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Ensuring Defense Counsel Competence at International Criminal Tribunals

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This article addresses the problem of incompetent representation by defense counsel in international criminal tribunals. According to the author, the ineffectiveness of a particular attorney may be attributable to a number of factors, including a lack of experience with international criminal law, unfamiliarity with the procedures of international criminal tribunals, and the simple failure to be fluent in the languages used by the court. Starr explains that the problem of incompetence persists because of obstacles to the recruitment, retention, and appointment of proficient defense lawyers, as well as the lack of administrative or judicial oversight concerning competence. The author points out the shortcomings of solutions that have already been suggested by scholars and advocates, such as establishing associations of counsel or creating an Office of the Defender within the tribunal. Finally, Starr sets forth a new method by which the International Criminal Court can hopefully avoid the incompetence problem that has plagued its predecessors. The author’s proposed solution incorporates expanded recruiting practices, intensive training programs, and a more selective appointment process.

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INTRODUCTION

The modern international criminal tribunals have devoted considerable efforts to providing fair trials to the accused—indeed, procedural fairness has often been described as the overriding objective of the tribunals. Yet the tribunals have been surprisingly tolerant of one widely recognized obstacle to the achievement of that objective: the incompetence of a number of counsel appearing before the international criminal tribunals specifically. I do not mean to suggest that such counsel are not capable lawyers in their home legal systems, nor that they could not become capable, with adequate training, of providing effective assistance at the international level. The proposals I make below include a training component that is designed in part to improve the competence of existing counsel.


2 I use the term “incompetence” as shorthand to refer to various shortcomings in skills that impair counsel’s abilities to provide effective defense in the context of international criminal tribunals specifically. 
appointed defense counsel.\(^3\) Some defendants certainly have been represented well or even excellently. But others have not been so lucky. A number of problems have been pointed out by the tribunals themselves in decisions criticizing submissions of counsel. For instance, the tribunals have often described defense submissions as incoherent or incomprehensible, or deemed them too unclear to merit consideration.\(^4\) Moreover, the tribunals have frequently observed that counsel have failed to raise potentially valid objections or arguments at the proper time,\(^5\) and simultaneously often chastised counsel for raising frivolous motions and arguments.\(^6\) In many cases, such problems result from inexperience: many counsel have little or no experience with criminal law, much less international criminal law. Other coun-

\(^{3}\) Defense counsel are appointed for indigent defendants. Because of the enormous cost of defense at the international level, nearly every defendant qualifies for appointed defense counsel, even though many defendants are not poor in absolute terms. See Ellis, supra note 1, at 972 (noting that as of 2003, over 90% of defendants at the ICTY had been represented by appointed counsel).

\(^{4}\) See, e.g., Prosecutor v. Gacumbitsi, ICTR-01-64-A, Decision on the Appellant’s Rule 115 Motion and Related Motion by the Prosecution, ¶ 3 (Oct. 21, 2005) (refusing to consider defense submission on the ground that it was “incoherent”); Prosecutor v. Galic, 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 (June 30, 2005) (noting that the Chamber “failed to understand” certain defense submissions and that it “struggled to understand the [defendant’s] language, logic, and arguments”); Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-A, Judgment, ¶¶ 333-334 (Dec. 13, 2004) (rejecting defense argument for lack of clarity); Semanza v. Prosecutor, ICTR-97-20-A, Decision on Defence Objections to the Prosecution’s Notice of Appeal (July 25, 2003) (describing defense arguments as “incomprehensible” and “patently misleading”). In citing examples from the case law here and below, I do not mean to suggest that the Tribunals’ criticisms of counsels’ arguments are necessarily always accurate; still, it is counsels’ responsibility to make arguments clear to the judges, so frequent judicial complaints about clarity are indicative that a significant effectiveness problem likely exists. Moreover, because of the generally collegial culture of the Tribunals (and perhaps to avoid embarrassing the Tribunal by publicly acknowledging incompetence), judicial criticisms of counsel may often actually be understated.

\(^{5}\) See infra note 78 (citing appellate cases dealing with arguments that trial counsel had failed to raise below).

\(^{6}\) See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-R, Decision on Motion for Extension of Time (Dec. 14, 2001); Prosecutor v. Strugar, Case No. IT-01-42-PT, Decision on the Defence’s Third Preliminary Motion (May 28, 2003); Prosecutor v. Hadžhasanović, Case No. IT-01-47-PT, Decision on “Joint Defence Request for Certification of the ‘Decision on Motion for Leave to Amend the Amended Indictment’ Dated 18 June 2003” (July 25, 2003); Prosecutor v. Blagojević, Case No. IT-02-60-T, Decision on Motion to Seek Leave to Respond to the Prosecution’s Final Brief (Sept. 28, 2004); Prosecutor v. Tomin, Case No. IT-05-88-2-PT, Decision on Two Motions Filed 10 January (Jan. 17, 2008); see Ellis, supra note 1, at 958 (discussing prevalence of frivolous arguments).
sel have been unfamiliar with various aspects of the tribunals' largely adversarial procedure, such as cross-examination. Some counsel lack fluency in the working languages of the court, a serious obstacle to legal research and drafting court filings.

I will not belabor these descriptive points, because these basic problems have been publicly recognized by many observers of the tribunals, including scholars, a tribunal judge, a senior prosecutor, and a number of defense counsel, as well as by official UN investigative reports. Given the rela-

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8 See Patricia M. Wald, Running the Trial of the Century: The Nuremberg Legacy, 27 Cardozo L. Rev. 1559, 1572 (2006) [hereinafter Wald, Running the Trial of the Century] (noting linguistic difficulties of some ICTY counsel); Patricia M. Wald, Reflections on Judging: At Home and Abroad, 7 U. Pa. J. Const. L. 219, 244 (2004) (“Briefs written by counsel who were not really comfortable with the operating language—French or English—proved hard to follow, and the judge often had to work overtime even to understand the argument that he had to evaluate.”).

9 See, e.g., Cook, supra note 7, at 496-501; D'Amato, supra note 7, at 465; Wladimiroff, supra note 7, at 6.

10 See Wald, ICTY, supra note 7, at 104-05.

11 See Tolbert, supra note 7, at 975-77 (referring to defense counsel as "the ICTY's Achilles' heel" and describing "shockingly poor performances"); cf. Prosecutor v. Blagojevic, IT-02-60-A, Decision on Prosecution's Motion to Extend Word Limit of Consolidated Response Brief, ¶¶ 3-4 (Dec. 6, 2005) (observing that the prosecution requested a longer brief responding to defendants' appeals on the ground that "the appeal briefs of both appellants are unclear and poorly structured, making it necessary for the Prosecution to provide explanations of its interpretations of their arguments and of the way the various arguments interrelate").

tively small number of tribunal cases so far, their widely varied circumstances, and the difficulty of retrospectively identifying the relative skill levels of different attorneys, it would be difficult to prove empirically that counsel's performance has changed the ultimate outcomes of tribunal cases. But it is obvious that having incompetent counsel presents a potentially serious risk to clients' interests, especially in a largely adversarial system where counsel have primary control over the investigation of cases, the introduction of evidence, and the questioning of witnesses, and where legal arguments can be waived if counsel fails to introduce them at the proper time. Moreover, because the problem is widely recognized, it poses a risk to the perceived fairness of international criminal tribunals, threatening many of the tribunals' transitional justice aims. Attorney incompetence costs the tribunals time and money—prosecutors, judges, and codefendants must grapple with frivolous arguments and motions, while judicial staff are often left to fill in gaps in the research supporting potentially valid arguments.


14 One existing study has attempted to assess the effect of defense attorneys' backgrounds (i.e., what countries they are trained in) on outcomes for clients at the ICTR, but in my view that study illustrates the difficulty involved in empirically assessing a system that has included very few cases. The quantitative analysis in the paper was based on a sample size of 185 criminal charges; however, those charges were brought against a total of just 20 defendants, meaning the observations were not independent of one another. See James Meernik & Christopher Farris, The Influence of Attorney Background on Judicial Decision Making at the International Criminal Tribunal for Rwanda, 89 JUDICATURE 326, 330 (2006).

15 See infra notes 77-78 and accompanying text (discussing adversarial aspects of tribunal procedure).

16 See, e.g., Marc Dubuisson et al., Contribution of the Registry to greater respect for the principles of fairness and expeditious proceedings before the International Criminal Court, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 565 (Carsten Stahn & Göran Sluiter eds., 2009) ("Justice is credible only when it is efficient, expeditious and fair.").

17 See Ellis, supra note 1, at 958-59; Tolbert, supra note 7, at 979 (noting that incompetence has led to “delays in the proceedings”); Richard J. Wilson, Assigned Defense Counsel in Do-
This Symposium article will focus on causes of and solutions to this incompetence problem, rather than on documenting its magnitude. I first consider why these shortcomings, recognized since the tribunals’ early years, have come to be and been permitted to persist—a somewhat puzzling question, given that the tribunals otherwise appear committed to providing fair trials and have devoted enormous resources to that task. The bulk of the article then addresses potential solutions. While the descriptive aspects of the piece will focus on the experience of the International Criminal Tribunals for Rwanda and the Former Yugoslavia (“ICTR” and “ICTY,” respectively), the ship has sailed for those temporary (albeit rather long-lived) institutions, which are winding up their operations. Thus, my prescriptive recommendations are directed at the International Criminal Court (ICC). Because it is beginning its first trials, the ICC has the opportunity to adopt measures to avoid repeating the mistakes of ICTR and ICTY, before path dependence makes effective change more difficult.19

I. REASONS FOR THE PROBLEM

To an American audience, it may seem unsurprising that tribunal defendants often receive ineffective assistance of counsel. An enormous number of defendants in U.S. courts face these problems,20 and scholars have raised...
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similar criticisms in other domestic systems.21 But the nature and causes of the problem are quite different in the international setting. Defense counsel in international tribunals are not particularly overworked. While domestic counsel are often asked to represent hundreds of defendants single-handedly each year,22 international counsel often spend years working full-time on the defense of a single client, with the help of co-counsel, legal assistants, interns, and investigators; some also maintain a practice in their home countries, but others do not.23 And although many defense counsel have justifiably complained that funding of defense teams falls considerably short of that of the prosecution,24 the problem cannot fairly be described as solely or even centrally a matter of resources. The tribunals have spent millions of dollars per defendant,25 in considerable part because of a commitment to providing fair trials. Furthermore, defense counsel today are reasonably well compensated even by Western standards.26 The sources of the problem, then, must lie elsewhere. In this Section, I consider some possible explanations.

