* at 182-83. ICTY judges and other commentators have offered similar opinions. See, e.g., Rohde, *supra* note 65, at 560; Patricia M. Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 CARDOZO L. REV. 1559, 1572 (2006); Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST. L. 219, 244 (2004).

77. ICTY RPE 1997, *supra* note 74, R. 45(A)(i).

one of the tribunal's official languages.⁷⁸ The ICTY's registrar has also introduced a more stringent vetting process to enable it to assess the language capabilities of counsel who claim to speak English or French.⁷⁹ Finally, whereas in the past the registrar could waive the language requirement for any defense counsel, now the registrar is permitted to waive the language requirement only for defense counsel assigned as co-counsel.⁸⁰ Consequently, lead counsel for any defendant must now have written and oral proficiency in French or English.

In recent years, the ICTY has also required counsel assigned to represent indigent defendants to have additional substantive experience. As noted, the ICTY initially permitted the appointment of any lawyer who was admitted to the practice of law or who was a university professor of law. However, in 1999, a U.N. Expert Group found these standards inadequate and recommended that the ICTY's requirements "be brought more in line with those of the ICTR, and in both cases elevated to require at least five years of criminal trial experience."⁸¹ The ICTY did not initially adopt these recommended standards, but rather amended its rules only to impose the vaguer, less stringent requirement that appointed counsel possess "reasonable experience in criminal and/or international law."⁸² It was not until 2004 that the ICTY began requiring appointed defense counsel to have both "established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law" and "at least seven years of relevant experience . . . in criminal proceedings."⁸³

In addition to meeting these requirements, lawyers who wish to represent ICTY accused now must be members of the Association of Defense Counsel, an organization established in 2002.⁸⁴ The association is authorized to expel members (which thereby prevent them from representing ICTY defendants)⁸⁵ and to require them to attend training

78. ICTY RPE 2010, *supra* note 72, R. 44(A)(ii) (emphasis added).

79. See KHAN & DIXON, *supra* note 6, § 20-94; Prosecutor v. Musliu, Case No. IT-03-66-PT, Decision on Assignment of Defence Counsel (ICTY Oct. 21, 2003).

80. ICTY Directive 2006, *supra* note 72, art. 14(C); see also Prosecutor v. Tolimir, Case No. IT-05-88/2-PT, Decision on Motion by the Accused for Review of the Registrar's Decision of 29 June 2007, ¶¶ 14–17 (ICTY July 20, 2007) (rejecting defendant's selection of lead counsel who was not fluent in French or English).

81. U.N. Expert Report, *supra* note 44, ¶ 210.

82. ICTY Directive on the Assignment of Defence Counsel, art. 14(A)(iii), Directive 1/94, *as amended*, U.N. Doc. IT/73/Rev. 8 (Dec. 15, 2000) [hereinafter ICTY Directive 2000].

83. ICTY RPE 2010, *supra* note 72, R. 45(B); accord ICTY Directive 2006, *supra* note 72, art. 14(A).

84. See ICTY R. P. & EVID. 44(A), U.N. Doc. IT/32/Rev. 24 (Aug. 5, 2002) (as amended) [hereinafter ICTY RPE 2002] (citing revision in which requirement of membership in association of counsel was added); accord ICTY Directive 2006, *supra* note 72, art. 14(A)(x).

85. Ass'n of Def. Counsel [ADC] Practising Before the ICTY, Constitution art. 6(1)(c)(ii-iii) (Oct. 23, 2004) [hereinafter ADC-ITCY Constitution], available at http://adci-icty.org/Documents/adci-icty_constitution.pdf.

programs.⁸⁶ The association also has a Disciplinary Council that monitors its members' representation and adjudicates complaints received against association members for alleged misconduct.⁸⁷ The ICTY itself has also become involved in disciplining counsel. During the tribunal's early years, it had no code of conduct for defense counsel. The ICTY adopted a code in 1997, but it contained no disciplinary mechanisms.⁸⁸ The current code, by contrast, creates a Disciplinary Panel to adjudicate ethical complaints made against defense counsel and requires counsel to report the professional misconduct of a colleague to the panel.⁸⁹ The panel has broad investigatory powers⁹⁰ and also has the power to temporarily suspend a lawyer from practicing before the tribunal until the charge against her has been adjudicated.⁹¹ Moreover, lawyers who have been found to have violated their professional obligations may be disqualified from subsequently representing ICTY accused.⁹²

As this discussion shows, whereas the ICTY initially found just about any lawyer who wished to represent an indigent defendant eligible to do so, the tribunal has more recently introduced reasonable entry requirements. Thus, whereas the ICTY initially did not require counsel to satisfy any competency or experience standards, now counsel must have "established competence" in one of the fields relevant to international criminal trials and must have at least seven years of relevant experience in criminal proceedings.⁹³ The ICTY has also strengthened and expanded its language proficiency requirement and narrowed the exception it allows to that requirement.⁹⁴ Finally, the ICTY has adopted a *Code of Professional Conduct* that not only imposes various obligations upon counsel but is backed up with an enforcement mechanism.⁹⁵

Although the ICTY now requires counsel wishing to represent indigent defendants to meet reasonable entry standards, a brief look at the other

86. Press Release, ICTY, Association of Defence Counsel Formally Recognised by the ICTY, JA/P.I.S/720e (Dec. 19, 2002) [hereinafter ICTY ADC Press Release].

87. ADC-ICTY Constitution, *supra* note 85, art. 16.

88. See ICTY CODE OF PROF'L CONDUCT FOR DEF. COUNSEL APPEARING BEFORE THE INT'L TRIBUNAL, U.N. Doc. IT/125 (June 12, 1997) [hereinafter FIRST ICTY CODE OF CONDUCT].

89. ICTY CODE OF PROF'L CONDUCT FOR DEF. COUNSEL APPEARING BEFORE THE INT'L TRIBUNAL, art. 36, U.N. Doc. IT/125/Rev. 3 (July 22, 2009) [hereinafter CURRENT ICTY CODE OF CONDUCT].

90. *Id.* art. 44.

91. *Id.* art. 45(A).

92. See ICTY RPE 2010, *supra* note 72, R. 44(A)(iv); see also Prosecutor v. Krajišnik, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, ¶¶ 14, 37 (ICTY Sept. 11, 2007).

93. ICTY RPE 2010, *supra* note 72, R. 45(B); accord ICTY Directive 2006, *supra* note 72, art. 14(A).

94. See *supra* text accompanying notes 78–80.

95. See *supra* text accompanying notes 89–92.

international tribunals shows that the ICTY lagged behind its peer institutions in imposing these requirements.⁹⁶ For instance, although the ICTR was established virtually contemporaneously with the ICTY, it imposed more stringent entry requirements far sooner than the ICTY and in general has shown a far greater willingness to restrict its defendants' choice of counsel. At the ICTR's inception, it imposed the same (minimal) requirements for counsel wishing to represent indigent defendants as the ICTY,⁹⁷ but within three years the ICTR was requiring such counsel to have ten years relevant experience.⁹⁸ Moreover, in 1998, the ICTR restricted defendants' choice of counsel still further by authorizing the registrar to take account of "geographical distribution" in the assignment of defense counsel.⁹⁹ Pursuant to this authorization, the ICTR's registrar imposed a moratorium on the assignment of French and Canadian lawyers because the registrar believed them to be overrepresented among the ranks of ICTR defense counsel.¹⁰⁰ Although the moratorium gave rise to considerable protest from ICTR defendants,¹⁰¹ it remained in place for over a year until the registrar determined that an appropriate geographical balance had been established.¹⁰² Pointing to the moratorium and other restrictive policies, some commentators have asserted that the ICTR sometimes "unnecessarily

96. That said, the ICTR's defense counsel regulations have lagged behind those of the ICTY in a few areas. For instance, the ICTR adopted its *Code of Conduct* in 1998, soon after the ICTY adopted its code, but the ICTR code has not created its own disciplinary regime.

97. See ICTR R. P. & EVID. 45(A) (June 29, 1995) (referencing language requirement for registration on the list of counsel for indigent defendants).

98. ICTR R. P. & EVID. 45(A) (June 8, 1998) (as amended). Of course, the requirements found in the rules and the requirements actually imposed can differ. A U.N. Office of Internal Oversight audit suggested that the ICTR had failed to document certain background checks and other procedures for vetting defense counsel. U.N. Office of Internal Oversight Servs., Internal Audit Div. II, Audit of ICTR Legal Aid Programme, ¶¶ 26, 34, 37, U.N. Doc. AA2005/260/05 (Feb. 16, 2006) [hereinafter ICTR Legal Aid Audit]. In 2007, ICTR judges revised the procedural rules to reduce the required experience to seven years, but they did so because the registrar had been having difficulty finding counsel who had ten years of relevant experience, Int'l Criminal Procedure Expert Framework [IEF], General Rules and Principles of International Criminal Procedure, Section B(4)(A) (unpublished draft manuscript) (on file with author) [hereinafter IEF Draft], and to enable young, highly competent ICTR staff lawyers to defend accused.

99. Prosecutor v. Nyiramasuhuko & Ntahobali, Case No. ICTR-97-21-T, Decision on a Preliminary Motion by the Defence for the Assignment of a Co-counsel to Pauline Nyiramasuhuko, at 6 (Mar. 13, 1998).

100. U.N. Expert Report, *supra* note 44, ¶¶ 230–31; Greaves, *supra* note 76, at 183–84; see Caroline Buisman et al., *Trial and Error: How Effective Is Legal Representation in International Criminal Proceedings?*, 5 INT'L CRIM. L. REV. 1, 16 (2005).

101. Simon M. Meisenberg, *The Right to Legal Assistance at the International Criminal Tribunal for Rwanda: A Review of Its Jurisprudence*, in FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW: STUDIES IN HONOUR OF AN AFRICAN JURIST, THE LATE JUDGE LAÏTY KAMA 125, 138 (Emmanuel Decaux et al. eds., 2007).

102. Greaves, *supra* note 76, at 185; U.N. Expert Report, *supra* note 44, ¶ 231.

restricts the defendant's right to choose counsel," particularly when its policies are compared to those of the ICTY.¹⁰³

In addition, all of the other international tribunals have, from their outset, required counsel to meet more rigorous entry standards than those initially in place at the ICTY. For instance, counsel who do not speak one of the respective tribunal's working languages are not eligible to represent indigent defendants in any of the other international tribunals.¹⁰⁴ Indeed, the ICC not only imposes the typical language proficiency requirement, but formally enforces it by administering a language proficiency test on defense counsel who either are not native speakers in the court's working languages or have not extensively studied or worked in these languages.¹⁰⁵ In addition, like the ICTR, the other international tribunals have required more extensive experience and qualifications of their defense counsel.¹⁰⁶ Both the ICC and the SCSL have not only required from their inceptions that counsel possess competence in the subject matter of the tribunals' cases, but have also required them to be practicing lawyers.¹⁰⁷ In this way, the ICC and the SCSL diverge from the ICTY, which continues to permit nonpracticing academics

103. See, e.g., Buisman et al., *supra* note 100, at 15. In support of their position, Buisman and her coauthors also point to "the policy of the ICTR registrar to refuse to assign co-counsel as lead counsel when the latter withdraws, irrespective of the wishes of the accused." *Id.* at 36.

104. See ICTR Directive on the Assignment of Defence Counsel, art. 13, Directive No. 1/96, as amended (Mar. 14, 2008); SCSL Directive, *supra* note 72, art. 13; ICC RPE, *supra* note 59, R. 22(1); STL RPE, *supra* note 61, R. 58(ii); ECCC INTERNAL RULES, *supra* note 62, R. 11(4)(c)(5).

105. KHAN & DIXON, *supra* note 6, § 20-94.

106. The SCSL requires lead counsel assigned to an indigent defendant to have seven years of experience as counsel and to possess reasonable experience in criminal law, international law, international humanitarian law, or international human rights law. SCSL Directive, *supra* note 72, art. 13. Defense counsel before the ICC similarly must demonstrate that they have established competence in international law or domestic criminal law and procedure as well as ten years experience "as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings." ICC RPE, *supra* note 59, Rule 22(1); ICC COURT REGULATIONS, *supra* note 72, Reg. 67(1). Even "persons who assist counsel in the presentation" of an ICC case must have either "five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure." ICC REGULATIONS OF THE REGISTRY, Reg. 124, Doc. ICC-BD/03-01-06 (March 6, 2006). At the ECCC, foreign counsel must have at least "(ten) years experience in criminal proceedings as a lawyer, judge, or prosecutor, or in some other capacity," and "have established competence in criminal law and procedure at the international or national level." ECCC INTERNAL RULES, *supra* note 62, R. 11(4)(c)(i)-(v). Finally, STL defense counsel must "possess established competence in criminal law and/or international criminal law, or other relevant competence," STL RPE, *supra* note 61, R. 59(B)(ii), and must possess relevant experience "as a judge, prosecutor, attorney or in some other relevant capacity" for at least ten years for lead counsel and seven years for co-counsel, *id.* R. 59(B)(iii).

107. See SCSL RPE, *supra* note 72, R. 44; ICC RPE, *supra* note 59, R. 22. Some commentators have observed that the ICC's requirements for being admitted to practice as a defense counsel are more stringent than those which apply to ICC judges. IEF Draft, *supra* note 98, at 28.

to represent its defendants. And the STL goes so far as to require additionally that prospective defense counsel interview with an Admission Panel, which determines whether counsel fulfills the conditions for admission.¹⁰⁸ To ascertain their competence and language skills, this panel can require applicants to take a language proficiency test¹⁰⁹ and to complete written assignments.¹¹⁰

Not only have the other international tribunals shown a greater initial willingness than the ICTY to impose credible entry requirements on defense counsel, they also appear to take a more active role in monitoring the performance of their defense counsel. For instance, once assigned, an ICC defense counsel is required to “maintain a high level of competence in the law applicable before the Court” and to “participate in training initiatives required to maintain such competence.”¹¹¹ The ICC Registry is under a corresponding obligation to develop and implement training programs for defense counsel,¹¹² and to that end has initiated countless programs, including an annual seminar that provides comprehensive training.¹¹³ Similarly, the Head of the STL Defense Office has an ongoing obligation to assess whether counsel are providing effective representation. He may “monitor the performance and work of counsel and the persons assisting them;”¹¹⁴ he may require counsel to undertake compulsory training;¹¹⁵ and he may, in exceptional circumstances, “invite the suspect or accused to provide his views on the adequacy and effectiveness of his legal representation and the performance of the assigned counsel.”¹¹⁶ Most importantly, the Head of the STL Defense Office can back up his monitoring authority by withholding payment of counsel’s fees, seeking to remove counsel, and, where appropriate, initiating disciplinary proceedings against counsel.¹¹⁷

2. Conflicts of Interest

Imposing more burdensome entry requirements on defense counsel is not the only way in which international tribunals can restrict their defendants’ choice of counsel. In addition, current ICTY defendants are less able

108. STL RPE, *supra* note 72, R. 59(C).

109. *Call for Applicants List of Counsel*, STL (June 1, 2011), <http://www.stl-tsl.org/en/documents/defence-office-documents/call-for-applicants-list-of-counsel>.

110. STL Directive on the Assignment of Defence Counsel, art. 9(E), *as amended* (Nov. 10, 2010), *available at* <http://www.stl-tsl.org/en/documents/defence-office-documents/directive-on-the-assignment-of-defence-counsel>.

111. ICC CODE OF PROF’L CONDUCT FOR COUNSEL, art. 7(2), ICC Doc. No. ICC-ASP/4/Res.1 (Jan. 1, 2006).

112. ICC REGULATIONS OF THE REGISTRY, *supra* note 106, Regs. 140, 141.

113. KHAN & DIXON, *supra* note 6, § 20-42.

114. STL RPE, *supra* note 61, R. 57(G)(i).

115. *Id.* R. 58(C).

116. *Id.* R. 57(G)(iv).

117. *Id.* R. 57(H).

than their predecessors to be represented by the counsel of their choice because changes to the ICTY's conflict of interest rules make it more likely that counsel will be found to suffer from a disqualifying conflict of interest.¹¹⁸ Some revisions concern the lawyer's general orientation toward her client and the tribunal,¹¹⁹ but the amendments that are most relevant to this study concern the defendant's ability to consent to conflicts. For instance, whereas the ICTY's original *Code of Conduct for Defense Counsel* permitted a client to consent to representation when his lawyer represented another client with materially adverse interests in a similar or identical matter,¹²⁰ the current code does not permit consent in such a situation.¹²¹

An even more significant change pertains to the defendant's ability to consent to any conflict. The ICTY's initial code provided that, when a conflict arose, counsel either had to "take all steps necessary to remove the conflict" or had to "obtain the full and informed consent of all potentially affected Clients to continue the representation, so long as Counsel [wa]s able to fulfil all other obligations under th[e] Code."¹²² Pursuant to this rule, then, clients were permitted to consent to serious conflicts, as evidenced by the Trial Chamber's treatment of the conflicts that arose in the *Simić* case in 1999.¹²³ There, Simo Zarić's lawyer, Borislav Pisarević, had personal knowledge of some of the events that were to be adjudicated at trial. In particular, Pisarević was alleged to have concealed a prospective witness in his

118. Initially, the ICTY manifested an extremely tolerant attitude toward conflicts of interest. In the *Čelebići* case, for instance, the lead counsel for Esad Landzo at trial became lead counsel for Landzo's codefendant Zejnil Delalić for the appeal. Landzo sought counsel's removal on conflict of interest grounds, alleging that counsel was privy to confidential information that could be detrimental to Landzo's appeal. The Appeals Chamber rejected Landzo's motion, finding without elaboration that "the material before it does not disclose the existence of a conflict of interest or any other ground for holding that John Ackerman is in contravention of the [relevant] standards of conduct." *Prosecutor v. Delalić, Mucic, Delic & Landzo*, Case No. IT-96-21, Order Regarding Esad Landzo's Request for Removal of John Ackerman as Counsel on Appeal for Zejnil Delalić (ICTY May 6, 1999), <http://www.icty.org/x/cases/mucic/tord/en/90506DS37199.htm>.

