

The Impact of International Lawyer
Organizations on Lawyer Regulation

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ARTICLE

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I. INTRODUCTION

While much of the scholarly attention devoted to lawyer regulation focuses on state or national actors, the impact of international lawyer organizations has been largely ignored. Increasingly, however, a number of such lawyer organizations influence the regulation of lawyers, including, *inter alia*, the International Bar Association (“IBA”), the Union Internationale des Avocats (“UIA”), the Council of Bars and Law Societies of Europe (“CCBE”), the Inter-American Bar Association (“IABA”), and the Pan-African Lawyers Union (“PALU”).¹ So, too, do a few national lawyer organizations with an international reach, such as the American Bar Association (“ABA”). Thus, the term “international lawyer organization” is used here to include not just organizations with a truly international membership, but transnational lawyer organizations, as well as national lawyer organizations with a substantial international mission. These organizations are playing an important role in shaping lawyer admission requirements and ethical standards for lawyers, the structure of lawyer regulatory systems, and attitudes about the role of lawyers in civil society.

1. For a description of the IBA and the CCBE, see *infra* Sections II.A, II.B. The UIA, formed in 1927, is an international lawyers’ organization composed of lawyer associations and individual members from 147 countries. *About Us*, UIA, <https://www.uianet.org/en/about-us> [<https://perma.cc/MR2S-ZDP8>]. The IABA was founded in 1940 by lawyers and jurists from forty-four professional organizations and seventeen nations in the western hemisphere. *About Us*, INTER-AMERICAN B. ASS’N, http://www.iaba.org/site/index.php?option=com_content&view=article&id=458&Itemid=149&lang=en [<https://perma.cc/VF6M-84ZV>]. The PALU, founded in 2002, is an association of five regional and fifty-five national lawyers’ associations and individual lawyers. PAN AFRICAN LAWYERS UNION, <https://lawyersofafrica.org> [<https://perma.cc/GJ6S-VT8C>].

Some of this influence occurs through the sharing of information and ideas. For example, bar association leaders from neighboring countries meet informally or form associations to discuss issues of common interest. Other efforts by international lawyer organizations to influence lawyer regulation at the national level occur in more direct and systematic ways, such as by providing in-country assessments of justice systems, model standards, and on-the-ground technical assistance.

Commercial and political interests play a role in international organizations' efforts to influence lawyer regulation. International lawyer organizations seek to encourage the development and adoption of common rules of practice to insure predictability in commercial transactions and dispute resolution.² These organizations also work to develop common rules that permit cross-border practice.³ Cross-border practice creates increased economic opportunities for lawyers (both domestically and internationally) and makes it easier for their clients to increase their profitability and efficiency by doing business abroad. Efforts to enable cross-border practice can also have a distinctly political objective. For example, for actors who strongly favor further European integration, facilitating the mobility of lawyers across the EU Member States advances that goal.⁴

Many international lawyer organizations also seek to influence lawyer regulation to promote the rule of law or human rights. Nations that are post-conflict or transitioning to democracies receive help from international lawyer organizations in developing national laws and institutions to advance these goals. Organizations like the International Commission of Jurists ("ICJ") work to establish the rule of law, in part by bolstering the ethics and independence of lawyers and judges.⁵ The

2. Indeed, professional associations often help deal with rule ambiguity in the transnational legal field. See Sigrid Quack, *Legal Professionals and Transnational Law-Making: A Case of Distributed Agency*, 14 *ORG.* 643, 650 (2007).

3. See *infra* notes 44-47, 83-84, 87, 169-70, 177, 181 and accompanying text.

4. For a discussion of the important role that lawyers played in the process of European integration, see Antonin Cohen & Antoine Vauchez, *Introduction: Law, Lawyers, and Transnational Politics in the Production of Europe*, 32 *LAW & SOC. INQUIRY* 75 (2007); Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union*, 2 *INT'L POL. SOC.* 128 (2008).

5. *About*, INT'L COMMISSION OF JURISTS, <https://www.icj.org/about/> [<https://perma.cc/FC6C-V28G>] [hereinafter ICJ]. The ICJ includes judges and lawyers from around the world. *Id.* It provides technical assistance, and reports and recommendations. INT'L COMMISSION OF JURISTS, ANNUAL REPORT 2015, at 30 (2016), available at <https://www.icj.org/wp-content/>

International Legal Assistance Consortium (“ILAC”), which includes more than fifty national and international lawyer organizations, helps to coordinate efforts by international actors to build justice systems in post-conflict countries.⁶ The development of lawyer regulation consistent with the rule of law not only strengthens governments and their institutions, but can provide increased predictability and protection for businesses that are considering investing in those countries and may need to use local lawyers and courts.

International lawyer organizations also act to influence lawyer regulation in response to actions by other international actors. For example, when Ireland needed financial help to weather the economic collapse in 2008, the “Troika” of the International Monetary Fund, European Central Bank, and European Commission insisted on regulatory reform of the Irish legal profession as a condition of their assistance.⁷ In response, leaders of the IBA, CCBE and ABA went to Ireland to oppose what they saw as draconian legislation that, if passed, could put Ireland “into conflict with fundamental tenets of the UN, the EU, and the Council of Europe regarding the organization of the legal profession.”⁸ Over the next few years, the lawyer organizations worked to protect the interests of the Irish legal profession until compromise on the legislation was reached. Similarly, the IBA, the CCBE, and national lawyer organizations worked together to oppose a requirement proposed by the Financial Action Task Force, an intergovernmental

uploads/2016/09/Universal-ICJAnnualReport15-Publications-Reports-Annual-Report-2015-ENG.pdf [https://perma.cc/A5C4-7SGN].

6. *Membership Organisations*, INT’L LEGAL ASSISTANCE CONSORTIUM, <http://www.ilacnet.org/member-organisations/> [https://perma.cc/244N-7WMF]. Members of ILAC include the ABA, the Bar Council of Ireland, the Tunisian Bar Association, the Hong Kong Bar Association, the Arab Lawyers Union, the CCBE, and the IBA. Formed in 2002 in Sweden, ILAC is an organization dedicated to advancing human rights and the independence of lawyers and judges. *Video: ILAC Celebrates 15 Years Rebuilding Justice Systems*, INT’L LEGAL ASSISTANCE CONSORTIUM (June 9, 2017), <http://www.ilacnet.org/blog/2017/06/09/ilac-15-years-rebuilding-justice-systems/> [https://perma.cc/S65R-57WK].

7. Andrew Boon, *Innovation and Change in the Regulation of Legal Services*, in *INTERNATIONAL PERSPECTIVES ON THE REGULATION OF LAWYERS AND LEGAL SERVICES* 241, 243 (Andrew Boon ed., 2017).

8. *Legal services Bill*, IRISH TIMES (Dec. 8, 2011), <https://www.irishtimes.com/opinion/legal-services-bill-1.9045> [https://perma.cc/6BJ7-MVGY]. The CCBE and ABA also sent a letter to the IMF Managing Director Christine Lagarde to express “growing concern” about changes the Troika sought in lawyer regulation in Ireland, Portugal, and Greece that would affect the independence of the legal profession. See Laurel S. Terry, *Transnational Legal Practice (International)*, 47 INT’L LAW. 485, 488 (2013).

body established to set standards to combat money laundering, that threatened lawyers' interests.⁹ International lawyer organizations also respond to international institutions when called upon for help, as the IBA and CCBE did in formulating the rules of ethical conduct for defense counsel appearing before the International Criminal Court.¹⁰

Through these efforts, international lawyer organizations are promoting a particular vision of the role of lawyers in civil society. This comes, in part, from the dissemination of international guidelines for legal professions. For example, in 1990 the United Nations adopted the Basic Principles on the Role of Lawyers ("UN Basic Principles"), in order to provide a framework for legislation by Member States.¹¹ Although the United Nations Committee on Crime Prevention and Control authored the UN Basic Principles, the drafters considered recommendations made by international lawyer organizations including the IBA and the ICJ.¹² The UN Basic Principles state that lawyers in promoting the cause of justice "shall seek to uphold human rights and fundamental freedoms."¹³ Likewise, the Council of Europe Recommendation on the Freedom of Exercise of the Profession of Lawyer was issued in 2006 to guide the EU Member States.¹⁴ These standards emphasize the importance of autonomy for the legal profession and articulate a vision of the "fundamental role" of lawyers and lawyer associations "in ensuring protection of human rights and fundamental freedoms."¹⁵ International lawyer organizations

9. See *infra* notes 298, 302-03, 305, 311-13, and 319 and accompanying text.

10. See *infra* Section III.B.1.

11. Eighth U.N. Cong. on the Prevention of Crime & the Treatment of Offenders, Basic Principles on the Role of Lawyers, U.N. Doc. A/CONF.144/28/Rev.1, at 117 (1990), available at <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx> [<https://perma.cc/MN4C-ZR8Z>] [hereinafter UN Basic Principles].

12. See U.N. Economic and Social Council, Committee on Crime Prevention and Control, Eleventh Session, Continuation of Preparation for the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, at 2, Nov. 24, 1989.

13. UN Basic Principles, *supra* note 11, at ¶ 14.

14. Council of Europe, Recommendation (2000) 21 on the Freedom of Exercise of the Profession of Lawyer (Oct. 25, 2000). Another important source of international standards is the European Parliament Resolution on the Legal Professions and the General Interest in the Functioning of Legal Systems (2006).

15. Council of Europe, Recommendation (2000) 21 on the Freedom of Exercise of the Profession of Lawyer (Oct. 25, 2000), *supra* note 14; see INT'L BAR ASS'N, STANDARDS FOR THE INDEPENDENCE OF THE LEGAL PROFESSION (1990) (noting that the independence of the legal profession "constitutes an essential guarantee for the promotion and protection of human rights").

disseminate these standards and advance this vision when they provide assessments of justice systems in other countries and advise governments and lawyer groups about lawyer regulation, including rules of professional conduct that they might adopt.

At the same time, by exporting these standards, the international lawyer organizations are facilitating the increasing convergence of the law governing lawyers in different countries. This includes regulatory models that place significant responsibility for regulation of the profession within lawyer organizations rather than government institutions.¹⁶ These standards also impose substantial educational requirements on lawyers, including, in some cases, university-level training before licensing individuals to practice law.¹⁷ Lawyers must also maintain client confidentiality, avoid conflicts of interest, and perform their work honestly and competently. They can face discipline—often administered by lawyer organizations—if they do not.

To better understand the impact of international lawyer organizations on lawyer regulation, this Article will examine three organizations: the IBA, CCBE, and ABA. The three are quite different in that the IBA is composed of a truly international membership, the CCBE is Europe-focused, and the ABA is a national organization, but engages in extensive international activities. Moreover, IBA membership includes national lawyer associations, law firms, and individuals; the CCBE consists only of national lawyer associations; and the ABA consists only of individual lawyers. Part II of this Article will describe the history, membership, structure, and work of the three organizations. As will be demonstrated, there are some differences in how they operate and what they do, but they share many similar views about the legal profession and its regulation. Part III will describe the ways in which these organizations cooperate on select issues to promote certain professional values and influence lawyer regulation throughout the world. In Part IV, this Article will consider the consequences of these activities, for legal professions, for public protection, and for civil society. The Article will discuss the implications of the increasing convergence of the law governing lawyers, including whether the efforts of these international lawyer organizations are leading to rules that have any adverse consequences.

16. *See, e.g., infra* notes 357-59 and accompanying text.

17. *See infra* notes 230, 364-66 and accompanying text.

The Article will also consider how the organizations' efforts create hard and soft law. It concludes by raising some additional questions about the role of international lawyer organizations and by making suggestions for future research.

II. OVERVIEW OF ORGANIZATIONS

A. International Bar Association

As “the world’s leading international organisation” of international legal practitioners and lawyer associations, the IBA has a membership of more than 100,000 lawyers (including individuals from 201 member law firms), 25 corporate groups, and 199 bar associations and law societies from over 160 countries.¹⁸ Founded in 1947, the organization engages in a wide range of activities around the world, including efforts to articulate standards for the regulation of lawyers. The IBA’s administrative headquarters are located in London and regional offices are in Sao Paulo, Seoul, Washington DC, and the Hague.¹⁹

The IBA grew out of initiatives of the ABA. In 1932, the ABA appointed a committee to explore alternatives for an international bar organization.²⁰ The ABA committee recommended possible affiliation with the UIA, an association of European lawyer organizations based in Brussels.²¹ Plans to affiliate were stopped, however, due to the war.²² The ABA resumed its efforts in 1944 with a special committee to investigate the feasibility of an international bar.²³ Shortly after the creation of the United Nations in 1945, the committee sent a draft plan

18. Telephone Interviews with Mark Ellis, IBA Executive Director (Feb. 16, 2018 and Mar. 27, 2018); *About the IBA*, INT’L B. ASS’N, https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx [<https://perma.cc/A6Q6-MMWK>]. The IBA includes some local bar associations, usually from large cities.

19. *About the IBA*, *supra* note 18.

20. Robert Nelson Anderson, *The International Bar Association: Its Establishment and Progress*, 36 ABA J. 463, 463 (1950).

21. *Id.* at 464. The UIA “operates in multiple languages” and “has historically been more civil-law oriented than has the IBA.” Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO’s Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 PENN. ST. INT’L L. REV. 695, 699 n.6 (2004).

22. Anderson, *supra* note 20, at 464.

23. INT’L BAR ASS’N, ELEVENTH CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION, LAUSANNE SWITZERLAND x (1966).

of organization to various lawyer organizations, and subsequently invited them to meet in New York.²⁴ The IBA's inaugural meeting in 1947 included representatives of twenty-three national bar associations from around the world.²⁵

As stated in its constitution, the IBA sought to discuss problems of professional organization, to foster uniformity in appropriate fields of law, to promote the administration of justice around the world, and to advance the principles and aims of the United Nations.²⁶ The organization began as a federation of national bar associations and later opened its membership to individual lawyers and law firms.²⁷ In its early years, IBA members were mainly business lawyers with transnational clients. As Andrew Boon and John Flood write, notionally the IBA "brings together lawyers and bar associations from around the world but, in reality, it primarily represents elite lawyers."²⁸ In the 1990s, the IBA broadened its agenda by promoting the idea of an international criminal court and responding to the increased global attention to human rights and corporate social responsibility.²⁹ The IBA created the IBA Human Rights Institute (IBAHRI) in 1995 with Nelson Mandela as its honorary president.³⁰

The IBA is governed by a several hundred-member council comprised of up to two representatives of each bar association member, plus officers.³¹ The IBA Council elects the president and other officers for two-year terms.³² It derives its funds from membership dues, sponsorships, publications, grants, and conferences.³³ The IBA's

24. *Id.*

25. Robert N. Anderson, *International Bar Association Celebrates its 20th Anniversary*, 52 ABA J. 259, 260 (1966).

26. *Id.*

27. Francis Neate, *International Bar Association*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2009), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e949?rskey=gLbTz2&result=1&prd=EPIL> [<https://perma.cc/U9RF-JD39>].

28. Andrew Boon & John Flood, *Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct*, 2 LEGAL ETHICS 29, 32 (1999).

29. See, e.g., David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 934 (2004).

30. *About the IBAHRI*, INT'L B. ASS'N, https://www.ibanet.org/Human_Rights_Institute/IBAHRI-About.aspx [<https://perma.cc/W7CA-XN43>].

31. *About the IBA*, *supra* note 18.

32. *Id.*

33. Telephone Interview with Mark Ellis, IBA Executive Director (Feb. 16, 2018).

operating income in 2016 was UK£21.7 million, including grants for IBAHRI.³⁴ Funding for IBAHRI comes from private foundations, governments, and individual donations. In 2016, IBAHRI spent almost UK£1 million, primarily on capacity building and training in a number of countries.³⁵

The IBA has a sprawling and somewhat decentralized organizational structure. In 2004, it was re-organized into two primary divisions, each subdivided further into sections and over seventy-five specialized committees. The Legal Practice Division includes sections on antitrust, corporate law, financial services, and other areas of substantive law. By contrast, the Public and Professional Interest Division addresses issues “that make the practice of law a profession and not only an occupation.”³⁶ This Division includes the IBAHRI, the Bar Issues Commission (“BIC”), and the Section on Public and Professional Interest (with committees on professionalism issues, among others). Committee chairs usually set the agenda and pace for what each committee does. And since the chairs and members are all volunteers, committee activity can vary enormously.³⁷ The decentralization and size of the IBA raise occasional concerns over communication.³⁸

The IBAHRI was established “to promote and protect human rights and the independence of the legal profession under a just rule of law.”³⁹ The organization operates under its own rules and with separate funding, due to the sensitive and sometimes controversial nature of its activities, which not all IBA members support.⁴⁰ The IBA has pursued

34. E-mail from Mark Ellis, IBA Executive Director, to Lynn Mather (Mar. 27, 2018, 18:52 EDT) (on file with authors).

35. IBAHRI, ANNUAL REVIEW 2016, at 48 (2016), available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=f6195c63-fd19-4fce-8786-aa13807b44f9> [<https://perma.cc/R4ST-QT9Q>].

36. *Public and Professional Interest Division*, INT’L B. ASS’N, https://www.ibanet.org/Committees/Divisions/Public_Professional_Interest_Div/ppidhome.aspx [<https://perma.cc/V5V7-V8VY>].

37. Interview #2 (Sept. 13, 2017). Several informants for this Article requested anonymity. Where we refer to information provided by such sources, we refer to them as “Interview #__.”

38. For example, IBA staff are not always aware of issues handled elsewhere in the organization. As one IBA staff member said, “sometimes things happen down the hall and we have no idea in our office what’s going on there.” Interview #2 (Sept. 13, 2017).

39. *About the IBAHRI*, *supra* note 30.

40. *Id.*

a broad agenda including issues such as climate change, cybersecurity, inequality, and anti-terrorism. These wider global issues have been very much part of the organization's mission, perhaps influenced by the leadership of the IBA's Executive Director Mark Ellis, who was formerly director of the ABA's Central European and Eurasian Law Initiative ("CEELI").⁴¹ In recent years, however, some bar association members have urged the organization to refocus its activities on legal practice and the legal profession and to avoid "making the IBA a political or a general human rights organization."⁴²

Throughout its history, the IBA has worked to strengthen the legal profession and regulate lawyers. Although these formal regulatory efforts are not "hard" law, they encompass many types of "soft" law: aspirational codes of conduct, guidelines and statements of general principles, tools of self-assessment for bar organizations, and influential commentary and reports.⁴³ As one of its earliest activities, the IBA formulated and, in 1956, adopted an "International Code of Ethics for Lawyers."⁴⁴ This was the first attempt to consolidate basic principles shared by lawyers for use in multijurisdictional practice.⁴⁵ The IBA code attempts to address the problem of "double deontology" whereby lawyers in transnational practice are subject to two sets of potentially conflicting ethical conduct rules.⁴⁶

The IBA helps members engaged in transnational legal practice in other ways as well. The IBA articulated guidelines for allowing foreign lawyers to practice in other countries with its 1998 "Statement of General Principles for the Establishment and Regulation of Foreign

41. *IBA heads of departments*, INT'L B. ASS'N, https://www.ibanet.org/About_the_IBA/IBA_heads_of_department.aspx [<https://perma.cc/U9RQ-UGM6>].

42. See Proposal to Refocus the Activities and Reform the Governance of the International Bar Association, IBA Council Meeting Agenda 125, May 27, 2017, *available at* <https://www.ibanet.org/Document/Default.aspx?DocumentUid=FABDD65D-2252-4CCA-9C79-1BEC79928A2E> [<https://perma.cc/78PH-R7RE>].