22 See Primus, supra note 20, at 683.
23 See Cook, supra note 7, at 496-97 (noting that defense counsel are well compensated and are “all too willing to spend countless hours with their clients”); UN Fee-Splitting Report, supra note 13, ¶ 7 (describing composition of defense teams); ICTY Office of Legal Aid, http://www.icty.org/sid/163 (last visited June 10, 2009) (same).
26 See Ellis, supra note 1, at 952-53 (noting that compensation of counsel has “drastically” improved since the 1990s, and that as of 2003, “an experienced counsel could earn more than $230,000 per year”); Sylvia de Bertodano, What Price Defence? Resourcing the Defence at the ICTY, 2 J. INT'L CRIM. JUST. 503, 504 (2004) (noting that as of 2004, defense teams at the ICTY were “paid on an hourly rate estimated at upwards of $360,000 a year”); Developments in the Law, supra note 7, at 1997 (observing that even the lesser rates paid in the 1990s were “apparently sufficient to attract numerous European and American attorneys” and were “disproportionately high for attorneys in other parts of the world”).
A. Obstacles to Recruitment and Retention

To the extent that the Tribunals have had trouble attracting a sufficient number of excellent defense lawyers, the primary problems are working conditions and unsympathetic clients rather than compensation. Because defense teams work on a contract basis, they lack the job security provided to prosecution and Chambers attorneys, who are professional-track employees. Moreover, defense counsel tend to be less integrated in the tribunal’s social community; they are physically housed outside the tribunal buildings, and some are actually based in other countries. By undermining quality of life and professional satisfaction, this isolation risks hurting retention of counsel as well as initial recruitment; it may undermine performance as well, because defense counsel are less able to build a collaborative community with institutional memory that may improve the quality of representation.

Furthermore, recruitment may be hampered by a comparative lack of prestige and moral appeal relative to prosecution work, given the nature of the cases. Domestic criminal defense attorneys are often motivated at least in part by a desire to protect the individual rights of indigent and vulnerable clients against the power of the state. In the international criminal context, however, these motivating factors may cut in the other direction, and the same individuals may be more inclined to work for the prosecution. After all, the defendants are often powerful government officials accused of committing serious human rights abuses against civilians.

Still, recruitment and retention problems should be surmountable. The world is full of capable attorneys who are willing to take interesting and

27 See Tolbert, supra note 7, at 982 (noting that ICTY defense counsel are outside contractors).
29 See, e.g., Charles J. Ogletree, Jr., Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 HARV. L. REV. 1239, 1240, 1243 (1993) (noting that “[m]any public defenders” are initially drawn to defense work by the chance to “fight injustice and help underprivileged citizens” and arguing that defenders may be especially strongly motivated if they conceive of themselves as “hero[es] taking on a powerful system”); Ian Weinstein, Teaching Reflective Lawyering in a Small Case Litigation Clinic: A Love Letter to my Clinic, 13 CLINICAL L. REV. 573, 599 (2006) (citing motivations including “that the power of the state should be constrained and monitored,” “challenging the police and prosecutors,” and “empowering the underclass”).
30 See McMorrow, supra note 28, at 152-53 (citing a defense attorney’s observation that many participants in international justice do not recognize the “nobility of giving vigorous defense to people charged with war crimes”).
challenging cases for good money, regardless of their altruistic appeal.\textsuperscript{31} And the tribunals do not have a large caseload. A bar with a few hundred skilled members, drawn from all across the world, would likely be adequate to fulfill international defense needs for the foreseeable future.

\section*{B. Lack of Hiring Standards}

The bigger problem is not that good attorneys are uninterested, but that the most capable attorneys are not given any particular preference in hiring. The ICTY and ICTR simply lack an effective filtering mechanism at the appointment stage.\textsuperscript{32} Hiring is done by an office within the Registry, which puts together a list of officially qualified counsel from which defendants may choose.\textsuperscript{33} Inclusion on the defense counsel list turns essentially on one criterion: admission to practice in good standing in any country.\textsuperscript{34} The Tribunals have added a length of practice requirement for defense counsel—now seven years, including some amount of criminal practice—and the ICC has adopted a ten-year minimum.\textsuperscript{35} However, this requirement does not ensure that counsel will have gained relevant experience or skills, and may actually exclude counsel who do have relevant skills.\textsuperscript{36} For instance, most ICTR de-

\textsuperscript{31} See Turner, supra note 24, at 548 (finding that many surveyed counsel were attracted to the intellectual challenge of Tribunal cases).

\textsuperscript{32} E.g., Cook, supra note 7, at 496; Tolbert, supra note 7, at 978-79; Ackerman, supra note 12, at 179 (describing the ICTY’s requirements as, “perhaps, the least stringent requirements that could conceivably be imposed”).


\textsuperscript{34} ICTY Rules of Procedure and Evidence, Rule 44(A)(i), IT/32/Rev.42 (Nov. 4, 2008) [hereinafter ICTY RPE]; see McMorrow, supra note 28, at 154 (“Qualifications to be placed on the list are relatively low.”); Wilson, supra note 17, at 167 (noting that it “appears that the interest of the Registry is to keep the list open to the widest possible number of available counsel, but the broad requirements . . . may be insufficient to guarantee qualified counsel”).


\textsuperscript{37} Tolbert, supra note 7, at 980; see Michael Greaves, The Right to Counsel before the ICTY and the ICTR for Indigent Suspects: An Unfettered Right?, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE 177, 179 (Richard May et al. eds., 2001) (arguing that the 10-year minimum
fense counsel have little experience with international criminal cases.\textsuperscript{38}

To illustrate this problem, imagine a general practitioner admitted in California with ten years' experience, including a number of criminal cases. Such a lawyer might be perfectly capable in California, but it would be preposterous to assume on this basis alone that she was capable of representing a criminal defendant in Japan, with its foreign substantive and procedural law, language, and culture. Generally, domestic bars do not automatically admit foreign lawyers on the basis of admission to practice and experience in their home countries. Instead, most domestic bars demand some showing of competency within the legal system in which the lawyer is seeking to practice.\textsuperscript{39} The international criminal tribunals likewise amount to legal systems that are significantly, or even drastically, different from any domestic system, making domestic bar qualifications and practice experience a grossly inadequate qualification taken alone.\textsuperscript{40}

The paucity of formal requirements for qualification might be a less serious problem if the hiring process were accompanied by serious discretionary review of the quality of counsel's record. For instance, the hiring requirements for Prosecution and Chambers positions are subject to a highly competitive selection process based on resumes, recommendations, and in-

\textsuperscript{38} Meernik & Farris, supra note 14.

\textsuperscript{39} Even in the EU, which has liberalized requirements for cross-national practice within Europe, almost every country imposes an aptitude test on lawyers entering practice from another E.U. country. The states that do not have such requirement allow a three-year adaptation period instead. See Laurel S. Terry, The Bologna Process and Its Impact on Europe: It's So Much More Than Degree Changes, 41 Vand. J. Transnat'l L. 107, 149-50 (2008); see also Wilson, supra note 17, at 167 (noting that many domestic jurisdictions furthermore require "much more specific criteria for inclusion in lists of assigned counsel [for criminal defendants], such as completion of a training course or continuing legal education, years of practice . . . , number of trials, specific types of trials, or demonstrated knowledge in a particular area of practice."). Indeed, lawyers usually must demonstrate competency anew when moving among U.S. states, despite the states' highly similar legal systems—although this requirement has often been criticized as unnecessary and protectionist. Andrew M. Perlman, A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers, 18 Geo. J. Legal Ethics 135, 136-37 (2004).

\textsuperscript{40} See Michael P. Scharf, Self-Representation Versus Assignment of Defence Counsel Before International Criminal Tribunals, 4 J. Int'l L. Crim. Just. 31, 39 (2006) ("The gamut of legal skills used in ordinary domestic criminal cases is insufficient for the trial of an accused war criminal. . . . [I]nternational courts . . . are sui generis, representing a blending of the common-law and civil-law approaches" and involving particularly intensive trials and complex fact investigations); Mark S. Ellis, Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel, 7 Duke J. Comp. \\& Int'l L. 519, 523 (1997) (noting that "extraordinary" skills are required in order to try Tribunal cases effectively).
terviews, with most of the more senior positions filled through internal hiring of people who already have Tribunal experience. On the defense side, however, after the list of qualified counsel is compiled, the Registry has essentially given complete deference to defendants' choice of counsel from that list. Indeed, one of the reasons for the list's unselective nature appears to be allowing defendants to choose whomever they want.41

Many scholars have suggested that restrictions on entry to the legal profession in domestic systems sometimes actually harm clients, who would be benefited by unfettered or at least more open choice—clients could then pay for exactly the qualifications they want in a lawyer, and not more.42 But such free-market arguments for deregulation (which in any event may be of limited application to the selection of appointed, court-paid counsel) assume that clients are at least reasonably capable of assessing the abilities of potential counsel.43 Whatever the merits of this assumption in domestic contexts, defendants at the international criminal tribunals are ill equipped to choose wisely or judge the quality of assistance they are receiving after they have made an initial choice. They have almost no information about potential counsel, they lack legal training, and most do not speak the languages in

41 See Ellis, supra note 1, at 963 (noting that the Registry will typically add counsel to the list at a defendant's request).