119. The ICTY's original rule required counsel to "at all times act in the best interests of the Client and [to] put those interests before their own interests or those of any other person." FIRST ICTY CODE OF CONDUCT, *supra* note 88, art. 9(1). The corresponding rule in the current code reaffirms counsel's duty of loyalty to his client but provides that "Counsel also has a duty to the Tribunal to act with independence in the interests of justice and shall put those interests before his own interests or those of any other person, organisation or State." CURRENT ICTY CODE OF CONDUCT, *supra* note 89, art. 14(A).

120. FIRST ICTY CODE OF CONDUCT, *supra* note 88, art. 9(3)(c)(iii).

121. CURRENT ICTY CODE OF CONDUCT, *supra* note 89, art. 14(D)(iii). The current code also limits the ability of former ICTY staff members to represent accused. *See id.* art. 14(C) (stating that counsel cannot represent a defendant in a case in which counsel participated "as an official or staff member of the Tribunal in any capacity" regardless of consent).

122. FIRST ICTY CODE OF CONDUCT, *supra* note 88, art. 9(5)(b).

123. *See Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević (ICTY Mar. 25, 1999).

home on the night of an important Serb attack, and he had seen other witnesses in the custody of his client's codefendant.¹²⁴ As a result of his involvement in these events, Pisarević was subject to being called as a witness to corroborate or undermine the testimony of these witnesses. In addition, Pisarević had previously represented certain prosecution witnesses and, in representing Zarić, he was likely to be called upon to cross-examine his former clients.¹²⁵ Thus, the case presented a potential conflict with a past client and a strong likelihood that the lawyer would be called as a prosecution witness in his client's own case, but the *Simić* Trial Chamber nonetheless determined that obtaining Zarić's full and informed consent was "an appropriate mechanism" for dealing with the conflict at that stage.¹²⁶

By contrast, the current ICTY code limits a defendant's ability to consent to a conflict because it permits consent only where it is not "likely to irreversibly prejudice the administration of justice."¹²⁷ This vague restriction gives ICTY judges considerable discretion to hold that a conflict cannot be cured by a defendant's consent. Indeed, pursuant to this provision, the ICTY has refused to permit consent in a series of cases presenting conflicts. In *Prlić*, for instance, defense counsel Zeljko Olujić was barred from representing defendant Bruno Stojić because Olujić was simultaneously representing another ICTY accused, Ivica Rajić.¹²⁸ Both Stojić and Rajić consented to Olujić's continued representation, but because Stojić and Rajić were "charged with the same criminal acts, and were allegedly linked by a relatively close superior-subordinate relationship," the Appeals Chamber concluded that there was "a substantial conflict of interests."¹²⁹ Similarly, the Appeals Chamber found that an unwaivable conflict of interest existed when Jovan Simić sought to represent both Jeljko Mejakić and Dragoljub Prcać, because Mejakić was a direct superior of Prcać and Prcać had already given the prosecution incriminating evidence against Mejakić.¹³⁰

124. *Id.* pt. II(A)(1)–(2).

125. *See id.*

126. *Id.* pt. II(B)(III).

127. CURRENT ICTY CODE OF CONDUCT, *supra* note 89, art. 14(E)(ii)(2).

128. Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for Appointment of Counsel, ¶¶ 28–33 (ICTY Nov. 24, 2004).

129. *Id.* ¶¶ 24, 27.

130. Prosecutor v. Mejakić et al., Case No. IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, ¶ 13 (ICTY Oct. 6, 2004). Similarly, in *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković (ICTY June 29, 2007), Čedo Prodanović and Jadranka Sloković were barred from representing defendant Ivan Čermak due to a conflict that arose from their simultaneous representation of Rahim Ademi, who was awaiting trial in Croatia. Although Čermak and Ademi were at that time charged with crimes taking place several years apart, the Appeals Chamber could not rule out the possibility that Ademi would later be charged with the same crimes for which Čermak was accused, particularly if

Concededly, the conflicts at issue in these cases were serious, but under previous rules they would not have prevented defendants from retaining the counsel of their choice. Indeed, the registrar's treatment of legal associate Marko Sladojević shows the careful scrutiny to which conflicts of interest are now subject. The registrar refused to appoint Sladojević as a legal associate on the *Karadžić* defense team due to a perceived conflict of interest stemming from Sladojević's representation of Momcilo Krajišnik.¹³¹ The registrar refused the appointment despite the fact that both Karadžić and Krajišnik had consented to the representation, despite the fact that the *Krajišnik* Appeals Judgement had already been issued, and despite the fact that the registrar had previously appointed Sladojević in the *Popović* case while he was acting as a legal associate to Krajišnik.¹³² The *Karadžić* Trial Chamber eventually reversed the registrar's decision,¹³³ but the decision itself underscores the increasing willingness of ICTY officials to rigorously apply the tribunal's conflict of interest provisions to limit defendants' choice of counsel.

Comparing the ICTY's conflict of interest rules with the analogous rules of the other tribunals is not especially illuminating. The ECCC and the STL do not have conflict of interest rules at present,¹³⁴ and there is virtually no conflict of interest jurisprudence at the tribunals that do have rules because defendants at the other international tribunals do not frequently seek representation by defense counsel from their own countries,¹³⁵ thus, the conflicts that often arise concerning Yugoslavian defense counsel at the ICTY simply have not come up at the other tribunals. Finally, what rules do exist suggest that the other tribunals have adopted conflict of interest provisions

Čermak's defense sought to shift the blame from Čermak to Ademi. *Id.* ¶ 26. Furthermore, Ademi was alleged to have exercised command authority over Čermak, and although it might have benefited Čermak to implicate Ademi in the crimes for which Čermak was charged, counsel would not have been able to pursue that strategy because to do so would violate the counsel's duty of loyalty to Ademi. *Id.* ¶ 27. Finally, in an earlier decision by the ICTY Appeals Chamber in this case, defense counsel Miroslav Šeparović argued that the Trial Chamber should have followed *Simić* and held that his client's consent cured the conflict. Prosecutor v. Gotovina et al., Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest and Finding of Misconduct, ¶ 32 (May 4, 2007). However, the Appeals Chamber found the *Simić* holding to be inapplicable because *Simić* had been decided before the ICTY limited the defendant's ability to consent to a conflict. *Id.* In the Appeals Chamber's view, no consent was possible because Šeparović's continued representation was "likely to irreversibly prejudice the administration of justice." *Id.* ¶ 33.

131. Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Decision on Accused Request for Judicial Review of the Registry Decision on the Assignment of Mr. Marko Sladojević as Legal Associate, ¶¶ 16–18 (ICTY Apr. 20, 2009).

132. *Id.* ¶¶ 16–17.

133. *Id.* ¶¶ 18–19.

134. The STL is still drafting its *Code of Conduct*. For the ECCC, I could find no rules.

135. However, some SCSL defendants, in the *CDF* and *AFRC* cases, have been represented by Sierra Leonean counsel, including Arrow Bockarie, Ansu Lansana, and Charles Margai.

similar to those of the ICTY. The SCSL's consent provision mirrors the current ICTY provision, and consequently permits a defendant to consent only to conflicts that are "unlikely to prejudice the administration of justice."¹³⁶ The ICC has not limited the defendant's ability to consent in that way, but it has prohibited counsel from acting in a case where there is a substantial likelihood that the counsel or an associate of the counsel will be required to appear as a witness.¹³⁷ This provision, therefore, would have prevented Pisarević from continuing to represent Simić had that case been before the ICC.

B. Firing Counsel

Just as the ICTY initially afforded defendants wide discretion in selecting their first lawyer, it similarly afforded them free rein to fire the lawyer they had selected and to choose another one. For instance, the registrar permitted Vlatko Kupreškić's lawyers to withdraw merely upon the lawyers' representation that the defendant had cancelled their power of attorney because he no longer trusted them.¹³⁸ Similarly, the *Čelebići* Trial Chamber granted Zdravko Mucić's request for the assignment of new counsel even though the reasons Mucić invoked for seeking his current counsel's withdrawal "[did] not reflect upon the competence or qualifications of" that counsel.¹³⁹ That is, ICTY defendants needed to make no showing of inadequate or wrongful behavior on the part of their current lawyers in order to get those lawyers replaced. It was enough, according to the Trial Chamber, that "the reasons for the accused's dissatisfaction with the counsel . . . are genuine and that the request is not being made for frivolous reasons or in a desire to pervert the course of justice, *e.g.*, by causing additional delay."¹⁴⁰ These lax standards show that the ICTY gave "wide effect to the concept of 'counsel of choice,'" which, not surprisingly, led in some cases to "a bewildering series of changes of counsel representing an individual Defendant."¹⁴¹

Just as the ICTY has in recent years applied more stringent entry requirements and conflicts of interest rules on defense counsel, it likewise has lately applied a more stringent standard to requests for counsel changes. For

136. SCSL CODE OF PROF'L CONDUCT FOR COUNSEL WITH THE RIGHT OF AUDIENCE BEFORE THE SPECIAL COURT FOR SIERRA LEONE, art. 15(D)(2) (May 13, 2006) (as amended), <http://www.sc-sl.org/LinkClick.aspx?fileticket=IbTonPmXLHk%3D&tabid=176>.

137. ICC CODE OF PROF'L CONDUCT FOR COUNSEL, *supra* note 111, art. 12(C). Two exceptions to this prohibition exist: where the counsel's testimony relates to an uncontested issue or to the value of counsel's services. *Id.*

138. Prosecutor v. Kupreškić, Case No. IT-95-16-A, Decision (ICTY May 17, 2000).

139. Prosecutor v. Delalić, Mucic, Delic & Landzo, Case No. IT-96-21-T, Decision on Request by Accused Mucić for Assignment of New Counsel, at 1 (ICTY June 24, 1996).

140. *Id.* ¶ 3.

141. Greaves, *supra* note 76, at 185. Similarly, a 1999 U.N. Expert Group criticized the ICTY and ICTR for allowing "an excessive number of changes in assigned counsel." U.N. Expert Report, *supra* note 44, ¶ 218.

instance, by 2003, a U.N. report observed that a defendant was allowed to change his defense counsel only upon a showing of “unusual and compelling circumstances.”¹⁴² In particular, the report described the ICTY registrar as permitting an “accused to choose new counsel only where there is evidence of exceptional circumstances, such as a complete breakdown in the relationship between counsel and client, or if counsel is ordered to withdraw from a case for ethical reasons.”¹⁴³ Some cases, however, suggest that even a “complete breakdown in the relationship between counsel and client” may not be sufficient to constitute exceptional circumstances justifying a counsel change. Vidoje Blagojević, for instance, sought the removal of his co-counsel but he did not succeed because his lead counsel wished to retain the co-counsel, and the Trial Chamber held that the decision to appoint or remove co-counsel was in the hands of lead counsel.¹⁴⁴ Blagojević responded by seeking to remove his lead counsel. By this time, Blagojević was no longer willing to have any contact with his lead counsel, but despite the unquestionable breakdown in communication, the Registry, Trial Chamber, and Appeals Chamber all refused Blagojević’s request to replace counsel.¹⁴⁵ The Trial Chamber blamed Blagojević for the breakdown in communication, and held that an accused’s decision “to cease communications with counsel is not equivalent to counsel breaching their obligation to communicate and consult with their client.”¹⁴⁶ As for Blagojević’s lack of trust in his counsel, the Trial Chamber held that

[a] lack of trust in counsel based on disagreements in approach to one’s defence, including the criteria upon which to determine the appropriate candidate for co-counsel, is distinguishable from a lack of trust due to a breach by counsel in fulfilling his professional and ethical responsibilities in the course of representation.¹⁴⁷

Thus, although in the past, the ICTY would authorize a counsel change if the defendant could show a genuine breakdown in communication and a lack of trust regardless of the cause, now those conditions are sufficient to justify a change of counsel only when they stem from counsel’s failure to fulfill his or her professional responsibilities.

The standards for discharging counsel are less clear at some of the more recently established international tribunals,¹⁴⁸ but the rules and case law of

142. *Comprehensive Report*, *supra* note 6, ¶ 49.

143. *Id.* ¶ 51.

144. *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, ¶¶ 78–85 (ICTY July 3, 2003).

145. *Id.*

146. *Id.* ¶ 120.

147. *Id.*

148. The ICC appears to have no standards governing a defendant’s request to discharge counsel, and the issue has not come up in the cases. Because the STL currently has no defendants, it also has not addressed the issue in a case, and Article 34 of the STL’s Directive on

the ICTR and SCSL establish standards that appear to mirror those currently in place at the ICTY. Like the ICTY, the ICTR's treatment of this issue has evolved over time. As early as 1997, the ICTR amended its procedural rules to add Rule 45(H), which allows Trial Chambers to instruct the registrar to replace an assigned counsel only "in exceptional circumstances . . . upon good cause being shown" and only if satisfied that the request for replacement "is not designed to delay the proceedings."¹⁴⁹ Even after the adoption of Rule 45(H), however, it was not uncommon for defendants to change counsel several times during the course of their proceedings.¹⁵⁰ In more recent times, though, ICTR Trial Chambers have interpreted the "exceptional circumstances" requirement far more rigorously. Whereas early ICTR defendants could meet the requirement simply by asserting that there had been a breakdown in communication and trust between themselves and counsel,¹⁵¹ by 2006, most decisions holding that a breakdown of trust constituted exceptional circumstances found that the breakdown of trust was attributable to some documented failing on the part of defense counsel, such as "lack of knowledge of the Rwandan context and history; a lack of initiative in the defence of the accused; an exceptional workload incompatible with other professional commitments; a breach of professional responsibilities, including the obligation to communicate with the client; and misconduct or manifest negligence."¹⁵² Similarly, during a 2006 U.N. audit of the ICTR's Legal Aid Programme, the U.N. Office of Internal Oversight

the Assignment of Defense Counsel, which permits the Head of the Defence Office to withdraw the assignment of counsel upon the request of the accused, provides the office no standards to guide its determination of the matter. *See* STL Directive, *supra* note 110, art. 34. The ECCC's rule, like the ICTY's, permits defendants to change counsel only "in exceptional circumstances." ECCC Defence Support Section Administrative Regulations, art. 7.2, ECCC Doc. No. RS-9.7.07. The ECCC Defence Support Section looked to the jurisprudence of the other international tribunals in deciding the one request it has received for a counsel change, but found the request easy to grant because it came after the trial was completed so that the counsel change necessitated no disruption to the proceedings. Trial Proceedings of Kaing Guek Eav (Duch), Case No. 001/18-07-2007-ECCC, Request by Mr. Kaing to Withdraw Co-Lawyer Francois Roux, ¶¶ 4, 6 (July 5, 2010).

149. ICTR RPE 2009, *supra* note 72, R. 45(H).

150. *See, e.g.*, U.N. Expert Report, *supra* note 44, ¶¶ 232–33 (citing *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Decision Relating to the Assignment of Counsel, at 3 (July 27, 1999), in which defendant changed counsel six times during the course of proceedings); *Prosecutor v. Ngeze*, Case No. ICTR-97-27-I, Decision on the Accused's Request for Withdrawal of His Counsel, Deliberations (Mar. 29, 2001) ("He is now requesting a fifth change.").

151. *See* *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Decision on the Request of the Accused for the Replacement of Assigned Counsel (Nov. 20, 1996); *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Decision on the Request of the Accused for Change of Assigned Counsel (June 26, 1997); *Prosecutor v. Nyiramasuhko & Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion on Withdrawal of Counsel, ¶ 14 (June 22, 2001).

152. *Nahimana, Barayagwiza & Ngeze v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, ¶ 12 (Nov. 23, 2006).