43. See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN L. REV. 706, 724, 757 (2010); see also *infra* Section IV. C.

44. Anderson, *supra* note 25, at 261.

45. Martha Walsh, *The International Bar Association Proposal for a Code of Professional Conduct before the ICC*, 1 J. INT'L CRIM. JUST. 490, 491-92 (2003).

46. See Matthew T. Nagel, *Double Deontology and the CCBE: Harmonizing the Double Trouble in Europe*, 6 WASH. U. GLOBAL STUD. L. REV. 455, 477-78 (2007).

Lawyers.”⁴⁷ In addition, the IBA developed guidelines on international commercial arbitration in an effort to provide a common understanding of the roles and conduct of arbitrators and legal practitioners who are based in different countries.⁴⁸

Studies by the IBA of issues concerning the state of the legal profession in various countries provide visibility and stimulate debate. The resulting reports may gain media coverage, mobilize concerned stakeholders, and put issues on the agenda of policymakers, eventually influencing some countries as they develop new laws. For example, the IBA has published a self-assessment checklist for bar associations to evaluate their own independence.⁴⁹ Such tools for evaluating the justice systems illustrates a type of soft law—shaping behavior by setting standards rather than imposing sanctions for rule violations as hard law does. The IBA also responds to requests from national bar associations, judiciaries, or NGOs seeking to strengthen legal rights and establish rule of law. For instance, the IBAHRI investigated the rule of law in Myanmar in 2012, urging support for legal reform,⁵⁰ and the IBAHRI later ran a series of workshops to help create Myanmar’s first independent, national organization of lawyers.⁵¹ The IBA is sometimes an important force behind such legal reform, providing financial and administrative assistance to developing nations.⁵²

47. *IBA Statement of General Principles for the Establishment and Regulation of Foreign Lawyers*, INT’L B. ASS’N (June 1998), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=CE283F20-6D78-40D2-8F6F-50285D37A527> [<https://perma.cc/LU6S-ADLJ>]. For a comparison of IBA and CCBE positions on this issue, see Alvin Chen & Helena Whalen-Bridge, *Singapore’s Unified Approach: Regulating Domestic and Foreign Lawyers in an Internationalised Jurisdiction*, in INTERNATIONAL PERSPECTIVES ON THE REGULATION OF LAWYERS AND LEGAL SERVICES, *supra* note 7, at 50-53.

48. See *infra* note 192 and accompanying text.

49. *The Independence of the Legal Profession: Threats to the bastion of a free and democratic society*, INT’L B. ASS’N (Sept. 2016), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=6E688709-2CC3-4F2B-8C8B-3F341705E438> [<https://perma.cc/K5R9-T9GP>].

50. *The Rule of Law in Myanmar: Challenges and Prospects*, INT’L B. ASS’N (Dec. 2012), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=DE0EE11D-9878-4685-A20F-9A0AAF6C3F3E> [<https://perma.cc/CKR3-3UNW>].

51. *Myanmar, Capacity Building, 2014-2016*, INT’L B. ASS’N (Apr. 15, 2015), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=b0dff549-f0f3-4a90-83d5-40b902fedbf9> [<https://perma.cc/XCW3-P2ZA>].

52. For example, the IBA helped to fund the South Pacific Lawyers Association, a group established in 2011 of fifteen lawyer organizations in small island nations (Papua New Guinea, Fiji, etc.) and introduced new systems of lawyer regulation on the islands. Francesca Bartlett, *A*

Another way in which the IBA addresses the regulation of lawyers is through the publication of the “Legal Regulators Directory” on the IBA website, which lists information on who regulates lawyer admission and discipline in each member jurisdiction and their contact information (where available).⁵³ Other IBA groups foster lawyer regulation through the creation of networks, dissemination of relevant news, organization of meetings, and publication of information from member organizations. For instance, the Rule of Law Forum publishes a searchable online database of those engaged in rule of law work.⁵⁴ In addition, international institutions such as the International Criminal Court (“ICC”), the Financial Action Task Force (“FATF”), or the World Trade Organization (“WTO”) often consult with the IBA and other global lawyer organizations.

B. Council of Bars and Law Societies of Europe

The CCBE was founded in 1960 to represent the bar associations and law societies of the six founding Member States of the European Economic Community (“EEC”) (Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany), in order to represent the interests of lawyers before the EEC. It was originally part of the UIA, and in 1966, it became an autonomous organization.⁵⁵ From the beginning, the European Commission closely consulted with the CCBE during the drafting of directives concerning the interests of the legal profession in Europe.⁵⁶

Today the CCBE is an association of lawyer organizations in thirty-two countries in Europe, including those of the European Union, the European Economic Area (Norway, Lichtenstein, and Iceland), and Switzerland. It has an additional thirteen associate and observer members.⁵⁷ Its seat is in Brussels and it represents more than one

Professional Project in the South Pacific: Regionalism and Reforming Solomon Islands’ Legal Profession, 42 *FORDHAM INT’L L. J.* 243, 251 (2018).

53. *IBA Legal Regulators Directory*, INT’L B. ASS’N, https://www.ibanet.org/Legal_Regulators_Directory.aspx [<https://perma.cc/VZ2G-Y7WZ>].

54. *RULE OF LAW DIRECTORY*, <https://www.roldirectory.org/Default.aspx> [<https://perma.cc/D22N-3D8G>].

55. *History*, CCBE, <http://www.ccbe.eu/about/history/> [<https://perma.cc/XK2B-VTGP>].

56. *Id.*

57. *Who we are*, CCBE, <http://www.ccbe.eu/about/who-we-are>. [<https://perma.cc/QL9R-PHK5>].

million European lawyers.⁵⁸ A president and three vice-presidents are elected by the general assembly, called the Plenary Session, which is comprised of all full members grouped in national delegations. The officers are elected for one-year terms.⁵⁹ The CCBE's day-to-day affairs are managed by a secretary general who oversees a secretariat of eleven full-time staff.⁶⁰

Only bar and lawyer associations belong to the CCBE.⁶¹ The CCBE members are grouped in national delegations with a maximum of six representatives from each country. Formal votes are weighted approximately by number of the countries' inhabitants. Funding comes mainly from contributions by the members.⁶² Additional revenues stem from the issuance of CCBE lawyers' identity cards⁶³ and from projects funded by EU institutions.⁶⁴ In 2016 its global income was over EU€2.3 million.⁶⁵

58. COUNCIL OF BARS & LAW SOC'YS OF EUR., ANNUAL REPORT 2017, at 6 (2017), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Publications/2017_ANNUAL_REPORT.pdf [<https://perma.cc/QH9C-ZBHG>].

59. COUNCIL OF BARS & LAW SOC'YS OF EUR., STATUTES OF THE COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE IX(a) (2013). Associate members do not have voting rights. *Id.*, IV(b).

60. See COUNCIL OF BARS & LAW SOC'YS OF EUR., *supra* note 58, at 47 (2017).

61. *How we work*, CCBE, <http://www.ccbe.eu/about/how-we-work> [<https://perma.cc/JEH8-CRQX>].

62. Funding is proportionate to the population of a country and in accordance with the GDP and the numbers of lawyers in that country. COUNCIL OF BARS & LAW SOC'YS OF EUR., ANNUAL REPORT 2012, at 58 (2012), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Publications/2012_ANNUAL_REPORT.pdf [<https://perma.cc/EV3X-K8FX>].

63. This identity card is produced by the CCBE and delivered to the national bar or regional or local authority. Those authorities then issue the cards to lawyers registered with them, facilitating access to legal institutions for lawyers outside their jurisdiction.

64. The CCBE receives grants from and has contracts with the European Commission. For example, it received money from the Commission for a project on the right to information and the right of access to a lawyer in criminal cases in 2015. It received a grant to maintain an online lawyers' directory through its e-Justice Portal in 2016. See COUNCIL OF BARS & LAW SOC'YS OF EUR., ANNUAL REPORT 2015 (2015), available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Publications/2015_ANNUAL_REPORT.pdf [<https://perma.cc/2WG7-WTW3>]; COUNCIL OF BARS & LAW SOC'YS OF EUR., ANNUAL REPORT 2016 (2016), available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Publications/2016_ANNUAL_REPORT.pdf [<https://perma.cc/RF6T-5NWX>].

65. *Transparency Register: Financial Data*, CCBE, <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=4760969620-65> [<https://perma.cc/43TW-5RU8>].

The threefold objectives of the CCBE are to represent the bars and law societies of its members; to act as a consultative and intermediary body among its members on all cross-border matters of mutual interest; and to monitor the defense of the rule of law, and protection of the fundamental and human rights and freedoms.⁶⁶ The most important elements in the CCBE mission are “the regulation of the profession, the defence of the rule of law, human rights and democratic values.”⁶⁷ Areas of special concern include “the right of access to justice, the digitisation of justice processes, the development of the rule of law and the **protection of the client through the promotion and defence of the core values of the profession.**”⁶⁸

The CCBE has twenty-six working groups and committees composed of experts appointed by the national delegations to develop policy papers and engage in other activities on issues ranging from substantive law and human rights, to issues directly affecting the legal profession.⁶⁹ For example, the PECO committee seeks to promote the rule of law and support reform processes in Central and Eastern Europe. It assists bars and law societies in that region with their reforms and looks into cases where lawyers are victims of human rights violations or where lawyers’ rights are at risk. It provided, for instance, comments on the drafts of the Legal Profession Act of Serbia, on Ukraine’s Law on the Bar and the Practice of Law, and the practice of the legal profession in Poland.⁷⁰ The CCBE also developed a find-a-lawyer search engine for the European e-justice portal. This portal provides European citizens with practical information and allows them to search in their own language for lawyers based on criteria such as a

66. COUNCIL OF BARS & LAW SOC’YS OF EUR., STATUTES OF THE COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, at 2 (2013).

67. *Who we are*, *supra* note 57.

68. *Id.*

69. *Committees & Working Groups*, CCBE, <http://ccbe.eu/actions/committees-working-groups/> [<https://perma.cc/43TW-5RU8>].

70. *See, e.g.*, COUNCIL OF BARS & LAW SOC’YS OF EUR., CCBE PECO COMMITTEE COMMENTS ON THE FINAL DRAFT OF “THE LEGAL PROFESSION ACT” – SERBIA, *available at* http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PECO/PECO_Position_papers/EN_PECO_20110303_CCBE_PECO_Committee_comments_on_the_final_draft_of_the_legal_profession_act_-_Serbia.pdf [<https://perma.cc/JA84-GBXH>]; COUNCIL OF BARS & LAW SOC’YS OF EUR., CCBE PECO COMMITTEE COMMENTS ON THE DRAFT UKRAINIAN LAW ON THE BAR, *available at* http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PECO/PECO_Position_papers/EN_PECO_20100326_CCBE_PECO_Committee_comments_on_the_draft_Ukrainian_law_on_the_Bar.pdf [<https://perma.cc/YY5W-QFPB>].

country, practice area or language.⁷¹ Another project is the “European Lawyers in Lesvos,” formed by the CCBE and the German Bar Association, and run in cooperation with the Greek bars, which provides pro bono assistance to migrants/refugees applying for international protection.⁷²

The CCBE provides statistics, newsletters, studies and impact assessments, as well as reports written by specialist committees and working groups (e.g., the company law committee, the access to justice committee, the human rights committee, and the anti-money-laundering committee).⁷³ All these activities are more or less centered on the legal profession. Many of the actions converge in three characteristic themes.

First, the CCBE often directly acts in situations where lawyers’ basic conditions of work are at stake. It intervenes in European court cases that concern core principles of the profession. The first case in which the European Court of Justice (“ECJ”) accepted the CCBE as an intervener representing the legal profession was the *AM & S* case in 1979, involving issues of professional privilege.⁷⁴ The CCBE also manages the Defense of the Defenders network that provides support for human rights lawyers.⁷⁵ It further assists national advocacy campaigns involving human rights or rule of law issues. The CCBE regularly issues letters in defense of at-risk human rights practitioners and grants an annual human rights award, which highlights the work of an eminent lawyer or lawyers’ organization that has demonstrated outstanding commitment and sacrifice in upholding fundamental values.⁷⁶

Second, the CCBE acts on the regulation of the legal profession in the Member States. It publishes practical guides that offer

71. CCBE, <https://www.ccbe.eu/> [<https://perma.cc/PL3L-ZZL3>].

72. EUROPEAN LAWYERS IN LESVOS, <http://www.europeanlawyersinlesvos.eu/> [<https://perma.cc/HP4D-BNE9>]; COUNCIL OF BARS & LAW SOC’YS OF EUR., *CCBEINFO* #69, at 4 (2018), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Newsletter/CCBEINFO69/EN_newsletter_69.pdf [<https://perma.cc/2DZU-GXYG>].

73. *Committees & Working Groups*, *supra* note 69.

74. JONATHAN GOLDSMITH, *THE HISTORY OF THE CCBE* 11-12 (May 2005), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EN_history_ccbe.pdf [<https://perma.cc/2BHE-5PMA>].

75. *Defence of the defenders*, CCBE, <https://www.ccbe.eu/actions/defence-of-the-defenders/> [<https://perma.cc/QW2T-2GTD>].

76. *About the Award*, CCBE, <http://ccbe.eu/actions/human-rights-award/> [<https://perma.cc/ECZ9-PTS2>].

recommendations and best practices, as well as position papers on legislation and the legal profession. Among these are the CCBE Statement on the European Commission Consultation on the Regulation of Professions,⁷⁷ the Model Articles on Conflict of Interest and Confidentiality,⁷⁸ and the CCBE Contribution on the proposed European Convention on the Profession of Lawyer.⁷⁹ The CCBE responded to the Parliamentary Assembly of the Council of Europe's invitation to the Committee of Ministers to initiate work on the drafting of a European Convention on lawyers.⁸⁰ CCBE experts underlined the need for a binding instrument to protect lawyers' rights and the need for an enforcement mechanism—some kind of hard law—to ensure its effectiveness. They also proposed to set up an annual monitoring report on the ongoing process to ensure accountability and share best practices.⁸¹

Third, the CCBE is active in cross-border work to deal with the double deontology problem. Lawyers practicing under the EU regime on free movement of lawyers are subject simultaneously to the code of their home state and the code of the host state in all activities pursued

77. COUNCIL OF BARS & LAW SOC'YS OF EUR., CCBE STATEMENT ON THE EUROPEAN COMMISSION CONSULTATION ON THE REGULATION OF PROFESSIONS: MEMBER STATES' NATIONAL ACTION PLANS AND PROPORTIONALITY IN REGULATION, *available at* http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EU_LAWYERS/Position_papers/EN_EUL_20160819_CCBE_statement_on_proportionality.pdf [https://perma.cc/SBZ3-JXT9].

78. COUNCIL OF BARS & LAW SOC'YS OF EUR., MODEL ARTICLE ON CONFLICT OF INTERESTS (2016), *available at* http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TOWARDS_MODEL_CODE/MOD_Position_papers/EN_MOD_20161202_Model_Article_on_Conflict_of_Interests.pdf [https://perma.cc/ZW2D-KRD7]; COUNCIL OF BARS & LAW SOC'YS OF EUR., MODEL ARTICLE ON CONFIDENTIALITY (2016), *available at* http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TOWARDS_MODEL_CODE/MOD_Position_papers/EN_MOD_20161202_Model_Article_on_Confidentiality.pdf [https://perma.cc/C3AD-RYQA].

79. *CCBE contribution on the proposed European Convention on the Profession of Lawyer*, CCBE (Sept. 15, 2017), <https://rm.coe.int/ccbe-contribution-european-convention-profession-lawyer-20170915-eng/168078f2f6> [https://perma.cc/9AVP-8FUX].

80. The Committee of Ministers is the Council of Europe's statutory decision making body and is made up of the Ministers for Foreign Affairs of Member States.

81. In its newsletter, the CCBE wrote, "these tools would help ensuring [sic] the safeguard of lawyers' right to assist citizens, as well as citizens' rights to access justice, and would fundamentally protect the Rule of Law." COUNCIL OF BARS & LAW SOC'YS OF EUR., *CCBEINFO #66* (Oct. 2017), *available at* http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Newsletter/CCBEINFO66/EN_newsletter_66.pdf [https://perma.cc/87KT-A2JM].

in the host state.⁸² The CCBE developed a Code of Conduct for European lawyers in 1988 to resolve cross-border conflicts due to concerns about the simultaneous application of different national codes of conduct to a same situation.⁸³ The Code is a binding text—hard law—for all members of a bar in Member States, who must comply with it in their cross-border activities.⁸⁴ The CCBE also adopted a Charter of Core Principles of the European Legal Profession in 2006 aimed at applying throughout Europe. These two documents, the Code and the Charter, are the basis of the deontology of the European legal profession and contribute, according to the CCBE, to “shaping the European lawyer and the European Bar.”⁸⁵

Besides these activities, the CCBE has consulted with European institutions such as the ECJ, the European Court of Human Rights (“ECHR”), the European Commission, and the European Parliament.⁸⁶ As mentioned above, the European Commission closely consulted with the CCBE on the promulgation of European directives that regulate the way that lawyers can practice in other Member States. The CCBE influenced the directives directly, by contacts established between the CCBE and the European Commission, and indirectly, through national delegation members of the CCBE, who were closely involved in discussions with their own governments. In 1977, a directive was passed which permitted EU lawyers to provide temporary services in

82. COUNCIL OF BARS & LAW SOC’YS OF EUR., GUIDELINES FOR BARS & LAW SOCIETIES ON FREE MOVEMENT OF LAWYERS WITHIN THE EUROPEAN UNION, available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EU_LAWYERS/EUL_Guides_recommendations/EN_FML_2016_Guide.pdf [<https://perma.cc/NJN2-R8UQ>].

83. COUNCIL OF BARS & LAW SOC’YS OF EUR., CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION (1988); see Boon & Flood, *supra* note 28, at 31. The Code has since been amended in 1998, 2002, and 2006. COUNCIL OF BARS & LAW SOC’YS OF EUR., CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS 13 (2013) [hereinafter CCBE CHARTER OF CORE PRINCIPLES and CCBE CODE OF CONDUCT].

84. In general, the national and local bars are responsible for enforcing the Code through disciplinary actions. The Code covers, for instance, contact in state A on a matter of law internal to state A between a lawyer of state A and a lawyer of state B. It does not include contacts between lawyers of state A in state A on a matter arising in state B. It would include any activities of lawyers of state A in state B. See John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT’L L. J. 673, 673-74 n.3 (1991-92).

85. CCBE CHARTER OF CORE PRINCIPLES, *supra* note 83, at 1.

86. *Committees & Working groups*, *supra* note 69.

an EU Member State other than their Member State.⁸⁷ Thus, as Laurel Terry wrote in 1993, “*Ultimately*, a German lawyer practicing in France may be subject to fewer conflicting ethical rules than a New Jersey lawyer practicing in the District of Columbia.”⁸⁸ In 1998, a further directive permitted EU lawyers to practice law in another Member State, provided that they are registered with, and are regulated by, the local host bar under their home title.⁸⁹ In 2014, lawyers have reached a level of free movement within the European Union that is “inconceivable in other parts of the world”⁹⁰

Although not explicit, CCBE first of all appears to see itself as part and parcel of the European Project, that is, the orchestrated evolution towards a united Europe. CCBE could be considered exemplary of how European institutions promote the integration of the Member States towards a more unified whole. The European project has been, in many ways, a legal project and lawyers have played a central role in its progress. A large number of organizations, working groups, and committees mobilize lawyers from different European countries for similar purposes. It creates opportunities for enterprising lawyers to establish professional rules that promote their own interests.⁹¹ The CCBE plays its role in this extensive network that provides European institutions with vital information for the preparation and implementation of European law and helps to embed EU law in the national jurisdictions of the Member States. In this sense, the CCBE serves an important political goal for Europe, while remaining an independent lawyers’ organization. At the same time, however, the CCBE must compete for public attention and funds with other European and international organizations to conduct its global human rights work. These include organizations like the IBA and the ABA, but also, for example, the Organization for Security and

87. Council Directive 77/249, 1977 O.J. (L 78) (EEC).

88. Laurel S. Terry, *An Introduction to the European Community’s Legal Ethics Code – Part I: An Analysis of the CCBE Code of Conduct*, 7 *GEO. J. LEGAL ETHICS* 1, 43 (1993).