42 See Frederick Link, Rational Standard Setting in Lawyer Qualification: A Critical Look at the Proposal of the New York Board of Law Examiners to Increase the Passing Score on the Bar Examination, 23 BUFF. PUB. INT. L.J. 51, 59-60 (2005); Benjamin H. Barton, An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?, 37 GA. L. REV. 1167, 1235-39 (2003) [hereinafter Barton, An Institutional Analysis] (arguing that a free-market approach would be advantageous to clients, but that it is ultimately unwise because it would result in the courts being flooded with frivolous litigation); Larry E. Ribstein, Lawyers as Lawmakers: A Theory of Lawyer Licensing, 69 Mo. L. Rev. 299, 304-306 (2004); Barton, Why Do We Regulate Lawyers?, supra note 17, at 436-441 (2001) (criticizing "the 'incompetent lawyer' justification for regulation" of entry).

43 See, e.g., Barton, An Institutional Analysis, supra note 42, at 1236 (noting that "a substantial portion of legal services are purchased by savvy entities"); Ribstein, supra note 42, at 306 ("Clients have low-cost methods of obtaining reliable information about lawyers without any regulation, including reputation information from friends and their own past dealings with lawyers."); see also Link, supra note 42, at 59-60 (acknowledging that the market for legal services can become distorted when clients are unable to observe lawyer quality accurately, such that restriction of clients' choices can improve their welfare); Carole Silver, Regulatory Mismatch in the International Market for Legal Services, 23 NW. J. INT'L L. & BUS. 487, 508-09 (2003) ("While the concern for protection against incompetence may be relevant to certain individual clients, sophisticated consumers of legal services are able to protect themselves."); Barton, Why Do We Regulate Lawyers?, supra note 17, at 441 (acknowledging that due to information problems, "lawyers who represent clients in serious criminal matters or lawyers who tend to represent less savvy clients, may need to be regulated.")
which the Tribunal operates. Also, some defendants have maintained the unduly cynical belief that they have no chance of prevailing regardless of whom they choose, or even that appointed counsel may be biased against them; these defendants have often chosen lawyers they know from home, even if they have no relevant experience. Many of these home-country counsel have proven to be the least capable.

To be sure, a good relationship between attorney and client is crucial to effective representation, so it is important to give defendants a range of choices. But defendants should not be entitled to choose counsel who are incapable of representing them with minimum effectiveness. Their choice to do so is not only self-destructive (usually inadvertently so); it also has serious costs for the tribunal itself in terms of time, money, and credibility, and it interferes with the tribunal's efforts to create an accurate historical record through an effective adversarial process. International human rights law has not generally been interpreted to allow indigent defendants unlimited choice when it comes to appointed counsel, as the ICTR Appeals Chamber has recognized; in contrast, the right to competent counsel has been treated as a human right. In any event, it should generally be possible to find counsel who can both relate well to their clients and represent them effec-

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44 See Cook, supra note 7, at 501 (noting that defendants do not understand the legal arguments in play).

45 See Bertodano, supra note 26, at 505 (noting that this dynamic was at the heart of the fee-splitting scandal). This cynicism is undue because the outcome of tribunal proceedings is hardly foreordained—a simple perusal of the tribunals' results shows that most defendants are acquitted on some charges and a few on all charges, and many defendants receive rather short sentences, especially at the ICTY. See ICTY, Cases and Judgments, Indictments and Proceedings, http://www.icty.org/action/cases/4 (last visited June 10, 2009) (describing disposition of every ICTY case); ICTR, Status of Cases, http://unictr.org/ENGLISH/cases/status.htm (last visited June 10, 2009) (same for ICTR); see also Turner, supra note 24, at 532 (noting that “acquittal rates at international criminal trials tend to be somewhat higher than acquittal rates in domestic proceedings”).

46 See Cook, supra note 7, at 498-99; Ellis, supra note 1, at 955-57.

47 See supra notes 16-17 and accompanying text.


49 See Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment, ¶ 61 (June 1, 2001); accord Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-T/ICTR-96-17-T, Decision on the Motions of the Accused for Replacement of Counsel, 5 (June 11, 1997).

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tively; if, for some reason, this is not possible, perhaps because of a particularly difficult client, tribunals should not simply sacrifice the latter goal. Rather, as discussed further below, they should attempt to compose multi-member defense teams that can collectively do both—the “client liaison” counsel need not necessarily be the lead counsel in charge of the team’s written work.51

C. Lack of Judicial Oversight

Subsequent supervision of counsel has not compensated for problems in hiring—after counsel’s initial appointment, there has been virtually no administrative or judicial oversight concerning competence. The Tribunals’ shared Appeals Chamber has held that the appellate standard of review is “gross incompetence” and that counsel are presumed competent.52 Furthermore, in the Media Case, the Appeals Chamber recently held that it is the defendant’s obligation to object to his own incompetent representation at trial.53 If he fails to raise such an objection until the appeal stage, he must then prove “that his counsel’s incompetence was so manifest as to oblige the Trial Chamber to act” sua sponte, and that the Trial Chamber’s failure to do so occasioned a miscarriage of justice.54 The Appeals Chamber did not explain how the non-lawyer defendant is expected to recognize his counsel’s failings at the trial stage, or to identify the appropriate procedural stage to raise an objection.

Unsurprisingly, these standards have proven difficult to satisfy. Defense counsel have occasionally been removed for reasons not directly related to competence—for instance, due to ethical scandals involving fees or attempts to influence witnesses.55 One ICTR defense attorney was removed after he was himself indicted by the Rwandan government for genocide—a reflection, perhaps, of the minimal degree of scrutiny given to counsel before appointment.56 However, it appears that counsel have rarely, if ever, been

51 See Ellis, supra note 1, at 959 (noting that the ICTY has had some success when it has teamed “a Yugoslav attorney with . . . a more seasoned international criminal lawyer”).
52 Akayesu, Case No. ICTR-96-4, Judgment, ¶¶ 76-77; see Kastenberg, supra note 50, at 206-07 (critiquing the Appeals Chamber’s “unwilling[ness] to ‘second-guess’ the decisions of trial defense counsel”).
54 Id.
55 See Ellis, supra note 1, at 968; Wilson, supra note 17, at 171-73.
removed due to the poor quality of their work. Although judicial opinions frequently criticize the defendant’s submissions, and sometimes reprimand or fine defense counsel for negligence or the filing of frivolous motions, the tribunals do not seem to order counsel removed for these reasons.

Appeals on the ground of ineffective assistance of counsel have hence overwhelmingly been rejected, usually because the gross negligence standard is not met. In the Media Case, the Appeals Chamber held that counsel did commit gross negligence by being absent for various segments of the trial. However, the Chamber found that because the testimony given during those absences did not affect the verdict, no appellate remedy was necessary. The Erdemovic Case was one rare instance in which the defendant actually received a significant remedy for his attorney’s failure—namely, he was allowed to withdraw his guilty plea because neither his attorney (who was unfamiliar with guilty pleas) nor the court had properly informed him of its consequences. The attorney in question stayed on the case through the

57 No clear instances of such removals are reflected in the publicly available decisions of the judges or the Registry, although it is possible that some could have taken place confidentially. In the Halilovic case, the Registry’s public decision replacing the defendant’s counsel referred to “available information which seems to put in doubt the quality of the representation.” See Prosecutor v. Halilovic, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, ¶¶ 55-62 (Aug. 19, 2002) (quoting Registry decision and describing counsel’s “incompetence”). However, it is not clear that this represents a case in which counsel was replaced for incompetence. The replacement actually happened on counsel’s own motion, filed on the basis of his health problems; meanwhile, the accused had also written to the Registry arguing that counsel’s work was compromised by his simultaneous representation of “a large number of clients in Bosnia and Herzegovina.” Prosecutor v. Halilovic, Case No. IT-01-48-T, Trial Judgment, Annex 2, para. 4 & n. 2672 (Nov. 16, 2005).

58 See supra notes 4-6 and accompanying text.

59 E.g., Nahimina et al. v. Prosecutor, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza’s Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant’s Brief (Aug. 17, 2006); Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-97-21-T, Decision on Nyiramasuhuko’s motion for Separate Proceedings, a New Trial, and a Stay of Proceedings (Rules 82(B) and 72(D), Rules of Procedure and Evidence) (April 7, 2006); Prosecutor v. Brdanin & Talić, Case No. IT-99-36-T, Decision on “Request for Certification to Appeal Against the Decision to Separate Trials” and on “Motion to Extend Time-Limit for Filing Brief in Support of Request for Certification to Appeal” (Oct. 3, 2002); see McMorrow, supra note 28, at 170.


61 Nahimana et al., Case No. ICTR-99-52-A, Judgment, ¶¶ 139-157 (Nov. 28, 2007).

62 Prosecutor v. Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, ¶¶ 16-18 (Oct. 7, 1997); see also Cook, supra note 7, at 499-501 (citing
entry of a new guilty plea and the sentencing, but co-counsel was appointed.63

Why have the tribunals been so reluctant to act on evidence of attorney incompetence, given the problems incompetence poses for the tribunals' operation and transitional justice objectives? The question requires speculation, and there may be numerous reasons; here, I offer two possible explanations. The first is the high cost of removing counsel or otherwise remedying incompetence. As I have argued elsewhere, international criminal tribunals' enforcement of defendants' rights more generally is plagued by the problem of "remedial deterrence": the infeasibility of available remedies deters tribunals from recognizing rights violations.64 The tribunals' trials cost millions of dollars, last for years, and can be traumatic for victim-witnesses—nobody wants to repeat this process, and starting over after a successful appeal or mistrial is thus essentially a practical impossibility.65 On the other hand, the tribunals are extremely reluctant simply to release defendants as a remedy for rights violations—doing so would interfere with their mission of avoiding impunity for international crimes and risk catastrophic political backlash.66 Given the absence of practical remedies, it is easier for the tribunals to avoid recognizing serious rights violations in the first place, or to deem them nonprejudicial.67

The tribunals' willingness to overlook counsel incompetence or negligence may be a good example of this remedial deterrence phenomenon. In Erdemovic, because the case involved counsel's advice concerning a guilty plea, the stakes were comparatively low. The problem of retrying the case was not presented, as no trial had taken place. Moreover, given the defendant's obvious desire to plead guilty, evidenced by his doing so without be-


65 Starr, supra note 64, at 715-17; see Langer, supra note 19, at 886 (noting that the ICTY judges have been driven by the need "to expedite the docket, not only to reduce the length of pre-trial detention, but also to defend the ICTY's legitimacy and international support").