Services reviewed five cases and found “that counsel was withdrawn or changed only on exceptional grounds.”¹⁵³

The SCSL applies the same Rule 45(H) to requests for changes of counsel, and its application of the rule in the *RUF* case showed the Trial Chamber’s considerable reluctance to permit counsel changes.¹⁵⁴ There, Augustine Gbao sought repeatedly to discharge his lead counsel, his first requests dating from the very outset of his trial.¹⁵⁵ Eventually, the lawyer came to agree with Gbao that they should part ways and consequently sought permission to withdraw on the ground that Gbao had refused to provide him instructions and had made public statements that caused the lawyer “a great degree of personal and professional embarrassment.”¹⁵⁶ The Trial Chamber rejected both Gbao’s and his counsel’s requests, finding that no exceptional circumstances had been demonstrated and that the Trial Chamber had “full confidence in the Defence Counsel and his ability to properly act in the best interest” of the defendant.¹⁵⁷ The Trial Chamber did eventually relent and permit Gbao to discharge his counsel, but only three and one-half years after Gbao’s first request. By that time, the counsel had taken two cases at the ICTR,¹⁵⁸ the Trial Chamber had been “flooded with letters” from Gbao seeking his lawyer’s withdrawal, and even Gbao’s co-counsel agreed that “there exist[ed] an ‘irrevocable breakdown in confidence’ between the Accused and his lead counsel . . . and that the situation was ‘irredeemable.’”¹⁵⁹

C. Self-Representation

Whereas the foregoing Sections have detailed the evolution in the ICTY’s jurisprudence regarding the hiring and firing of defense counsel, this Section turns to the evolution in the ICTY’s treatment of defendants

153. ICTR Legal Aid Audit, *supra* note 98, ¶ 35.

154. Notably, however, the SCSL failed entirely to apply the standard when defendant Charles Taylor dramatically fired his counsel on the first day of trial and counsel left the courtroom despite repeated orders from the Trial Chamber to remain. Sara Kendall, *The Opening of the Trial of Charles Taylor: Early Developments and Delays*, SIERRA LEONE TRIAL MONITORING PROJECT WKLY. REP. (U.C. Berkeley War Crimes Studies Ctr., Berkeley, Calif.) July 3, 2007, at 2–3, 9.

155. See *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Gbao—Decision on Application to Withdraw Counsel, ¶¶ 1, 5, 7 (July 6, 2004); *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-AR73, Gbao—Decision on Appeal Against Decision on Withdrawal of Counsel, ¶¶ 29–61 (Nov. 23, 2004); *Sesay*, Case No. SCSL-04-15-T, Written Reasons for Decision on Application of Third Accused to Dispense with the Mandate of Court Appointed Counsel, Mr. Andreas O’Shea, ¶ 6 (Dec. 6, 2007).

156. *Sesay*, Case No. SCSL-04-15-T, Decision on Application by Counsel for the Third Accused to Withdraw from the Case, ¶ 2 (Apr. 5, 2006).

157. *Id.*

158. *Sesay*, Case No. SCSL-04-15-T, Written Reasons for Decision on Application of Third Accused to Dispense with the Mandate of Court Appointed Counsel, Mr. Andreas O’Shea, ¶ 12 (Dec. 6, 2007).

159. *Id.* ¶¶ 29, 31.

who wish to forego counsel entirely. Echoing Article 14(3)(d) of the International Covenant for Civil and Political Rights, the statutes of all of the international tribunals provide an accused with the right to “defend himself in person or through legal assistance of his own choosing,”¹⁶⁰ and the tribunals have interpreted this language as providing defendants with a right of self-representation. Again, among the international tribunals, the ICTY has the most developed practice, and that tribunal has considered the right of self-representation in the *Milošević*, *Šešelj*, *Tolimir*, and *Karadžić* cases. However, most of those cases featured both notorious defendants and starkly different factual circumstances, so it is difficult to trace a clear evolution in the ICTY’s treatment of this issue over time. Nevertheless, the following discussion suggests that whereas the tribunal initially showed great willingness to tolerate delay and to otherwise adapt its proceedings as a consequence of an accused’s decision to represent himself, that willingness had substantially declined by the time Radovan Karadžić’s case came to trial. Indeed, as early as 2006, Nina Jørgensen observed that the focus of the ICTY’s self-representation jurisprudence had “shifted from establishing the modalities for the exercise of the right . . . to establishing the circumstances under which the right may be qualified and the modalities of restricting it.”¹⁶¹ In particular, as I will explain below, whereas the ICTY went to great lengths to preserve Milošević’s and Šešelj’s right of self-representation, even though doing so disrupted, delayed, and impaired the dignity of those trials, the ICTY has shown no similar solicitude for Tolimir’s or Karadžić’s desire to self-represent.

A brief look at the *Milošević* and *Šešelj* proceedings demonstrates the lengths to which the ICTY has been willing to go in order to accommodate a defendant’s right of self-representation. Milošević’s self-representation proved problematic from the very outset of his proceedings because he initially refused to answer questions and made lengthy, irrelevant speeches instead of legal arguments.¹⁶² Milošević’s behavior improved as the proceedings progressed, but he continued to browbeat witnesses and make disparaging comments about the court,¹⁶³ tactics that, not surprisingly, lengthened the conduct of his trial. In addition, Milošević suffered from

160. ICTY Statute, *supra* note 66, art. 21(4)(d); ICTR Statute, *supra* note 66, art. 20(4)(d); SCSL Statute, *supra* note 66, art. 17(4)(d); STL Statute, *supra* note 60, art. 16(4)(d); Rome Statute, *supra* note 57, art. 67(1)(d); ECCC Statute, *supra* note 66, art. 35(d).

161. Nina H.B. Jørgensen, *The Problem of Self-Representation at International Criminal Tribunals*, 4 J. INT’L CRIM. JUST. 64, 65 (2006).

162. See Prosecutor v. Milošević, Case No. IT-99-37-I, Transcript of Initial Appearance, at 2–5 (ICTY July 3, 2001); *id.*, Transcript, at 66–68 (Oct. 29, 2001); *id.*, Transcript, at 134–40 (Dec. 11, 2001); *id.*, Transcript, at 286–89 (Jan. 9, 2002); see also PATRICIA M. WALD, OPEN SOC’Y INST., TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM 31 (2009), http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/tyrants_20090911/tyrants_20090911.pdf; Michael P. Scharf & Christopher M. Rass, *Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?*, 20 OHIO ST. J. ON DISP. RES. 3, 4 (2005).

163. Scharf & Rass, *supra* note 162, at 5.

severe, chronic cardiovascular problems, and the consequent bouts of exhaustion likewise led to numerous delays, as Milošević was often unable to attend trial.¹⁶⁴ To prevent these delays, the prosecution repeatedly asked the Trial Chamber to impose counsel on Milošević,¹⁶⁵ but the Trial Chamber instead reduced the trial schedule so as to give Milošević more time to rest.¹⁶⁶ Despite the reduced schedule, Milošević's health-related absences continued. A little more than two years into the trial, more than sixty trial days (which was the equivalent of approximately six months of trial time on the reduced schedule) had been lost. The prosecution's case had been interrupted more than a dozen times, and the commencement of the defense case had been postponed five times.¹⁶⁷

The Trial Chamber did eventually appoint defense counsel for Milošević. The Appeals Chamber reluctantly upheld the appointment, but it reversed the Trial Chamber's Order on Modalities. In particular, the Appeals Chamber found that the Trial Chamber had "failed to recognize that any restrictions on Milošević's right to represent himself must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial."¹⁶⁸ Concluding that the Trial Chamber had "relegate[d] Milošević to a visibly second-tier role in the trial,"¹⁶⁹ the Appeals Chamber ordered the Trial Chamber to craft a working regime rooted in the default presumption that, "when he is physically capable of doing so, Milošević will take the lead in presenting his case" by questioning witnesses, arguing motions, and presenting a closing statement.¹⁷⁰ Thus, Milošević did continue to present his case. He also continued to flout various

164. Even during the early phases of his trial, Milošević's poor health frequently prevented him from attending. In 2002, for instance, he was absent March 18–28, June 17–27, July 18–19, November 1–6, and November 12–15. *Prosecutor v. Milošević*, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, ¶ 6 n.10 (ICTY Sept. 22, 2004).

165. *Milošević*, Case No. IT-02-54-T, Prosecution's Submission on the Implications of the Accused's Recurring Ill-Health and the Future Conduct of the Case—Corrected Version (ICTY Sept. 30, 2003); *Milošević*, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, ¶ 7 (ICTY Apr. 4, 2003).

166. *Milošević*, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, ¶ 41. Eventually, the Trial Chamber decided to sit for only three days per week, thereby providing Milošević with four consecutive rest days per week. *Milošević*, Case No. IT-02-54-T, Transcript, at 27063 (ICTY Sept. 30, 2003).

167. *Milošević*, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, ¶ 11; see also WALD, *supra* note 162, at 38 ("During most of the next four years, his ill health required constant recesses; 66 trial days . . . had to be canceled for health reasons . . .").

168. *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 17 (ICTY Nov. 1, 2004).

169. *Id.* ¶ 16.

170. *Id.* ¶ 19.

procedural rules,¹⁷¹ and he continued to delay the trial with his political grandstanding.¹⁷² Finally, and most importantly, Milošević's medical conditions continued to delay the trial. The Trial Chamber continued to sit for only three days per week to enable Milošević to rest,¹⁷³ and it continued to adjourn the trial when even that schedule proved too demanding.¹⁷⁴ Finally, the Trial Chamber rejected the prosecution's request that appointed counsel be permitted to present the case during Milošević's health-related absences.¹⁷⁵

According to some commentators, ICTY judges "ben[t] over backwards to maintain the appearance of fairness" and thereby "permitted Milošević to treat witnesses, prosecutors, and themselves in a manner that would earn ordinary defense counsel expulsion from the courtroom."¹⁷⁶ But even if they did, the ICTY's tolerance of Milošević's trial tactics pales in comparison to the accommodation it has made for Vojislav Šešelj. From his first day in The Hague, Šešelj made absolutely clear that he would not comply with the tribunal's rules and that he instead intended to use the trial as a political platform.¹⁷⁷ In response, and over Šešelj's vehement opposition, the Trial Chamber appointed standby counsel for Šešelj less than three months after he arrived in The Hague.¹⁷⁸ Šešelj remained fully in charge of his case even after the appointment of standby counsel because counsel was charged merely with assisting Šešelj "whenever [Šešelj] so requested."¹⁷⁹ But by installing standby counsel, the Trial Chamber ensured that if Šešelj engaged "in disruptive conduct or conduct requiring his removal from the courtroom," then standby counsel could take over the defense.¹⁸⁰

171. *Milošević*, Case No. IT-02-54-T, Transcript, at 34520–33, 34555–63 (ICTY Dec. 15, 2004); see also Judith Armatta, *A Role for Assigned Counsel*, GLOBAL POL'Y F. (Dec. 15, 2004), <http://www.globalpolicy.org/component/content/article/163/29330.html>; Alison Freebairn, *Milošević Running Out of Time*, INST. FOR WAR & PEACE REPORTING (Nov. 17, 2005), <http://iwpr.net/report-news/milosevic-running-out-time>.

172. See Mirjan Damaška, *Assignment of Counsel and Perceptions of Fairness*, 3 J. INT'L CRIM. JUST. 3, 4 (2005); Freebairn, *supra* note 171.

173. Freebairn, *supra* note 171.

174. See *Milošević*, Case No. IT-02-54-T, Transcript, at 46667–69 (ICTY Nov. 29, 2005); Anthony Deutsch, *Slobodan Milošević's Trial Adjourned After Defendant Says He Is Unwell*, ASSOCIATED PRESS, Nov. 16, 2005; *Milošević Trial Adjourned Until 23 January*, SENSE TRIBUNAL, Dec. 12, 2005, http://www.sense-agency.com/icty/milosevic-trial-adjourned-until-23-january.29.html?cat_id=1&news_id=9422.

175. *Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Motion for Specific Orders Relating to Trial in Absentia (ICTY Jan. 20, 2006).

176. Scharf & Rassi, *supra* note 162, at 4–5.

177. Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defence, ¶¶ 23–26 (ICTY May 9, 2003).

178. *Id.* ¶ 27.

179. *Id.* ¶ 30.

180. *Id.* ¶¶ 28, 30. As noted, Šešelj vehemently opposed the appointment of standby counsel and thereafter worked tirelessly to revoke it. Šešelj's efforts are described in *Šešelj*,

Šešelj continued his remarkably disruptive and obstructionist conduct during his lengthy pretrial proceedings. According to the Trial Chamber, Šešelj repeatedly raised “irrelevant or specious matters,”¹⁸¹ he repeatedly used obscene or offensive language,¹⁸² he breached confidentiality,¹⁸³ and he showed an “unwillingness to follow rules set by the Tribunal” in “almost all of his submissions.”¹⁸⁴ In summary, the Trial Chamber concluded that most of Šešelj’s 191 submissions had been “frivolous and abusive,” and they showed Šešelj to be “a person bent on following a path of persistent obstruction of the judicial process.”¹⁸⁵ In consequence of these conclusions, the Trial Chamber imposed counsel on Šešelj.¹⁸⁶ Šešelj appealed, and although the Appeals Chamber disputed none of the Trial Chamber’s factual findings, it reversed the Trial Chamber’s imposition of defense counsel, holding that the Trial Chamber should have specifically warned Šešelj that counsel would be imposed if his disruptive behavior continued.¹⁸⁷ In so holding, the Appeals Chamber itself explicitly warned Šešelj that “should his self-representation . . . substantially obstruct the proper and expeditious proceedings in his case, the Trial Chamber will be justified in promptly assigning him counsel” after giving him a chance to be heard.¹⁸⁸

When the case then returned to the Trial Chamber after appeal, Šešelj had no counsel, standby or other. This is because the Registry had withdrawn the standby counsel who had been serving up until that time when it had appointed counsel for Šešelj on the Trial Chamber’s order,¹⁸⁹ and the Appeals Chamber had reversed the Trial Chamber’s appointment of counsel. Seeking to reintroduce the *status quo ante*, the Trial Chamber ordered the registrar to reappoint standby counsel under basically the same conditions as had previously governed the standby counsel’s relationship with Šešelj.¹⁹⁰ Šešelj, however, vigorously opposed the reappointment of standby counsel

Case No. IT-03-67-PT, Decision on Request of the Accused to Revoke the Ruling of the Trial Chamber to Appoint Standby Counsel (ICTY May 3, 2005), and *Šešelj*, Case No. IT-03-67-PT, Decision on Submission No. 115 (ICTY June 16, 2006). See also Alexander Zahar, *Legal Aid, Self-Representation, and the Crisis at the Hague Tribunal*, 19 CRIM. L.F. 241, 242 (2008).

181. *Šešelj*, Case No. IT-03-67-PT, Decision on Assignment of Counsel, ¶ 34 (ICTY Aug. 21, 2006).

182. *Id.* ¶¶ 45, 46, 48–52, 55–56, 58.

183. *Id.* ¶¶ 54, 63.

184. *Id.* ¶ 41.

185. *Id.* ¶ 75.

186. *Id.* ¶ 81.

187. Prosecutor v. *Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel, ¶¶ 22–26, 52 (ICTY Oct. 20, 2006).

188. *Id.* ¶ 52.

189. *Šešelj*, Case No. IT-03-67-PT, Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial, ¶ 4 (ICTY Oct. 25, 2006).

190. Prosecutor v. *Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel, ¶ 6 (ICTY Dec. 8, 2006).

and in response launched a hunger strike. For the next twenty-eight days, Šešelj refused all food and medicine and also refused to participate in his trial.¹⁹¹ The Trial Chamber repeatedly warned Šešelj that it would impose counsel unless he began participating in the trial, and on November 27, 2006, the Trial Chamber did impose counsel.¹⁹²

Šešelj again appealed and by the time the case was before the Appeals Chamber, Šešelj was in a “severely weakened” condition¹⁹³ and likely to die within two weeks.¹⁹⁴ No doubt concerned about Šešelj’s grave condition and the negative publicity his death would have generated, the Appeals Chamber essentially capitulated to Šešelj’s demands by prohibiting the Trial Chamber from imposing standby counsel “unless Šešelj exhibits obstructionist behavior fully satisfying the Trial Chamber that, in order to ensure a fair and expeditious trial, Šešelj requires the assistance of standby counsel.”¹⁹⁵ Describing the decision as one “in which any coherent legal argument is hard to detect,” Göran Sluiter opined that it served “no other purpose than to put an end to Šešelj’s hunger strike.”¹⁹⁶ Moreover, after the Appeals Chamber’s decision, Šešelj’s case was transferred to a Trial Chamber that has been remarkably accommodating of his desire to self-represent. For instance, although Šešelj’s case was ready for trial in November 2006 when the Appeals Chamber first reinstated his right to represent himself, his trial did not

191. *Serbian Politician Ends His Hunger Strike*, N.Y. TIMES, Dec. 9, 2006, at A5.

192. *See* Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on Request for Certification to Appeal Decision (No. 2) on Assignment of Counsel, ¶ 1 (ICTY Dec. 5, 2006); Šešelj, Case No. IT-03-67-T, Pre-Trial Conference Transcript, at 818, 823–25 (ICTY Nov. 27, 2006).

193. *Serbian Politician Ends His Hunger Strike*, *supra* note 191.

194. *Serb Suspect ‘Can Be Force Fed,’* BBC NEWS, Dec. 6, 2006, <http://news.bbc.co.uk/2/hi/europe/6214862.stm>.

195. Šešelj, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel, ¶ 28. The Appeals Chamber conceded that its decision restoring Šešelj’s right to self-representation did not expressly prohibit the Trial Chamber from reappointing standby counsel, but it held that by doing so immediately after the Appeals Chamber’s decision and without any showing of additional obstruction by Šešelj, the Trial Chamber undermined “the practical implementation” of the Appeals Chamber’s decision. *Id.* ¶ 26.