89. There are two ways of providing cross-border services under home title as a lawyer in the EU: by practicing on a permanent basis in another Member State or by providing temporary services across the border.

90. COUNCIL OF BARS & LAW SOC’YS OF EUR., CCBE POSITION: EVALUATION OF THE LAWYERS’ DIRECTIVES (Sept. 12, 2014), available at http://ccbe.eu/NTCdocument/EN_12092014_EN_CCBE_1_1412929215.pdf [<https://perma.cc/3LPP-6JYC>].

91. Alex Jettinghoff, *Introduction to Lawyers’ Circles - Lawyers and European Legal Integration*, RECHT DER WERKELIJKHEID 3-12 (2004).

Cooperation in Europe and the Dutch Helsinki Committee, which embrace the rule of law ideology together with human rights issues in their missions.⁹²

In 2014, after a long debate within the CCBE about how best to manage the increasingly important EU-funded projects, the CCBE established the European Lawyers Foundation (“ELF”), an independent organization. The CCBE “felt that the launch of an independent Foundation to handle EU projects in the future would permit the CCBE to focus on its core policy and lobbying work for the European Legal Profession.”⁹³ In its policy plan ELF writes: “The collaboration between ELF and CCBE ensures that ELF has access to the expertise of the CCBE through its committees on substantive law and its network of national lawyers.”⁹⁴ By registering ELF as a Dutch public benefit organization, the foundation gains tax advantages.⁹⁵ The foundation’s activities “aim to further the objectives, values and subsequent policy of the European lawyers” as developed by the CCBE.⁹⁶ ELF receives its funds partially from the European Union.⁹⁷ It also receives financial support from various bars and other donors, and was sponsored by the municipality of the Hague.⁹⁸ The Dutch Bar provides ELF with free office space.⁹⁹ In addition to its many European law projects, ELF has projects in countries outside of Europe, such as those on the reestablishment of the rule of law in Venezuela, and the organization of conferences in Africa and Cambodia to assist lawyers

92. See *Human Rights*, OSCE, <http://www.osce.org/human-rights> [https://perma.cc/D6G5-NPPJ]; *OSCE Office for Democratic Institutions and Human Rights*, OSCE, <https://www.osce.org/odihr/> [https://perma.cc/E2LR-LJ5R]; NETHERLANDS HELSINKI COMMITTEE, <https://www.nhc.nl> [https://perma.cc/5D7R-GZJJ].

93. COUNCIL OF BARS & LAW SOC’YS OF EUR., ANNUAL REPORT 2014, at 15 (2014), available at http://ccbe.eu/fileadmin/speciality_distribution/public/documents/Publications/2015_ANNUAL_REPORT.pdf [https://perma.cc/ZBV4-TG3N].

94. EUR. LAW. FOUND., STICHTING EUROPEAN LAWYERS FOUNDATION POLICY PLAN (2015), <http://europeanlawyersfoundation.eu/wp-content/uploads/2014/09/European-Lawyers-Foundation-Policy-Plan1.pdf> [https://perma.cc/2R6D-KH7T].

95. ANBI, EUR. LAW. FOUND., <http://elf-fae.eu/about-us/anbi/> [https://perma.cc/8YE6-UURG].

96. EUR. LAW. FOUND., <http://elf-fae.eu/> [https://perma.cc/77AP-BEVL].

97. ANBI, *supra* note 95.

98. *Id.*

99. *Id.*

in developing countries to cope with the consequences of globalization.¹⁰⁰

C. American Bar Association

The ABA was formed in 1878 by elite lawyers and is one of the largest voluntary professional organizations in the world.¹⁰¹ It has almost 400,000 members, including US lawyers, law students, non-US legal professionals, and non-lawyers.¹⁰² Its current mission statement articulates four goals: serving members; improving the profession; eliminating bias and enhancing diversity; and advancing the rule of law.¹⁰³ The ABA's approximately 600-member House of Delegates is ultimately responsible for establishing ABA policy on professional and public issues.¹⁰⁴ It is comprised of delegates elected by ABA members in each state, delegates elected by state bar associations and other lawyer organizations, and delegates elected at the Annual Meeting.¹⁰⁵ The House of Delegates elects the officers of the ABA and the Board of Governors, which oversees the management of the ABA.¹⁰⁶ The ABA has thirty-five standing committees as well as twenty sections, which often have their own divisions or committees.¹⁰⁷ The committees and sections rely on the volunteer work of their members, although some receive substantial support from ABA staff.

100. *External Projects*, EUR. LAW. FOUND., <http://elf-fae.eu/external-projects/> [https://perma.cc/MBE3-AA2B].

101. *About the American Bar Association*, ABA, https://www.americanbar.org/about_the_aba.html [https://perma.cc/G4C7-4T7B].

102. *ABA Membership FAQ*, ABA, <https://www.americanbar.org/membership/faq.html> [https://perma.cc/NF3G-3JUC].

103. *ABA Mission and Goals*, ABA, https://www.americanbar.org/about_the_aba/aba-mission-goals.html [https://perma.cc/KWS2-K6K2].

104. AM. BAR ASS'N, AMERICAN BAR ASSOCIATION POLICY AND PROCEDURES HANDBOOK 2017-2018, at 3 (2017), available at https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2017_2018_greenbook_electronic_version.authcheckdam.pdf [https://perma.cc/9EEX-TYVE] [hereinafter ABA HANDBOOK].

105. *Id.* at 8. The US Attorney General and the director of the Administrative Office of the US Courts are also members of the House of Delegates. *Id.*

106. *Id.* at 3, 11.

107. *Committees*, ABA, <https://www.americanbar.org/groups/committees.html> [https://perma.cc/YJ9A-WEZ3]; *Sections*, ABA, <https://www.americanbar.org/groups/sections.html> [https://perma.cc/799E-Y478].

The ABA is headquartered in Chicago and it employs 723 people.¹⁰⁸ Its total operating revenue is approximately US\$207 million.¹⁰⁹ This revenue is derived from membership dues, meeting fees, publications, and monies received by the ABA Fund for Justice and Education, a 501 (c)(3) organization that allows the ABA to accept grants and tax-exempt contributions for law-related public service and educational activities.¹¹⁰ The Fund for Justice and Education supports nearly 200 ABA programs and services, but the vast majority of grants received by the Fund support ABA rule of law activities.¹¹¹

Although the ABA's focus is primarily domestic, it has been concerned with international law and international issues since its inception. Indeed, the ABA's first constitution specified that one of its seven standing committees would be on international law.¹¹² It has several committees and sections that are involved in international issues.¹¹³ Some of them directly work on issues relating to lawyer regulation on the international level, including the Standing Committee on International Trade in Legal Services,¹¹⁴ the ABA Center for

108. AM. BAR ASS'N, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, at 1 (2014), https://www.americanbar.org/content/dam/aba/administrative/aba/aba_financials/fy15abafederalform990asfiledpublicdisclosurecopy.authcheckdam.pdf [<https://perma.cc/V8BR-6CLJ>].

109. See AM. BAR ASS'N, CONSOLIDATED FINANCIAL STATEMENTS, REPORT OF INDEPENDENT CERTIFIED ACCOUNTANTS 6 (Aug. 31, 2017), available at <https://www.americanbar.org/content/dam/aba/administrative/treasurers-office/aba-audited-financials-fy2017-with-singe-audit-reports-final.authcheckdam.pdf> [<https://perma.cc/3F9N-XGMK>].

110. *Id.* at 34. By contrast, the ABA is a 501 (c)(6) organization for which contributions are not tax-deductible as charitable donations.

111. AM. BAR ASS'N, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, at 2 (2013), available at <https://www.americanbar.org/content/dam/aba/administrative/Finance/Filed83114form990FJE.authcheckdam.pdf> [<https://perma.cc/PV29-PHL2>].

112. Victor C. Folsom, *History of the Section of International Law: The First Thirty-Five Years*, 16 INT'L LAW 119, 119 (1982).

113. For example, the Section of Antitrust Law has an International Committee and two international task forces, one on antitrust developments and the other on cartels. *Section on Antitrust Law: Committees*, ABA, https://www.americanbar.org/groups/antitrust_law/committees.html [<https://perma.cc/7BA7-4KRE>]. The Intellectual Property Section has a China IP Issues Committee and an International Trade Commission Committee. *Section of Intellectual Property*, ABA, https://www.americanbar.org/groups/intellectual_property_law/committees.html [<https://perma.cc/C3EE-YH2J>].

114. This committee addresses multilateral and bilateral trade negotiations that affect the US legal profession. *International Trade in Legal Services: About the Standing Committee*, ABA (May 16, 2018), https://www.americanbar.org/advocacy/governmental_legislative_work/

Professional Responsibility, and the Task Force on Gatekeeper Regulation and the Profession. Two of the ABA's largest international initiatives are the Section of International Law ("ABA SIL"), and the ABA Rule of Law Initiative ("ABA ROLI").

Formed in 1933, ABA SIL seeks to promote interest and research in international law and further its development; to promote professional relationships with lawyers similarly engaged in other countries; and to advance the rule of law.¹¹⁵ It has more than 20,000 members from over 100 countries.¹¹⁶ Approximately eighteen percent of its members are non-United States qualified lawyers.¹¹⁷ ABA SIL has over sixty committees, tasks forces, and working groups.¹¹⁸ Some of them work on issues affecting lawyer regulation including the International Anti-Money Laundering Committee, the International Ethics Committee, and the Transnational Legal Practice Committee.¹¹⁹ ABA SIL issues reports and recommendations that create official ABA policy, and engages in advocacy.¹²⁰ In addition, ABA SIL engages in outreach to the global legal community through its International Legal Exchange Program ("ILEX").¹²¹ As part of ILEX, ABA SIL works with international and foreign lawyer organizations to facilitate joint programming, policy initiatives and projects, and it regularly sends SIL leaders to attend annual meetings of foreign and international bar associations.¹²²

priorities_policy/promoting_international_rule_law/internationaltradetf/taskforceabout.html [https://perma.cc/NS3J-EWDC].

115. It was originally named the International and Comparative Law Section. David S. Clark, *The Modern Development of American Comparative Law: 1904-1945*, 55 AM. J. COMP. L. 587, 610 (2007); *About the Section of International Law*, ABA, https://www.americanbar.org/groups/international_law/about_us.html [https://perma.cc/P6AV-LUEE].

116. AM. BAR ASS'N, ABA SECTION OF INTERNATIONAL LAW, *available at* https://www.americanbar.org/content/dam/aba/uncategorized/international_law/section_profile.authcheckdam.pdf [https://perma.cc/U45A-NMXA].

117. *Id.*

118. *About the Section of International Law*, *supra* note 115.

119. *See Committees*, ABA, https://www.americanbar.org/groups/international_law/committees.html [https://perma.cc/3HD3-ZHEU].

120. *About the Section of International Law*, *supra* note 115.

121. *International Legal Exchange Program (ILEX)*, ABA, https://www.americanbar.org/groups/international_law/international-projects/international_legal_exchange/ [https://perma.cc/XQ3U-2U8A].

122. *Id.*; AM. BAR ASS'N, *supra* note 116. ABA SIL has also developed a Global Bar Association Database which contains contact, meeting, and leadership information for over 700 lawyer associations around the world. *See International Projects*, ABA, <https://www>.

The ABA's other large international activity is its rule of law initiative, which started in 1990 as a pro bono project to provide legal advice to newly independent countries that were formerly part of the Soviet Union.¹²³ It began after ABA leaders—including the Chair of SIL—traveled to Eastern Europe to ask whether anyone would be interested in hearing from US or Western European lawyers about law reform.¹²⁴ Originally known as ABA CEELI, it obtained US\$400,000 in start-up funding from the National Endowment for Democracy, a non-governmental organization primarily funded by the US government,¹²⁵ to provide technical assistance to Eastern European countries that were seeking help with constitution drafting and law reform.¹²⁶ In the mid-1990s, CEELI started supporting institution development, such as judicial training centers and bar associations.¹²⁷ The ABA subsequently established additional regional assistance programs in Africa, East Asia, Latin America, and the Caribbean.¹²⁸ In 2007, the ABA merged CEELI and the other regional programs into ABA ROLI.¹²⁹

Today ABA ROLI describes itself as “an international development program.”¹³⁰ It seeks “to strengthen legal institutions, to support legal professionals, to foster respect for human rights, and to

[americanbar.org/groups/international_law/international-projects/](https://www.americanbar.org/groups/international_law/international-projects/) [https://perma.cc/AG5U-UGLS].

123. AM. BAR ASS'N, ABA RULE OF LAW INITIATIVE PROGRAM BOOK 3 (2016), available at <https://www.americanbar.org/content/dam/aba/directories/roli/misc/aba-rol-2016-program-book.authcheckdam.pdf> [https://perma.cc/ZUQ9-KUP7] [hereinafter ABA PROGRAM BOOK].

124. See Homer E. Moyer, et al., *The History of CEELI, the ABA's Rule of Law Initiative, and the Rule of Law Movement Going Forward*, 18 MINN. J. INT'L LAW 304, 308 (2009); James R. Silkenat, *The American Bar Association and the Rule of Law*, 67 SMU L. REV. 745, 747 (2014).

125. See Moyer et al., *supra* note 124, at 313. The National Endowment for Democracy was founded in 1983 and was funded by Congress. See David Lowe, *Idea to Reality: NED at 30*, NAT'L ENDOWMENT FOR DEMOCRACY, <http://www.ned.org/about/history/> [https://perma.cc/7YBH-FEAN].

126. Moyer et al., *supra* note 124, at 305, 307, 309. CEELI opened its first overseas office in Sofia, Bulgaria in 1991. Jennifer Rasmussen, *A Short History of the American Bar Association Rule of Law Initiative's Technical Assistance Approach*, 31 WIS. INT'L L. J. 776, 777 (2013).

127. Moyer et al., *supra* note 124, at 316.

128. Rasmussen, *supra* note 126, at 778-79.

129. *Id.*

130. *Our Origins & Principles*, ABA, https://www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html [https://perma.cc/ARV8-C23K].

advance public understanding of the law and of citizen rights.”¹³¹ Its main program areas focus on Governance and Justice System Strengthening, Human Rights and Access to Justice, Conflict Mitigation and Peacebuilding, and Sustainable Development.¹³² Many of its projects are not directly related to the legal profession or the courts, such as efforts concerning the environment, public health, and atrocity prevention.¹³³ It occasionally works with other lawyer organizations, such as the IBA, the CCBE, and ILAC.¹³⁴

ABA ROLI’s US offices are located in Washington, D.C. and it works in more than fifty countries.¹³⁵ It has 326 full-time staff, with 249 who work abroad in ABA ROLI’s 28 field offices.¹³⁶ It maintains full-time project or country directors in many of the countries in which it operates.¹³⁷ Its work is substantially assisted by volunteer lawyers and judges from the United States.¹³⁸ ABA ROLI primarily works on projects for which it receives grants, with most of its funding coming from the US Agency for International Development and from the US State Department.¹³⁹ Over time, it has also received funding from other

131. ABA PROGRAM BOOK, *supra* note 123, at 4.

132. *Id.* at 6-8.

133. *Id.* at 8; M. Margaret McKeown, *The ABA Rule of Law Initiative: Celebrating 25 Years of Global Initiatives*, 39 MICH. J. INT’L L. 117, 129-39 (2018).

134. *See, e.g.*, Louraine C. Arkfeld, *The Rule of Law and an Independent Judiciary*, 46 JUDGES’ J. 12, 12 (2007); Press Release, CCBE, Memorandum of Understanding on Migration signed between the CCBE and ABA ROLI (Mar. 21, 2016), *available at* http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Pressreleases/2016/EN_MIG_20160321_pr_0416.pdf [<https://perma.cc/2J7A-4QQT>]; *ILAC Successfully Completes Rule of Law & Justice Sector Assessment Mission in Guatemala*, ILAC (Oct. 23, 2017), <http://www.ilacnet.org/blog/2017/10/23/ilac-justice-sector-assessment-guatemala/> [<https://perma.cc/WSP9-3PYU>].

135. ABA PROGRAM BOOK, *supra* note 123, at 3, 5.

136. E-mail from Jessie Tannenbaum, ABA ROLI Advisor and Co-Chair of ABA ROLI’s Legal Profession Reform Practice Group, to Leslie C. Levin (Nov. 6, 2017, 08:22 EST) (on file with authors). More than 90% of ABA ROLI employees who work abroad are natives of the countries in which they work. Jessie Tannenbaum, Remarks at the Regulation of Legal and Judicial Services Conference: Comparative and International Perspectives, at Fordham Law School, NY, NY, (Dec. 8, 2017).

137. *See Staff by Region*, ABA ROLI, https://www.americanbar.org/advocacy/rule_of_law/about/aba_rol_i_staff.html [<https://perma.cc/74GL-KCJJ>].

138. McKeown, *supra* note 133, at 127-28, 144, 148.

139. *See* AM. BAR ASS’N, NOMINEE REFERENCE MANUAL 95 (2016).

sources including some European governments, foundations, and individual donors.¹⁴⁰ In 2016, its budget exceeded US\$40 million.¹⁴¹

ABA ROLI's decisions about the projects on which it works are driven by its field offices, which identify local needs, and its other professional staff, rather than by the ABA membership.¹⁴² ABA ROLI's twenty-one member Board of Directors approves the list of countries in which ABA ROLI can operate.¹⁴³ ABA ROLI has five regional councils that have authority to initiate rule of law activities and to provide strategic direction and oversight.¹⁴⁴ ABA ROLI's involvement in specific projects can arise in various ways. In some cases a stakeholder in a country (e.g., ministries of justice, lawyer organizations, civil society groups) will ask for ABA ROLI's assistance and if the request is consistent with ABA ROLI's mission, if the project appears meritorious, and if it is able to obtain funding (or if the project is self-funded by the stakeholder), it will provide the assistance.¹⁴⁵ The decision on whether to seek funding is made in ABA ROLI's Washington, D.C. office, with input from field offices. ABA ROLI's staff also regularly reviews Requests For Applications from donors—most often the US government—and decides if it wants to apply for a grant and propose a project.¹⁴⁶ It pays attention to donor priorities.¹⁴⁷ Thus, although the availability of donor funding does not alter ABA ROLI's mission, it can influence the direction of its work in a particular country.¹⁴⁸

From the outset, CEELI—and later ABA ROLI—sought to promote a participatory model of working with its in-country partners.

140. ABA PROGRAM BOOK, *supra* note 123, at 9.

141. AM. BAR ASS'N, ABA RULE OF LAW INITIATIVE ANNUAL REPORT 2016-2017, at 20 (2017), available at <https://www.americanbar.org/content/dam/aba/directories/roli/misc/aba-rol-i-annual-report-2016-2017.pdf> [<https://perma.cc/2AW5-EEJV>].