66 Starr, supra note 64, at 717-19 (describing history of the Barayagwiza case and its legacy for the tribunals).

67 Id. at 720-30.
ing offered any deal by the prosecution, it was likely that a new guilty plea would be entered after the addition of new co-counsel. But because most cases are not settled by plea, incompetence might not be recognized until well into the pretrial or trial process or even after trial. In such cases, replacement of counsel would at a minimum cause major delays, financial costs, and inconvenience for the parties and witnesses. If trial counsel were to be deemed incompetent on appeal, the entire trial would likely have to be repeated. Either outcome would seriously embarrass the tribunals and threaten the defendant’s right to a speedy trial.

Another possible reason incompetent counsel are tolerated stems from a clash between common law and civil law approaches, which the tribunals have famously sought to integrate. Most of the judges (and many Registry officials) come from civil law systems, in which defense counsel’s role,

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68 This in fact is what occurred, see Erdemovic Sentencing Judgment, supra note 63, and it was fairly predictable, as the defendant had consistently shown a willingness to cooperate, having turned himself in to the Tribunal before even being investigated, see Nancy Amoury Combs, Copping a Plea to Genocide: The Plea Bargaining of International Crimes, 151 U. Pa. L. Rev. 1, 109-10, 139-41 (2002). Moreover, even if the parties had failed to reach a new agreement and a trial had been necessitated, this would surely not have been seen as such a huge loss for the Tribunal as a retrial after a first trial would have been. At the time, plea bargaining was essentially unknown (indeed, quite controversial) at the international level, see Combs, supra, at 6-7, 139-41; vacating the plea would thus at worst have resulted in a return to the normal practice of holding a trial. 69 Currently, nine of the sixteen permanent judges at the ICTY come from civil law systems, and a tenth, Judge Agius, comes from Malta, a blended common law/civil law system. See ICTY website, The Judges, http://www.icty.org/sid/151 (last visited June 10, 2009) (linking to biographies of Judges Agius, Kwon (Korea), Antonetti (France), Guney (Turkey), Liu (China), Orie (Netherlands), Pocar (Italy), Delvoie (Belgium), and Vaz (Senegal)). Four of the civil law judges plus Judge Agius sit on the seven-member Appeals Chamber, which also hears ICTR appeals. See ICTY website, The Assignment of Cases, http://www.icty.org/sections/TheCases/AssignmentofCases (last visited June 10, 2009). In addition to the Appeals Chamber judges, four of the seven additional permanent judges at the ICTR are from civil law systems. See ICTY website, The Chambers, http://www.ictr.org/ENGLISH/geninfo/chambers.htm (last visited June 10, 2009) (listing judges from Norway, Madagascar, Russia, and Sri Lanka). At the ICC, the proportion of civil law judges is larger: currently 13 out of 17. See ICTY website, Structure of the Court, http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Content.aspx?NRMODE=Published&NRNODEGUID={9BOAAEF8-0280-490C-A5AA-1DFABB0FB0EF}&NRORIGINALURL=/Menus/ICC/Structure+of+the+Court/&NRCACHEHINT=Guestfb (last visited June 10, 2009) (listing judges from South Korea, Mali, Germany, Costa Rica, Finland, Latvia, Brazil, Bulgaria, France, Botswana, Belgium, Italy, and Bolivia).
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while nontrivial, lacks the importance it has in adversarial systems.\textsuperscript{70} In an inquisitorial system, the prosecutor's role is more solicitous of the defendant's interests, providing the defendant with some protection.\textsuperscript{71} Even more significantly, the judges may see themselves, rather than counsel, as the ultimate protector of defendants' rights, capable of filling any gap left by inadequate performance by defense counsel.\textsuperscript{72} Of course, this is not to say that

\textsuperscript{70} See McMorrow, supra note 28, at 140-43 (discussing differing systems' views of defense counsel roles and explaining that in civil law systems defense counsel do not cross-examine witnesses and do not engage in "aggressive fact development"); Langer, supra note 19, at 848-52 (discussing different systems' competing views of judges' and counsels' roles); Craig M. Bradley, Overview to CRIMINAL PROCEDURE: A WORLDSIDE STUDY, at xvii-xviii (Craig M. Bradley ed., Carolina Academic Press 1999) (noting that in civil law systems "[s]ince the State is theoretically neutral, acting in the best interests of both parties, there is no need for a defense attorney (though defense attorneys are now required in most countries)").

\textsuperscript{71} See, e.g., Bradley, supra note 70; George C. Thomas III, Improving American Justice by Looking at the World, 91 J. CRIM. L. & CRIMINOLOGY 791, 816 (2001) (noting that "the reason [defense] counsel is generally more limited in other countries . . . manifests the trust that other countries have (or perhaps, had) in systems where [among other things] the prosecutor owed duties to the defendant").

\textsuperscript{72} See Salvatore Zappalà, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 63 (2003) (arguing that the judges are the "ultimate guardians of justice" and that they therefore need not assign standby counsel to pro se defendants); Richard S. Frase, Book Review, 39 No. 4 CRIM. L. BULL. 6 (2003) (noting that "central features of the Civil Law model" include "reliance on police, prosecutors, and judges rather than defense counsel to gather and present exculpatory evidence"); Gregory A. McClelland, A Non-Adversary Approach to International Criminal Tribunals, 26 SUFFOLK TRANSNAT'L L. REV. 1, 17 (2002) (noting that "if the defendant's counsel fails to raise defenses in a common law trial, the defendant may be forever barred from raising them; whereas, the civilian court often does (and in some jurisdictions, may have a duty to) raise and resolve defenses and arguments favorable to the accused"); id. at 22 (observing that the "non-adversary judge, . . . rather than counsel, is also responsible for ensuring the best arguments of each party are considered and resolved"); Thomas, supra note 71, at 808-810 (describing relatively passive roles of defense counsel and active roles of judges in Argentina, France, and Germany); Nigel G. Foster & Satish Sule, German LEGAL SYSTEM & LAWS 354 (Oxford Univ. Press 1993) ("A judge's role is also to protect the accused, especially where the accused has no defence."); Renee Lettow Lerner, The Intersection of Two Systems: An American on Trial for Murder in the French Cour d'Assises, 2001 U. ILL. L. REV. 791, 819 ("It was not easy to convince [a French judge and prosecutor] how much our system depends on having good defense counsel—the French are so used to relying on judicial officers."). Máximo Langer has noted that in the early years of the ICTY, "because the judges were convinced that the Rules had enacted a predominantly adversarial procedure, they generally tried to behave according to that system [as passive umpires]—even those coming from civil law jurisdictions." Langer, supra note 19, at 859-60. However, this adjustment by civil law judges may not have extended to their conception of the proper role of defense counsel. Langer further observes that "legal actors with an inquisitorial set of internal dispositions showed a resistance toward [the active, adversarial] conception of the defense,"
defense incompetence is not a problem when it occurs in a civil law system—but it may be less of a problem, which may make judges and Registry officials more reluctant to take on the costs of remedying incompetence. Notably, ineffective assistance of counsel does not appear to be an established basis for appeal in many civil law countries. As George Thomas has observed:

The issue [of appellate standards for ineffective assistance] might not arise in civil law countries. The formal nature of the trial and (at least until recently) the relatively passive role of defense counsel both before and during trial would suggest that the question of effective representation might not even appear on the radar screen of lawyers and judges. The physical presence of a lawyer representing the defendant might satisfy the civil law because the right to counsel is not so central in the first place.

There is variation among both common law countries and civil law countries—for instance, while Canada, Israel, and the United States permit criminal convictions to be set aside on the basis of ineffective assistance of counsel, this ground of appeal is essentially unknown in the United Kingdom and South Africa. In any event, whether or not the difference tracks the common/civil law divide, it is clear that many international judges come from domestic systems in which judicial oversight of the quality of defense counsel is limited or absent. Of course, this point should not be overstated as a causal theory; after all, even courts in common law systems that do incorporate appeals for ineffective assistance are often criticized for being too willing to tolerate incompetence. It is nonetheless a possible part of the

with some judges becoming irate at defense counsel whom they perceived as overly aggressive. Id. at 861-62.

See Thomas, supra note 71, at 813.

Id. at 814-15.

See id. at 815-16 (reviewing comparative study of criminal procedure by Craig M. Bradley). Many scholars have observed that the United States is an outlier in the degree to which it expects defense counsel to adopt an adversarial posture. As one scholar has noted, “many Americans would be shocked by the seemingly docile nature of defense counsel in England, as well as in most other common law jurisdictions and all civil law nations.” Erik Luna, A Place for Comparative Criminal Procedure, 42 Brandeis L.J. 277, 313-14 (2004); see also Thomas, supra note 73, at 807 (“The role of the lawyer in the United States is broader than in any other country.”). Likewise, civil law systems are not uniform; many incorporate aspects of adversarial procedure. See Frase, supra note 72. And Thomas notes that because of this shift toward a more adversarial model in some countries, “the civil law view that defense counsel is unnecessary” may be changing. Thomas, supra note 73, at 817.

See supra notes 20-21 (citing scholars discussing the United States).
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explanation for why the problem persists even in tribunals that have ample money to spend on each case, and that have otherwise committed considerable institutional resources toward the development of fair trial procedures.

Even if judges' expectations are influenced by inquisitorial backgrounds, the actual trial process in play at the ICTY and ICTR has been generally adversarial, making defense counsel's role quite important.\(^7\) Counsel, and not the court, are principally in charge of calling witnesses, asking questions, and raising legal objections, which may be deemed waived if not raised by counsel at the appropriate time.\(^7\) If counsel fails to perform these tasks effectively, it is unlikely that anyone else will fill in the gap, at least on a consistent basis.