196. Göran Sluiter, *Karadžić on Trial: Two Procedural Problems*, 6 J. INT’L CRIM. JUST. 617, 620 (2008). Sluiter critiqued the decision in greater detail in Göran Sluiter, *Compromising the Authority of International Criminal Justice*, 5 J. INT’L CRIM. JUST. 529, 533–34 (2007). Alexander Zahar agreed, observing that the Appeals Chamber “capitulated to Šešelj’s blackmail, twisting process and law” so as to provide Šešelj “not only with self-representation, but with self-representation untrammelled by standby counsel.” Zahar, *supra* note 180, at 244; *see also* Eugene Cerruti, *Self-Representation in the International Arena: Removing a False Right of Spectacle*, 40 GEO. J. INT’L L. 919, 982 (2009). At the same time, it must be acknowledged that certain extralegal factors understandably may have influenced the Appeals Chamber’s decision. In particular, Šešelj’s Radical Party was seeking power in upcoming Serbian elections, and tribunal officials as well as the Serbian government feared that Šešelj’s death would render him a martyr in the popular imagination and would thereby boost hard-line nationalists. *See* Marlise Simons, *UN Tribunal Halts Trial of Serb Sent to Hospital*, N.Y. TIMES, Dec. 4, 2006, at A3.

begin for another year, largely as a consequence of Šešelj's pretrial demands.¹⁹⁷

By the time Zdravko Tolimir and Radovan Karadžić asserted their right to self-represent in 2007 and 2008, respectively, the tribunal was ready to take firmer control of the issues surrounding self-representation. Such firm control initially appeared necessary because Tolimir appeared ready to use some of the same obstructionist tactics that had characterized Milošević's and Šešelj's trial strategies. To be sure, Tolimir did not insult the tribunal or otherwise behave belligerently, but he did obstruct his pretrial proceedings by steadfastly refusing to accept any documents from the prosecution or Registry because the documents were not provided in the Cyrillic script.¹⁹⁸ Although Tolimir claimed not to be able to read Serbian in Latin script,¹⁹⁹ the Pre-Trial Judge and the Appeals Chamber each rejected his request to be provided documents in the Cyrillic script, finding that he could read the documents provided to him.²⁰⁰ Further, when Tolimir continued to refuse receipt of documents, the Trial Chamber formally warned him that failure to accept the documents would result in the immediate imposition of counsel.²⁰¹ Tolimir thereafter agreed to receive documents (through his legal adviser),²⁰² and his trial is proceeding apace.

The Trial Chamber seemed even more inclined to cabin the notorious Radovan Karadžić's ability to disrupt his trial through his self-representation. Just a few months after Karadžić began to self-represent, the tribunal amended its procedural rules to specifically authorize a Trial Chamber to assign counsel to represent the interests of a self-representing accused.²⁰³ Although this amendment was deemed to "codify, and not modify," existing case law,²⁰⁴ I believe it signaled the ICTY's adoption of a more

197. Zahar, *supra* note 180, at 258.

198. 'Last Warning' for Zdravko Tolimir, SENSE TRIBUNAL, June 30, 2008, http://www.sense-agency.com/icty/last-warning-for-zdravko-tolimir.29.html?cat_id=1&news_id=8363.

199. See, e.g., Prosecutor v. Tolimir, Case No. IT-05-88/2-I, Accused's Motion to the President of the Tribunal and Members of the Appeals Chamber to Exercise Their Discretionary Powers and Reconsider Their Decision on the Appeal Against the Interlocutory Appeal Against the Oral Decision of the Pre-Trial Chamber of 11 December 2007, ¶ 2 (ICTY Apr. 16, 2008).

200. Prosecutor v. Tolimir, Case No. IT-05-88/2-PT, Transcript, at 109, 113–17 (ICTY Dec. 11, 2007); Prosecutor v. Tolimir, Case No. IT-05-88/2-AR-73.1, Decision on Zdravko Tolimir's Request for Reconsideration of Appeals Chamber's Decision of 28 March 2008, ¶¶ 2, 12 (ICTY June 18, 2008).

201. Tolimir, Case No. IT-05-88/2-PT, Transcript, at 175–77 (ICTY June 30, 2008).

202. Tolimir, Case No. IT-05-88/2-I, Submission of the Accused to the Registrar of the Tribunal and the Pre-Trial Chamber Pursuant to the Order of the Pre-Trial Judge dated 30 June 2008 on Disclosure (ICTY July 4, 2008).

203. See ICTY RPE 2010, *supra* note 72, R. 45*ter*.

204. Prosecutor v. Šešelj, Case No. IT-03-67-T, Public Version of the "Consolidated Decision on Assignment of Counsel, Adjournment and Prosecution Motion for Additional Time with Separate Opinion of Presiding Judge Antonetti in Annex," ¶ 63 (ICTY Nov. 24, 2009).

restrictive approach that shows less solicitude for a defendant's desire to self-represent. This more restrictive approach can be seen in the *Karadžić* Trial Chamber's decisions on time limits and the choice of assigned counsel, which differ markedly from the *Šešelj* Trial Chamber's decisions on similar issues.²⁰⁵ I discuss these decisions in more detail below.

The different approaches begin with time limits. Whereas the *Šešelj* Trial Chamber permitted *Šešelj* a very lengthy pretrial period, the *Karadžić* Trial Chamber ordered trial to commence fifteen months after *Karadžić* arrived in The Hague.²⁰⁶ *Karadžić* requested an additional ten months to prepare for trial, setting forth the specific preparatory tasks that he needed to complete and the time necessary for completing them.²⁰⁷ *Karadžić* also pointed out that the average and medial pretrial periods for previously tried accused—most of whom had had counsel—were several months longer than he had been given.²⁰⁸ The Trial Chamber nonetheless rejected *Karadžić*'s request, determining that *Karadžić* had had enough time to prepare for trial.²⁰⁹ The Trial Chamber noted that *Karadžić* had put forward a "large volume" of motions and requests during the pretrial period, including a lengthy motion in which he claimed immunity from prosecution.²¹⁰ The Trial Chamber suggested that, by doing so, *Karadžić* had wasted time that he should have used to prepare for trial.²¹¹ The Appeals Chamber upheld the Trial Chamber's decision,²¹² endorsing its reasoning²¹³ and observing that many of the limitations *Karadžić* faced were related to his decision to self-represent. The Appeals Chamber acknowledged that it was obliged to ensure a fair trial for self-represented accused,

205. Here, I must acknowledge, however, that the different approaches that we see in *Šešelj* and *Karadžić* may stem more from the different composition of the respective Trial Chambers than from a broad-based evolution in legal thinking. At the same time, I do believe that at least some of the divergences I describe result from a newfound willingness on the part of the ICTY to hold self-representing accused to reasonable standards even when doing so impinges to some degree on their right of self-representation.

206. Prosecutor v. *Karadžić*, Case No. IT-95-5/18-PT, Status Conference Transcript, at 436, 454–56 (ICTY Sept. 8, 2009).

207. *Karadžić*, Case No. IT-95-5/18-PT, Submission on Commencement of Trial, ¶¶ 15–28 (ICTY Sept. 3, 2009).

208. *Id.* ¶ 34, Annex I.

209. *Karadžić*, Case No. IT-95-5/18-PT, Status Conference Transcript, at 461–62.

210. See *Karadžić*, Case No. IT-95-5/18-PT, Holbrooke Agreement Motion (ICTY May 25, 2009); *Karadžić*, Case No. IT-95-5/18-PT, Status Conference Transcript, at 455.

211. *Karadžić*, Case No. IT-95-5/18-PT, Status Conference Transcript, at 455.

212. The Appeals Chamber did determine that the Trial Chamber had given *Karadžić* inadequate time to review his marked-up indictment, so it ordered the Trial Chamber to delay the commencement of the trial for one week, but it otherwise rejected *Karadžić*'s appeal. See Prosecutor v. *Karadžić*, Case No. IT-95-5/18-AR73.5, Decision on Radovan *Karadžić*'s Appeal of the Decision on Commencement of Trial, ¶¶ 21–23, 27 (ICTY Oct. 13, 2009).

213. *Id.* ¶¶ 21–24.

but it pointed out that a defendant who chooses to represent himself relinquishes many of the benefits associated with representation by counsel.²¹⁴

Reasonable minds may differ over whether the Trial Chamber accorded Karadžić sufficient time to prepare for trial, for although Karadžić chose to spend much of his pretrial period researching and presenting his immunity motion instead of preparing for trial, it is also true that his case features a massive quantity of documents, many of which were disclosed to Karadžić only a few months before the trial was to begin.²¹⁵ For that reason, and because Karadžić's pretrial period was shorter on average than those of previous ICTY accused, the Trial Chamber could have provided Karadžić more time without attracting negative attention for doing so.²¹⁶ Indeed, the Trial Chamber's refusal to grant Karadžić more time stands in stark contrast to the accommodation that the ICTY previously accorded Milošević and Šešelj and can reasonably be seen as signaling a new, less tolerant attitude toward self-representing accused.

Karadžić responded to the unfavorable Trial and Appeals Chambers' rulings by refusing to appear at trial, maintaining that he was not adequately prepared. The Trial Chamber immediately ordered the registrar to appoint standby counsel.²¹⁷ Pursuant to this order, the registrar provided Karadžić with a list of five lawyers whom the registrar had deemed eligible for appointment. Karadžić objected to all five, complaining that none of them were from Serbia or Bosnia and Herzegovina and that four of the five had previously represented leaders of the Kosovo Liberation Army who had fought against the Serbs.²¹⁸ Karadžić nonetheless asked to meet with each of the counsel, and although he reported that "all of them made an excellent impression," he asked to see a list of all eligible counsel so that he could search for a lawyer from his own region.²¹⁹ Karadžić maintained that such a lawyer would be able to prepare for trial more quickly because he or she would have prior knowledge of the relevant events and would be able to

214. *Id.* ¶ 24.

215. See Bogdan Ivanisević, *Court May Be Wise to Give Karadžić More Time*, BALKAN INSIGHT (Oct. 29, 2009), <http://old.balkaninsight.com/en/main/comment/23295>.

216. Of course, the Trial Chamber's refusal to grant Karadžić more time may have stemmed from the Trial Chamber's desire to comply with the tribunal's Completion Strategy, as some legal advisors to Karadžić have alleged. See *Karadžić*, Case No. IT-95-5/18-PT, Submission on Commencement of Trial, ¶ 14 (ICTY Sept. 3, 2009).

217. *Karadžić*, Case No. IT-95-5/18-T, Decision on Appointment of Counsel and Order on Further Trial Proceedings, ¶¶ 25–26 (ICTY Nov. 5, 2009). The appointment of standby counsel did not end up having considerable practical effect because the Trial Chamber has permitted Karadžić to continue to represent himself so long as he behaves appropriately, but should he fail to do so, he will then forfeit his right to self-representation and standby counsel will take over as an assigned counsel to represent him. *Id.* ¶¶ 25, 27.

218. *Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Motion to Vacate Appointment of Richard Harvey, ¶ 5 (ICTY Dec. 23, 2009).

219. *Id.*

communicate more effectively with Karadžić.²²⁰ The registrar declined to provide Karadžić with such a list and instead appointed Mr. Richard Harvey.

In appointing Harvey, the Registry appeared to diverge markedly from precedent. Previously, the *Šešelj* Appeals Chamber had strongly suggested that an accused has the right to select his standby counsel when it stated:

Should a time come when the Trial Chamber [imposes standby counsel], the Rule 44 list of Counsel should be provided to Šešelj and he should be permitted to select standby counsel from that list. Alternatively, should the full restoration of Šešelj's right to self-representation fail to curb his obstructionist behaviour, the Trial Chamber would be permitted to proceed to assign counsel to Šešelj. Again . . . if the Trial Chamber feels justified in making such a decision, the Rule 44 list of Counsel should be provided to Šešelj, and he should be permitted to select counsel from that list. Should Šešelj refuse to cooperate in selecting counsel from the list, the Registry may choose counsel at its discretion.²²¹

Although this language indicated that the Registry erred in refusing to allow Karadžić to choose his appointed counsel, the Trial Chamber did not reach that conclusion but rather sought to distinguish *Šešelj*. In particular, the Trial Chamber held that the Appeals Chamber's instructions in *Šešelj* were "based on the very specific facts of the *Šešelj* case, which differ considerably" from the facts of *Karadžić*.²²² Among the distinguishing facts were Šešelj's "troubled history" with his standby counsel and the animosity Šešelj bore toward him.²²³ This pronouncement is surprising because, with it, the *Karadžić* Trial Chamber appears to be asserting that Šešelj would have been permitted to select standby counsel primarily because Šešelj had behaved so badly with standby counsel whom he did not select. Because Karadžić, by contrast, had been polite and professional, the Registry did not permit him to select counsel.

Because this is not a principled basis for distinguishing the two cases, one might instead assume that the different conclusions reached in *Šešelj* and *Karadžić* reflect an evolution in the tribunal's approach toward self-representing accused. Indeed, the Appeals Chamber's decision affirming the Trial Chamber appears to confirm that different approach. Although it acknowledged that it had provided Šešelj with the right to select appointed counsel, it noted that the *Šešelj* decision "was rendered in a unique factual and procedural context very different from Karadžić's" and asserted that "a Chamber's context-limited decision to provide for processes beyond those

220. *Id.*

221. Prosecutor v. Šešelj, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, ¶ 28 (ICTY Dec. 8, 2006).

222. *Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Motion to Vacate Appointment of Richard Harvey, ¶ 36.

223. *Id.* ¶¶ 36–37.

guaranteed by the Statute and the Rules does not create an automatic right to these processes.”²²⁴

As noted above, the other tribunals have rarely had occasion to address matters of self-representation, so an examination of their jurisprudence is not especially illuminating. That caveat notwithstanding, the other tribunals do seem inclined to take earlier and more robust steps to impose reasonable restrictions on defendants’ right of self-representation. For one thing, whereas it was not until 2008 and the appearance of Karadžić that the ICTY adopted Rule 45*ter*—which authorizes the imposition of counsel on a defendant who wishes to self-represent²²⁵—the ICTR adopted the same rule six years earlier, and the SCSL and the STL have provided their Trial Chambers with that authority from their inception.²²⁶ Further, application of that rule at the SCSL shows that tribunal’s greater willingness to reasonably restrict a defendant’s right to self-represent.

When the *Civil Defence Forces (CDF)* trial began, defendant Sam Hinga Norman asked to represent himself, but the Trial Chamber concluded that Norman’s right of self-representation could only be “exercised with the assistance of Counsel to be assigned to the trial.”²²⁷ In reaching that decision, the Trial Chamber invoked such factors as the complexity of the case, the need for the trial to be completed expeditiously, the potential for disruption to the court’s calendar, and the need to safeguard the rights of Norman’s coaccused.²²⁸ The Trial Chamber also considered the ICTY’s self-representation jurisprudence and tried to distinguish *Milošević* and *Šešelj* by observing that, unlike Milošević and Šešelj, Norman had not requested self-representation until the eve of trial, and Norman had codefendants whose trials could be adversely affected by his self-representation.²²⁹

Although these factors do constitute actual differences between the cases, they do not appear sufficiently significant to justify the differing outcomes between the cases. Rather, the procedural histories of *Milošević* and *Šešelj* show that the ICTY maintained a firm commitment to permitting self-representation even when that self-representation substantially disrupted the trial proceedings. The SCSL’s treatment of the issue in *Norman*, by contrast, shows none of that commitment.

224. Prosecutor v. Karadžić, Case No. IT-95-5/18-AR73.6, Decision on Radovan Karadžić’s Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, ¶ 31 (Feb. 12, 2010).

225. See ICTY RPE 2010, *supra* note 72, R. 45*ter*.

226. See ICTR R. P. & EVID. 45 (July 6, 2002) (as amended); SCSL Directive, *supra* note 72, art. 10; STL RPE, *supra* note 61, R. 59(F).

227. Prosecutor v. Norman, Fofana & Kondewa (*Civil Defence Forces (CDF)* Case), Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court, ¶ 32 (June 8, 2004).

228. *Id.* ¶¶ 26–27.

229. *Id.* ¶¶ 17–19.

D. Summary

The foregoing Sections detail an evolution in the regulation of the defense counsel–client relationship across international tribunals. In the early days of the ICTY—the first modern international tribunal—entry requirements for defense counsel were extraordinarily low, defendants were permitted to waive virtually any conflict of interest, and they could fire their counsel virtually at will. As a consequence of these policies, when the ICTY was established and for many years thereafter, defendants had virtually unlimited discretion in their choice of counsel. In addition, defendants also could choose to eschew defense counsel entirely, and the tribunal showed tremendous willingness to adapt its proceedings to accommodate that choice.