142. E-mail from Tannenbaum, *supra* note 136. A member of the ABA Board of Governors serves as a liaison to ABA ROLI. ABA ROLI Board, ABA, https://www.americanbar.org/advocacy/rule_of_law/about/board.html [<https://perma.cc/PLS9-GNZ6>].

143. ABA HANDBOOK, *supra* note 104, at 45-46.

144. *Id.* at 156. The councils cover Africa, Asia and the Pacific, Central Europe and Eurasia, Latin America and the Caribbean, and the Middle East and North Africa. *Id.* The chairs of the regional councils serve on the ABA ROLI board of directors. *Id.* at 45.

145. E-mail from Tannenbaum, *supra* note 136.

146. *Id.*

147. *Id.*

148. *Id.*

The original leaders wanted to get the agenda from the countries to which they were providing assistance.¹⁴⁹ Those agendas focused on both human rights issues and commercial issues because, as one Polish official explained, “if our economic reforms fail, our political reforms fail.”¹⁵⁰ Since then, ABA ROLI has developed “core principles” which include a “highly consultative approach” that responds to the needs and interests of local stakeholders and employment of “a comparative approach,” which seeks to identify universal standards and global best practices, “with the US legal system providing just one of several available models” that host countries can draw upon.¹⁵¹ It also strives to provide technical assistance that is “neutral and apolitical.”¹⁵² Yet the technical assistance that ABA ROLI provides is often designed to strengthen democratic institutions.¹⁵³ Indeed, some have argued that the ABA’s efforts promote a distinctly American economic and political view.¹⁵⁴

ABA ROLI’s efforts to improve justice systems abroad are wide-ranging and are directed at legal professions, the court system, public education, and law reform. One way it seeks to improve justice systems is by providing detailed assessments of the condition of the legal profession, the judiciary, prosecutors, and legal education in developing countries based upon indices it has developed.¹⁵⁵ ABA ROLI also provides technical assistance to governments and lawyer

149. Moyer et al., *supra* note 124, at 318.

150. *Id.* at 317-19. During the early to mid-1990s, the USAID reportedly was more concerned about economic development than rule of law issues. *Id.* at 320-21.

151. *Our Origins & Principles*, *supra* note 130.

152. Rasmussen, *supra* note 126, at 777.

153. *See, e.g., supra* notes 125-27 and accompanying text; ABA PROGRAM BOOK, *supra* note 123, at 24-25, 64; Silkenat, *supra* note 124, at 753; *ABA ROLI to Host Round Table on Participatory Democracy in Morocco*, ABA (Nov. 1, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/11/aba_rol_i_to_hostrou.html [<https://perma.cc/49YN-A4DF>].

154. *See, e.g.,* Ole Hammerslev, *The European Union and the United States in Eastern Europe: Two Ways of Exporting Law, Expertise and State Power*, in *LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION* 134, 135, 143-44 (Yves Dezalay & Bryant Garth eds., 2011). Others have observed, however, that while the advice from the ABA programs inevitably reflect American knowledge, the advice is typically not solely “American” in content, and includes other models and articulates legal principles that have common international acceptance. *See* Jacques deLisle, *Lex Americana? United States Legal Assistance, American Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179, 248-51 (1999).

155. *See* ABA PROGRAM BOOK, *supra* note 123, at app. A.

organizations to strengthen legal professions. For example, it assists in the drafting of legislation governing legal professions, lawyer ethics codes, and disciplinary rules.¹⁵⁶ It also helps to support the establishment of new lawyer organizations and provides advice to build the capacity of those organizations so that they can function effectively.¹⁵⁷ It assists with improving legal education, creating and facilitating bar examinations, and training practicing lawyers in lawyering skills, ethical rules, and substantive law.¹⁵⁸

D. Comparison of the Organizations

The following table summarizes some of the differences among the three organizations and reveals significant variation in size, annual revenue, and staff.

Table 1: Comparison of Organizations

	IBA	CCBE	ABA
Year founded	1947	1960	1878
Membership	199 lawyer associations, 100,000 individual lawyers, 25 corporate groups	32 European Bar Associations (+13 associate/observers)	Almost 400,000 individual members
Main Headquarters	London	Brussels	Chicago (ABA) Washington, DC (ABA ROLI)
Annual Operating Income (2016-17)	UK£21.7 million	EU€2.3 million	US\$207 million (includes ABA ROLI)

156. *Id.* at 14; see also James E. Moliterno, *Exporting American Legal Ethics*, 43 AKRON L. REV. 769, 771-74 (2010) (describing work in Albania, Bulgaria, and Kosovo).

157. See, e.g., ABA PROGRAM BOOK, *supra* note 123, at 7, 14; *Our Rule of Law Work in Kyrgyzstan: Supporting the Kyrgyzstani legal defense community*, ABA ROLI, https://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/kyrgyzstan/programs/ [https://perma.cc/58YM-SP52].

158. See, e.g., ABA PROGRAM BOOK, *supra* note 123, at 7, 14; USAID IN ARMENIA, MIDTERM EVALUATION OF THE ARMENIA RULE OF LAW PROGRAM 15-20 (2012), available at http://pdf.usaid.gov/pdf_docs/Pdact403.pdf [https://perma.cc/RW8R-MNMS].

Size of professional staff	About 80	About 12	723 (includes 326 ABA ROLI)
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III. RELATIONSHIPS AMONG THE ORGANIZATIONS: COOPERATION, COORDINATION, AND COMPETITION

While the descriptions above depict three organizations operating largely independently, this Section explores relationships, similarities, and differences among the organizations. At the most basic level, the organizations are not operating entirely independently due to overlap in membership. For example, the ABA and all the member lawyer organizations of the CCBE also belong to the IBA. Individual leaders in the IBA also serve in leadership roles at the ABA.¹⁵⁹ And the former director of ABA CEELI now serves as the IBA's Executive Director.¹⁶⁰ Second, all three organizations share many of the same goals and recognize how their voices can be amplified when expressed in concert with other lawyer organizations. Coordinating activities – concerning human rights violations in a particular country, international tribunals or treaties, or cross-border legal rules—also provides efficiencies in sharing expertise and in coalition building. The Annual L4 meetings of the presidents of the ABA, IBA, CCBE, and UIA also facilitate collaboration or common positioning on current issues.¹⁶¹

At the same time, these three organizations have different constraints on them due to their funding, membership, organization, and mission. For example, the CCBE is mainly focused on the European project while the IBA has broader concerns and constituencies. For the ABA, the US government's foreign policy positions or relations with other governments may constrain it from

159. See Laurel Terry & Carole Silver, *Transnational Legal Practice* [2014], 49 ABA/SIL 413, 423 n. 56 (2015).

160. See *supra* note 41 and accompanying text.

161. COUNCIL OF BARS & LAW SOCIETIES OF EUR., CCBE/INFO #54, at 2 (July-Aug. 2016), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Newsletter/CCBEINFO54/EN_newsletter_54.pdf [https://perma.cc/Z6A6-T38G]. For example, the presidents and presidents-elect of the four organizations attended the 2016 L4 meeting. The agenda addressed “the most important political issues of the moment” including migration, human rights and rule of law, independence and professional secrecy, and Brexit. *Id.*

acting in certain spheres.¹⁶² Disagreement within the membership about the role of lawyer organizations and about social issues may also constrain these lawyer organizations from acting. So, too, do competing interests within the organizations.¹⁶³ Competition is also unavoidable between organizations that fulfill the same tasks (e.g., training lawyers) in the same countries (e.g., Eastern Europe, China), address the same topics (e.g., lawyer conduct, human rights, the rule of law), and partly depend on the same sources of money (e.g., grants and donors). Some have noted competitive tension between the IBA and the CCBE due to “professional jealousy,” “feuding history” or the CCBE’s belief that the IBA is “starting to encroach on its territory.”¹⁶⁴

In attempting to resolve practical legal problems, the organizations also engage in broader ideological negotiations over the transnational legal order.¹⁶⁵ As examples, should civil law or common law approaches to advocacy be dominant? How should lawyers respond to the Americanization of legal practice (global law firms and adversarial approaches)? Finally, any global contest over ideals and procedures also involves real world political and economic struggles among leaders, ideologies, and competing financial and legal power centers such as London, Brussels, and New York.

This Section is divided into two parts. Part A examines cooperation and competition among the organizations on efforts relating to lawyer regulation that they have each initiated, largely reflecting the internal history, priorities, and agendas of the organizations themselves. Part B explores the relationship among the organizations as they respond to the needs or activities of other international or intergovernmental organizations and to nations or national bar associations. The specific cases in Part B thus situate the three lawyer organizations in a global context as they engage with other groups. The cases selected here are illustrative and other important organizations—such as the WTO—could also be explored. The distinction between the organizations’ individual initiatives and their responses to outside groups should not be taken as a bright line, but

162. See *infra* note 272 and accompanying text.

163. See *infra* note 349 and accompanying text.

164. Interview #2 (Sept. 13, 2017); Telephone Interview #6 (Feb. 5, 2018).

165. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 316 (1996) (“The international legal field, therefore, should be seen as a virtual space for battles that may vary in intensity in different places and times—and that have more or less strong echoes in national and local power relations.”)

instead as an organizing device for considering some of the many different activities of the three organizations.

A. The Organizations Acting on Their Own Initiatives

1. Codes, Principles, and Guidelines for Conduct

All three organizations place great importance on developing professional standards of conduct for lawyers. They did not develop in isolation from one another and it is useful to look at their evolution. The ABA was the first of the organizations to develop standards for lawyers, in its 1908 Canons of Professional Ethics.¹⁶⁶ The original thirty-two canons varied greatly in their level of specificity and did not have the force of law unless they were adopted by a state. The ABA replaced the Canons in 1969 with the Code of Professional Responsibility, which was a mix of aspirational statements and specific disciplinary rules.¹⁶⁷ The Code was replaced again in 1983 with the ABA Model Rules of Professional Conduct, which are detailed rules that have been adopted in some form by every US jurisdiction.¹⁶⁸

Efforts to create an ethical code on the international level began in 1956, when the IBA adopted its International Code of Ethics, a relatively short document that was designed for lawyers engaged in cross-border practice.¹⁶⁹ It was intended as a “guide” as to what the IBA “considered to be a desirable course of conduct by all lawyers engaged in international practice.”¹⁷⁰ As Mary Daly noted, the IBA Code was “essentially a statement of norms” similar to the ABA Canons.¹⁷¹ The IBA revised the code in 1988, again in 2011 as the IBA International Principles on Conduct for the Legal Profession (the IBA Principles), and efforts are underway to substantially revise the code

166. See CANONS OF PROF'L ETHICS (AM. BAR ASS'N 1908).

167. See MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1969).

168. See *Alphabetical List of Jurisdictions Adopting Model Rules*, ABA (Aug. 17, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html [https://perma.cc/7PEL-JNC6].

169. See Mary C. Daly, *Dichotomy Between Standards and Rules*, 32 VAND. J. TRANSNAT'L L. 1117, 1158 (1999).

170. See *id.* at 1158-59.

171. *Id.* at 1159.

again.¹⁷² The IBA Principles were drafted with the assistance of Americans with deep knowledge of the ABA Model Rules.¹⁷³ Each of the ten IBA Principles includes “commentary on how it could be used as a basis to establish codes of conduct for lawyers within different jurisdictions.”¹⁷⁴ The IBA Principles expressly state that they are not to be used to impose disciplinary sanctions and lack any enforcement mechanisms. But they do “serve as a basis on which codes of conduct may be established by the appropriate authorities for lawyers in any part of the world.”¹⁷⁵ And indeed, many jurisdictions have adopted the principles for their legal professions.¹⁷⁶

The CCBE attempted to articulate standards of cross-border practice for EU lawyers starting with its 1977 Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community.¹⁷⁷ The Declaration contained eight ethical standards and was similar in style and format to the 1956 IBA Code.¹⁷⁸ In 1982, the CCBE began to explore the feasibility of drafting a code of conduct that would articulate a set of principles that could be adopted as codes in the Member States.¹⁷⁹ The CCBE was assisted by work done by the IBA, the UIA, and “in particular” by work done by the ABA on its codes of conduct.¹⁸⁰ In 1988, the CCBE adopted a Code of Conduct for European Lawyers (“CCBE Code”) to clarify ethical rules for European lawyers doing business across European borders.¹⁸¹

172. *IBA Publishes New Code of Conduct for Global Legal Profession*, INT’L B. ASS’N (July 21, 2011), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=BC99FD2C-D253-4BFE-A3B9-C13F196D9E60> [<https://perma.cc/E7DN-S6U9>] [hereinafter *IBA Publishes New Code*].

173. The Commentary to the IBA Principles is dedicated to Steven Krane, an expert in US legal ethics who “assisted greatly” with earlier versions of the IBA Principles. Ellyn Rosen, who was then Regulation Counsel at the ABA Center for Professional Responsibility, was also thanked for her input, as were two other Americans who were among the members of the IBA’s BIC Policy Committee. See INT’L BAR ASS’N, INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION 1 (2011).

174. See *IBA Publishes New Code*, *supra* note 172.

175. INT’L BAR ASS’N, INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION 5 (2011).

176. Telephone Interview with Mark Ellis, *supra* note 33.

177. CONSULTATIVE COMMITTEE OF THE BARS & LAW SOC’YS OF THE EUROPEAN CMTY., DECLARATION OF PERUGIA ON THE PRINCIPLES OF PROFESSIONAL CONDUCT OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY (1977).

178. Daly, *supra* note 169, at 1159.

179. See Toulmin, *supra* note 84, at 674.

180. *Id.*

181. Chen & Whalen-Bridge, *supra* note 47, at 52; Terry, *supra* note 88, at 7.

The CCBE Code has been adopted in some way by all of the member jurisdictions and is enforced through European member bars or national regulatory agencies.¹⁸² One example concerns the drafting of the new Dutch Code, about which one participant states, “we have looked very carefully into the CCBE Code, especially on a) consistency and b) these situations in which a Dutch lawyer is directly confronted with the CCBE Code, for instance in a cross-border practice.”¹⁸³ In 2006, the CCBE also adopted the CCBE Charter of Core Principles of the European Legal Profession (“CCBE Charter”). It takes into account “the principles of General Application in the International Bar Association’s International Code of Ethics.”¹⁸⁴ The Charter is not conceived as a code of conduct, but instead aims to help bar associations struggling for independence and to increase lawyer understanding of the importance of their role in society.¹⁸⁵

The standards articulated by all three organizations share important commonalities. The IBA Principles are titled: independence, honesty/integrity/fairness, conflicts of interest, confidentiality/professional secrecy, clients’ interest, lawyers’ undertaking, clients’ freedom, property of clients and third parties, competence, and fees.¹⁸⁶ These issues are also addressed in the CCBE Code, the CCBE Charter, and the ABA Model Rules.¹⁸⁷ Nevertheless, the content of lawyers’ obligations in areas such as conflicts of interest, fees, confidentiality, and advertising differs.¹⁸⁸ Concepts such as “lawyer independence” or “conflicts of interest” have different meanings or interpretations across jurisdictions. Moreover, the ABA Model Rules are much longer and more detailed than the IBA Principles or the CCBE Code. In the United

182. See *Adoption of the CCBE Code of Conduct 2006*, CCBE (Apr. 12, 2013), http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_20131204_Status_of_the_CCBE_Code_of_Conduct_at_a_national_level.pdf [<https://perma.cc/J8KM-6Y2C>]; Telephone Interview with Jonathan Goldsmith, former Secretary-General of the CCBE (Feb. 5, 2018).

183. E-mail from anonymous informant to Leny de Groot-van Leeuwen (Jan. 29, 2018, 10:27 AST) (on file with authors).

184. CCBE CHARTER OF CORE PRINCIPLES, *supra* note 83, at 7. It also refers to the IBA’s General Principles for the Legal Profession. *Id.*

185. *Id.* at 1.

186. INT’L BAR ASS’N, INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION 5-7 (2011).

187. See, e.g., CCBE CHARTER OF CORE PRINCIPLES & CCBE CODE OF CONDUCT, *supra* note 83, at 5, 8-10; CCBE CODE OF CONDUCT, *supra* note 83, at 15-19; MODEL RULES OF PROF’L CONDUCT r. 1.1, 1.2, 1.5, 1.6, 1.7, 1.15 (AM. BAR ASS’N 2016).

188. Boon & Flood, *supra* note 28, at 35-37.

States, lawyer codes are law-like rules, while elsewhere—and especially in civil law countries—such codes have been understood as “general norms of professional behavior.”¹⁸⁹

The organizations have also articulated standards for ethical conduct in international arbitration. International commercial arbitration has largely displaced domestic courts as the preferred method for settling important transnational disputes.¹⁹⁰ Early efforts by the ABA and the IBA focused on the ethics of arbitrators.¹⁹¹ Due to conflicting assumptions of appropriate ethical conduct by lawyers from different countries, there has also been a pressing need for common ethical standards for lawyers representing parties in international arbitration. The IBA has been a leader in addressing this problem through the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Evidence Rules”), first issued in 1999, and the 2013 IBA Guidelines on Party Representation in International Arbitration (“IBA Party Guidelines”).¹⁹² An experienced US arbitration lawyer observed that these rules and guidelines are essential in her practice: “I treat them as a source of law.”¹⁹³ A large IBA survey of arbitration practitioners found that the IBA Evidence Rules were referenced in forty-eight percent of arbitration proceedings.¹⁹⁴ There was “a clear divide” between responses from common law and civil law countries with US respondents referencing them more than lawyers in any other

189. Daly, *supra* note 169, at 1122.

190. Florian Grisel, *Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession*, 51 LAW & SOC’Y REV. 790, 791 (2017). For a discussion of the increasing importance of international arbitration, see generally ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY* (2017); DEZALAY & GARTH, *supra* note 165.

191. See AM. BAR ASS’N & AM. ARBITRATION ASS’N, *CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES* (1977); INT’L BAR ASS’N, *GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION* (2004 & 2014); Edna Sussman, *Ethics in International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives*, in *SOFT LAW IN INTERNATIONAL ARBITRATION* (Lawrence W. Newman & Michael J. Radine eds., 2014).

192. INT’L BAR ASS’N, *RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION* (2010); INT’L BAR ASS’N, *GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION* (2013).

193. Telephone Interview #4 (Jan. 16, 2018).

194. INT’L BAR ASS’N, *ARBITRATION GUIDELINES AND RULES SUBCOMMITTEE, REPORT ON THE RECEPTION OF THE IBA ARBITRATION SOFT LAW PRODUCTS 8* (2016). The IBA Party Guidelines were referenced much less often (sixteen percent). *Id.* at 74.

country.¹⁹⁵ One area in which disagreement is especially apparent is witness preparation, where US jurisdictions allow lawyers to “coach” witnesses while some European nations treat pre-testimonial communication with witnesses as unethical.¹⁹⁶ The IBA Evidence Rules only state that “it shall not be improper” to interview witnesses “and to discuss their prospective testimony with them,”¹⁹⁷ leaving unclear to what extent coaching is allowed.¹⁹⁸ Thus, despite general agreement on IBA ethical principles governing international arbitration, their actual meaning remains contested in practice. Uncertainty over international arbitration conduct rules in practice, the lack of effective enforcement, pushback to the “Americanization of international arbitration,” and perceived conflicts of interest when arbitration lawyers simultaneously act as arbitrators, all threaten the legitimacy of international arbitration.¹⁹⁹

The ethical and other concerns surrounding international commercial arbitration are exacerbated in the growing and politically sensitive arena of investment treaty arbitration. Unlike international commercial arbitration, investment treaty arbitration involves foreign companies (often large multinationals) filing claims against host states over laws (e.g., health, environment, human rights) that the investor companies argue contravene treaties between the host state and the investor’s home country. Critics of Investor-State Dispute Settlement (“ISDS”) – as investment treaty arbitration is called—point to conflicts of interest, inequality of parties, lack of transparency, and pro-investor bias among arbitrators. After much debate, in July 2015, the European Parliament proposed a new investment court to replace the use of arbitration for resolving investor-state disputes, and the European Commission presented details on this proposed new court in November 2015.²⁰⁰ All three international lawyer organizations have been

195. *Id.* at 75.

196. CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 112-13 (2014).

197. INT’L BAR ASS’N, RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION art. 4 (3) (2010).

198. ROGERS, *supra* note 196 at 114-15.

199. *See id.* at 132 (noting “[t]he lack of effective counsel regulation . . . is a potential crisis that can threaten the legitimacy of international arbitration”); *see also* Eric Bergsten, *Americanization of International Arbitration*, 18 PACE INT’L L. REV. 289, 300-01 (2006); Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT’L L. 111, 150-51 (2008).

200. *See* European Parliament Resolution of 8 July 2015 on the European Parliament’s

engaged by the debate over ISDS. A CCBE working group was appointed in 2010 to develop new guidelines for international arbitration lawyers but the project stalled and the CCBE has yet to speak publicly about the EC's proposed investment court. The IBA's public statement, in association with the IBA Arbitration Committee, defended the arbitration status quo.²⁰¹ In 2016 a working group of ABA SIL's Arbitration Committee issued a report that raised critical questions about the proposed investment court and its "inchoate and often, incoherent" procedures.²⁰² All three lawyer organizations deferred to their constituencies of international arbitration lawyers and resisted public demands from some Member States and NGOs for changes that would have reduced lucrative opportunities for lawyers to serve as arbitrators and increased public scrutiny of lawyers' conduct.

Some of these lawyer organizations are also beginning to articulate new norms concerning lawyers' responsibilities in the areas of human rights. The IBA recently developed a Business and Human Rights Guidance for Bar Associations that reflect broader human rights values, moving beyond the traditional norms of the legal profession. The Guidance creates aspirational standards designed to help business lawyers (including in-house lawyers) in advising their clients to recognize human rights risks and responsibilities, "including global soft law standards such as United Nations Guiding Principles on

Recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 2014/2228 (INI) (2015). In November 2015, the European Commission released details on its proposed two-tiered court with permanent judges from the United States, Europe, and other states. Since then, the use of this new investment court has been incorporated in Europe-Canada and Europe-Vietnam trade agreements, as well as in the proposed Transatlantic Trade and Investment Partnership. *See Dispute Settlement*, EUR. COMMISSION (Sept. 19, 2017), <http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement> [<https://perma.cc/9FGC-EJNQ>].

201. The IBA's news release came out three months before the European Parliament vote, perhaps hoping to influence the debate. *See IBA issues fact-correcting statement on ISDS*, INT'L B. ASS'N (Apr. 20, 2015), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=1dff6284-e074-40ea-bf0c-f19949340b2f> [<https://perma.cc/HJD7-TEMM>]; *see also* Jonathan Goldsmith, *ISDS—A Lawyers' Issue*, L. SOC. GAZETTE (July 10, 2015), <https://www.lawgazette.co.uk/comment-and-opinion/isds--a-lawyers-issue/5049949.article> [<https://perma.cc/HJD7-TEMM>] (noting that the "tenor of the [IBA] statement was very pro-ISDS").

202. AM. BAR ASS'N, INVESTMENT TREATY WORKING GROUP: TASK FORCE REPORT ON THE INVESTMENT COURT SYSTEM PROPOSAL 16 (2016), *available at* <http://apps.americanbar.org/dch/thedl.cfm?filename=/IC730000/newsletterpubs/DiscussionPaper101416.pdf> [<https://perma.cc/LN4J-3G2D>].

Business and Human Rights.”²⁰³ Although less developed, the CCBE has also issued “Guidances” on Corporate Social Responsibility.²⁰⁴

2. Lawyer Discipline

The IBA, CCBE, and ABA have all authored recommendations, guidelines or standards concerning lawyer discipline. They share the view that responsibility for lawyer discipline should lie at the national level. The IBA and CCBE recommendations focus primarily on the need for a discipline system that is independent from the government and that provides due process. The ABA’s rules reflect similar concerns, but are much more detailed, in part because they were designed for direct adoption by US jurisdictions. All three organizations also act in other ways that influence lawyer discipline processes in various countries.

The IBA membership includes nearly 200 lawyer associations, which differ in their approach to lawyer discipline. National and local bars handle initial discipline in just over half of the Member States, with independent regulatory bodies doing so in one-quarter of the states, and courts or governments in one-fifth of the states.²⁰⁵ It is not surprising, then, that IBA member associations vary in their support of global initiatives on lawyer discipline. In 2007, the IBA adopted a Guide for Establishing and Maintaining Complaints and Discipline Procedures (“IBA Guide”) following meetings with bar leaders from developing countries who expressed a need for basic complaints and

203. *Training Lawyers on Business and Human Rights*, INT’L B. ASS’N, <https://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx> [<https://perma.cc/XDY5-RPZH>].

204. COUNCIL OF BARS & LAW SOC’YS OF EUR., CCBE PRACTICAL ISSUES FOR BARS AND LAW SOCIETIES ON CORPORATE SOCIAL RESPONSIBILITY: GUIDANCE III 3 (2017), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CSR/CSR_Guides__recommendations/EN_CSR_20170519_Guidance-III.pdf [<https://perma.cc/P5P3-46KP>]. The CCBE also has announced that its Corporate Responsibility Committee intends to issue a Guidance on Corporate Responsibility, which will encompass “social, environmental, ethical, human rights and anti-corruption concerns.” COUNCIL OF BARS & LAW SOC’YS OF EUR., CCBE CORPORATE RESPONSIBILITY AND THE ROLE OF THE LEGAL PROFESSION 3 (2017), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CSR/CSR_Position_papers/EN_CSR_20130207_CSR-and-the-role-of-the-legal-profession.pdf [<https://perma.cc/96TY-PMZZ>].

205. INT’L BAR ASS’N, FINDINGS FROM THE DIRECTORY OF REGULATORS OF THE LEGAL PROFESSION 7-8 (2016).

discipline procedures they could adopt.²⁰⁶ The IBA Guide provides a model with twenty fairly general provisions.²⁰⁷ It does not specify whether the bar association or some other entity should handle complaints or administer the disciplinary or appeal tribunals.

The IBA may also influence lawyer disciplinary systems in countries to which it provides technical assistance. For example, in 2014, the IBA, together with ELF and the CCBE, responded to a request for assistance from the Ukrainian National Bar Association (“UNBA”).²⁰⁸ It organized a conference in which one of the topics was ethics and discipline. In the final report, one of the recommendations was that the UNBA’s and local bars’ disciplinary procedures “should be streamlined in accordance with the guidelines of the CCBE and the IBA.”²⁰⁹

The CCBE’s efforts with respect to discipline recognize that in the absence of specific EU rules, each Member State is free to regulate lawyers’ conduct in its territory.²¹⁰ There are, in fact, a few broad principles governing disciplinary proceedings that were approved by the Committee of Ministers to the Council of Europe in 2000.²¹¹ In 2007, the CCBE issued Recommendations on Disciplinary Process for the Legal Profession (“CCBE Recommendations”), which acknowledge that each bar or law society has its own system of disciplinary proceedings arising from its own traditions, but meanwhile emphasizes that these are based on a common set of principles.²¹² The

206. INT’L BAR ASS’N, GUIDE FOR ESTABLISHING AND MAINTAINING COMPLAINTS AND DISCIPLINE PROCEDURES 2 (2007), available at https://www.ibanet.org/barassociations/bar_associations_complaints_procedures.aspx [<https://perma.cc/YQ9L-37EE>] [hereinafter IBA GUIDE].

207. *Id.* at 2-4.

208. INT’L BAR ASS’N, IMPROVING THE LEGAL SERVICES IN UKRAINE (2016), available at <http://europeanlawyersfoundation.eu/wp-content/uploads/2015/01/DEF-TOTAL-Report-on-the-Ukrainian-Project-ENG.pdf> [<https://perma.cc/QL3F-5KSM>].

209. *Id.* at 6.

210. See COUNCIL OF BARS & LAW SOC’YS OF EUR., SUMMARY OF DISCIPLINARY PROCEEDINGS AND CONTACT POINTS IN THE EU AND EEA MEMBER STATES, available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EU_LAWYERS/Position_papers/EN_EUL_20161128_Table_discipline.pdf [<https://perma.cc/JL8R-WZDU>].

211. Council of Europe, Recommendation (2000) 21 on the Freedom of Exercise of the Profession of Lawyers.

212. COUNCIL OF BARS & LAW SOC’YS OF EUR., RECOMMENDATIONS ON DISCIPLINARY PROCESS FOR THE LEGAL PROFESSION (2007). The principles include the right of bars and law

message is: leave the disciplinary measures and systems on a national level, but based on a common set of principles.

The CCBE also works with countries to strengthen disciplinary regulation in Europe and elsewhere. In addition to its work in the Ukraine, the CCBE sought cooperation with the US Conference of Chief Justices (“CCJ”), on the sharing of disciplinary information between Europe and the United States. Those efforts culminated in a 2009 CCJ resolution to encourage US disciplinary bodies to share information with European disciplinary bodies about violations of US disciplinary rules by European lawyers.²¹³ This was followed with a 2013 resolution in which the ABA House of Delegates adopted ABA Guidelines for an International Regulatory Information Exchange and urged state regulatory authorities to adopt them.²¹⁴

The ABA has also authored detailed rules concerning the structure and administration of lawyer discipline systems known as the Model Rules for Lawyer Disciplinary Enforcement (“MRLDE”) for use in the United States.²¹⁵ When ABA ROLI promotes the adoption of lawyer discipline systems in other countries, its vision of how those systems should be constituted or reformed is influenced, at least to some extent, by the MRLDE.²¹⁶ For example, in 2016 it provided a report to the Bar Association of Sri Lanka with specific suggestions about how to improve its discipline system that referenced the MRLDE.²¹⁷ ABA

societies to participate in the conduct of disciplinary proceedings and the importance of due process.

213. CONF. OF CHIEF JUST., RESOLUTION 2 IN SUPPORT OF COOPERATION AMONG UNITED STATES AND EUROPEAN DISCIPLINARY BODIES (2009), *available at* <http://ccj.nesc.org/~media/microsites/files/ccj/resolutions/01282009-in-support-of-cooperation-among-united-states-and-european-disciplinary-bodies.ashx> [<https://perma.cc/N4PY-J3GX>].

214. AM. BAR ASS’N, RESOLUTION ON GUIDELINES FOR AN INTERNATIONAL REGULATORY EXCHANGE (2013), *available at* https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_hod_annual_resolutionswithreports.authcheckdam.pdf [<https://perma.cc/DE9S-WUKN>]. The IBA subsequently adopted Guidelines that were modeled in part on the ABA guidelines. *See* INT’L BAR ASS’N, IBA GUIDELINES FOR AN INTERNATIONAL REGULATORY INFORMATION EXCHANGE REGARDING DISCIPLINARY SANCTIONS AGAINST LAWYERS (2017); Telephone Interview with Elyn Rosen, Regulation and Global Initiatives Counsel, ABA Center for Professional Responsibility (Jan. 19, 2018).

215. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (AM. BAR ASS’N 2002). In addition, the ABA has promulgated standards that are designed to promote consistency in the imposition of sanctions in the United States. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (AM. BAR ASS’N 1992).

216. It is also influenced to some extent by international standards and norms.

217. ELLYN ROSEN, REPORT FOR THE BASL ON RECOMMENDATIONS FOR ENHANCING ETHICS OF THE LEGAL PROFESSION 5-19 (2016). Rosen, who was at the ABA Center for

ROLI also advised lawyers involved in drafting new discipline procedures in Armenia, Albania, and Kyrgyzstan, and referenced the ABA MRLDE in their consultations.²¹⁸

Another way in which ABA ROLI influences lawyer discipline abroad is through its Legal Profession Reform Index (“LPRI”), which includes “Disciplinary Proceedings and Sanctions” as one of the factors for assessing the progress of legal profession reform.²¹⁹ Although that factor simply states, “Lawyers are subject to disciplinary proceedings and sanctions for violating standards and rules of the profession,” ABA ROLI’s reports—which are shared with legal assistance funders and other sources—sometimes reflect ABA ROLI’s view of how a lawyer discipline system should operate. For example, in its LPRI report on Bulgaria, ABA ROLI advocated for a reading of the law that would make discipline proceedings open and cautioned against an approach to sanctions that would yield inconsistent sanctions in different jurisdictions.²²⁰ Likewise, its LPRI report on Moldova expressed some basis for concern that the outcome of hearings may be “unduly lenient.”²²¹ While LPRI reports summarize what investigators learn from lawyers about their perceptions of the lawyer discipline systems

Professional Responsibility, prepared the report as part of an ABA ROLI project. *See* USAID, QUARTERLY REPORT JULY – SEPTEMBER 2016: CIVIL SOCIETY INITIATIVES TO PROMOTE THE RULE OF LAW (CSI.ROL) IN SRI LANKA 2-3 (2016), *available at* http://pdf.usaid.gov/pdf_docs/PA00MGV2.pdf [<https://perma.cc/R28N-5H89>] [hereinafter USAID QUARTERLY REPORT FOR SRI LANKA].

218. *See* Telephone Interview with Hasmik Hakobyan, ABA ROLI Country Director, Armenia (June 20, 2017); ABA CEELI, ANALYSIS OF THE DRAFT LAW ON THE LEGAL PROFESSION OF THE REPUBLIC OF ALBANIA 11 (2003), *available at* https://www.americanbar.org/content/dam/aba/directories/roli/albania/albania_law_on_legal_prof.authcheckdam.pdf [<https://perma.cc/FZR3-E8DD>] [hereinafter ABA CEELI ANALYSIS OF THE DRAFT LAW OF ALBANIA]; AZAMAT KERIMBAEV, SUPPORT TO THE KYRGYZSTANI LEGAL DEFENSE COMMUNITY, QUARTERLY REPORT 4 (2016), *available at* http://pdf.usaid.gov/pdf_docs/PA00MJJT.pdf [<https://perma.cc/M3UX-Q6N6>].

219. *See, e.g.*, AM. BAR ASS’N, ABA ROLI LEGAL PROFESSION REFORM INDEX FOR MEXICO 11 (June 2011), *available at* https://www.americanbar.org/content/dam/aba/directories/roli/mexico/mexico_legal_profession_reform_index_2011_en.authcheckdam.pdf [<https://perma.cc/65UG-STFY>] [hereinafter ABA ROLI LEGAL PROFESSION REFORM INDEX FOR MEXICO].

220. AM. BAR ASS’N, ABA CEELI LEGAL PROFESSION REFORM INDEX FOR BULGARIA 34 (2004), *available at* <https://www.americanbar.org/content/dam/aba/directories/roli/bulgaria/bulgaria-lpri-2004.authcheckdam.pdf> [<https://perma.cc/Z7G7-MEPQ>].

221. AM. BAR ASS’N, ABA ROLI LEGAL PROFESSION REFORM INDEX FOR MOLDOVA, VOL. II, at 45 (2009), *available at* https://www.americanbar.org/content/dam/aba/directories/roli/moldova/moldova_lpri_04_2009_eng.authcheckdam.pdf [<https://perma.cc/LS9N-B6MU>].

in their countries, they sometimes also contain commentary that suggests—subtly or otherwise—how those systems should be improved.²²²

Overall, it appears that when working in an international context, all three organizations promote the adoption of effective lawyer disciplinary systems but seek to avoid the appearance of interference in national regulation. Given the diversity of their memberships in their approaches to lawyer discipline due to variation in culture, history, and legal systems, the IBA and CCBE, in particular, must engage in a balancing act to avoid endorsing any one particular approach, while also expressing support for the independence of the bar. ABA ROLI seemingly provides more guidance in its advisory missions to countries in transition.

3. Independence of the Legal Profession

All three organizations actively promote the independence of the legal profession. They do so, in part, on the theory that an independent profession can help insure a properly functioning legal system.²²³ The CCBE and ABA also argue for self-regulation as integral to lawyer independence. For example, the CCBE Charter states, “The CCBE is convinced that only a strong element of self-regulation can guarantee lawyers’ professional independence vis-à-vis the state, and without a guarantee of independence it is impossible for lawyers to fulfill their professional and legal role.”²²⁴

The lawyer organizations use rhetoric, conferences, in-country assessments, and measurement tools to promote lawyer independence and their vision of appropriate lawyer regulation throughout the world. For example, ABA ROLI uses its LPRI to assess the role of lawyers in developing countries and the legal environment in which they operate and “to monitor progress towards establishing a more ethical, effective, and independent profession of lawyers.”²²⁵ First used in 2003, the ABA

222. *See id.* (noting “it is difficult to generate public confidence in the willingness of the Bar to police the conduct of its members when so few cases produce sanctions”).

223. *See, e.g., The Independence of the Legal Profession: Threats to the bastion of a free and democratic society, supra* note 49, at 5.

224. CCBE CHARTER OF CORE PRINCIPLES AND THE CCBE CODE OF CONDUCT, *supra* note 83, at Principle (j).

225. *See* ABA ROLI LEGAL PROFESSION REFORM INDEX FOR MEXICO, *supra* note 219, at i; Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative*

has performed the LPRI assessment twenty times in thirteen countries.²²⁶ The assessment is based on twenty-four factors derived from international standards for the legal profession, mainly developed by the United Nations and the Council of Europe.²²⁷ The LPRI provides benchmarks in such areas as professional freedoms, education, admission to the profession, and conditions and standards of practice.²²⁸ One factor states that “[p]rofessional associations of lawyers are self-governing, democratic, and independent from state authorities.”²²⁹ Other factors include the establishment of standards of professional ethics, sanctions for violations of professional rules, a “university-level, legal education,” and a rigorous examination for bar admission.²³⁰ ABA ROLI states that that the LPRI is “globally applicable” and that it enables legal assistance providers, the donor community, and stakeholders in the countries to implement more effective legal reform programs.²³¹

The IBA views lawyer independence of sufficient importance that in 1990, it adopted Standards for the Independence of the Legal Profession to assist in “promoting and ensuring the proper role of lawyers which should be taken into account and respected by Governments within the framework of their national legislation.”²³² It has also recently taken steps to develop an assessment tool for lawyer

Perspectives, 4 WASH. U. GLOBAL STUD. L. REV. 463, 522 (2005). The assessment is performed through a combination of analyses of the country’s laws and in-country interviews. See ABA PROGRAM BOOK, *supra* note 123, at 125.

226. ABA PROGRAM BOOK, *supra* note 123, at 125. The assessments are published in detailed, publicly available reports. See e.g., AM. BAR ASS’N, ABA ROLI LEGAL PROFESSION REFORM INDEX FOR THE KYRGYZ REPUBLIC, VOL. II (2014), available at <https://www.americanbar.org/content/dam/aba/directories/roli/kyrgyzstan/roli-kyrgyz-republic-legal-profession-reform-index-2014.authcheckdam.pdf> [<https://perma.cc/TX9T-MHCW>] [hereinafter ABA ROLI LEGAL PROFESSION REFORM INDEX FOR THE KYRGYZ REPUBLIC].