One partial solution to the incompetence problem might be to shift the nature of the proceedings toward a truly inquisitorial approach in which defense counsel's role is less central to trial fairness.\(^7\) Perhaps this will ultimately happen at the ICC, whose procedures so far reflect somewhat more of a civil-law influence than do those at the ICTY and ICTR.\(^8\) But failure to

\(^7\) See Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L LAW. 21, 37-38 (2000) (noting that the ICC Statute creates a role for defense counsel drawn largely on the common-law model); Combs, *supra* note 68, at 70 (noting that although the procedure in the ICTR and ICTY has both adversarial and inquisitorial features, it is principally adversarial).

\(^8\) See *Kambanda*, Case No. ICTR-97-23-A, Judgment, ¶ 25-29; *Prosecutor v. Simic*, Case No. IT-95-9-A, Judgment, ¶ 212 (Nov. 28, 2006). In cases involving indictment defects, the Appeals Chamber has permitted appellants to raise challenges not raised properly below, but has shifted the burden of proving prejudice in such cases to the appellant; when indictment defects are raised properly at trial, the prosecution must prove them harmless. See *Niyitigeka v. Prosecutor*, Case No. ICTR-96-14-A, Judgment, ¶ 200 (July 9, 2004). In other cases, the Appeals Chamber sometimes relaxes the waiver doctrine to protect defendants from the failures of trial counsel, particularly with respect to failure to introduce critical exculpatory evidence; however, new evidence may only be admitted when the appellant shows that trial counsel was "grossly negligent". *See*, e.g., *Prosecution v. Mejakic et al.*, Case No. IT-02-65-AR11 bis 1, Decision on Joint Defense Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, ¶ 9 (Nov. 16, 2005); *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Appeal Judgment, ¶ 60 (Oct. 23, 2001). Even when the Appeals Chamber adopts a more lenient standard, however, the defendant is still dependent on effective appellate counsel to point out trial counsel's failures, and is likely to be out of luck if his trial counsel is still handling his case.

\(^7\) See McClelland, *supra* note 72, at 27 (arguing that equality of arms is hopeless and that the "best way to ensure some degree of parity... is to entrust the acquisition and presentation of evidence to a neutral entity").

ensure counsel’s competence seems like a poor reason for choosing among procedural frameworks, at least if there are feasible mechanisms for remedying that failure directly. In any event, whatever procedural role defense counsel play, as long as the right to counsel exists, it would be much better to make that right meaningful by ensuring that counsel are capable of doing their jobs. The next Part accordingly discusses different strategies for doing so.

II. SOLUTIONS

In this part, I consider scholars’ and advocates’ existing proposals for improvement of the defense bar, and offer a new proposal of my own: a system of screening and testing potential counsel that centers on a specialized bar exam in international criminal law. Drawing on scholarship criticizing existing domestic bar exams, I offer specific suggestions for how such an exam might be designed to be an effective test of competence.

A. Existing proposals

Little existing scholarship focuses primarily on the incompetence problem, as opposed to other issues relating to the defense, such as the resources provided to defense teams, the right to self-representation, the motivations of defense counsel, and an ethical controversy concerning fee-splitting that arose at the ICTY in its early years. But the scholarship that does exist has generally proposed one or more of three remedies.

First, scholars and advocates in the early years of the Tribunals put forth proposals for improving the professionalization of the international defense bar through the establishment of associations of counsel. These proposals

(188)


(2009).


83 See Turner, supra note 24.

84 See generally Bertodano, supra note 26; Ellis, supra note 1, at 964–66.

have in substantial part already been adopted—for instance, in 2002, an Association of Defense Counsel (ADC) was established for the ICTY, at the request of judges.\(^8\) Also in 2002, the International Criminal Bar (ICB) was established, with the objective of becoming “an institutional cornerstone” that can help to “place the legal profession . . . on a equal footing with the prosecution and the judiciary” in international criminal proceedings.\(^8\)

Although the ICB’s initial focus is the ICC, it ultimately intends to support defense work at other tribunals, including domestic courts in transitional regimes.\(^8\)

While it is a step in the right direction, the establishment of the ADC has not solved the ICTY’s incompetence problem, and I think the ICB is likely to have similar limitations at the ICC. These associations are not selective, have shown no interest in becoming selective, and have no incentive to impose competence standards that many of their members might fail.\(^8\)

Furthermore, membership in the ICB is not mandatory in order to appear before the ICC.\(^9\) And, in any event, the ICB appears to have taken an institutional position against making the requirements for admission to the ICC’s list of qualified counsel more demanding.\(^9\)

The primary function of both

\(^{87}\) See Elise Groulx Diggs, Verbatim, THE CHAMPION 44, 46-47 (Nov. 28, 2004) (statement of the ICB president). Other organizations that preexisted the ADC and ICB include the International Criminal Defense Attorneys Association and the Association des Avocats de la Defense aupres du Tribunal International pour Rwanda. See also Wilson, supra note 17, at 157.
\(^{88}\) Diggs, supra note 87, at 46.
\(^{89}\) See Ellis, supra note 1, at 969-70 (noting that any current or former ICTY counsel may join the ADC); International Criminal Bar [hereinafter ICB] Constitution, art. 5(1) (likewise providing for admission of individuals who qualify to practice before the Court’); see also Tolbert, supra note 7, at 985 (noting that if the ADC were empowered to act like a “traditional domestic bar association” it might fall prey to “cronyism”); McMorrow, supra note 28, at 159-60 (noting that the ADC has rarely disciplined attorneys for any reason); Id. at 157-58 (noting that attorney self-regulation is not effective even in domestic systems like those of the United States and Yugoslavia, where disbarment is rare); Barton, An Institutional Analysis, supra note 42, at 1208-09 (arguing that domestic bar associations do a poor job of self-regulation).
\(^{90}\) See Virginia Lindsay, Exec. Comm. of the ICB, Address at the Fifth Session of the Assembly of States Parties to the Rome Treaty (Nov. 24, 2006) (noting that only one-third of the ICC’s list of counsel and half of those counsel currently assigned to cases are members of the ICB).
\(^{91}\) Letter from Jeroen Brouwer and Eberhardt Kempf, Presidents of the ICB, to ICC President Philippe Kirsch and other officials, p. 11 (Sept. 12, 2006) [hereinafter ICB Letter], available at http://217.148.84.127/bpi-icb/files/ICB%20position%20paper%2020120906.pdf (“For those who are qualified to appear on the List of Counsel, there should not be unnecessary barriers to admission to the List.”).
the ADC and the ICB has been to advocate on behalf of the interests of defendants and the defense bar. Both the ICB and the ADC have also focused on the development of professional ethics standards for attorneys and on training, and the ADC has suspended at least one member due to an ethical problem. It is certainly useful to have organizations playing these roles, but unless these organizations substantially change their focus or admissions requirements, they will not offer a solution to incompetence.

Second, some scholars and advocates have proposed the creation of a defense branch within the tribunal, an Office of the Defender, replacing the current system in which appointed counsel come from outside the Tribunal. In principle, this proposal is a good idea that could help to improve the quality of defense. It might help to alleviate recruitment difficulties by improving defense counsel’s conditions of employment, providing the benefits and job security that accompany a career position rather than contract work. It could help to alleviate the social and professional isolation of defense counsel, integrating them into a single unit with centralized offices and allowing them to share institutional wisdom with one another. The office could put in place systems for training new defense counsel, supervising junior attorneys, and identifying the most qualified junior attorneys to promote. It could have a centralized process for recruiting counsel, considering applications, making hiring decisions, and appointing particular counsel to particular cases, rather than delegating those tasks to the Registry, which is not involved in the actual work of defending cases and which tends to defer excessively to defendants themselves. It could also help to correct two

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92 See McMorrow, supra note 28, at 159 (noting that the ADC was created by judges for this purpose); McGonigle, supra note 24, at 11; see generally ICB Letter, supra note 91 (advocating on behalf of defense counsel with respect to a number of issues).
93 See Diggs, supra note 87, at 46-47; Code of Conduct and Disciplinary Procedure of the International Criminal Bar [hereinafter ICB Code] available at http://www.amicc.org/docs/ICB_CodeofConduct.pdf (last visited June 10, 2009). These professional standards include a duty of competence, see ICB Code, ¶ 5, but there is so far no evidence that the ICB intends to give this provision teeth by imposing some form of scrutiny of attorneys’ capabilities and performance.
94 See Ellis, supra note 1, at 971; McGonigle, supra note 24, at 11; ICB Letter, supra note 91, at 14-15.
95 See Bertodano, supra note 26, at 506.
97 See Gallant, supra note 77, at 42.
factors that contribute to the perceived and/or actual inequality of arms between the defense and the prosecution: the fact that the prosecution, but not the defense, has a structurally central position as an organ of the institution, and the fact that prosecution and chambers attorneys mostly participate in a cozy expatriate social community while defense counsel are relatively excluded.\footnote{98}{See Developments in the Law, supra note 7, at 2004 (discussing these advantages).}

Notwithstanding these advantages, the creation of an Office of the Defender is almost surely politically infeasible, at least in the near future. Advocates have unsuccessfully pushed this idea for years.\footnote{99}{See LEGUM, supra note 76.} The idea gained little interest in the ICC negotiations,\footnote{100}{LEGUM, supra note 96, at 261; Wilson, supra note 17, at 192 ("Resistance to the idea of independent defense in an international tribunal is strong, as indicated by the response of states to any such proposal during the drafting of the Rules of Procedure and Evidence of the proposed ICC.").} although the ICC has established an Office of Public Counsel for the Defence, which does provide some institutional support for defense counsel (who are still outside contractors).\footnote{101}{See The Office of Public Counsel for the Defence, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/Office+of+Public+Counsel+for+the+Defence/ (last visited June 10, 2009).} The proposal also poses potential difficulties related to conflicts of interest that are more complicated than those facing domestic public defenders' offices; most of the Court's cases will likely involve large-scale conspiracies or systems of abuse involving many principal players. Consequently, many of its defendants are likely to have closely intertwined cases.\footnote{102}{See Wilson, supra note 17, at 181 (proposing a "mixed model of staff and assigned counsel" to prevent conflicts).} In any event, for the indefinite future, the Registry will almost certainly remain in charge of appointing defense counsel, and it is more productive to focus on how the Registry could improve that process.\footnote{103}{See Tolbert, supra note 7, at 985 (arguing that "the Registrar is the only authority in a position to protect the public interest" and should "keep firm control over . . . issues relating to qualifications and discipline of defense counsel"); ICC Rules of Procedure and Evidence, Rule 21 (assigning the Registry the role of maintaining the list of qualified counsel).}

Moreover, even if an Office of the Defender were created, it would still be equally important to ask how it should go about identifying and training qualified counsel. Likewise, even if the professional associations started to play a more active filtering and competence-monitoring role, it would still be necessary to ask what standards they should impose. The proposals I suggest below are targeted at the Registry's hiring process, but a similar filtering
process could also be used by these other actors.