In recent years, by contrast, the ICTY has restricted defendants' choices in all of these areas, and subsequent international tribunals have continued that trend by adopting more restrictive policies from their inceptions. Now, to be clear, although I believe that these restrictions constitute a clear and important evolution in the tribunals' policies, as I will discuss in Part III, I do not mean to suggest that the restrictions are unduly restrictive. Yes, the tribunals have imposed additional entry requirements on counsel wishing to defend indigent defendants, but these entry requirements are not overly burdensome.²³⁰ Yes, the tribunals have limited their defendants' ability to waive certain conflicts of interest, but similar or more onerous restrictions are found in most domestic codes of conduct.²³¹ Finally, although the ICTY does seem intent on keeping Tolimir and Karadžić on a tighter leash than previous self-representing accused, its true resolve is hard to measure because Tolimir and Karadžić have not pushed the tribunal with the tactics of their predecessors. Accordingly, though an evolution is underway, I do not wish to overstate either its novelty or its real-world impact: international criminal defendants continue to possess substantial discretion to decide who, if anyone, will represent them.

230. See ICTR RPE 2009, *supra* note 72, R. 45(A); ICTY Directive 2006, *supra* note 72, art. 14; see also ICTY ADC Press Release, *supra* note 86 (explaining the objectives of the Association of Defense Counsel and the training component of the association, which, notably, omits mandatory continuing education); cf. Starr, *supra* note 6, at 194–96 (advocating for the requirement of a “bar exam in international criminal law” for prospective defense counsel at the ICC and noting that such an exam is not required at the ICTY or ICTR).

231. Compare CURRENT ICTY CODE OF CONDUCT, *supra* note 89, art. 14(E)(ii)(2) (preventing ICTY defendants from consenting to conflicts of interest that are “likely to irreversibly prejudice the administration of justice”), with AM. BAR ASS’N [ABA] MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 15 (2011) (resembling the ICTY’s current rule by prohibiting the American client from consenting to conflicts of interest if the interests of the client would not be adequately protected by consent), and COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE [CCBE] CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS § 3.2 (2008), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductpl_1306748215.pdf (providing no apparent mechanism for allowing a defendant to waive any conflict).

At the same time, although the current real-world impact of the evolution may not be momentous, some of its causes are. Indeed, the following Part shows that both the defense counsel evolution just described and the procedural evolution discussed in Part I reflect a far broader, more fundamental evolution: the evolution towards legitimacy for international criminal justice.

III. EVOLVING TOWARDS LEGITIMACY

On the surface, the evolutions described in Parts I and II are easy to explain. The ICTY's procedural evolution stemmed primarily from a desire to expedite tribunal proceedings. Early ICTY trials were labeled excessively lengthy and inefficient, so in order to shorten them, the ICTY amended its rules to allow judges to exercise greater control over both pretrial and trial proceedings. The subsequent international tribunals also had efficiency in mind when they included nonadversarial elements either in their initial sets of procedural rules or in early revisions of those rules,²³² although political considerations²³³ also played a role at some tribunals, as did the desire to better represent the procedures of civil law countries,²³⁴ many of which are among the staunchest supporters of international criminal justice.

Some of the restrictions that the tribunals have placed on the defendants' choice of counsel also stemmed from a desire to reduce the length and cost of trials. When the tribunal permitted defendants to fire counsel virtually at will, trials were delayed because every time a defendant discharged his counsel, the proceedings had to be suspended to provide the defendant's new lawyer sufficient time to learn the case.²³⁵ Reducing the number of counsel changes thereby reduced delay. Similarly, the ICTY's willingness to accommodate self-representing defendants was contributing to the high cost

232. See, e.g., ANTONIO CASSESE, REPORT ON THE SPECIAL COURT FOR SIERRA LEONE SUBMITTED BY THE INDEPENDENT EXPERT 20–21 (2006); GEERT-JAN KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 7 (2005) (noting inquisitorial elements in ICTR procedure adopted to enhance efficiency); Gilbert Bitti, *Two Bones of Contention Between Civil and Common Law: The Record of the Proceedings and the Treatment of a Concursus Delictorum*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW, *supra* note 5, at 273, 275–76; Matthew Gillett & Matthias Schuster, *The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence*, 7 J. INT'L CRIM. JUST. 885, 886–87 (2009).

233. Ambos, *supra* note 2, at 7–9 (arguing that the powers of the ICC Pre-Trial Chamber derive less from a particular legal system and more from a political compromise).

234. Silvia A. Fernández de Gurmendi, *International Criminal Law Procedures*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 217, 220 (Roy S. Lee ed., 1999).

235. See *Comprehensive Report*, *supra* note 6, ¶¶ 49–51; JARINDE TEMMINCK TUINSTR, DEFENSE COUNSEL IN INTERNATIONAL CRIMINAL LAW 60 (2009). Permitting defendants to fire counsel virtually at will also creates incentives for defendants to engage in fee splitting with their counsel, a practice the tribunals have sought to eliminate. See, e.g., *id.* at 60.

and long length of those trials, so the ICTY has become less accommodating in recent years.

By contrast, the introduction of more burdensome qualifications requirements for defense counsel stemmed less from a desire to enhance efficiency and more from a desire to improve the quality of defense representation. During the ICTY's early years, numerous scholars, judges, and even defense counsel themselves pointed to deficiencies in defense representation.²³⁶ It stood to reason, then, that the ICTY and subsequent tribunals would seek to address those deficiencies by requiring that counsel be better credentialed, more experienced, and better able to speak the working languages of the tribunals. Indeed, the most influential factor driving the ICTY's defense counsel regulation evolution was the ICTY's own experience. As it internalized the negative consequences of the free rein it had accorded defendants in the use, selection, and retention of counsel, it tightened that rein.

The motivations just described do explain the evolutions, but only in part. Consider, for one thing, that many of the problems the ICTY later sought to ameliorate were problems that could have been foreseen at the tribunal's inception. Commentators have bemoaned the relative inefficiency of adversarial procedures for decades,²³⁷ and tribunal judges surely were aware that these procedures, along with the broad discretion they gave defendants to fire their counsel and to self-represent, would substantially lengthen proceedings. Further, because international criminal trials are procedurally complex and feature a body of law that is unfamiliar to most defense counsel, the ICTY judges must have known that their failure to impose any meaningful entry requirements on those counsel would result in suboptimal representation in many cases.

That at least some of these problems could have been anticipated is shown by the fact that roughly contemporaneous tribunals did anticipate them—or at least took steps to rectify them far sooner than the ICTY did. For instance, the ICTR required its defense counsel to meet substantial qualifications standards as early as 1998, whereas the ICTY did not impose its (less burdensome) requirements until 2004. Likewise, long before the ICTY's experience with self-representation had made clear the disruption that it can cause, the ICTR and the SCSL showed themselves willing to reasonably restrict their defendants' right to self-represent. The Rome Statute

236. See, e.g., *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, ¶ 21 nn.62–63 (ICTY June 30, 2005); Ackerman, *supra* note 75, at 170; Ellis, *supra* note 6, at 956–58; Tolbert, *supra* note 65, at 975–77; Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 104–05 (2001).

237. See, e.g., Albert Alschuler, *Implementing the Criminal Defendants Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 939–40, 960 (1983); Gordon van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 408, 465–66, 475–76 (1992).

also created a far more blended procedural system in July 1998, before the ICTY added substantial nonadversarial elements to its procedural rules.

So, if the trial inefficiency and counsel incompetency that eventually motivated the ICTY's procedural and regulatory evolutions were foreseeable—and indeed had motivated other tribunals to make different decisions from the ICTY—then why did the ICTY initially adopt and later maintain its laissez-faire attitude for so long? In other words, why would the ICTY be more reluctant than its contemporary tribunal counterparts both to empower its judges to exercise reasonable control over its proceedings and to restrict its defendants' ability to select or eschew counsel? The answer, I believe, lies in the ICTY's initial, extreme vulnerability and its concomitant vital need to build credibility and legitimacy.

We now know that the ICTY was the crucial first step on the road to a modern international criminal law revolution, but, when it was created, its significance—indeed its very survival—was in considerable doubt.²³⁸ Given that nearly fifty years had elapsed since the creation of the first international criminal tribunals at Nuremberg and Tokyo, the mere establishment of the ICTY was considered to be “[a]gainst great odds.”²³⁹ Its eventual success was seen as even less likely. The ICTY was established in the midst of an armed conflict by Western powers that were reluctant to devote military resources to ending the conflict, so the tribunal was seen less as a principled effort to extend the reach of criminal accountability to mass murderers and more as a fig leaf to conceal Western unwillingness to take truly effective action.²⁴⁰ The tribunal's legal legitimacy was questioned by those who doubted the Security Council's authority to establish an international criminal tribunal,²⁴¹ and its political legitimacy was under attack because no tribunal had been established to prosecute the authors of the many atrocities committed during the fifty years following the World War II trials.²⁴² Thus,

238. HAZAN, *supra* note 7, at 43–64.

239. SCHARF, *supra* note 9, at xv; see also Daphna Shrager & Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360, 361 (1994) (describing the “perceived political and legal factors which made the effective establishment of such a tribunal [the ICTY] difficult if not impossible”); Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 CRIM. L.F. 237, 237 (1994) (“One may call it truly amazing that the international community, acting through the Security Council, has been able to set up two international criminal jurisdictions in the recent past.”).

240. HAZAN, *supra* note 7, at 21, 42, 49; David J. Scheffer, *Three Memories from the Year of Origin, 1993*, 2 J. INT'L CRIM. JUST. 353, 353 (2004).

241. See *Prosecutor v. Tadić*, Case No. IT-94-I, Decision on the Defence Motion on Jurisdiction, ¶¶ 1–2 (ICTY Aug. 10, 1995); Jan M. Sjöcrona, *The International Criminal Tribunal for the Former Yugoslavia: Some Introductory Remarks from a Defence Point of View*, 8 LEIDEN J. INT'L L. 463, 464–66 (1995); U.N. Council OKs Yugoslav War Crimes Court, ST. LOUIS POST-DISPATCH, May 26, 1993, at 8A.

242. Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 349–50 (1999); Cassandra Jeu, *A Successful, Permanent International Criminal Court . . . “Isn't it Pretty to Think So?”*, 26 Hous. J. INT'L L. 411, 424–25 (2004).

the decision to prosecute Yugoslavian offenders was perceived by many—both inside and outside of the former Yugoslavia—as exemplifying biased and selective justice.²⁴³

Within the former Yugoslavia, the ICTY's legitimacy and impartiality was even more suspect. Serbs throughout the region considered the tribunal an illegitimate and biased court that had been established to persecute them.²⁴⁴ Bosnian Muslims were more favorably disposed to the tribunal, but they still viewed it with a healthy dose of skepticism because they perceived it to be yet another ineffective gesture from an indifferent international community.²⁴⁵ Finally, the very fact that the tribunal was established while the war was taking place meant that accurate information was scarce and that each party to the conflict was able to propound a self-interested narrative that situated its members as victims, not perpetrators.²⁴⁶ As Janine Clark put it: "Truth is an inherently contested concept and nowhere is this more evident than in [Bosnia and Herzegovina] itself, where essentially three competing versions of truth exist—the Bošnjak, the Serb and the Croat—according to which 'we' were the principal victims and 'they' were the aggressors."²⁴⁷ Thus, considerable factual uncertainty surrounded the tribunal's early operations, and because no consensus existed regarding who was doing what to whom, the people of the former Yugoslavia could have little confidence that the ICTY would accurately assess the legal claims put before it.

Perhaps even more destabilizing than the factual uncertainty surrounding the tribunal's early operations was the legal uncertainty that was just as

243. Jeu, *supra* note 242, at 424; Jon Henley, *War Tribunal Issues First Indictment*, GUARDIAN, Nov. 8, 1994, at 10; *Time for a Global Criminal Court*, N.Y. TIMES, Nov. 21, 1994, at A14; U.N. Council OKs Yugoslav War Crimes Court, *supra* note 241, at 8A.

244. See *supra* sources accompanying note 26.

245. Coll, *supra* note 27, at J8. Included among previous ineffective gestures were several Security Council resolutions imposing an economic embargo on Serbia that had little practical effect. See, e.g., S.C. Res. 764, ¶ 10, U.N. Doc. S/RES/764 (July 13, 1992); S.C. Res. 771, ¶ 5, U.N. Doc. S/RES/771 (Aug. 13, 1992); see also SCHARF, *supra* note 9, at 34–35. The Security Council also imposed a no-fly zone over Bosnia when Bosnian Serb aircraft began to attack civilian targets by air, S.C. Res. 781, ¶ 1, U.N. Doc. S/RES/781 (Oct. 9, 1992), but at the urging of the United Kingdom and France, the clause providing for enforcement of the no-fly zone was omitted from the resolution, and over the next six months, more than 465 violations of the no-fly zone were documented but ignored. SCHARF, *supra* note 9, at 35–36.

246. HAZAN, *supra* note 7, at 178; Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina*, 7 J. INT'L CRIM. JUST. 463, 476 (2009); Dan Saxon, *Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia*, 4 J. HUM. RTS. 559, 562 (2005). As late as 2004, eighty-four percent of Serbian respondents to a public opinion survey believed that Serbs constituted the largest proportion of war victims. ORENTLICHER, *supra* note 18, at 60.

247. Clark, *supra* note 246, at 476.

pervasive. The ICTY's original statute comprises a mere ten pages,²⁴⁸ and many of its provisions are summary and undetailed. For instance, although the statute listed the crimes over which the tribunal had jurisdiction, it did not set forth the elements of those crimes. Consequently, during the tribunal's early years, what exactly the prosecution had to prove or what the defendant had to defend against was frequently unclear.²⁴⁹ It was only when the early ICTY cases were adjudicated that, for instance, the elements of rape, torture, persecution, and inhumane acts, among other crimes, were delineated.²⁵⁰ Moreover, the ICTY Statute was completely silent as to defenses. Therefore, in the tribunal's very first case, it had to decide whether duress could be a defense to an international crime that involved the killing of a person,²⁵¹ and only in later cases did it decide the applicability of other defenses.²⁵²

As a consequence of these circumstances, many early commentators—and even some tribunal judges—expected the ICTY to fail,²⁵³ and the

248. The ICTY Statute, *supra* note 66, was originally drafted as ten pages within a report by the U.N. Secretary-General, and that report, including the statute, was then approved by a Security Council resolution in May 1993. See U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, at 36, U.N. Doc. S/25704, Annex (May 3, 1993); S.C. Res. 827, *supra* note 66.

249. See *Prosecutor v. Tadić*, Case No. IT-94-I-T, Opinion and Judgement, ¶ 694 (ICTY May 7, 1997) (noting that persecution as a crime against humanity “has never been clearly defined”); Louise Arbour, *Foreword* to *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS*, at ix–x (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) (“[C]ertain elements of certain offences and doctrines of criminal responsibility, and a myriad of issues of procedure and evidence remain to be elaborated in all their detail.”); *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 1998 (2001) (“The crimes within the subject matter jurisdiction of the ICTY and the ICTR—genocide, crimes against humanity, and war crimes as described in the Geneva and Hague Conventions—were vaguely defined and seldom enforced prior to the creation of the tribunals.”); Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 TRANSNAT’L L. & CONTEMP. PROBS. 15, 18 n.9 (1997); Sjöcrona, *supra* note 241, at 470–73 (describing the many questions posed by the ICTY’s jurisdictional provisions on war crimes and crimes against humanity).

250. See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 174–85 (ICTY Dec. 10, 1998) (defining rape); *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, ¶¶ 562–66, 582–627 (ICTY Jan. 14, 2000) (discussing persecution and inhumane acts); *Prosecutor v. Delalić, Mucic, Delic & Landzo*, Case No. IT-96-21-T, Judgment, ¶¶ 446–97 (ICTY Nov. 16, 1998) (discussing torture); *Tadić*, Case No. IT-94-I-T, Opinion and Judgment, ¶¶ 727–30, 748 (discussing inhumane acts).

251. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment, ¶¶ 16, 19 (ICTY Oct. 7, 1997).

252. See *Prosecutor v. Delalić, Mucic, Delic & Landzo*, Case No. IT-96-21-A, Judgment, ¶ 525 (ICTY Feb. 20, 2001) (finding the defense of necessity to be inapplicable “in relation to an allegation of active mistreatment of detainees”); *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-T, Judgment, ¶ 706 (ICTY Nov. 2, 2001) (rejecting voluntary intoxication as a mitigating factor in sentencing).

253. See, e.g., HAZAN, *supra* note 7, at 49; D’Amato, *supra* note 13, at 501–02; David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401,

international community initially seemed content to let it do so. The United Nations provided the ICTY with such inadequate resources during its early years²⁵⁴ that the tribunal's first prosecutor unofficially threatened to resign if funding were not increased.²⁵⁵ The ICTY received even less enforcement support, a failure that posed an even greater threat to the tribunal's survival. During its first two years, the ICTY had no defendants in custody. By Spring 1998, the tribunal had issued 205 arrest warrants, but the states of the former Yugoslavia had executed only six.²⁵⁶ Although successive ICTY Presidents presented numerous reports to the Security Council complaining about lack of state cooperation, the Security Council "failed to respond in a meaningful way."²⁵⁷ Other states, for their parts, were reluctant to assist in enforcement; they allegedly refused to provide the tribunal key intelligence information, and they declined to order the 60,000 peacekeepers in Bosnia to arrest tribunal indictees.²⁵⁸ Thus, although the NATO-led peacekeeping force in Bosnia had the authority to arrest ICTY indictees, it declined to do so and indeed "went out of its way to avoid arresting suspects, reportedly waving Karadžić and other suspects through NATO checkpoints."²⁵⁹ The ICTY's enforcement difficulties were so severe that Ted Meron, one of the tribunal's staunchest champions, suggested that the international community should either support the tribunal or shut it down.²⁶⁰

402–04, 414–15, 419 (1994) (stating that the obstacles to the success of the international criminal court for the former Yugoslavia remain "profound").