227. See ABA ROLI, LEGAL PROFESSION REFORM INDEX FOR MEXICO, *supra* note 219, at iii. The LPRI also draws on sources from organizations such as the CCBE, the IBA, and the UIA. *Id.*

228. *Id.*; ABA PROGRAM BOOK, *supra* note 123, at 125. Although ABA ROLI states that the LPRI simply identifies the strengths and weaknesses of a country’s legal profession and does not include recommendations, as a practical matter, some of the assessments border on recommendations. See *supra* notes 220-22 and accompanying text.

229. See ABA ROLI LEGAL PROFESSION REFORM INDEX FOR MEXICO, *supra* note 219, at 54.

230. *Id.* at 27, 30, 42, 44.

231. AM. BAR ASS’N, LEGAL PROFESSION REFORM INDEX (on file with author).

232. See generally INT’L BAR ASS’N, *supra* note 15.

independence. In 2016, an IBA Task Force on the Independence of the Legal Profession issued a report that provides a checklist of “indicators of independence” intended to serve as a self-assessment tool for use by bar associations, lawyers and other stakeholders.²³³ Some of the “common threats” to independence include very low bar admission standards, vague regulations concerning discipline, lack of publicly available discipline orders, intrusive legislation that forces lawyers to reveal client confidentiality, and “the proliferation of new categories of unregulated legal professionals who provide legal services.”²³⁴

The CCBE has not developed its own assessment tools, but has largely promoted lawyer independence through its Charter, speeches, newsletters, reports, and the training of jurists, particularly in eastern European and other countries where democracies and the rule of law are perceived to be in danger.²³⁵ Recently, it has spoken out on the importance of lawyer independence in its Model Article of Independence.²³⁶ It has also done so in its 2017 statement on the proposed European Convention on the Profession of Lawyer.²³⁷

All three organizations have also worked together and with other organizations to assess the state of the legal profession in various countries. For example, in 2007 the IBAHRI and the CCBE conducted a joint mission to Poland that assessed concerns about legislative amendments initiated by the government that could negatively affect lawyers and the rule of law.²³⁸ These included proposed legislation giving the Ministry of Justice an increased role in lawyer disciplinary proceedings. The organizations recommended in their report that

233. *The Independence of the Legal Profession: Threats to the bastion of a free and democratic society*, *supra* note 49, at 35.

234. *Id.* at 36-37.

235. See, e.g., *PECO Committee*, CCBE, <https://www.ccbe.eu/actions/committees-working-groups/?idC=534&Committee=PECO> [<https://perma.cc/9GFD-9Z87>].

236. COUNCIL OF BARS & LAW SOC'YS OF EUR., MODEL ARTICLE ON INDEPENDENCE (2017), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TOWARDS_MODEL_CODE/MOD_Position_papers/EN_MOD_20170519_Model-Article-on-Independence.pdf.

237. See *CCBE contribution on the proposed European Convention on the Profession of Lawyer*, *supra* note 79.

238. COUNCIL OF BARS & LAW SOC'YS OF EUR. & INT'L BAR ASS'N, JUSTICE UNDER SIEGE: A REPORT ON THE RULE OF LAW IN POLAND 5 (2008), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PECO/PECO_Reports/EN_PECO_20071106_Report_on_the_rule_of_law_in_Poland.pdf [<https://perma.cc/Z2XF-UW8Y>] [hereinafter JUSTICE UNDER SIEGE].

legislation granting the Minister of Justice a “supervisory” role over the legal profession should be repealed.²³⁹

Similarly, ABA CEELI collaborated with the CCBE in its assessment of draft laws relating to Armenian lawyers to identify attributes of the proposed legislation that could “undermine the independence and effectiveness of the legal profession in Armenia.”²⁴⁰ Cooperation is facilitated, in part, by the fact that the ABA, the CCBE and the IBA all belong to ILAC. So, for example, representatives of the IBA and ABA ROLI participated in an ILAC assessment related to the rule of law and the justice system in Libya.²⁴¹ They recommended, *inter alia*, that the Libya Bar Association adopt an ethical code focusing on “the profession’s core values, including independence, integrity, prevention of conflicts of interest, and confidentiality.”²⁴²

4. Pro Bono

The question of how to provide individuals who cannot afford a lawyer with access to legal representation has taken on great urgency in the last few decades. Political change in the United States led to sharp cuts in government funding of legal aid after 1980 and more recently, governments such as the UK and Australia that subsidize legal assistance found their budgets strapped by rising costs.²⁴³ The need for access to legal representation has essentially prompted two responses by lawyer organizations. The first is to call for governments to provide more funding for legal services and to develop better systems for

239. *Id.* at 10.

240. AM. BAR ASS’N, ABA CEELI ANALYSIS OF THE DRAFT LAW ON ADVOCACY AND ADVOCATES’ ACTIVITY OF THE REPUBLIC OF ARMENIA 1, n.1 (2003), available at https://www.americanbar.org/content/dam/aba/directories/roli/armenia/armenia_draft_advocacy_law_2003.authcheckdam.pdf [<https://perma.cc/QST9-A3DJ>] [hereinafter ABA CEELI ANALYSIS OF THE 2003 DRAFT LAW OF ARMENIA].

241. *ILAC Assessment Mission to Libya*, INT’L LEGAL ASSISTANCE CONSORTIUM (Jan. 23, 2013), <http://www.ilacnet.org/blog/2013/01/23/ilac-assessment-mission-to-libya/> [<https://perma.cc/WR4V-H9LV>].

242. INT’L LEGAL ASSISTANCE CONSORTIUM, ILAC RULE OF LAW ASSESSMENT REPORT, LIBYA 2013, at 77 (2013).

243. See Robert Granfield & Lynn Mather, *Pro Bono, the Public Good, and the Legal Profession: An Introduction*, in PRIVATE LAWYERS & THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 8 (Robert Granfield & Lynn Mather eds., 2009); Cynthia Adcock, *Shaped by Educational, Professional and Social Crises: The History of Law Student Pro Bono Service*, in PRIVATE LAWYERS & THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 36 (Robert Granfield & Lynn Mather eds., 2009).

providing access to lawyers. The second is a call for more lawyers to offer their services *pro bono publico*. All three organizations call for more government-funded legal aid.²⁴⁴ It is the pro bono issue, however, that more directly implicates lawyer regulation.

The idea that lawyers might have some obligation to provide pro bono emerged in the United States in the late 1960s.²⁴⁵ In 1983 the ABA endorsed the principle in its Rules of Professional Conduct that “every lawyer has a professional responsibility to provide legal services to those unable to pay.”²⁴⁶ The IBA issued a 2008 Pro Bono Declaration which “calls on lawyers, law firms and bar associations to provide pro bono legal service” without remuneration “on a consistent year-round basis.”²⁴⁷ In its recent work on revising the IBA International Principles on Conduct for the Legal Profession, the BIC policy committee is debating whether “access to justice is a governmental, a state duty” or a “professional duty . . . that should be in the new professional code.”²⁴⁸ While the CCBE’s Charter of Core Principles states that European lawyers are concerned about access to

244. See, e.g., *Testimony of Linda A. Klein, President of the American Bar Association, in Support of Legal Services Corporation Funding before the H. Comm. On Appropriations*, 115th Cong. (2017) (statement of Linda A. Klein, President, American Bar Association), available at <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABASenatetestimonyforLSCwithcover%205-12-2017.authcheckdam.pdf> [<https://perma.cc/53GA-JYF6>]; COUNCIL OF BARS & LAW SOC’YS OF EUR., CCBE RECOMMENDATIONS ON LEGAL AID 4, available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ACCESS_TO_JUSTICE/ATJ_Position_papers/EN_ATJ_20180323_CCBE-Recommendations-on-legal-aid.pdf [<https://perma.cc/9AQ8-TABH>] [hereinafter CCBE RECOMMENDATIONS ON LEGAL AID].

245. MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 161 (1988).

246. MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR ASS’N 1983). ABA ROLI’s LPRI Factor 19 also evaluates whether lawyers “participate in special programs to ensure that all persons, especially the indigent and those deprived of their liberty, have effective access to legal services.” See ABA ROLI LEGAL PROFESSION REFORM INDEX FOR MEXICO, *supra* note 219, at 48. The focus, however, is mostly on legal aid programs rather than on lawyers providing significant pro bono work. See, e.g., LEGAL PROFESSION REFORM INDEX FOR THE KYRGYZ REPUBLIC, *supra* note 226, at 44-47.

247. See generally INT’L BAR ASS’N, IBA PRO BONO DECLARATION (2008), available at <https://www.internationalprobono.com/resources/attachment.174876> [<https://perma.cc/UQ3E-VD9P>].

248. Telephone Interview with Jonathan Goldsmith, *supra* note 182. Goldsmith organized the BIC policy working group that dealt with the IBA code revisions.

justice,²⁴⁹ it does not suggest that lawyers should perform pro bono work. Instead, the CCBE has focused its attention on expanding and improving legal aid. For example, in 2010 the CCBE wrote recommendations that call on European institutions and Member States to deal with legal aid as a fundamental right, support training for lawyers who provide legal aid, and “set common minimum standards for granting legal aid within the territory of the EU.”²⁵⁰ The CCBE’s position reflects concerns that by suggesting lawyers have a pro bono obligation, this may negatively affect European governments’ willingness to adequately fund legal aid.

Although none of the three organizations has attempted to promulgate rules or law that would require lawyers to perform pro bono work, they have all attempted to promote voluntary pro bono to increase access to legal services. Thus, the ABA’s Standing Committee on Pro Bono and Public Service focuses on US pro bono efforts.²⁵¹ SIL’s International Legal Resource Center encourages and enables legal professionals to provide pro bono technical legal assistance to rule of law implementers in developing countries.²⁵² ABA ROLI has established pro bono legal aid clinics in the Congo.²⁵³ It has also

CCBE CHARTER OF CORE PRINCIPLES AND THE CCBE CODE OF CONDUCT, *supra* note 83, at 5, 8.

250. CCBE RECOMMENDATIONS ON LEGAL AID, *supra* note 244, at 3, 6, 8. It strongly reiterated these positions in 2013, following a conference organized by the European Commission Directorate for Justice that was designed to reflect on the EU’s justice policy. COUNCIL OF BARS & LAW SOC’YS OF EUR., CONTRIBUTION FROM THE COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE (CCBE) TO THE DEBATE LAUNCHED BY THE ASSISES DE LA JUSTICE CONFERENCE 8 (2013), *available at* <https://www.slideshare.net/Avocatsdumonde/ccbe-contribution-aux-assises-de-la-justice> [<https://perma.cc/QL8A-QYLC>].

251. *See, e.g.*, AM. BAR ASS’N, ABA STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE’S SUPPORTING JUSTICE: A REPORT OF THE PRO BONO WORK OF AMERICA’S LAWYERS (2018), *available at* https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lc_pb_supporting_justice_iv_final.authcheckdam.pdf [<https://perma.cc/KSW9-Q3QB>].

252. *Celebrating International Pro Bono*, ABA (Aug. 1, 2016), https://www.americanbar.org/advocacy/rule_of_law/newsroom_events/general_news/news-staff-director-celebrating-international-pro-bono-0716/ [<https://perma.cc/V7CL-SCXD>]; INTERNATIONAL LEGAL RESOURCE CENTER, 2016 ANNUAL REPORT 19 (2017), *available at* https://www.americanbar.org/content/dam/aba/uncategorized/international_law/ilrc_annual_report_2016.authcheckdam.pdf [<https://perma.cc/AFT4-2JWZ>]; *International Projects*, *supra* note 122.

253. *See ABA ROLI Expands Its Programming in the DRC*, ABA (Jan. 2009), https://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo/news/news_drc_aba_rol_i_expands_programming/ [<https://perma.cc/8562-BZMG>].

established a refugee assistance center in Armenia that relies on the pro bono assistance of lawyers and law students, and it supports legal aid clinics in law schools in Mexico, Tajikistan, and elsewhere.²⁵⁴

The other two organizations have worked to encourage pro bono service within their membership. The IBA has actively promoted pro bono through its Pro Bono and Access to Justice Committee. One project involves a website to encourage pro bono, promote volunteering as central to legal practice, and link requests for pro bono assistance with IBA group member firms who can help.²⁵⁵ The IBA Pro Bono Committee also recommends best practices, publishes a regular Pro Bono newsletter, gives awards, and provides a Clearinghouse Manual with practical information and useful contacts.²⁵⁶ While the CCBE does less to promote pro bono, it participates in the European Lawyers in Lesvos project mentioned earlier.²⁵⁷

B. The Organizations Advising or Responding to External Organizations

1. Responses to International Courts

The problem of how to harmonize rules of professional conduct becomes particularly acute when lawyers with different legal training (e.g., civil law vs. common law) are advocating before international or regional courts. Ethical rules in those courts introduce the problem of “triple” deontology by adding yet a third layer of requirements on top of the differences in ethical codes and cultures of the jurisdictions of opposing counsel. Judith McMorrow notes, “Even within the common law tradition, expectations vary,” on issues such as witness preparation,

254. *ABA ROLI's Armenia Legal Assistance Center Provides Lifeline of Pro Bono Assistance*, ABA (Mar. 30, 2017), https://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/armenia/news/news-armenia-refugee-legal-assistance-center-0317.html [<https://perma.cc/BA5D-XAK2>]; *Rule of Law Programs in Tajikistan*, ABA, https://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/tajikistan/programs.html [<https://perma.cc/P2LL-GMZD>]; ABA PROGRAM BOOK, *supra* note 123, at 62, 74, 96.

255. *IBA Pro Bono*, INT'L B. ASS'N, https://www.ibanet.org/IBA_Pro_Bono.aspx [<https://perma.cc/44JK-74WV>].

256. *See, e.g., IBA Pro Bono Committee Overview*, INT'L B. ASS'N, https://www.ibanet.org/PPID/Constituent/ProBono_Accs_Justice/Overview.aspx [<https://perma.cc/3G68-TK93>].

257. *See supra* note 72 and accompanying text.

consultation with clients, and styles of advocacy.²⁵⁸ The problem is compounded when some lawyers come from civil law jurisdictions, where they play a different role in advocacy and have somewhat different conceptions of their ethical responsibilities.²⁵⁹

There is no single set of ethical standards that regulates practice before international courts and tribunals.²⁶⁰ Indeed, there are no codes of conduct for practice before the European Court of Justice, the European Court of Human Rights, or the International Court of Justice.²⁶¹ When the International Criminal Tribunals for the Former Yugoslavia (“ICTY”) and Rwanda (“ICTR”) began operation in the midst of armed conflicts in the 1990s, they also had no codes of conduct for counsel appearing before them.²⁶² In 1996, the Registrar for the ICTY began work on a code of professional conduct for defense counsel, with advice from a committee composed of two members of the IBA, two members of the UIA, and a member of the Dutch Bar Association (*Nederlands Orde van Advocaten*).²⁶³ The ABA Model Rules of Professional Conduct extensively influenced the contents of the Code of Professional Conduct for Counsel Appearing Before the ICTY,²⁶⁴ which went into effect in 1997.²⁶⁵ A year later a substantially similar code went into effect for the ICTR.²⁶⁶

258. Judith A. McMorrow, *Creating Norms of Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT’L & COMP. L. REV. 139, 142 (2007).

259. Michael G. Karnavas, *Defence Counsel Ethics, the ICC Code of Conduct and Establishing a Bar Association for ICC List Counsel*, 16 INT’L CRIM. L. REV. 1048, 1049-50, 1056-59 (2016).

260. See Arman Sarvarian, *Common Ethical Standards for Counsel before the European Court of Justice and European Court of Human Rights*, 23 EUR. J. INT’L L. 991, 991 (2012).

261. *Id.*; John Dugard, *John W. Turner Lecture: The Implications for the Legal Profession of Conflicts Between International Law and National Law*, 46 S. TEXAS L. REV. 579, 581 (2005).

262. Walsh, *supra* note 45, at 493.

263. See Int’l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int’l Humanitarian Law Comm. in the Territory of the Former Yugoslavia Since 1991, Fourth Annual Rep., U.N. Doc. A/52/375, at 26-27 (1997). The other members were chosen by ballot from a list of counsel who had indicated a willingness to represent indigent individuals. *Id.* at 26.

264. See Michael Bohlander, *International Criminal Defence Ethics: The Law of Professional Conduct for Defence Counsel Appearing Before International Criminal Tribunals*, 1 SAN DIEGO INT’L L. J. 75, 82 (2000); Karnavas, *supra* note 259, at 1090.

265. See Bohlander, *supra* note 264, at 80.

266. See *id.* (referring to the two codes as “almost identical”). In November 2012, the two codes were replaced by a single code as the tribunals were winding down their work. See UNITED NATIONS MECHANISM FOR INT’L CRIMINAL TRIBUNALS, CODE OF PROFESSIONAL CONDUCT FOR DEFENSE COUNSEL APPEARING BEFORE THE MECHANISM (2012), *available at*

When the International Criminal Court (“ICC”) was established by the Statute of Rome in 2002, its rules required promulgation of a professional conduct code through a process involving consultation with independent representative bodies of counsel and legal associations.²⁶⁷ The IBA and the International Criminal Bar (“ICB”) both prepared draft codes of professional conduct.²⁶⁸ The IBA formed an eleven-member Advisory Panel to draft a proposed code (“the IBA Draft Code”).²⁶⁹ Two Advisory Panel members were former presidents of the CCBE.²⁷⁰ In May 2002 the IBA circulated its draft to lawyers’ associations, NGOs, and other interested groups for comment.²⁷¹ The ABA did not directly participate in this process, apparently because the US Congress did not ratify the treaty creating the ICC.²⁷² The ABA did, however, have representatives who participated in the ICB’s parallel work on a proposed draft code.²⁷³

At a November 2002 IBA conference on the draft code attended by a CCBE representative and participants from twenty jurisdictions,²⁷⁴ there was a spirited debate along “a civil law/common law divide” on

http://www.unmict.org/sites/default/files/documents/pd_mict6_en.pdf [https://perma.cc/HT8M-MW53].

267. Int’l Bar Ass’n, *IBA Code of Professional Conduct for Counsel Before the International Criminal Court*, 37 INT’L LAW. 1067, 1067-68 (2003) [hereinafter *IBA Code for Counsel Before the ICC*].

268. The ICB, which includes bar associations such as the ABA as well as lawyers and NGOs, was created to represent the interests of counsel before the ICC. Int’l Criminal Bar, Ethics Committee, *Proposed Code of Conduct and Disciplinary Procedure Applicable to Counsel Appearing Before the International Criminal Court*, 11 L. & BUS. REV. AM 83, 83 (2005).

269. *IBA Code for Counsel Before the ICC*, *supra* note 267, at 1068.

270. *IBA Code for Counsel Before the ICC*, *supra* note 267, at 1068. Two former presidents were Ramon Mullerat and Heinz Weill. *Structure*, CCBE, <http://www.ccbe.eu/webseiten-schreiben/structure/> [https://perma.cc/L5KA-7N75].

271. *IBA Code for Counsel Before the ICC*, *supra* note 267, at 1068.