Finally, many have advocated more training for defense counsel, and some relatively limited training programs have in fact been adopted. Training is certainly a crucial aspect of any plan to improve the quality of defense, including the one I set forth in the next section, but training alone is not enough. Training programs can effectively teach discrete skills or information to otherwise capable attorneys—for instance, teaching adversarial courtroom procedure to skilled criminal lawyers from civil-law systems. But training is unlikely to correct serious linguistic incompetence or a basic lack of skill in crafting written arguments—or at least, sufficiently extensive programs would not be an effective use of tribunal resources. Finally, unless training is linked to enforceable requirements to demonstrate competency, some counsel probably will not participate, or will not take it seriously.

B. A New Proposal for Improving the Registry's Appointment Process

Tribunals need better administrative and judicial oversight of defense counsel throughout the trial process, but the most important step in improving defense counsel performance is undoubtedly hiring better counsel in the first place. Removing incompetent counsel is a major setback to the progress of a case and, as noted above, judges and Registry officials are extremely unlikely to do it. Also, because trials are already so long, further delays to replace counsel would raise serious speedy trial concerns and would compound the already astronomical cost of international justice. Thus, instead, the solution must come at the front end: better recruiting, better training, and a more selective appointment process. In this Section, I develop a proposal for accomplishing these goals at the ICC.

104 See, e.g., Tolbert, supra note 7, at 980-81; Wilson, supra note 17, at 190-91.
106 See Wald, Running the Trial of the Century, supra note 8, at 1588 (noting that Balkan counsel have improved at cross-examination with training).
107 See Wald, ICTY, supra note 7, at 104 (noting limits of training).
108 Other observers have suggested that hiring should become more selective, but have not made specific proposals for how this should be accomplished. See Tolbert, supra note 7, at 980 (noting that “some reasonable criteria should be established[,]” and that attorneys should “be required to demonstrate competence in criminal law” and to participate in training).
1. Recruiting

As to recruiting, the ICC should attempt to attract strong candidates by promoting defense work as an entrée into, or a means of advancement in, a broader career track in international criminal law. In applications for prosecution, Chambers, and Registry positions, candidates with experience on defense teams should be treated as "internal" candidates for the purpose of hiring preferences, and their defense work should count fully toward requirements for advancement (or perhaps even be treated more favorably than other work within the Court). This would help compensate for the lack of long-term job security in contract-based defense positions, and for the relative lack of prestige and moral appeal that many candidates likely associate with defense work.

Moreover, candidates for prosecution, Chambers, and Registry attorney positions should automatically be considered for defense jobs even if they do not express an interest—or at least, the default option should be to consider them for such positions unless they explicitly decline to be considered. Many qualified candidates that might not have otherwise considered working on the defense side might do so once an actual job offer was presented to them, especially if defense counsel were the only job the Court was offering them. Of course, nobody should be appointed to a defense team unless the Registry is confident that he or she is committed to put on a zealous defense. In addition to interviewing counsel candidates to assess their motivation level, the Registry should help to shape their incentives by informing them that their work as defense counsel will be regularly evaluated, and that positive evaluations that show zealous and effective work on the client's behalf will be a prerequisite not just for continued defense work but also for consideration for other positions within the Court. Moreover, it is crucial that counsel recruited in this way be able to gain the trust of their clients. Before appointment to a particular case, potential defense counsel should meet with their prospective clients to discuss, among other things, the reasons they want to represent them. While defendants need not be given unfettered choice of counsel, their confidence in counsel’s commitment should play an important role in assignment.

Notably, it may be easier for the ICC to attract strong candidates than it has been for the ICTY and ICTR because there is an obvious pool of qualified applicants who might be especially interested: experienced international criminal law practitioners from non-party states, such as the United States. Many such lawyers by now have considerable experience from the ad hoc tribunals but will have a difficult time obtaining ICC staff positions (in Chambers, the Office of the Prosecutor, or the Registry) because of the pre-
ference for nationals of party states.\textsuperscript{109} The ICC's stated criteria for defense counsel appointment, in contrast, do not include such a preference.\textsuperscript{110} In general, the coming closure of the ICTY and ICTR will make a large pool of qualified lawyers from both party and non-party states available when the ICC will presumably need a material number of defense counsel. The ICC should aggressively recruit those lawyers to defense positions.

2. Screening and Training Applicants

The ICC should not replicate the ICTY and ICTR Registry's current unselective process for appointing defense counsel. A basic first step would be to assess CVs more rigorously, and there is some evidence that the ICC intends to do this. Its Rules state that counsel must have "established competence in international or criminal law and procedure" (although the Rules do not demand competence in both, or in international criminal law specifically),\textsuperscript{111} and its website requests that applicants send a "[d]etailed curriculum vitae, allowing for appraisal of the candidate's competence and experience."\textsuperscript{112} Moreover, applicants must fill out a form that includes various questions about their experience and requests self-assessments of their language, computer skills, and legal knowledge in various fields.\textsuperscript{113} But CV-based assessment alone is insufficient. Fair assessment of the relative qualities of CVs from all over the world is difficult, and if the Court intends to maintain a geographically diverse pool of counsel while also ensuring quality, it needs to create a way for diverse candidates to be compared objectively and to demonstrate competence in ways other than a background in elite institutions.\textsuperscript{114} Moreover, even successful practice in a domestic system is insufficient to connote competence to practice in the ICC specifically.

\textsuperscript{111} See ICC Rules of Procedure and Evidence, Rule 22(1) (emphasis added).
\textsuperscript{113} Candidate Application Form List of Counsel, http://www.icc-cpi.int/NR/rdonlyres/E3C4CC69-6CF1-4116-8104-3CCF4011414A/143535/Counsel_Form_enl.doc (last visited June 10, 2009).
\textsuperscript{114} See International Criminal Court Recruitment, http://www.icc-cpi.int/Menus/ICC/Recruitment/ (last visited June 10, 2009) (stating that the Court aims to achieve "equitable geographical representation for positions in the professional category").
Instead, I propose a two-step process for training lawyers and testing their competence before they start work. First, all potential counsel who are identified, based on CV assessment, as plausible candidates should be subject to a detailed written examination that tests the knowledge and skills necessary to perform written defense work—a bar exam in international criminal law. Those who pass the bar would then be qualified to file written submissions at any stage and to serve as appeals counsel, but those who intend to serve as lead or co-counsel at the trial stage would be required, before trial begins, to go through a second assessment focused on in-court skills. An intensive training program would be offered before both assessments. Junior lawyers working in supervised positions could be hired before passage and permitted to begin work, but would be required to pass the next time the training program and exam are offered (approximately annually). Although passage could also be required for prosecutors, judicial staff, counsel for victims, or even judges, I focus only on the assessments' utility in ensuring competent defense in this piece.

Some form of examination is a prerequisite for admission to practice law in a large number of domestic jurisdictions. However, many scholars have criticized domestic bar exams, most notably for being poorly suited to test competence to practice law. The objections scholars have raised are
serious, but none provides a good reason for rejecting testing entirely—rather, they provide reasons to design a better test of competence. Here, I offer some thoughts on how the ICC could do so.

a. Scope

Many critics have argued that the substantive scope of domestic bar exams fails to correspond to the law that practicing lawyers need to know. For instance, commentators in the United States and Germany have written that bar exams are both over- and under-inclusive, largely because they cover a broad range of subjects, while the practice of law is increasingly specia-

vid B. Wilkins, A Systematic Response to Systemic Disadvantage: A Response to Sander, 57 STAN. L. REV. 1915, 1946-47 (2005) (arguing that “[a]lthough any argument that such exams have no relationship to quality would certainly strain credulity... the assumption that bar passage... is synonymous with legal competence has not only never been proven but is, given what we know about the exam and its history, implausible on its face”) (italics omitted); Sally Simpson & Toni M. Massaro, Students With “CLAS”: An Alternative to Traditional Bar Examinations, 20 GA. ST. U. L. REV. 813, 823-24 (2004); William C. Kidder, 29 LAW & SOC. INQUIRY 547, 556 (2004) (arguing that bar exams serve protectionist purposes and “can have little to no relationship to the real competency requirements needed to promote sound legal representation”); Larry Ribstein, supra note 42; Barton, An Institutional Analysis, supra note 42, at 1236-37; Kristin Booth Glen, Thinking Out of the Bar Exam Box: A Proposal to “Mac-Crate” Entry to the Legal Profession, 23 PACE L. REV. 343, 361 (2003) [hereinafter Glen, Bar Exam Box] (arguing that because the bar exam tests competency poorly, it is worse than nothing, because it gives clients a “false sense of security”); Society of American Law Teachers Statement on the Bar Exam, 52 J. LEGAL EDUC. 446, 446-47 (2002) [hereinafter SALT Statement]; Andrea A. Curcio, A Better Bar: Why and How the Existing Bar Exam Should Change, 81 NEB. L. REV. 363, 366, 422 (2002).