254. See, e.g., STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 188 (1997); SCHARF, *supra* note 9, at 79–84; THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 280 (1998).

255. Tomuschat, *supra* note 239, at 21 n.8.

256. McDonald, *supra* note 10, at 563. This dismal enforcement record led the tribunal to label itself "a partial failure—through no fault of its own—because the vast majority of indictees continue to remain free, seemingly enjoying absolute immunity." *Id.*; ICTY President, *Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, transmitted by Note of the Secretary-General*, ¶ 175, U.N. Doc. A/52/375-S/1997/729 (Sept. 18, 1997).

257. McDonald, *supra* note 10, at 562.

258. Gabrielle Kirk McDonald, *Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia*, 24 HASTINGS INT'L & COMP. L. REV. 155, 160 (2001); see also MERON, *supra* note 254, at 281; Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 795–96 (1998) (discussing the international community's "unwilling[ness] to make the sacrifices necessary to arrest indicted persons"); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 358 (1999); Schrag, *supra* note 249, at 22 (arguing that NATO's failure to arrest Karadžić and Mladić "is accurately seen as a symptom of the international community's ambivalence towards the Tribunal").

259. ORENTLICHER, *supra* note 26, at 28; see also HAZAN, *supra* note 7, at 92.

260. Theodor Meron, *Answering for War Crimes: Lessons From the Balkans*, FOREIGN AFF., Jan.–Feb. 1997, at 2.

Frédéric Mégret has observed that “international criminal trials are uniquely prone to being suspected of bias since they operate in an environment traditionally characterized by particularly intense conflicts of interest and values.”²⁶¹ Certainly, that observation applied to the ICTY, and it, along with the other circumstances just described, placed the ICTY in a uniquely vulnerable position even as compared to the other international criminal tribunals. For instance, although the ICTR suffered similar funding and staffing deficiencies in its early days,²⁶² it was able to gain custody over high-level indictees very soon after it was established²⁶³ and thereby gained an important measure of credibility. Further, although the government of Rwanda has criticized various aspects of ICTR proceedings,²⁶⁴ it has always supported the tribunal’s prosecutorial goals and has, for the most part, complied with tribunal orders and requests.²⁶⁵ The people of Rwanda, moreover,

261. Frédéric Mégret, *Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure*, 14 UCLA J. INT’L L. & FOREIGN AFF. 37, 71 (2009).

262. See Lawyers Comm. for Human Rights, *Prosecuting Genocide in Rwanda: A Lawyers Committee Report on the ICTR and National Trials*, at VI(A)–(B) (July 1997) (unpublished working paper) (on file with Columbia International Affairs Online); RATNER & ABRAMS, *supra* note 254, at 188.

263. See Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PENN. L. REV. 1, 67 n.279 (2002).

264. Rwanda has complained about the length and inefficiency of ICTR proceedings. Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT’L L. REV. 31, 35–36 (2002); Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, 3 J. INT’L CRIM. JUST. 950, 951 (2005). Some governmental officials have also suggested that the ICTR’s budget would be better spent on other measures. See e.g., JUSTICE DELAYED, *supra* note 3, at 26; Aloys Habimana, *Judicial Responses to Mass Violence: Is the International Criminal Tribunal for Rwanda Making a Difference Towards Reconciliation in Rwanda?*, in INTERNATIONAL WAR CRIMES: MAKING A DIFFERENCE?: PROCEEDINGS OF AN INTERDISCIPLINARY CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 83, 86 (Steven R. Ratner & James L. Bischoff eds., 2004) [hereinafter MAKING A DIFFERENCE]. Rwanda was also unhappy with the decision to locate the tribunal outside of Rwanda. See Timothy Longman, *The Domestic Impact of the International Criminal Tribunal for Rwanda*, in MAKING A DIFFERENCE, *supra*, at 39; JUSTICE DELAYED, *supra* note 3, at 19 (recommending that ICTR trials be conducted in Rwanda). Even with respect to these issues, however, Rwanda’s view of the ICTR has improved over time. See Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 28 (2002).

265. Although generally supportive of the ICTR, Rwanda has occasionally retaliated against tribunal rulings and prosecutorial investigations of which it disapproved. See KINGSLEY CHIEDU MOGHALU, *RWANDA’S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE* 140 (2005) (describing Rwanda’s refusal to issue visas to permit Rwandan witnesses to travel to the ICTR in retaliation for the prosecutor’s investigation of the alleged crimes of the Rwanda Patriotic Front (RPF)); Franck Petit, *Cameroonian Intrigues*, INT’L JUST. TRIB., Mar. 5, 2001 (describing Rwanda’s intention to “suspend all relations” with the ICTR following a November 1999 ruling ordering the release of Jean-Bosco Barayagwiza because of procedural errors); *ICTR/Prosecution–Synthesis: Prosecutors at the ICTR*, HIRONDELLE NEWS AGENCY, Oct. 29, 2003 (describing Rwanda’s response to the Barayagwiza ruling as well as its opposition to the ICTR’s investigation into crimes allegedly committed by members of the RPF).

have held a generally positive view of the tribunal, with a majority believing that the tribunal has functioned well and that it is fair to all ethnic groups.²⁶⁶ As for the SCSL, Sierra Leoneans have appeared even more favorably disposed. Although Sierra Leoneans do register some complaints about the tribunal,²⁶⁷ in a nationwide survey, overwhelming majorities of them expressed their belief that the SCSL has contributed to peace building and that its trials are fair and help to deter future violence.²⁶⁸ Indeed, Donna Arzt compared local impressions of the early SCSL with those of the ICTY and concluded that, in contrast to the mistrust that pervades local views about the ICTY, “receptiveness toward the Special Court is rather broad, with concerns expressed more in regard to details and implementation than overall legitimacy.”²⁶⁹

The ICTY was not the recipient of such favorable initial impressions, and the challenging circumstances and deep-seated distrust that surrounded its early work rendered it uniquely vulnerable and subject to perceptions of illegitimacy. It is this vulnerability and concomitant need to build legitimacy that drove both the ICTY’s initial procedural and regulatory choices and its decision to retain many of those choices after other international tribunals had rejected them. Indeed, as I will argue in the following pages, adopting adversarial procedures and permitting them to be utilized by a

266. Longman, *supra* note 264, at 37–38. Interestingly, in a reverse of the ethnically self-interested views about the ICTY that prevail amongst the people of the former Yugoslavia, the ICTR has more support among Rwandan Hutus (who have been the ICTR’s exclusive target) than among their Tutsi compatriots. *Id.* at 38. Rwandan Hutus, however, do believe that the tribunal should prosecute members of the RPF for their alleged crimes against Hutus. *Id.*; JUSTICE DELAYED, *supra* note 3, at 19; Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 418 (2006).

267. Some Sierra Leoneans complain, for instance, that the SCSL should have indicted more perpetrators, and many believe that it should not have indicted Sam Hinga Norman. Additionally, some assert that the resources devoted to the SCSL might have been put to better use. INT’L CRISIS GRP., THE SPECIAL COURT FOR SIERRA LEONE: PROMISES AND PITFALLS OF A “NEW MODEL” 10 (2003); RACHEL KERR & JESSICA LINCOLN, KING’S COLL. LONDON, THE SPECIAL COURT FOR SIERRA LEONE: OUTREACH, LEGACY AND IMPACT FINAL REPORT 21–23 (2008); TOM PERRIELLO & MARIEKE WIERDA, INT’L CTR. FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY 2, 28, 30–31, 38 (Prosecution Case Studies Series 2006); Donna E. Arzt, *Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 233 (2006); James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT’L L.J. 616, 641–43 (2005); Vincent O. Nmeihelle & Charles Chernor Jalloh, *International Criminal Justice: The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107, 109 (2006).

268. MEMUNATU BABY PRATT, NATION-WIDE SURVEY REPORT ON PUBLIC PERCEPTIONS OF THE SPECIAL COURT FOR SIERRA LEONE 23–24 (2007) (on file with author); *see also* Arzt, *supra* note 267, at 233 (“Despite endless debate about its cost and legitimacy . . . Sierra Leoneans welcomed the court. We saw it not only as a mechanism for transnational justice but also as an instrument to transform our judicial system. . . . Nobody therefore challenged the court’s existence.”) (internal quotation marks omitted).

269. Arzt, *supra* note 267, at 233.

lawyer of the defendant's choice stood as the only viable options for an institution as weak and mistrusted as the ICTY.

To make this argument, I must provide a brief description of adversarial and nonadversarial procedures. Criminal proceedings in an adversarial system are structured in the form of a contest between the defendant and the state. The adversarial model charges the parties with investigating the facts, researching the law, and presenting the case in the manner most favorable to their own positions.²⁷⁰ Thus, in an adversarial system, it is the parties who are responsible for unearthing the evidence, determining what arguments to advance, and deciding how best to support those arguments. In other words, the parties decide which witnesses to call, in what order to call them, and what questions to ask, among many other decisions. Trial judges and lay jurors are expected to passively receive the evidence presented by the parties. Although trial judges are authorized to ask questions, doing so is frowned upon, and judicial interventions are unlikely to be meaningful in any event because judges in adversarial systems are kept uninformed about the facts of their cases prior to trial.²⁷¹

As the prior description reveals, proceedings in an adversarial system are driven by the parties. In contrast, proceedings in a nonadversarial system are driven by the judiciary. Some nonadversarial criminal justice systems place pretrial investigations in the hands of an investigating judge, who is charged with collecting both inculpatory and exculpatory evidence.²⁷² Other nonadversarial systems do not use investigating judges; however, even in nonadversarial systems in which the parties play a more robust role in the pretrial investigations, at trial it is the presiding judge who determines which witnesses to call and who takes the lead in questioning those witnesses.²⁷³ It is only after the presiding judge has concluded her questioning that the lawyers have the opportunity to suggest additional

270. See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 43 (5th ed. 2009); LUBAN, *supra* note 1, at 57; Sward, *supra* note 28, at 302.

271. Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1090–91 (1975). That is, because judges in an adversarial system do not become familiar with the evidence before trial, they do not know where the evidentiary weaknesses lie and therefore are unable to question the parties effectively.

272. See, e.g., Christine van den Wyngaert, *Belgium*, in *CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY* 1, 9 (Christine van den Wyngaert et al. eds., 1993); Richard Vogler, *Criminal Procedure in France*, in *COMPARATIVE CRIMINAL PROCEDURE* 14, 19 (John Hatchard et al. eds., 1996). For a discussion of the powers of investigation held by judges in various countries, see Denis Salas, *The Role of the Judge*, in *EUROPEAN CRIMINAL PROCEDURES* 488, 506–09 (Mireille Delmas-Marty & J.R. Spencer eds., 2002).

273. GERHARD ROBBERS, *AN INTRODUCTION TO GERMAN LAW* 189 (1998); Mary C. Daly, *Some Thoughts on the Differences in Criminal Trials in the Civil and Common Law Legal Systems*, 2 J. INST. FOR STUDY LEGAL ETHICS 65, 70 (1999); Damaška, *supra* note 271, at 1088; Joachim Herrmann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755, 760 (1992); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 143 (1983); Van den Wyngaert, *supra* note 272, at 33.

questions.²⁷⁴ Consequently, as Mirjan Damaška puts it, in a nonadversarial trial, the “bulk of information is obtained through judicial interrogation, and only a few informational crumbs are left to the parties.”²⁷⁵ The presiding judge is also authorized to raise any issues relevant to the charges and can “even hear evidence not formally put forward by the parties.”²⁷⁶ Not surprisingly, therefore, most commentators consider the key difference between adversarial and nonadversarial proceedings to be that the former are party dominated, and the latter are judge dominated.²⁷⁷

This key difference reflects the two systems’ very different ideological underpinnings. By placing so much control in the hands of the parties, adversarial systems manifest respect for litigant autonomy and party participation²⁷⁸ while expressing a concomitant distrust of the state and state officials. Mirjan Damaška has noted, for instance, that adversarial systems are founded on traditional Lockean liberal values that include distrust of the state²⁷⁹ and a “complementary demand for safeguards against abuse” by state officials.²⁸⁰ Other commentators have echoed this understanding of the adversarial system,²⁸¹ and have contrasted it with the “collectivistic values

274. See LUBAN, *supra* note 1, at 94–95 (noting that in Germany lawyers rarely ask more than a couple of questions, both because the judge has typically asked all of the relevant questions and because intruding further might be taken as criticism of the judge’s work); Tomlinson, *supra* note 273, at 143 (observing that during trials in the French assize courts, “[t]he number of questions proposed by the other participants is usually quite limited, however, and the president plainly dominates the courtroom proceeding”).

275. Damaška, *supra* note 271, at 1089.

276. See Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 559 (1973).

277. Philippe Bruno, *The Common Law from a Civil Lawyer’s Perspective*, in INTRODUCTION TO FOREIGN LEGAL SYSTEMS 1, 5 (Richard A. Danner & Marie-Louise H. Bernal eds., 1994); Daly, *supra* note 273, at 67–68 (observing that “[i]n the [nonadversarial] civil law system, the judges—not the parties—drive the criminal process”); Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 841 (1997) (“[W]hile the continental criminal judge takes the lion’s share of factfinding activity, in Anglo-American lands procedural action is to a much greater extent in the hands of the lawyers for the prosecution and the defense.”); Van Kessel, *supra* note 237, at 431 (“A central difference between the adversary and nonadversary systems is that in the latter the judge controls the process rather than the lawyers.”).

278. See Sward, *supra* note 28, at 302, 310, 318, 324 (observing that party control is understood to preserve individual autonomy and dignity because it “giv[es] litigants the fullest voice possible” in their cases). Lon Fuller believed, for instance, that “[t]he essence of the adversary system is that each side is accorded a participation in the decision that is reached, a participation that takes the form of presenting proofs and arguments.” Fuller, *supra* note 28, at 41.

279. Damaška, *supra* note 276, at 565.

280. *Id.* at 583.

281. See, e.g., STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 49–51 (1984); RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 355 (2001); Frank J. Macchiarola, *Finding the Truth in an American Criminal Trial: Some Observations*, 5 CARDOZO J. INT’L & COMP. L. 97, 99 (1997); Mégret, *supra* note 261, at 46; Marian Neef &

and benevolent paternalism” that underpin nonadversarial procedural systems²⁸² and the trust in state officials that these systems reflect.²⁸³ As Nico Jörg and his coauthors put it, nonadversarial systems are premised on the notion that “the state is the benevolent and most powerful protector and guarantor of public interest and can . . . be trusted to ‘police’ itself.”²⁸⁴ They go on to observe that nonadversarial procedures “function by virtue of society’s faith in the fundamental commitment of state institutions to act in the interests of justice (in all senses of the word).”²⁸⁵ Karl Llewellyn built upon these themes in sketching contrasting criminal justice models whose procedures bear striking resemblances to adversarial and nonadversarial procedures and whose underlying ideologies reflect the attitude toward officials described above. Llewellyn, for instance, contrasted the “parental” system of criminal justice with that of the “arm’s length” system, describing the former as based on a “feeling of groupness,” or “We-ness,”²⁸⁶ that sees the defendant as an integral part of the community. By contrast, the “arm’s length” system—which Llewellyn describes as a caricature of the modern adversarial system—views the defendant as a “person quite outside the community,” whom the officials can take hold of only if they can pin upon him some specific act.²⁸⁷ Llewellyn delineates one of the basic characteristics of the arm’s length system as distrust of officials.²⁸⁸

Merely to describe nonadversarial procedures as conceptualizing the state as a benevolent protector of public interest, capable and willing to police itself, is to show how extraordinarily unsuitable those procedures would have been for early ICTY proceedings. If the use of the adversarial system in the United States is understood to reflect Americans’ notorious

Stuart Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y. L.F. 123, 156 (1974).

282. Damaška, *supra* note 276, at 565.

283. *Id.* at 583–84 (“[T]he ideology supporting modern non-adversary procedure . . . exhibits much less distrust of police, prosecutors, judges, and public officials in general.”); Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT’L & COMP. L. 1, 2 (1997); Mégret, *supra* note 261, at 46; *cf.* Luna, *supra* note 30, at 300 (contrasting “the civil law tradition [that] was not forged in an abiding distrust of centralized authority”).

284. Jörg et al., *supra* note 30, at 44; *see also* DAMAŠKA, *supra* note 31, at 173.

285. Jörg et al., *supra* note 30, at 55; *see also id.* at 43 (“[L]egitimacy of the inquisitorial procedure in a democratic context requires an inordinate amount of faith in the integrity of the state and its capacity to pursue truth . . .”).

286. LLEWELLYN, *supra* note 30, at 448.

287. *Id.* at 445.