272. According to one participant in the code drafting process, the IBA did receive comments from US-trained lawyers in other organizations. See E-mail from Martha Walsh to Lynn Mather (Mar. 14, 2018: 10:53 EDT) (on file with authors). Also, the ABA has strongly advocated that the US government work with the ICC. See, e.g., *International Courts & International Affairs Committee*, ABA, <http://apps.americanbar.org/dch/committee.cfm?com=IC930000> [https://perma.cc/64J5-FR55]. The ABA Center for Human Rights has a grant-funded project that supports the ICC. See ABA-ICC PROJECT, <https://www.aba-icc.org> [https://perma.cc/BUZ2-RCL2].

273. Like the IBA, the ICB forwarded its proposed draft code to the ICC Registrar in early 2003. *International Criminal Bar*, *supra* note 268, at 84.

274. COUNCIL OF BARS & LAW SOC’YS OF EUR., *CCBEINFO* #4, at 8 (2003), available at http://www.ccbe.eu/NTCdocument/n_04_enpdf1_1180966023.pdf [https://perma.cc/2MMT-4F4J]; Walsh, *supra* note 45, at 496.

the nature of professional roles and values.²⁷⁵ The conference ultimately reached compromises to produce the final IBA Draft Code that it submitted to the ICC's Registrar in early 2003.²⁷⁶ In 2004, the ICC Registrar circulated its draft code,²⁷⁷ which differed organizationally and in several substantive respects from the 2003 IBA Draft Code. During the consultative and redrafting process that followed, several lawyer organizations and NGOs provided input. The CCBE recommended several changes such as narrowing the proposed confidentiality exceptions.²⁷⁸ The ABA, through its representative to the ICB, also provided detailed comments, urging the adoption of several provisions in the ABA Code and the MRLDE.²⁷⁹ After further revisions, the final version of the ICC Code of Professional Conduct for Counsel ("the ICC Code") was adopted in December 2005.²⁸⁰

It is not clear how much the lawyer associations' efforts affected the final ICC Code, although the Legal Representation Team of the Coalition for the International Criminal Court²⁸¹ stated that "most

275. Walsh, *supra* note 45, at 497.

276. *IBA Code for Counsel Before the ICC*, *supra* note 267, at 1068.

277. Int'l Criminal Court Assembly of State Parties, Proposal for a Draft Code of Professional Conduct for Counsel before the International Criminal Court, ICC-ASP/3/11/Rev.1 (2004), available at https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-3-11-Rev1-English.pdf [<https://perma.cc/F7LY-ZXE3>].

278. Council of Bars & Law Soc'ys of Eur., CCBE Comments on the Draft Code of Conduct for Counsel before the International Criminal Court Prepared by the Registrar 3-4 (2004) (on file with authors) [hereinafter CCBE Comments on the Draft Code].

279. Memorandum from Ellyn S. Rosen, Associate Regulation Counsel, to David Stoelting, ABA Representative to the Council of the International Criminal Bar (Oct. 27, 2005) (on file with authors) [hereinafter Rosen memo]. Although Stoelting was merely the ABA's representative to the International Criminal Bar, which was participating in the comment process, he sent the ABA memo directly to the Fourth Session of the Assembly of Parties, which was working on the ICC code. Memorandum from David Stoelting to Fourth Session of the Assembly of Parties (Nov. 10, 2005) (on file with authors). The Rosen memo stated that the suggestions "do not constitute a formal filing or position" of the ABA, but the intent to communicate the ABA's views was clear.

280. See Int'l Criminal Court Assembly of State Parties, ICC Fourth Session Proceedings of the Assembly of States Parties to the Rome Statute, ICC-ASP/4/L.32 (2005), at 7-8.

281. The Coalition for the International Criminal Courts is a group of NGOs and other organizations working to strengthen international cooperation with the ICC. *About the Coalition*, COALITION OF THE INT'L CRIM. CT. (July 13, 2016), <http://iccnw.org/?mod=coalition> [<https://perma.cc/J8HG-YHTU>]. The Legal Representation Team was composed of Coalition members who were interested in responding to the drafting of the ICC Code. See Coalition for the Int'l Criminal Court, The Legal Representation Team of the Coalition for the International Criminal Court (CICC) Comments on Art. 22 of the Draft Code of Professional Conduct 1-2 (2005), available at http://www.iccnw.org/documents/LR_article22_tampaper_Nov05.pdf [<https://perma.cc/K2HR-B698>] [hereinafter Legal Representation Team].

comments provided by NGOs and counsels' organizations have been taken into account by the Task Force [working for the ICC Registrar] in its redrafting of the Code."²⁸² One such change occurred at the end of the drafting process, when the Task Force revised ICC Code Article 22 concerning fee splitting in response to concerns raised by the CCBE, the ABA, and the Legal Representation Team.²⁸³ A few additional points are worth noting as they illustrate the recursive nature of this process. The IBA Advisory Panel seemingly relied on the ICTY Code—which was strongly influenced by the ABA Model Rules²⁸⁴—as a starting place for drafting the IBA Draft Code.²⁸⁵ The ICTY Code and the IBA Draft Code are organizationally very similar. Some of the language in the IBA Draft Code is taken almost verbatim from the ICTY Code.²⁸⁶ Like the ICTY Code and the IBA Draft Code, the final ICC Code reflects the approach to several issues found in the ABA Model Rules.²⁸⁷

282. Legal Representation Team, *supra* note 281, at 2; *see* Rosen memo, *supra* note 279, at 1 (noting that the draft code “resolves numerous problems regarding the previous, and very different, draft”).

283. *See* CCBE Comments on the Draft Code, *supra* note 278, at 3; Legal Representation Team, *supra* note 281, at 2-5; Rosen memo, *supra* note 279. The final version of the ICC Code article 22 tracks the language suggested by the Legal Representation Team.

284. *See supra* note 264 and accompanying text. For a detailed discussion of the similarities, *see* Bohlander, *supra* note 264.

285. The report accompanying the IBA Draft Code indicates the ICTY Code was among the codes of professional responsibility consulted. *IBA Code for Counsel Before the ICC*, *supra* note 267, at 1086; *see* Walsh, *supra* note 45, at 497 (noting that the ICTY and ICTR Codes “provided the basis for the IBA proposal”).

286. *Compare* IBA Draft Code art. 11 *with* INT’L TRIBUNAL FOR THE PROSECUTION OF PERS. RESPONSIBLE FOR SERIOUS VIOLATIONS OF INT’L HUMANITARIAN LAW COMM. IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, CODE OF PROFESSIONAL CONDUCT FOR COUNSEL APPEARING BEFORE THE INTERNATIONAL TRIBUNAL, Doc. No. IT/125 REV.3, art. 10 (1997); *compare also* IBA Draft Code art. 5 *with* INT’L CRIMINAL COURT, CODE OF PROFESSIONAL CONDUCT FOR COUNSEL, ICC Doc. ICC-ASP/4/21ICC, art. 6 (2005) [hereinafter ICC CODE]; *see* Bohlander, *supra* note 264, at 106.

287. For example, the ICC Code treats disqualification of the lawyer who serves as a witness much in the same as the ABA Model Rules. *Compare* ICC CODE, *supra* note 286, art. 12 (3) *with* MODEL RULES OF PROF’L CONDUCT r. 3.7 (a) (AM. BAR ASS’N 1983). There are also similarities in the duty to communicate with clients and communication with unrepresented persons. *Compare* ICC CODE art. 15 (1) *with* MODEL RULES OF PROF’L CONDUCT r. 1.4 (b) (AM. BAR ASS’N 1983); *compare also* ICC CODE art. 26 *with* MODEL RULES OF PROF’L CONDUCT r. 4.3 (AM. BAR ASS’N 1983). *See also* Rosen memo, *supra* note 279, at 1 (noting that “several of the significant revisions [in the ICC Code] track more closely the language found in the ABA Model Rules of Professional Conduct”).

In late 2012, IBAHRI issued a report recommending that the ICC Code be amended to include prosecutors or that a separate code of conduct for prosecutors should be promulgated.²⁸⁸ Although the timing may have been coincidental, the ICC's Office of the Prosecutor adopted a Code of Conduct for the Office of the Prosecutor in September 2013.²⁸⁹ In its 2012 report, the IBAHRI also proposed specific revisions of the ICC Code, and voiced opposition to a proposal by the ICC Registry for a Registry-directed mechanism to monitor the performance of counsel.²⁹⁰ The objections focused, in part, on concerns about maintaining lawyer independence and suggested that monitoring the legal profession "is best carried out by a body of its peers who understand the dilemmas, difficulties and intricacies faced by counsel practicing before the international court."²⁹¹ In 2016, the CCBE joined with other lawyer organizations to oppose efforts by the ICC's Registrar to form a compulsory bar association that it viewed as threatening the independence of lawyers.²⁹² The IBA, CCBE, and to a lesser extent, the ABA, have issued statements or attended meetings to support the independence and interests of lawyers who appear before the ICC.²⁹³

2. Responses to Transnational Organizations: FATF

The Financial Action Task Force ("FATF") exemplifies one of many transnational standard-setting organizations that consult with international lawyer organizations in setting policies that can affect the regulation of lawyers. The FATF is an intergovernmental body established in 1989 by ministers of several countries seeking to combat

288. INT'L BAR ASS'N, COUNSEL MATTERS AT THE INTERNATIONAL CRIMINAL COURT: A REVIEW OF KEY DEVELOPMENTS IMPACTING LAWYERS PRACTICING BEFORE THE ICC-ASP/4/L.32, at 7-8 (2005) [hereinafter IBA COUNSEL MATTERS].

289. See Lawrence Pacewicz, *Introductory Note to International Criminal Court Code of Conduct for the Office of the Prosecutor*, 53 ILM 397 (2014).

290. IBA COUNSEL MATTERS, *supra* note 288, at 7-8, 27.

291. *Id.* at 29.

292. See Press Release, CCBE, For a free and independent defence before the International Criminal Court (June 29, 2016), available at http://www.ccbe.eu/NTCdocument/CP_ABCPI_160629_ENp1_1467213623.pdf [<https://perma.cc/K87Z-WS9Z>].

293. See *ICCBA Event with National and International Bars on future collaboration*, INT'L CRIM. B. ASS'N (Mar. 29, 2017), <https://www.iccba-abcpi.org/single-post/2017/03/29/ICCBA-event-with-National-and-International-Bars-on-future-collaboration> [<https://perma.cc/V8KA-68AQ>] (describing meeting of International Criminal Court Bar Association with representatives of bar associations including the CCBE, UIA, and ABA).

money laundering and other threats to the international financial system.²⁹⁴ The FATF expanded its efforts in 2001 to fight terrorist financing.²⁹⁵ Its members now include thirty-five jurisdictions and two regional associations (the European Council and the Gulf Cooperation Council), and nine associate members.²⁹⁶ While the FATF's Recommendations do not have the force of law, its membership and requirements create powerful incentives for compliance.²⁹⁷

When the FATF pursued an initiative starting in 2002 to impose gatekeeping obligations on designated non-financial businesses and professionals ("DNFBPs"), including lawyers, the IBA, the CCBE, the ABA, and other national lawyer associations wrote to the FATF to resist those efforts.²⁹⁸ Nevertheless, in 2003, the FATF extended its anti-money laundering Recommendations, which included a suspicious transaction reporting requirement,²⁹⁹ to all DNFBPs, including legal professionals.³⁰⁰ The Recommendations included an Interpretive Note, however, which stated that legal professionals "are not required to report their suspicions [about transactions] if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege."³⁰¹

294. *Who We Are*, FATF, <http://www.fatf-gafi.org/about/howweare/> [<https://perma.cc/E65A-4NUN>].

295. See FATF-GAFI, FINANCIAL ACTION TASK FORCE, TERRORIST FINANCING 5 (2008), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Terrorist%20Financing%20Typologies%20Report.pdf> [<https://perma.cc/Z75R-D3EW>].

296. *FATF Members and Observers*, FATF, <http://www.fatf-gafi.org/about/membersandobservers/> [<https://perma.cc/87BW-T5L5>]. There are also several observers, including the International Monetary Fund and the World Bank. *Id.*

297. Laurel S. Terry, *U.S. Legal Profession Efforts to Combat Money Laundering and Terrorist Financing*, 59 N.Y. L. SCH. L. REV. 487, 489 (2015).

298. Kevin L. Shepherd, *Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers*, 43 REAL PROP., TRUST & EST. L. J. 607, 611, 620-22 (2009). The DNFBPs also included, *inter alia*, casinos, dealers in real estate and other high value items, trust service providers, notaries, accountants, and auditors. *Id.* at 620.

299. In 1990, FATF issued its Forty Recommendations, which were intended to serve as a comprehensive plan for combating money laundering. *Id.* at 616. The Recommendations have been revised on a few occasions since then. John A. Terrill, II & Michael A. Breslow, *The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach*, 59 N.Y. L. SCH. L. REV. 433, 434 (2015).

300. Shepherd, *supra* note 298, at 620. The Recommendations applied to legal professionals when they prepare or carry out transactions for clients concerning specified activities, including the buying and selling of real estate. *Id.* at 622.

301. FATF-GAFI, FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS (2013), available at <http://www.fatf-gafi.org/media/fatf/>

The lawyer organizations subsequently negotiated with the FATF over its approach to the regulation of lawyers.³⁰² When the FATF continued to consider imposing a disclosure requirement on lawyers, a 2006 IBA press release noted that a suspicious transaction reporting obligation “breached the principle of the attorney-client relationship—which lies at the core of the legal profession worldwide; severely harms the rule of law and democracy; and impairs access to justice.”³⁰³ In 2007, the FATF issued a risk-based Guidance for financial institutions known as the *Financial Institution Guidance*.³⁰⁴ The lawyer organizations subsequently argued that lawyers should not be treated like financial institutions or other DNFBPs and should not be subject to a suspicious transaction reporting requirement because of concerns about privilege, confidentiality, and preservation of the attorney-client relationship.³⁰⁵ In 2008, after consultation with the lawyer organizations, the FATF considered some of the profession’s concerns and issued a *Guidance for Legal Professionals* that “does not address FATF’s Recommendations relating to suspicious transaction reporting”³⁰⁶ Nevertheless, subsequent FATF statements and efforts suggested that it believed that lawyers should be subject to additional anti-money laundering obligations.³⁰⁷

Tension between the FATF and the lawyer organizations can be seen in reports on their consultations. The IBA, the CCBE, and the ABA were invited to participate in the 2010 FATF consultation.³⁰⁸ The

documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf [https://perma.cc/YRP9-JZAH].

302. Shepherd, *supra* note 298, at 626, 628-30, 645-46.

303. *IBA Debates Concerns about Anti-Money Laundering Legislation at FATF Summit*, INT’L B. ASS’N (Nov. 16, 2006), <https://www.anti-moneylaundering.org/Document/Default.aspx?DocumentUid=0E9FA688-5BA1-4C38-9B54-4CDA00BC5CED> [https://perma.cc/8RGB-3S6M].

304. Shepherd, *supra* note 298, at 626-27.

305. *Id.* at 635-36.

306. FATF, RBA GUIDANCE FOR LEGAL PROFESSIONALS, ¶ 120 (2008), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf> [https://perma.cc/9CMX-JCQS]; Shepherd, *supra* note 298, at 633, 636.

307. See, e.g., Duncan E. Osborne, *The Financial Action Task Force and the Legal Profession*, 59 N.Y. L. SCH. L. REV. 421, 430 (2015). FATF reportedly intends to rewrite its *Lawyers’ Guidance for the Legal Profession*.

308. See FATF, CONSULTATION ON PROPOSED CHANGES TO THE FATF STANDARDS: COMPILATION OF RESPONSES FROM DESIGNATED NON-FINANCIAL BUSINESS AND PROFESSIONS (DNFBP’S) 8, 36, 51-52 (2011), available at <http://www.fatf-gafi.org/media/fatf/documents/publicconsultation/First%20public%20consultation%20document%20responses%20dnfbp.pdf> [https://perma.cc/GZC4-DWE7].

CCBE noted that “at the end of the day we left with the impression that decisions had already been made and that the comments of the private sector representatives may not have a real chance of being of influence to the final version.”³⁰⁹ Likewise, the IBA believed that “the session in Paris was merely a reporting of what FATF has already decided to do on several issues, rather than an interchange of ideas as to what should be done.”³¹⁰ The president of the CCBE subsequently wrote to the FATF: “Regrettably, the CCBE has not been informed of any developments since the November 2010 meeting” and that it was “disappointed with the level of engagement to date.”³¹¹ Moreover, “other organizations representing the legal profession across the globe share these concerns and have communicated similar views.”³¹²

Bar associations also opposed efforts on the European and the national level to implement gatekeeping legislation that would require them to report information about their clients.³¹³ Those efforts have not been entirely successful. The European Union adopted a 2005 directive on preventing the use of the financial system for money laundering and terrorist financing that applies to the financial sector and to lawyers and notaries when cash payments are made of EU€15,000 or more.³¹⁴ These actors are required to verify the identity of their customers and to report suspicions of money laundering or terrorist financing to the public authorities.³¹⁵ The CCBE supported the appeal challenging this EU directive, but it was upheld before the European Court of Human Rights.³¹⁶ The ABA was more successful in avoiding federal

309. *Id.* at 36.

310. *Id.* at 53. A US bar association representative was even more critical, stating that “FATF’s strategy of private sector consultations has been in many respects a charade.” See Osborne, *supra* note 307, at 428.

311. Letter from Georges-Albert Cal, CCBE President, to John Carlson, Principal Administrator (June 20, 2011), available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/gk_ccbe_letter.authcheckdam.pdf [<https://perma.cc/WEH8-NEJK>].

312. *Id.*

313. Shepherd, *supra* note 298, at 662-63.

314. Council Directive 2005/60, 2005 O.J. (L 309/15) (EC) [hereinafter Council Directive 2005/60]. This was followed by a 2015 directive that “seeks to strengthen EU rules and to ensure the consistency with the global standards laid down in the international recommendations adopted by the FATF.” Council Directive 2015/849, 2015 O.J. (L 141/73) (EC).

315. Council Directive 2005/60, *supra* note 314, ¶¶ 24, 27.

316. Michaud v. France, App. No. 12323/11, Eur. Ct. H.R., ¶ 88 (2013), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Judgments/ECHR/EN_ECHR_20130507_Michaud.pdf [<https://perma.cc/GW3U-G999>].

legislation in the United States that would impose disclosure requirements on lawyers.³¹⁷

Noteworthy is that the three lawyer organizations basically express the same views and often use the same arguments in the money laundering debate.³¹⁸ While this may reflect, in part, the same abhorrence against the regulatory enemy, at least some degree of coordination among these organizations occurred. This can be seen, for example, when the IBA, the CCBE, and the ABA jointly wrote *A Lawyer's Guide to Detecting and Preventing Money Laundering* in 2014 to address the fact that FATF had not provided enough guidance for lawyers who might be inadvertently assisting criminal conduct.³¹⁹ The tone of this document expresses great concern about how the legal profession is portrayed in a 2013 FATF report.³²⁰ For example, the *Guide* states, "the FATF report is in danger of creating a misleading impression of the legal profession. The profession believes that . . . circumstances in which lawyers are knowingly involved in criminal activities are quite rare."³²¹ As can be seen, these organizations will work together to promote the legal profession's interests, particularly when lawyers' reputations and prerogatives appear under attack.

3. Responses to Nations, Individual Lawyers, Bar Groups, or NGOs

All three organizations respond to some requests for assistance from in-country stakeholders, but the ABA best exemplifies that approach, primarily through ABA ROLI. In some cases, it is assisted by the ABA Center for Professional Responsibility, ABA SIL, or other ABA sections with relevant expertise.