119 No test, of course, will be a perfect test of competence; for instance, a lawyer could perform well on a test and still lack the commitment, work ethic, or client relation skills to provide effective representation over the long term. See, e.g., Charles T. Beeching, Jr., A Bar Examiner’s Perspective on Minimum Competence, B. EXAMINER, Nov. 1996, at 6. But a well designed test can still be a valuable proxy, and can screen out candidates who clearly lack essential skills. See Suzanne Darrow-Kleinhaus, A Response to the Society of American Law Teachers Statement on the Bar Exam, 54 J. LEGAL EDUC. 442, 442 (2004) (arguing that despite its flaws the U.S. bar exam “serves a necessary function”). Notably, Spain’s system, which is rare in that it lacks a bar exam, has been criticized for producing many very poorly prepared lawyers. See Peter Joy, How Lawyers Qualify in Europe, 2000 EUR. LAW. 1(5), 60-61.

lized. This problem makes designing a general domestic bar exam that effectively tests competency a Herculean task. Fortunately, the ICC faces no such difficulty. A bar exam in international criminal law would be highly specialized, and thus quite easy to tailor to the substantive knowledge and skills that international defense counsel specifically need.

The exam should cover, first, the basics of substantive international criminal law: the elements of the crimes within the Court’s jurisdiction, their defenses, and modes of individual liability for collective crimes. To that end, applicants should be expected to be familiar with the substantive provisions of the Rome Statute, the ICC’s Elements of Crimes document, the Court’s case law (which at this point is minimal, but will grow), and relevant precedents from the ICTY and ICTR that are likely to inform the Court, especially in its early years when it has little jurisprudence of its own to draw on. Equally important, the test should cover the ICC’s Rules of Procedure and Evidence, the international human rights principles governing the criminal process, and any practice directives with which counsel will be expected to comply.

b. Testing Understanding

Domestic bar exams are often criticized for testing memorization rather than understanding. The solution, at least in the international criminal law context, is simple: the exam should be open-book. Exam administrators should furnish some of the materials themselves and set rules for what else can be brought. All test-takers should be provided at the very least with copies of the most essential ICC documents—in particular, the Rome Statute, the Elements of Crimes, the Rules of Procedure and Evidence, and the Code

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121 See, e.g., Glen, Bar Exam Box, supra note 118, at 362-65; SALT Statement, supra note 118, at 448; Keilmann, supra note 117, at 302-06 (“[T]he state exams require students to master far too much material. The huge number of laws, it is argued, calls for specialization.”).
122 See Starr, supra note 25, at 1267 (discussing ICTY/ICTR influence on ICC); see also Wilson, supra note 17, at 167 (noting that “knowledge of international humanitarian law seems indispensable, and general knowledge of the statutes, rules, and ever-growing jurisprudence of the tribunals are sine qua non for appearance there.”).
123 See Barton, Why Do We Regulate Lawyers?, supra note 17, at 459-60 (criticizing the U.S. bar exam for focusing “almost exclusively on substantive legal issues and ‘thinking like a lawyer’ and dedicating little, if any, space to the specifics of practice before courts”).
124 See, e.g., Irish, supra note 117, at 16 (discussing South Korea, Japan, and Taiwan); SALT Statement, supra note 118, at 447; Curcio, supra note 118, at 374-77.
125 See Curcio, supra note 118, at 374 (noting that closed-book format drives test-takers to focus on memorization).
of Professional Conduct—and they could be provided with additional legal materials that are relevant to the questions they are asked: international court decisions, ICC Preparatory Commission materials, excerpts from the leading treatises, and so forth. They can then be tested on their ability to identify germane points in those materials and use them to support a legal argument in a hypothetical case.

c. Testing Writing and Legal Analysis Skills

Probably the most important lawyering skills for defense counsel are the ability to analyze the application of a legal principle to a particular situation and to communicate that analysis in writing. Defense counsel must employ these skills again and again at all stages of the proceedings. Written bar exams in the U.S. have proven fairly effective at testing these skills, so it should not be difficult to ensure that the ICC exam does the same, simply by including essay questions involving the analysis of challenging fact situations or procedural predicaments. Many of the most universal criticisms of the U.S. bar exams have targeted the use of multiple-choice questions, which (while they may have some utility in broadening the substantive coverage of a multisubject exam) do not test legal methods that correspond closely to those actually employed by practicing lawyers. Multiple-choice questions simply should not be used on an ICC exam.

d. Testing Language Skills

One of the most common problems in defense counsel submissions is linguistic incompetency: some counsel who claim to be proficient in English or French actually are not. This problem no doubt hampers such counsel’s

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127 See, e.g., Glen, Bar Exam Box, supra note 118, at 376; Kristin Booth Glen, When and Where We Enter: Rethinking Admission to the Legal Profession, 102 COLUM. L. REV. 1696, 1712 (2002) [hereinafter Glen, Rethinking Admission]; Darrow-Kleinhaus, supra note 119, at 442-46.
128 See Day, supra note 120, at 337, 339.
129 See, e.g., Wilkins, supra note 118, at 1950; SALT Statement, supra note 118, at 447-48 (“No practicing lawyer is faced with the need to apply a memorized legal principle to a set of facts she has never seen before and then choose, in 1.8 minutes, the “most correct” of four given answers.”).
130 See Wald, Reflections on Judging: At Home and Abroad, supra note 8. The Tribunals’ procedural rules generally require counsel to be fluent in French or English, although they allow waiver of this requirement in “the interests of justice.” See ICTY RPE, supra note 34,
Ensuring Defense Counsel Competence

research ability, and makes their written submissions difficult or even im-
possible to understand. One possible response would be to require counsel
to pass, at a high level, a proficiency exam in English or French, such as the
one administered by the UN.131 But if a bar exam were established, a sepa-
rate competency exam would not be necessary, because the bar exam would
offer something better: the ability to test would-be counsel's ability to use
English or French to write persuasive essays about international criminal
law. That is, requiring counsel to take the bar in English or French would
test the exact language skills that counsel have to use in practice.

To be sure, counsel who speak the language of the accused but do not
speak English or French may still play a valuable role on ICC defense teams
(particularly if it proves impossible to recruit enough multilingual lawyers
who can do both).132 Communication with the accused is crucial, and it may
be easier to build a relationship of trust if that communication can happen
without an interpreter. Still, as long as the case law and other relevant mate-
rials are limited to English and French, counsel that lack proficiency in these
languages should not be appointed to lead counsel roles. Legal research is
too central to the lead counsel's task to be delegated to interpreters, and
while legal assistants may help with research, lead counsel must be able to
read primary materials so as to be able to evaluate and make use of his assis-
tants' work product.133 The problem could be solved by the use of differing
qualification requirements for different members of the defense team. An
alternative method of certifying competence, focused on interpersonal skills
and not necessarily requiring mastery of English or French, might be de-
dsigned for specialized defense team members whose principal role would be
to communicate directly with the client.134

e. Testing Relevant Research Skills

International defense counsel work requires the ability to do legal re-

at Rule 44(a)(2).

131 See United Nations, Language Proficiency Examinations,
ams).

132 See Wald, Running the Trial of the Century, supra note 8, at 1578 (noting that the ICTY
has sometimes waived the language qualification requirement for counsel "because ICTY de-
fendants wanted counsel who spoke their Balkan dialect").

133 Legal Education & Admission to the Bar, Report of the Task Force on Law Schools and
the Profession: Narrowing the Gap, in LEGAL EDUCATION AND PROFESSIONAL

134 Subsection g, infra, offers some ideas for how interpersonal skills could be tested.
search—and specifically, mastery of the particular court's electronic research tools. Although domestic bar exams often omit this skill, there is no reason it cannot be tested on a bar exam, and it should be.\textsuperscript{3} As part of the exam, test-takers could be given one or two research projects that counsel could reasonably be expected to complete in a half or full day—for instance, drafting an urgent motion for provisional release based on a family medical emergency. To preserve exam security, test-takers should be given computers with Internet access that is confined to the online databases that they will use regularly as counsel, such as the judicial records databases of the ICTY\textsuperscript{136} and ICTR\textsuperscript{137} and the ICC's “Legal Tools” electronic library, which currently consists of 25,000 legal documents and commentaries on international criminal law.\textsuperscript{138}

f. Allowing Plenty of Time

Bar examinations in the United States cram a large number of questions into a short amount of time. Scholars have criticized this characteristic on two grounds. First, it prizes speed over thoughtfulness and care and thus encourages hasty and sloppy lawyering, while not corresponding to anything lawyers actually need to do in practice.\textsuperscript{139} Second, it may contribute to the bar exam's lower passage rate for racial minority groups, because of a psychological phenomenon known as "stereotype threat."\textsuperscript{140} In high-stakes testing situations involving tight time constraints, studies have suggested that

\begin{itemize}
\item \textsuperscript{135} See Glen, Rethinking Admission supra note 127, at 1711 (criticizing U.S. bar exam on this ground); Curcio, supra note 118, at 371, 411 (same).
\item \textsuperscript{136} See ICTY Court Records Online Database, http://icty.org/default.aspx (last visited June 10, 2009).
\item \textsuperscript{137} See ICC Legal Texts and Tools, http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Legal+Tools/ (last visited June 10, 2009).
\item \textsuperscript{138} See id. (describing this database). See also Curcio, supra note 118, at 395 (noting that U.S. professional licensing exams in architecture are computer-based and provide test-takers with access to reference materials); \textit{id.} at 396-97 (suggesting that if bar takers were provided with Internet access or a CD-ROM with legal materials, it would be possible "to completely eliminate the current 'memorize the law' model").
\item \textsuperscript{139} See Glen, Bar Exam Box, supra note 118, at 475-76, 508; Curcio, supra note 118, at 375 (noting that "relying on one's memory rather than on one's research of the law may lead to Rule 11 sanctions or malpractice liability").
\end{itemize}
stereotypes—social expectations that certain groups will perform more poorly—may be self-fulfilling prophecies. The "stereotype threat" theory holds that minorities as well as women, aware of those stereotypes, second-guess their own answers unnecessarily and thus take too long to progress through the questions, ultimately running short of time.141

The first of these two concerns is equally applicable in the international criminal justice contexts, and the second may well be.142 In addition, time-pressured exams would be certain to disparately impact fluent but non-native speakers of English and French, who can be expected to conduct research and writing a bit more slowly than native speakers. A slight disadvantage with respect to speed ought not to be taken to suggest that such lawyers cannot operate effectively as counsel, so long as their ultimate work product is excellent, and it would be counterproductive to exclude otherwise strong candidates for this reason. To avoid these problems, the exam should be spread out over multiple days, and on each day test-takers should be given plentiful time to complete the material.