288. *Id.* at 444–45. Similarly, John Griffiths contrasts the family model of the criminal justice process with the battle model, predicating the latter “on the idea that there is in the domain of the criminal process an irreconcilable conflict between the individual and the state” and the former “on the proposition of reconcilable interests, even a state of love. While the family model implies a basic trust in public officials, the battle model is characterized by a lack of faith in them.” Damaška, *supra* note 276, at 572.

distrust for their governmental officials,²⁸⁹ consider the procedural implications of the far more virulent skepticism and mistrust that pervaded the ICTY at its inception. Indeed, consider the following summary: In the midst of a brutal war in which each party to the conflict believed itself to be entirely right and its opponents entirely wrong, the U.N. Security Council used a somewhat novel legal mechanism to establish an international criminal tribunal, following fifty years in which international crimes all over the globe had gone unprosecuted. The international tribunal was charged with prosecuting genocide, war crimes, and crimes against humanity, but it was not told what those crimes were or what defenses could be brought against them. The international tribunal also was not initially provided sufficient funds or enforcement support to carry out its work in even a minimally effective way. The tribunal's judges were charged with drafting the new tribunal's procedural rules, and they therefore had the authority to structure the tribunal's proceedings along either adversarial or nonadversarial lines. But although the judges had the theoretical ability to craft nonadversarial trial proceedings in which the judges took the lead in deciding which witnesses to call and what questions to ask, because such nonadversarial procedures are founded on "collectivistic values," "benevolent paternalism,"²⁹⁰ and trust for state officials, they would have had no ideological grounding in the early ICTY. Uncertainty and skepticism about every aspect of the tribunal abounded during its early years, and that uncertainty and skepticism rendered it impossible to adopt a set of procedures that presupposed trust between citizen and state and between litigant and the judicial system. Under these circumstances, the only viable procedural system for the early ICTY was the procedural system that bestows upon the parties maximum control over their cases. That is, the only viable procedural system for the early ICTY was the adversary system.

Further, it is not merely that the ideological underpinnings of the adversary system are in far better alignment with the perceptions and reality of the early ICTY. In addition, social psychology research of the last few decades shows that adversarial procedures had considerable potential to provide the ICTY other key benefits. In the past, social psychologists assumed that people assessed the desirability of procedural systems primarily on the basis of the outcomes they received under those systems,²⁹¹ but the seminal work of John Thibaut and Laurens Walker showed that individuals' preferences for one set of procedures over another are in fact substantially predicated on their perceptions of the fairness of those

289. See SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 33 (1981); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 15 (2001).

290. Damaška, *supra* note 276, at 565.

291. LIND & TYLER, *supra* note 32, at 1.

procedures.²⁹² That is, as Allan Lind and Tom Tyler put it, “fairness is a major and very likely *the* major determinant of procedural preferences.”²⁹³ Following upon Thibaut and Walker’s studies, subsequent researchers have shown that individuals who believe that the procedures used in their cases were fair view the legal officials, judicial institutions, and the specific outcomes of their cases more favorably. Indeed, as a general matter, assessments of procedural fairness lead to “greater overall satisfaction with the legal experience and more positive affect with respect to an encounter with the justice system.”²⁹⁴ Two studies in this vein, for instance, examined the views of convicted felons and showed that a defendant’s evaluation of his overall experience in the criminal justice system is heavily influenced by his assessment of whether his case was handled fairly.²⁹⁵ Researchers conclude, therefore, that the use of procedures perceived to be fair provides “a cushion for authorities when the outcomes they have provided are unfavorable.”²⁹⁶ That is, when procedures perceived to be fair are used, individual views about authorities remain positive, whereas when procedures perceived to be unfair are used, “negative outcomes lead to negative affect toward the authorities involved.”²⁹⁷ Finally, and most relevant here, research shows that people are more likely to accept and obey negative decisions when they believe those decisions were made pursuant to fair procedures.²⁹⁸

The research just canvassed took place within the context of stable groups that have existing authority structures. These authorities are widely considered to be legitimate and therefore entitled to obedience. However, studies show that the fairness effect I have described is less influential in the context of authorities with questionable legitimacy. In particular, when individuals doubt the legitimacy of an authority, they are less willing to defer to the authority’s decisions on the basis that the decisions were made fairly. Rather, they will focus more on the favorability of the decision.²⁹⁹ Thus, a

292. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 68, 74 (1975).

293. LIND & TYLER, *supra* note 32, at 34.

294. *Id.* at 70.

295. *Id.* at 73; Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 L. & SOC’Y REV. 483, 483 (1988); Jean M. Landis & Lynne Goodstein, *When Is Justice Fair? An Integrated Approach to the Outcome Versus Procedure Debate*, AM. B. FOUND. RES. J. 675, 675, 706–07 (1986).

296. LIND & TYLER, *supra* note 32, at 71.

297. *Id.* at 72.

298. LIND & TYLER, *supra* note 32, at 81–82; *see also* MACCOUN ET AL., *ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM* 56–57, 60–62 (1988); Katherine M. Kitzman & Robert E. Emery, *Procedural Justice and Parents’ Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 L. & HUM. BEHAV. 553, 554 (1993); Lind et al., *supra* note 33, at 240, 245–47 (1993); Tyler, *supra* note 33, at 119.

299. Tyler, *supra* note 33, at 120.

central goal for new authorities must be to gain legitimacy, and fairness assessments also play a key role in this quest. In particular, if “people view or personally experience the authorities as making decisions fairly, they increasingly view them as legitimate. Over time, this legitimacy shapes deference, which becomes increasingly independent of the favourability of policies and decisions.”³⁰⁰ In other words, the key ingredient that shapes an individual’s assessment of an institution’s legitimacy—legitimacy that leads individuals to defer to the decisions of that institution—is the fairness of the procedures through which institutions exercise their authority.

Because the perception of fair procedures is so influential to so many realms, it becomes crucial to determine what procedures are perceived to be most fair. Through a series of studies, Thibaut and Walker concluded that individuals across legal cultures consider adversarial procedures to be fairer than nonadversarial procedures.³⁰¹ When they sought to determine why adversarial procedures were consistently viewed as fairer, their studies consistently showed the key differentiating element to be the litigants’ level of control over the process. That is, “procedures that vest process control in those affected by the outcome of the procedure are viewed as more fair than are procedures that vest process control in the decision maker.”³⁰² Thibaut and Walker’s findings were replicated in numerous subsequent studies³⁰³ that show not only the importance of process control for litigants but the reasons for that importance: litigants desire process control not so much because they believe it will enable them to achieve better outcomes, but rather for the opportunity it provides them to express their opinions and arguments; that is, to tell their side of the story.³⁰⁴ Thus, “voice,” or the capacity to have one’s feelings heard, appears to be a critical factor in

300. *Id.*

301. THIBAUT & WALKER, *supra* note 292, at 78–80. Subsequent researchers replicated this finding. See Stephen LaTour, *Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. PERSONALITY & SOC. PSYCHOL. 1531, 1543 (1978). Some later studies, however, suggested that culture plays a more influential role in procedural preferences than Thibaut and Walker’s research indicated. Cf. Rebecca A. Anderson & Amy L. Otto, *Perceptions of Fairness in the Justice System: A Cross-Cultural Comparison*, 31 SOC. BEHAV. & PERSONALITY 557 (2003); Kwok Leung, *Some Determinants of Reactions to Procedural Models for Conflict Resolution: A Cross-National Study*, 53 J. PERSONALITY & SOC. PSYCHOL. 898, 898 (1987).

302. LIND & TYLER, *supra* note 32, at 35; see also Robert Folger & Jerald Greenberg, *Procedural Justice: An Interpretive Analysis of Personnel Decisions*, in 3 RESEARCH IN PERSONNEL AND HUMAN RESOURCE MANAGEMENT 141, 153 (Kendrith Rowland & Gerald Ferris eds., 1985) (“[T]he research on dispute resolution, whether in legal or nonlegal settings, clearly indicates that procedures giving disputing parties control over the resolution process are preferred to those that do not offer any such process control.”).

303. Pauline Houlden et al., *Preferences for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 13, 26–27 (1978); LaTour, *supra* note 301, at 1543.

304. LIND & TYLER, *supra* note 32, at 101.

procedural fairness judgments.³⁰⁵ For that reason, rules that prevent litigants from presenting issues that they believe are important (even if they actually are not) have the effect of restricting process control and thereby “lead to feelings of procedural unfairness.”³⁰⁶

As is apparent, this research is highly relevant to the ICTY because it suggests that adversarial procedures were not only a far better ideological fit for the early tribunal but that they also had the potential to strengthen the tribunal by enhancing its fledgling legitimacy. The early ICTY was not considered a legitimate criminal justice system in the eyes of its defendants or most of their compatriots. The tribunal could not hope to gain legitimacy overnight; indeed, to this day the tribunal struggles to appear legitimate to certain constituencies.³⁰⁷ Nonetheless, it was crucial for the tribunal to take what steps it could to enhance its authority and build its credibility. Because adversarial procedures are considered fairer than nonadversarial procedures, and because perceptions of fairness lead to perceptions of legitimacy as well as to deference, adversarial procedures were the obvious choice for a tribunal as weak and vulnerable as the ICTY.

Recall, though, that the key element leading to perceptions of fairness is process control. Litigants consider adversarial procedures to be fairer because adversarial procedures permit litigants greater control over the presentation of their cases. That is, adversarial procedures permit litigants to make many of the strategic and expressive decisions that judges typically make in nonadversarial systems. But even within adversarial criminal justice systems, the level of process control afforded to litigants can vary as a system’s evidentiary rules, time limits, and witness procedures can preclude litigants from making certain arguments. Additionally, and even more fundamentally, a litigant’s process control can be inhibited because, even in an adversarial system, it is not the litigant but the litigant’s lawyer who controls much of the process. In the United States, for instance, criminal defendants have the last word about the “ends” of representation; consequently, it is they who decide whether to plead guilty,³⁰⁸ waive a jury trial,³⁰⁹ or launch an appeal.³¹⁰ However, it is the defendant’s lawyer who retains decision-making authority over the “means” of the representation; thus, it is the lawyers who decide which witnesses to call, what questions to ask them,

305. Blair H. Sheppard, *Justice Is No Simple Matter: Case for Elaborating Our Model of Procedural Fairness*, 49 J. PERSONALITY & SOC. PSYCHOL. 953, 954, 959 (1985); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 74, 79 (1985).

306. LIND & TYLER, *supra* note 32, at 95.

307. See ORENTLICHER, *supra* note 18, at 16, 21.

308. ABA, STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-5.2(a)(i) (3d ed. 1993) [hereinafter ABA STANDARDS].

309. See *Graves v. P.J. Taggares Co.*, 616 P.2d 1223, 1228 (Wash. 1980) (en banc); ABA STANDARDS, *supra* note 308, Standard 4-5.2.

310. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

and how to sculpt the arguments that make up the case.³¹¹ Even domestic defendants may resent these restrictions on their process control, particularly if they suspect that their lawyers are not entirely loyal or are not working their hardest to secure a favorable outcome.³¹² However, most domestic criminal defendants do experience some measure of process control because their lawyers seek to advance the broad goals the defendants wish advanced in the general way they wish them advanced.³¹³ In particular, both defendants and their lawyers typically seek either an acquittal or the lowest available sentence.

In contrast to domestic defendants, an ICTY defendant's experience of process control is more greatly impacted by the use of a lawyer because the goal alignment between defendants and lawyers that we presume with domestic defendants and their lawyers cannot be presumed at the ICTY. For instance, whereas domestic defendants virtually always seek an acquittal, or at least a lowered sentence, ICTY defendants are far more likely to seek alternative or additional goals. Some ICTY defendants are focused less on precluding or minimizing punishment and more on proclaiming their version of the conflict to their compatriots and the international community.³¹⁴ They may believe that their acquittal is impossible at the ICTY,³¹⁵ or they may prefer to use their trial as a platform to influence local politics or to

311. *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977); *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983); *State v. Rodriguez*, 612 P.2d 484, 489 (Ariz. 1980); ABA STANDARDS, *supra* note 308, Standard 4-5.2(b).

312. Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4, 7 (1971). Concern about lawyers' loyalty was particularly prevalent among defendants who were represented by public defenders; many such defendants believed that public defenders owed a certain loyalty to the state because the state paid the public defenders' salary. JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 105, 110-13 (1972).

313. *See, e.g.*, ABA MODEL RULES OF PROF'L CONDUCT R. 1.2 (2011) (requiring lawyers to "abide by a client's decisions concerning the objectives of representation and . . . [to] consult with the client as to the means by which they are to be pursued"); *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973) ("[T]he duty of the lawyer, subject to his role as an 'officer of the court,' is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State.") (citation omitted).

314. WALD, *supra* note 162, at 37; *see also* Scharf & Rassi, *supra* note 162, at 5-6.

315. *See* Prosecutor v. Milošević, Case No. IT-99-37-I, Initial Appearance Transcript, at 4-5 (ICTY July 3, 2001); Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 550 (1998) (describing some defense counsel who do not believe that acquittals are possible at the ICTY); *Milosevic's Appeal*, BBC NEWS (Apr. 3, 2001), http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1257621.stm; *see also* Prosecutor v. Tolimir, Case No. IT-05-88/2-I, Submission of the Accused to the Tribunal Concerning the Deception of the Public and the Disturbance to My Family Caused by False Statements Made by the Registry and the Political and Media Pressures It Has Exerted on the Tribunal, ¶ 5 (ICTY Oct. 8, 2007) (showing the accused argued that the Registry was trying to deny him his right to self-represent and "impose on [him] a counsel who will, in [his] name, accept the pleas bargained by the Registry and the Prosecutor's Office").

enhance their image and legacy in the world outside of the ICTY.³¹⁶ In addition, even when ICTY defendants do seek “traditional” goals, they are more likely than domestic defendants to try to advance them through “untraditional” means. For instance, they might seek an acquittal not through painstaking engagement with the evidence the prosecution has presented but by attacking the legitimacy of the tribunal³¹⁷ or the impartiality of the judges.³¹⁸ The problem is that these alternative goals and tactics are ones that many defense counsel are unwilling to advance. Under these circumstances, where the potential for divergence between the lawyers’ ends and means and the defendants’ ends and means was so great, the decision of who should select the defendant’s counsel or whether he must have counsel at all became crucial.

Moreover, even where goal divergence was not an issue between ICTY defendants and their counsel, trust was likely to be. Certainly, even domestic defendants vitally need defense counsel whom they can trust to assist them in battling the immense power of the state. The comparable needs of ICTY defendants were even greater, however, for they believed themselves to be battling not a state but the entire international community that had banded together to create an institution predisposed to convicting them.³¹⁹ For this reason, although ICTY officials might have had confidence that any reputable defense counsel would provide independent and trustworthy assistance, in the circumstances under which the ICTY was established, a counsel’s actual independence was less important than his perceived

316. See MICHAEL A. NEWTON & MICHAEL P. SCHARF, *ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN* 110 (2008); WALD, *supra* note 162, at 47–48; Scharf & Rassi, *supra* note 162, at 4–6 (describing Milošević’s masterful use of his trial to influence public opinion in Serbia).

317. See *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, ¶¶ 1–2 (ICTY Aug. 10, 1995).

318. *Prosecutor v. Šešelj*, Case No. IT-03-67, Decision on Motions for Disqualification of Judge Patrick Robinson, Judge Alphons Orie, and Judge Bakone Justice Moloto, ¶ 1 (ICTY Nov. 6, 2006); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-R, Decision on Motion for Disqualification, ¶¶ 1–4 (ICTY July 2, 2008); *Prosecutor v. Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings, ¶¶ 17–22 (ICTY Aug. 29, 2005) (separate opinion of Bonomy, J., on contempt of the tribunal); *Prosecutor v. Karadžić et al.*, Case No. IT-95-05/18-PT, Decision on Motion to Disqualify Judge Picard and Report to the Vice President Pursuant to Rule 15(B)(ii), ¶¶ 4–9 (ICTY July 22, 2009); see also WALD, *supra* note 162, at 12.

In many cases, the accused do not deny the acts they have ordered which are the basis of the charges; they argue that they did it with beneficent and patriotic motives . . . and that they must be allowed to make those motives clear to the public to show the hypocrisy and perfidy of their accusers.

Id.

319. See *Milošević*, Case No. IT-99-37-I, Initial Appearance Transcript, at 2–5; *Prosecutor v. Milošević*, Case No. IT-99-37-PT, Motion Hearing Transcript, at 134–40 (ICTY Dec. 11, 2001); *Milošević*, Case No. IT-99-37-PT, Pre-Trial Conference Transcript, at 89 (ICTY Jan. 9, 2002).

independence. Still more important was the breadth of his perceived independence, for truly trustworthy defense counsel would be independent not only from the prosecution and tribunal but also from the international community as a whole; that is, the most trustworthy counsel in the eyes of an ICTY defendant may well be the one who rejects the very assumptions upon which the international criminal justice project is founded.