g. Testing Oral Communication and Courtroom Skills

One of the most pervasive criticisms of ICTY and ICTR counsel has been that they lack the necessary courtroom skills, especially with cross-examination.143 Counsel who wish to perform these tasks at trial should be trained in and tested on adversary courtroom procedure. In addition, lead trial counsel (or team members whose role especially focuses on client relations, as mentioned above) must also have the interpersonal skills necessary to counsel their clients and to seek their input into their defense strategy. While these skills may seem difficult to test on a bar examination, critics of U.S. bar examinations (which are wholly written) have developed some proposals that are worth considering.144 Courtroom skills could be tested

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141 Cross, supra note 140, at 97-98; Glen, Bar Exam Box, supra note 118, at 473-75, 508; Steele & Aronson, supra note 140.
142 The ICB has already suggested that women are underrepresented in the existing list of ICC counsel. ICB Letter, supra note 91, at 11.
143 See supra note 7 and accompanying text.
144 See, e.g., Lawrence M. Grosberg, Standardized Clients: A Possible Improvement for the Bar Exam, 20 GA. ST. U. L. REV. 841, 841-44 [hereinafter Grosberg, Standardized Clients] (2004); Glen, Bar Exam Box, supra note 118, at 346 ("proposing an experiential, performance-based alternative bar exam"); SALT Statement, supra note 118, at 451 (proposing consideration of a "practical-skills teaching term" modeled on a Canadian approach, which would include "assessments[] in interviewing, advocacy, legal writing, and legal drafting skills"); Curcio, supra note 118, at 394-96 (noting that computer-based simulations could provide a practical means of administering skills testing); id. at 414 (discussing use of actors as "stan-
through exercises involving actors as mock witnesses and judges, while client counseling skills could be tested through the use of mock clients. Similar forms of testing are in effect in U.S. medical education and board qualification, where the use of actors as standardized mock patients is routine, and there have been some U.S. experiments with use of such methods in the legal context. In Germany, oral examinations including “case presentations” are required of every entering lawyer. Likewise, in France and Italy candidates who pass initial written exams must then complete oral assessments; these are mostly focused on substantive law. In Britain, would-be barristers undergo assessments of advocacy skills, such as handling of witnesses, as part of a training program called the Bar Vocational Course.

For two reasons, however, I propose that oral testing not be required of all defense counsel, but rather be separated into a second stage required only of counsel already admitted to the ICC bar who now seek to be appointed as lead or co-counsel in a particular case at the trial stage. First, such assessments are likely to be significantly more cost- and time-intensive than a written exam, and they are simply not necessary for all counsel. Junior lawyers on a defense team need not examine witnesses and are unlikely to play a principal role in consulting clients, while appellate counsel’s tasks are overwhelmingly centered on legal research and writing. And it is certainly not necessary to administer the oral test to those who do not pass the written portion of the exam; separating the two stages would allow that group to be screened out.

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145 Grosberg, Standardized Clients, supra note 144, at 842; Lawrence M. Grosberg, Medical Education Again Provides a Model for Law Schools: The Standardized Patient Becomes the Standardized Client, 51 J. LEGAL EDUC. 212 (2001).

146 E.g., Glen, Bar Exam Box, supra note 118, at 409-10; Grosberg, Standardized Clients, supra note 144, at 852-62.


Second, oral and thus non-blind examinations create the opportunity to introduce any number of unconscious (or conscious) biases. Studies in a wide variety of professional contexts have shown the persistence of gender and racial discrimination in hiring and performance assessment even in countries, like the United States, where such discrimination is squarely illegal and socially disapproved.\(^{151}\) Blind assessment methods—like screened auditions for orchestras—have proven in some contexts to significantly reduce that discrimination.\(^{152}\) In my view, this evidence is sufficient to justify blind-grading written examinations and avoiding oral testing except where it is really necessary—as it certainly is for lead trial counsel, given the ad hoc tribunals' problems with poor courtroom skills. When carrying out oral testing, every effort should be made to reduce possible bias. For instance, very specific performance criteria should be developed ahead of time; the evaluating committee should reflect the Court's diversity, in addition to being themselves experienced and well-respected international criminal lawyers; and the evaluation process should itself be monitored to ensure that consistent standards are being applied.

In terms of evaluating interactions with clients, coming up with a "standard" client may be especially difficult in the international context, of course, because of cultural differences. Perhaps counsel could be exposed to several different mock clients representing a variety of different personality and cultural profiles that are representative of the diversity of defendants to which ICC counsel might be assigned. Alternatively, rather than using a completely standardized set of mock clients for all applicants, counsel seeking appointment to specific cases could be tested using mock clients whose profiles are designed to approximate those of the particular defendants whom counsel are seeking to represent. Or part of the appointment process


could involve observation of counsel’s actual initial interaction with the client she is seeking to represent. Because the defendant would be involved in choosing his own lawyer and could observe his communication skills directly, testing client communication skills may be a less crucial aspect of the oral testing proposal than testing courtroom skills, which would not normally be observed until long after counsel’s initial assignment to the case.

h. Training for the Test

The purpose of a bar exam requirement should not be exclusivity for its own sake, as it appears to be in some domestic systems.\(^{153}\) A high pass rate should be the goal, so as to ensure a plentiful supply of qualified defense counsel, but this should be achieved through effective training rather than dilution of standards.

I envision a full-time training course of about three weeks prior to the written bar exam, offered free to qualified applicants being considered for appointment to counsel positions, or to junior lawyers already working in supervised positions. Candidates facing substantial hardship could be given additional stipends for their travel and time, which would help to mitigate the disparate impact on lawyers from poor countries, and the course could possibly be offered in a virtual-classroom setting to reduce costs. I think that for any experienced lawyer who already had the necessary competence in English or French writing and basic legal analysis skills, three weeks of classes and study time would be enough time to cover the core material, even though it obviously could not cover every nuance. For comparison, U.S. bar review courses cover a dozen or more fields of law in eight or ten weeks.\(^ {154}\) An additional training course of perhaps a week or so would be offered for those lawyers taking the second-stage trial skills test. Neither training course would be mandatory; candidates who are truly already qualified to practice at the Court should have no difficulty passing the exam with-

\(^{153}\) Bar exams in South Korea, Japan, and Taiwan have particularly been criticized on this ground; with pass rates between two and ten percent, they are often described as simply means of protecting existing lawyers from competition. See Irish, supra note 117, at 17-18; see also Curtis J. Milhaupt & Mark D. West, Law’s Dominion and the Market for Legal Elites in Japan, 34 LAW & POL’Y INT’L Bus. 451, 459-60 (2003) (arguing that the extremely difficult Japanese bar exam has produced a scarcity of lawyers); Glen, Bar Exam Box, supra note 118, at 373-74 (discussing arguments that the U.S. bar is a “profoundly anticompetitive . . . ‘guild restriction’”).

out taking the training, meaning that for such candidates, satisfying the exam requirement would require no more of an investment than the few days required to take the test itself.

Providing this training in international criminal law would have the corollary benefit of helping to train a corps of lawyers who could later return to their home systems with familiarity with this body of law, even if they do not end up practicing in the ICC. This could help to serve the ICC’s broader objectives of encouraging domestic legal systems to institute effective systems for fairly trying and punishing international crimes. Moreover, qualified candidates could be attracted to defense positions precisely because of the availability of the free training program and the value of bar certification itself in obtaining jobs at home or elsewhere in the international community. Bar exams are never particularly popular requirements, and are often arduous, and one plausible objection to adding such a requirement at the ICC is that it could deter some qualified counsel from applying. However, the possible career advantages brought by certification and training could counteract this risk, such that the bar requirement need not worsen recruitment problems and could possibly help to alleviate them.

i. Continuing Education

Because the ICC is new, its case law is likely to evolve rapidly. Practicing counsel should thus be required, at appropriate intervals following their bar admission (perhaps every two years), to participate in brief training programs focused on recent changes in the law. Counsel would also be expected, of course, to track changes in the law on an ongoing basis as part of their professional duty of competence, but providing continuing education could help to make sure that counsel do not miss any important developments. These training programs could include testing on the new material, but such a test could be much more limited in scope and duration than the initial bar exam. Continuing education and/or retesting requirements could be heightened for counsel who have a break of many years in their practice of international criminal law, or who do not practice for many years following their initial bar certification but later seek appointment to a case.

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155 See, e.g., David Tolbert, International Criminal Law: Past and Future, 30 U. Pa. J. Int’l L. 1281, 1293-94 (2009) (describing the ICC’s ability to “assist[] states in bringing their judicial systems up to a standard where they can prosecute crimes under the ICC Statute” as “the key question for international criminal law” that will determine whether “the ICC is to make a broader impact than simply holding a limited number of trials in The Hague”).

156 Likewise, counsel who seek to practice in a language that they have not actively used in many years could be asked to take a screening test for continued linguistic competence.
This proposal will no doubt be expensive at the outset. But these costs must be put in perspective: international criminal trials are unbelievably expensive. The ICTY has averaged around $10 million to $15 million per defendant.\textsuperscript{157} Investing in more skilled counsel at the outset might help to save costs in the long run, because incompetent counsel cost tribunals money by filing frivolous motions and forcing judicial staff to fill in research gaps to support potentially valid arguments.\textsuperscript{158} And in any event, given that the international community has decided that it is worth spending these kinds of sums to run these trials, then it would be worth spending a little more to try to increase their fairness.

**CONCLUSION**

The too-frequent problem of defense counsel incompetence has been widely recognized since the early days of the modern international criminal tribunals, and it is important that the ICC take steps now to avoid replicating that problem. New testing requirements, like those I have proposed here, are rarely popular with those who have to comply with them, and they also impose costs and design challenges on those who must administer them. Yet it is worth taking on these costs—or at least, worth investing in some other serious strategy for ensuring competency of counsel—lest the fairness and credibility of the young Court's proceedings be undermined.

\textsuperscript{157} See Starr, supra note 25.

\textsuperscript{158} See Henderson, supra note 21 and accompanying text.