What sort of defense counsel would this be? Almost by definition, it will not be the counsel who is most competent in the traditional sense of the term. The most desirable counsel in the defendant's eyes may not have knowledge of or experience in the relevant subject matter. This counsel may not be fluent in the working languages of the tribunal. This counsel may even be laboring under a conflict of interest that would cause significant concern in a more traditional representation. But despite these "deficiencies," such counsel may be best placed to assist the defendant by quelling his fears and presenting his case in the way he would like it presented. In particular, this counsel will be more willing to tell the defendant's whole story—not only the legally relevant portions of the story, but also the politically relevant portions; the portions that rally supporters and embarrass the international community.

In many cases, then, the most desirable lawyer from the defendant's perspective is the defendant himself. Even some high-profile domestic defendants are unable to find lawyers willing to advance their chosen defenses,³²⁰ and ICTY defendants are apt to place even greater value on the autonomy that self-representation affords. But whether representing themselves or being represented by others, many ICTY defendants desire a lawyer who can and will refocus the lens from the narrow charges in the indictment to the broader, more morally ambiguous context surrounding those charges.

That such a lawyer would serve the defendant's needs might seem to us at best irrelevant and at worst counterproductive. If an African-American defendant wanted free rein to select defense counsel in order to choose one who would tell the story of slavery during his burglary trial, that desire would not strike most American legal professionals as an argument in favor of liberal lawyer-selection rules. But, that is because the American criminal justice system is mature and its legitimacy has been established. It and other well-established domestic criminal justice systems can be confident that their task is a narrow, legal one: to determine if Defendant A committed Crime B at Time C and Location D, and nothing more. All else is irrelevant.

320. Recent Case, *Criminal Law—Sixth Amendment—Ninth Circuit Affirms Denial of Unabomber Theodore Kaczynski's Request to Represent Himself at Trial*, 115 HARV. L. REV. 1253, 1254 (2002) (reporting that the Unabomber, Theodore Kaczynski, pled guilty when his lawyer insisted on presenting mental competency evidence and the court refused to allow him to self-represent); Joanmarie Ilaria Davoli, *Physically Present Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 331–32, 335 (2010) (reporting that Long Island Railroad shooter Colin Ferguson elected to represent himself when his lawyers wanted to raise an insanity defense).

The ICTY—particularly at its inception—could have had no such confidence either in itself or in its mission. It was weak and vulnerable; defendants viewed it with hostility, and outside observers viewed it with skepticism. Although not every defendant sought to challenge the tribunal or refocus the lens through which the crimes were viewed, in order to retain whatever small measure of legitimacy the early ICTY had, it had to afford every defendant the opportunity to do so. That is, although allowing defendants free rein to hire, fire, or eschew counsel gave rise to substantial costs, those costs were worth incurring in the early days of the ICTY because restricting defendants' choices would have been costlier still. It was problematic enough to establish an international criminal tribunal when none had been established during the preceding half century of atrocities. It was problematic enough to bring before that tribunal low-level defendants who were prosecuted solely because they were capable of being apprehended when higher-level, more culpable offenders were not. Given these problematic features, the tribunal could not afford in addition to create the appearance of muzzling defendants either by adopting judge-driven, nonadversarial procedures, or worse still, by rigorously regulating the lawyer selection and withdrawal process. Even as late as 2005, Mirjan Damaška criticized the decision to impose counsel on Milošević, cautioning that “an adolescent justice system . . . with still fragile legitimacy should be concerned” with the perception of unfairness.³²¹ Concern about that perception of unfairness was all the more pervasive and justified during the ICTY's earliest years, and it understandably drove the tribunal's hands-off approach to counsel matters.

During the ensuing years, the tribunal gained legitimacy and credibility. Allegations of selectivity and bias diminished to some degree as the tribunal prosecuted members of each of the ethnic groups involved in the conflict. Although a substantial proportion of citizens from the former Yugoslavia continue to distrust and oppose the tribunal's work,³²² that distrust and opposition have declined over the years.³²³ The states of the former Yugoslavia became far more inclined to cooperate with the tribunal by sharing information,³²⁴ by searching for suspected war

321. Damaška, *supra* note 172, at 4.

322. Clark, *supra* note 246, at 483; ORENTLICHER, *supra* note 18, at 18.

323. A poll of Serbian citizens showed, for instance, that whereas sixty-four percent of Serbians considered the ICTY a threat to Serbia in 2000, forty percent did in 2003. Igor Bandović, *Remarks of Igor Bandović*, in MAKING A DIFFERENCE, *supra* note 264, at 95.

324. See ICTY President, *Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, transmitted by Note of the Secretary-General, ¶¶ 67–68, 74, U.N. Doc. A/65/205–S/2010/413 (July 30, 2010) [hereinafter ICTY 2010 Report]; Letter Dated 1 November 2010 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Addressed to the President of the Security Council, Annex II, ¶¶ 67–70, 75, U.N. Doc. S/2010/588 (Nov. 19, 2010) [hereinafter Prosecutor's 2010 Security Council Report]. *But see*

criminals,³²⁵ and by turning over those suspects once apprehended.³²⁶ Further, whereas the early days of the tribunal saw widespread denial of the crimes both by government officials and ordinary citizens, in recent years, that denial has begun to give way. After years of denying that atrocities took place in Srebrenica,³²⁷ for instance, in 2003, the Republika Srpska (RS) set up a commission to investigate the events of Srebrenica.³²⁸ The commission found that nearly 8000 people were killed in Srebrenica in July 1995, leading the RS government to issue a formal apology for the killings.³²⁹ Public and governmental acceptance of other Serb crimes has also increased, albeit not dramatically.³³⁰ Serbian journalist Ljiljana Smajlović asserts as a general matter, however, that the “‘findings of the Tribunal are more accepted now’ than during earlier periods”; consequently, “the public now ‘accepts that Serbs committed enormous crimes.’”³³¹

Arguably even more important is that the tribunal’s status in the international community has also improved during these years, as it obtained custody over more and more of its indictees and prosecuted them in proceedings that appeared to largely comply with well-established due process norms. Concededly, certain aspects of the tribunal’s proceedings have been criticized on human rights grounds,³³² but the proceedings as a whole—and

id. ¶¶ 71–73 (reporting that the prosecution’s long-standing request to Croatia for military documents regarding Operation Storm remains outstanding).

325. By most accounts, Serbia eventually made a credible effort to locate the ICTY’s most notorious outstanding indictee, Ratko Mladić, possibly in light of calls by the ICTY Prosecutor to intensify those. See ICTY 2010 Report, *supra* note 324, ¶ 70; Prosecutor’s 2010 Security Council Report, *supra* note 324, ¶¶ 61–66; *Serbia Requests Interpol Help in Search for Mladić*, BALKAN INSIGHT, Nov. 17, 2010, <http://www.balkaninsight.com/en/article/serbia-requests-interpol-help-in-search-for-mladic>.

326. See ORENTLICHER, *supra* note 18, at 33–35; ORENTLICHER, *supra* note 26, at 30.

327. ORENTLICHER, *supra* note 18, at 63; Marlise Simons, *Officers Say Bosnian Massacre Was Deliberate*, N.Y. TIMES, Oct. 12, 2003, <http://www.nytimes.com/2003/10/12/world/officers-say-bosnian-massacre-was-deliberate.html?scp=1&sq=officers%20say%20bosnian%20massacre%20was%20deliberate&st=cse> (“[P]ersistent denials on the part of the Bosnian Serbs, including a recent government report maintaining that most of the men found in mass graves—many with their hands tied behind their backs—were killed in combat.”); Emir Suljagić, *Truth at the Hague*, N.Y. TIMES, June 1, 2003, <http://www.nytimes.com/2003/06/01/opinion/truth-at-the-hague.html?scp=1&sq=Truth%20at%20the%20Hague&st=cse>.

328. See ORENTLICHER, *supra* note 26, at 95.

329. *Id.* at 95.

330. See *id.* at 91–97; ORENTLICHER, *supra* note 18, at 50.

331. ORENTLICHER, *supra* note 18, at 19 (quoting journalist Ljiljana Smajlović). As Serbian human rights lawyer Bogdan Ivanišević puts it, Serbs who persist in denying Serbian crimes are now “from the margins.” *Id.* at 63.

332. Some commentators maintain that the tribunal’s sometimes lengthy pretrial detentions may violate the defendants’ right to an expeditious trial. *E.g.*, SAFFERLING, *supra* note 40, at 147; Hafida Lahiouel, *The Right of the Accused to an Expeditious Trial*, in *ESSAYS ON ICTY PROCEDURE*, *supra* note 3, at 197; Ralph Zacklin, *The Failings of the Ad Hoc International Tribunals*, 2 J. INT’L CRIM. JUST. 541, 543 (2004); see also ZAPPALÁ, *supra* note 55, at 252. See generally Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and Its Progeny*, *Due Process Deficit*, 4 INT’L CRIM. L. REV. 243, 291–93 (2004).

in particular the healthy number of acquittals those proceedings have produced³³³—depict a criminal justice system that seeks to advance worthy penological goals while respecting the defendants' fair trial rights.³³⁴ Finally, and perhaps most importantly, the tribunal's legitimacy and credibility grew when the principles that motivated its creation were carried forward through the establishment first of the ICTR, then of the permanent ICC, and now of a host of other ad hoc international tribunals that prosecute recent and distant atrocities. The creation of these institutions both propelled and vindicated the ideal that international crimes can and should be prosecuted. Thus, what began primarily as a political move, a fig leaf concealing Western apathy, has grown and matured into a legitimate legal and political force. New atrocities routinely give rise to calls for international criminal justice,³³⁵ and although few of those calls lead to the creation of new international tribunals or cases before the ICC, they nonetheless increase the likelihood that other accountability mechanisms will be pursued.³³⁶ They also reflect the now widespread expectation that international crimes will

333. The ICTY has acquitted the following defendants either at trial or on appeal: Ljube Bošković, *Prosecutor v. Bošković & Tarčulovski*, Case No. IT-04-82-T, Judgement, ¶ 606 (July 10, 2008); Zejnil Delalić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, ¶ 721 (Nov. 16, 1998); Fatmir Limaj and Isak Musliu, *Prosecutor v. Limaj, Bala & Musliu*, Case No. IT-03-66-T, Judgement, ¶¶ 740, 743 (Nov. 30, 2005), *aff'd*, Case No. IT-03-66-A, Judgement, ¶¶ 275, 314–15, 344–47 (Sept. 27, 2007); Sefer Halilović, *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgement, ¶ 753 (Nov. 16, 2005); Ramush Haradinaj and Idriz Balaj, *Prosecutor v. Haradinaj, Balaj & Brahimaj*, Case No. IT-04-84-T, Judgement, ¶¶ 502–03 (Apr. 3, 2008), *partial re-trial ordered*, Case No. IT-04-84-A, Judgement, ¶ 377 (July 19, 2010); Dragan Papić, Zoran Kupreškić, Mirjan Kupreškić, and Vlatko Kupreškić, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, ¶ 769 (Jan. 14, 2000), *rev'd in part*, Case No. IT-95-16-A, Judgement, at 168–69 (Oct. 23, 2001); Milan Milutinović, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, ¶ 284 (Feb. 26, 2009); Miroslav Radić, *Prosecutor v. Mrkšić, Radić & Šljivančanin*, Case No. IT-95-13/1-T, Judgement, ¶ 714 (Sept. 27, 2007); Naser Orić, *Prosecutor v. Orić*, Case No. IT-03-68-A, Judgement, at 64 (July 3, 2008).

334. My recent book, NANCY A. COMBS, *FACTFINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* (2010), calls into question the fact-finding capabilities of certain international tribunals, but my research did not encompass the ICTY and furthermore was not available when the tribunal was gaining in credibility and legitimacy.

335. See, e.g., Human Rights in Palestine and Other Occupied Arab Territories: Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, Human Rights Council, 12th Sess., ¶ 1772, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009); HUMAN RIGHTS WATCH, "BECAUSE THEY HAVE THE GUNS . . . I'M LEFT WITH NOTHING": THE PRICE OF CONTINUING IMPUNITY IN CÔTE D'IVOIRE 35 (May 2006); Public Statement, Amnesty Int'l, Myanmar: UN General Assembly Should Call for Commission of Inquiry, AI Index ASA 16/011/2010 (Sept. 3, 2010); Public Statement, Amnesty Int'l, Sri Lanka: The ACF Case 4 Years On: Sri Lankan Families Still Waiting for Justice, AI Index ASA 37/012/2010 (Aug. 19, 2010); Neil MacFarquhar, *U.N. Officials Say About 500 Were Victims of Congo Rapes*, N.Y. TIMES, Sept. 8, 2010, at A8; Marlise Simons, *Palestinians Press for War Crimes Inquiry on Gaza*, N.Y. TIMES, Feb. 10, 2009, at A13.

336. These measures might include truth commissions, civil remedies, or both.

generate a credible response.³³⁷ International criminal law has come of age, and the now mature and legitimate ICTY stands as its foundation.

Once this foundational evolution was underway, the procedural and defense counsel evolutions described herein were able to commence. It was appropriate when the tribunal was an extraordinarily weak and vulnerable institution to vest in the parties maximum process control. Doing so both accorded with the ideological assumptions underlying the tribunal and helped to legitimate the tribunal by enhancing its reputation for fairness. Once the tribunal had gained a measure of legitimacy and credibility, however, the judges could reduce the defendants' process control as a means of advancing other valuable ends. Thus, the judges reformed pretrial and trial procedures in order to expedite proceedings, even though doing so transferred some process control from the defendants to the judges. Likewise, the judges limited defendants' ability to fire their counsel and to self-represent for the same reasons, and they imposed reasonable experience and qualifications requirements on defense counsel to improve the quality of representation that defendants receive. These reforms were uncontroversial in themselves both because they were moderate in scope and because they were undertaken to meet pressing needs, but they were both conditioned upon and reflect the most fundamental and controversial evolution of all: the evolution that transformed international criminal justice from a passing novelty into a respected accountability mechanism that appears to be here to stay.

CONCLUSION

In the domestic context, large-scale procedural reforms, including those involving the regulation of defense counsel, typically both reflect and instantiate large-scale social, political, and cultural conditions in the society in question. For instance, although American pretrial procedures had for decades (if not longer) operated in a discriminatory manner that disadvantaged the poor and racial minorities, it was only following a marked evolution in the country's views on racial discrimination that the Supreme Court was able to set in motion the due process revolution that transformed the American criminal justice system.³³⁸ Similarly, the introduction of lawyers into criminal trials in eighteenth-century England was driven by a desire to curb the perjury that had become prevalent in those trials,³³⁹ but that introduction was possible only because of a seventeenth-century change in political theory in which the dominant conception of the citizen as subor-

337. See sources cited *supra* note 335.

338. Barry C. Feld, *The Politics of Race and Juvenile Justice: The "Due Process Revolution" and the Conservative Reaction*, 20 JUST. Q. 765, 765-66 (2003); see J. SCOTT HARR & KÄREN M. HESS, CONSTITUTIONAL LAW AND THE CRIMINAL JUSTICE SYSTEM 260 (2d ed. 2002).

339. JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 148 (2003).

dinate to the crown was replaced by notions of equality and procedural opportunity.³⁴⁰ We can see, then, that domestic procedural reforms typically occur when a problem arises in a political and social context that recognizes it as a problem and sees its remedy as consistent with its aims and worldview.³⁴¹

Similar conditions surround procedural reforms in the international context. The problem sought to be remedied by many of the ICTY's procedural reforms was the excessive length of trials. This is a problem that any criminal justice system would desire to ameliorate, but the political context in which the ICTY then operated rendered the problem in acute need of a remedy. In particular, soon after it began providing the international tribunals with the funds necessary to carry out their mandates, the international community made clear its unwillingness to continue such funding indefinitely. It thereby compelled the ICTY and ICTR to adopt completion strategies that called upon the tribunals to close their doors within relatively short time spans.³⁴² In order to carry out their completion strategies, the tribunals abandoned certain investigations, transferred cases to certain domestic courts, and increased their efforts to obtain guilty pleas from defendants.³⁴³ The procedural reforms described herein thus were not formally mandated by the tribunals' completion strategies, but they were undertaken in a political context that was particularly amenable to such reforms.

What this Article has shown is that whereas such a favorable political context may be a necessary condition for large-scale political reform, it is not a sufficient condition. The ICTY's initial and acute institutional weakness compelled it initially to adopt certain obviously suboptimal procedural rules and defense counsel regulations. As the years passed, the tribunal adopted more advantageous procedural rules and defense counsel regulations, and on the surface these appeared to stem directly from the difficulties engendered by the initial rules. This Article has shown, however, that the relationship is far more complicated. Specifically, it was only when the tribunal had been strengthened and legitimated—in part by the very procedural rules and defense counsel regulations that it sought to abandon—that the tribunal could adopt procedural rules and defense counsel regulations that enabled it both to fulfill its own mandate and launch the international criminal justice revolution that has transformed international law and global politics.

340. *Id.* at 89–90.

341. See PETER J. VAN KOPPEN & STEVEN D. PENROD, *The John Wayne and Judge Dee Versions of Justice*, in ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS 347, 349–54 (2003) (describing the different socio-political roots of Dutch and American criminal justice systems).

342. See S.C. Res. 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003); S.C. Res. 1534, ¶ 7, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

343. NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 29–30 (2007).