317. See Kevin L. Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence*, REV. OF BANKING & FIN. SERVS., 33, 34-35, 37-38 (2012); see also Osborne, *supra* note 307, at 425.

318. See *supra* notes 303, 305, 309-11 and accompanying text.

319. See ABA, *A LAWYER'S GUIDE TO DETECTING AND PREVENTING MONEY LAUNDERING* 6-7 (2014), available at https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventingmoneylaundering.authcheckdam.pdf [<https://perma.cc/43CU-YGQM>] [hereinafter *A LAWYER'S GUIDE*].

320. FATF, *MONEY LAUNDERING AND TERRORIST FINANCING VULNERABILITIES OF LEGAL PROFESSIONALS* (2013), <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf> [<https://perma.cc/6FVV-DNKC>].

321. *A LAWYER'S GUIDE*, *supra* note 319, at 6-7.

ABA ROLI most directly affects lawyer regulation in other countries through the technical assistance it provides when it advises in the drafting of legislation governing legal professions. These laws often provide for the establishment of independent lawyer associations to which all lawyers must belong.³²² The legislation also contains admission requirements, some of the rules governing lawyers' conduct, and provisions concerning lawyer discipline.³²³ For example, ABA ROLI provided assistance in the drafting of Kyrgyz's Law on Advocatura that was passed in 2014.³²⁴ That law specifies the requirements for admission to practice, which include graduating from a law faculty, completing a one-year apprenticeship, and passing a qualifying examination.³²⁵ It requires lawyers to keep secret "information which has become known" in the course of providing legal assistance, echoing the US version of lawyer confidentiality.³²⁶ The law also provides for the suspension or revocation of an advocate's license if the advocate breaches the professional ethics code.³²⁷ When ABA ROLI assists with drafting legislation, it does not do the initial drafting, but will supply examples of legislation in other countries,³²⁸ provide analyses of drafts,³²⁹ and otherwise act as a sounding board.³³⁰

As previously noted, ABA ROLI also facilitates the development of lawyers' ethics codes and lawyer discipline processes in other

322. *See, e.g.*, LIBYA LAW NO. (3) OF 2014 ON LAW PRACTICE art. 52-55 (Libya).

323. *Id.* at art. 4, 32-34, 41-45.

324. *See* ABA ROLI LEGAL PROFESSION REFORM INDEX FOR THE KYRGYZ REPUBLIC, *supra* note 226; Telephone interview with Azamat Kerimbaev, ABA Country Director in Kyrgyzstan (June 20, 2017).

325. LAW ON ADVOCATURA OF THE KYRGYZ REPUBLIC AND ADVOCATE ACTIVITIES art. 19 (2014) (Kyrg.).

326. *Compare id.* at art. 26(5), with MODEL RULES OF PROF'L CONDUCT r. 1.6 (a) (AM. BAR ASS'N 2016).

327. LAW ON ADVOCATURA OF THE KYRGYZ REPUBLIC AND ADVOCATE ACTIVITIES art. 22 (2014) (Kyrg.).

328. For example, when Libyan lawyers were drafting a new law governing the legal profession, ABA ROLI provided them with documents including ethics codes written in Arabic from Lebanon and Morocco, portions of the IBA and CCBE standards, and the ABA Model Rules. Telephone Interview with Kevin George, former ABA ROLI Country Director, Libya (May 2, 2017).

329. *See, e.g.*, ABA CEELI ANALYSIS OF THE DRAFT LAW OF ALBANIA, *supra* note 218, at *passim* (assessing the draft law in terms of its compliance with international standards and offering general commentary and specific recommendations for modifications of the draft).

330. *See* Moyer et al., *supra* note 124, at 321; Silkenat, *supra* note 124, at 749; Telephone Interview with Kevin George, *supra* note 328.

countries.³³¹ In Libya, ABA ROLI directly assisted with drafting a lengthy instructors' manual for educating Libyan lawyers which provides for lawyer training on topics such as conflicts of interest, confidentiality, and competence.³³² The LBA later made the taking of the ethics course described in the instructors' manual a requirement for new lawyers.³³³

In addition, ABA ROLI assists with improving legal education in many countries.³³⁴ It has worked in Cambodia, Mexico, the Middle East, and Eurasia to establish legal clinics to train law students.³³⁵ It has launched efforts in Jordan, Egypt, and elsewhere to improve pedagogical methods in law schools and students' practical skills.³³⁶ It has also worked to introduce legal ethics training in the law school curriculum. For example, it helped develop a curriculum for Cambodia's first university legal ethics course.³³⁷ In order to improve the quality of lawyers, it has also supported work in several countries

331. *See, e.g., supra* notes 156, 217-18 and accompanying text.

332. *See* LIBYAN BAR ASSOCIATION, FUNDAMENTALS OF ETHICAL PROFESSIONAL CONDUCT, INSTRUCTORS' MANUAL (on file with authors). The handbook was also drafted by the US-Middle East Partnership Initiative, a US government-funded organization that seeks to further participatory governance, economic reform, and education in Africa and the Middle East. *See* US Office of the Spokesman, *U.S. Middle East Partnership Initiative*, U.S. DEP'T OF STATE ARCHIVE (Dec. 12, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/15923.htm> [<https://perma.cc/QD66-PEJE>].

333. E-mail from Kevin George, former ABA ROLI Country Director, Libya, to Leslie C. Levin (June 7, 2017, 13:02 EDT) (on file with authors).

334. ABA PROGRAM BOOK, *supra* note 123, at 7, 14; USAID IN ARMENIA, *supra* note 158, at 17-20. One way it does this is by assessing legal education in the countries through its Legal Education Reform Index. *See, e.g.,* LEGAL EDUCATION REFORM INDEX IN KOSOVO, VOL. II (July 2010), https://www.americanbar.org/content/dam/aba/directories/roli/kosovo/kosovo_legal_education_reform_index_07_10_eng.authcheckdam.pdf [<https://perma.cc/KVZ7-AUG4>].

335. *Cambodia Programs*, ABA, https://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/cambodia/programs.html [<https://perma.cc/7F6U-HDBA>]; Elizabeth Anderson, *Back to School Special: Legal Education as a Component of Rule of Law Development*, ABA (August 2015), https://www.americanbar.org/advocacy/rule_of_law/newsroom_events/general_news/news-staff-director-message-legal-education-key-component-of-rule-of-law-0815.html [<https://perma.cc/8PW9-7RL2>].

336. Anderson, *supra* note 335.

337. *Cambodia Programs*, *supra* note 335. It has also introduced courses in legal ethics at the University of Pristina in Kosovo. *See* USAID, ABA-ROLI ACTIVITIES IN KOSOVO: EVALUATION REPORT 5 (2010).

to develop bar examination questions and to provide the infrastructure to administer such examinations.³³⁸

The IBA operates differently, but responds to the needs of in-country stakeholders in some similar ways. The IBAHRI has sent over forty-five fact-finding teams around the globe since 1995 in response to requests by NGOs or bar leaders concerning rule of law issues, violations of human rights, judicial corruption, or threats to the legal profession's independence.³³⁹ The IBA then publishes reports with recommendations for action in countries such as in Egypt, Malawi, and Myanmar.³⁴⁰ Sometimes the IBA and the CCBE work together on such projects.³⁴¹

The IBAHRI also engages in training and capacity building to support local and national bar associations. Its capacity building involves "the placement of a legal specialist to work with the bar association or law society to strengthen internal operations, ensure sustainable finances, provide training for staff and members, and to build links with international and regional organizations."³⁴² The IBA sees the creation of self-governing professional organizations as a most valuable tool for "ensuring that lawyers maintain independence and integrity when representing clients."³⁴³ For example, the IBA's Legal Policy and Research Unit worked with Timor Leste to establish its first national bar association.³⁴⁴

Finally, when lawyers face threats from their governments, such as discipline or detention for speaking out or for representing unpopular clients, the three lawyer organizations may take up their cause. Through global publicity and mobilization of other bar groups and NGOs, international pressure is brought to bear to show support for an independent legal profession. A striking instance of this occurred

338. See, e.g., KERIMBAEV, *supra* note 218, at 10-11; ABA PROGRAM BOOK, *supra* note 123, at 14, 69.

339. *International Human Rights Fact Finding Guidelines*, INT'L B. ASS'N (2015), https://www.ibanet.org/Fact_Finding_Guidelines.aspx [<https://perma.cc/SU3F-SLND>].

340. *Id.*

341. See JUSTICE UNDER SIEGE, *supra* note 238, at 5.

342. *Training and Capacity Building*, INT'L B. ASS'N, https://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/Training-and-Capacity-Building.aspx [<https://perma.cc/3VBD-A36F>].

343. *Id.*

344. *IBAHRI legal specialist to help Timor Leste establish first national bar association*, INT'L B. ASS'N (Dec. 16, 2015), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=74f5f08f-65b5-4ed1-a977-4cfc2659eb58> [<https://perma.cc/M5FR-Q8ZV>].

following the July 2015 crackdown in China on activist lawyers when international networks of lawyers, academics, media, and NGOs immediately began investigations and lodged protests to the Chinese government.³⁴⁵ The IBA wrote a letter to the Chinese Premier expressing its grave concern over the situation.³⁴⁶ The CCBE—which had sent twenty-eight letters regarding violations of lawyers’ rights in China since 2007—also sent a letter at that time.³⁴⁷ The ABA responded two weeks later with a much more muted statement that expressed more support for future cooperation with China on legal issues than dismay about China’s treatment of the activist lawyers.³⁴⁸ The language seemingly reflected a “deep cleavage” within the ABA about how best to respond.³⁴⁹

The efforts of all three organizations through assessments, technical support, and public statements communicate a particular view of lawyer regulation. At the same time, they articulate a vision of the importance of lawyer independence that includes protection of the attorney-client relationship from interference by the state.

345. SIDA LIU & TERENCE C. HALLIDAY, *CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK* 157-67 (2016).

346. *Id.* at 162.

347. COUNCIL OF BARS & LAW SOC’YS OF EUR., *CCBE REPORT, SITUATION OF LAWYERS IN CHINA 1* (2015), http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS/EN_HR_20151026_CCBE-Report-Situation-of-lawyers-in-China.pdf [<https://perma.cc/4KVC-YN7W>].

348. *ABA President William C. Hubbard Statement on Lawyers in China*, ABA (Aug. 3, 2015), https://www.americanbar.org/news/abanews/aba-news-archives/2015/08/aba_president_willia.html [<https://perma.cc/V76Y-76WK>].

349. LIU & HALLIDAY, *supra* note 345, at 163 (noting that this compromise position reflected a “deep cleavage” between ABA ROLI, which preferred no public statement, and the ABA Human Rights Center which pressed for a much stronger expression of concern); see Robert Edward Precht, *A Moral Dilemma for the American Bar Association*, WASH. POST (Sept. 6, 2015), https://www.washingtonpost.com/opinions/a-moral-dilemma-for-the-american-bar-association/2015/09/06/55e4bf74-5343-11e5-933e-7d06c647a395_story.html?noredirect=on&utm_term=.d8cfeb23d615 [<https://perma.cc/5A53-4F4A>] (noting that ABA “members who wanted the organization to issue a statement criticizing the crackdown were met with strong opposition” by opponents who argued “that such a statement might provoke the Chinese government to retaliate by closing the Beijing office”). ABA ROLI has had a longtime presence in Beijing and preferred to support diverse strategies in response to the crackdown, including private dialogue with Chinese leaders, engagement with the US government in dialogue with China, other ABA events and publications to raise awareness, and presentation of the ABA Human Rights Award the following year to the detained Chinese lawyer, Wang Yu. E-mail from anonymous informant to Lynn Mather (June 15, 2018, 3:51 EDT) (on file with authors).

*IV. IMPLICATIONS AND IMPACT**A. Convergence of Rules*

Do the activities of the three lawyer organizations contribute to the convergence of rules governing the legal profession? In general, the answer is affirmative. Four reasons explain why. First, the IBA, CCBE, and ABA share the same values, principles, and legal language. With minor variations, they embrace and reflect the world view of western liberalism, with its emphasis on democracy and on the centrality of the individual as the prime locus of value, the right to pursue one's own interest in freedom, the efficiency of free markets, the importance of human rights, the rule of law, and access to justice.³⁵⁰ The organizations promote the same ideas, norms and principles, and use the same arguments. Consequently, they communicate and reinforce a similar message wherever they go.

Second, as previously noted, the IBA, the CCBE and ABA work together and with other international lawyer organizations to strengthen their impact. The organizations coordinate efforts, often compromising on their differences and collaborating when it makes sense. This coordination is facilitated through actions such as joint missions, meetings, and statements.

Third, overlapping memberships and networks, including at the very top of the organizations, further convergence.³⁵¹ The organizations' leaders have a long history of working together and some occupy key roles in two or more organizations. As examples, Mark Ellis brought his experience from the ABA to the IBA; Jonathan Goldsmith was Secretary-General of the CCBE while also serving on the IBA BIC; and Ellyn Rosen, Regulation and Global Initiatives

350. As an example of variation in the organizations' focus on free markets, compare the IBA's and CCBE's aggressive promotion of free markets through facilitation of transnational practice with the IBA-funded ELF projects that have assisted lawyers in developing countries to become better equipped to compete with global law firms. These efforts seek to help local lawyers achieve an increased share of legal work. *See, e.g., South African Development Community*, EUR. LAW. FOUND., <http://elf-fae.eu/southern-african-development-community/> [<https://perma.cc/2WLB-XA9W>].

351. For additional examples of overlapping membership, see Terry & Silver, *supra* note 159, at 423 n.56, 428-29.

Counsel at the ABA Center for Professional Responsibility, is also a member of the IBA BIC Regulation Committee.³⁵²

Fourth, a strong alternative to this vision of western liberalism does not exist in practice. In terms of international power and prestige, no international organization of, say, Islamic, Marxist or Confucian lawyers seriously competes with this vision. Indeed, lawyers' interests in operating in global markets seemingly incline legal professions in many countries to adopt the western approach to lawyer regulation.³⁵³

Why would the IBA, CCBE, and ABA walk this missionary road? A degree of idealism can be seen, exemplified by the attention of all three organizations to human rights, the rule of law, and access to justice. Some motivations behind the organizations' actions, however, appear to be protection of lawyers' practice, position, privilege, and purse.³⁵⁴ We encounter these interconnected issues, for instance, in the discussion of cross-border lawyering. Facilitating and regulating lawyers' movement among jurisdictions creates efficiency at the system level, expands business opportunities, and maintains privileges such as confidentiality. Grounded as the international lawyer organizations are in the tacit belief in the superiority of western liberalism, they seemingly do not suffer from reflective hesitation. Nevertheless, all three organizations appear to be aware that local situations demand locally grounded responses and attempt to adjust their approaches accordingly. Doing so, they build soft global law, ready to be used in training lawyers, and in hard national regulations.

B. Protecting Lawyers or the Public?

Efforts by international lawyer organizations to encourage better lawyer training, the promulgation of ethical codes, and the implementation of a disciplinary process to enforce them are positive developments for the public and the integrity of justice systems everywhere. It is less clear, however, whether these efforts are

352. See *supra* notes 41, 182 and accompanying text; *Officers Directory for Bar Issues Commission Regulation Committee*, INT'L B. ASS'N, https://www.int-bar.org/Officers/Index.cfm?unit=277_0_0_1_0 [<https://perma.cc/UFY9-HDAD>].

353. See James R. Faulconbridge & Daniel Muzio, *Professions in a Globalizing World: Toward a Transnational Sociology of the Professions*, 27 INT'L SOC. 136, 148 (2011) (noting, "In many ways, transnational professional projects and their connections to the Washington Consensus are designed to make professional services more market orientated and aligned with the neoliberal doctrines that dominate business.")

354. This is true of the IBA, CCBE, and ABA, but not necessarily of IBAHRI, ELF, or ABA ROLI.

producing systems and standards that are adequately protective of the public's interests. By touting the importance of self-regulation, and circulating ethical standards from countries in which lawyers wrote their own rules, the international organizations risk reproducing some standards and systems of lawyer regulation that historically have been more protective of lawyers than the public.

This is true with respect to the self-regulation of lawyer discipline systems. Lawyer discipline systems administered by lawyer organizations have often been slow, shrouded in secrecy, and overly-lenient.³⁵⁵ For this reason, some countries with long experience with lawyer-run discipline systems have moved away from systems administered by the legal profession and instead established independent or court-administered systems.³⁵⁶ Nevertheless, the CCBE recommends that the primary responsibility for the conduct of disciplinary proceedings preferably lies, in the first instance, with lawyer organizations.³⁵⁷ ABA ROLI also promotes the view that lawyer associations should be responsible for discipline in the first instance.³⁵⁸ In countries where ABA ROLI consulted on the drafting of the law governing lawyers such as Armenia, Georgia, Kosovo, Kyrgyz, and Libya, lawyer discipline is handled primarily by lawyer

355. See, e.g., DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES 10, 57-61 (2004); Richard F. Devlin & Porter Heffernan, *The End(s) of Self-Regulation?*, 45 ALBERTA L. REV. 169, 194 (2008); Leslie C. Levin, *Building A Better Lawyer Discipline System: The Queensland Example*, 9 LEGAL ETHICS 187, 189-90 (2006); Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 FORDHAM L. REV. 2761, 2867-68 (2012).

356. See, e.g., Noel Semple et al., *A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England and Wales, and North America*, 16 LEGAL ETHICS 258, 271, 276 (2013).

357. COUNCIL OF BARS & LAW SOCIETIES OF EUR., RECOMMENDATIONS ON DISCIPLINARY PROCESS FOR THE LEGAL PROFESSION 2 (2007).

358. See, e.g., Meghan McCormack, *Legal Reform in the Kyrgyz Republic* 1, 4-5 (2014). In contrast, in the United States, the ABA takes the position that lawyer discipline systems should be administered by the courts. See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT pmbl. (AM. BAR ASS'N 2002).

associations.³⁵⁹ The IBA's stance on lawyer discipline is more mixed.³⁶⁰

When disciplinary rules are drafted by national lawyer groups, they do not always provide for a transparent process or widespread publication of the results of discipline proceedings.³⁶¹ Moreover, the lawyer-run disciplinary bodies are sometimes reluctant to impose discipline on their own members.³⁶² Thus, the lawyer-controlled model of discipline is not necessarily optimal for protecting the public. At the same time, the alternative of leaving disciplinary proceedings to the courts may not be very attractive either, because courts may be weak, corrupt, underfunded, or highly dependent on the state. Likewise, when lawyer discipline is administered by the executive, it can seriously threaten independence. Thus, a lawyer-run discipline system may be the best alternative under some circumstances, although more could be done to improve it.

The laws and rules promoted by international lawyer organizations also reflect the self-interest of the legal profession in that they raise high barriers to entry to the profession and can negatively affect access to justice. The UN Basic Principles simply provide,

359. *See, e.g.*, KYRGYZ REGULATIONS ON THE COMMISSION ON LEGAL ETHICS OF THE LEGAL PROFESSION (on file with authors) (Kyrg.); ABA ROLI, LEGAL PROFESSION REFORM INDEX FOR GEORGIA, VOL. II, at 33-35 (2007), available at https://www.americanbar.org/content/dam/aba/directories/roli/georgia/georgia_lpri_volume_ii_11_2007.authcheckdam.pdf [<https://perma.cc/4NRT-XLZB>]. Most of those countries do, however, provide lawyers with a right to appeal adverse decisions to the courts. *See, e.g.*, LAW OF THE REPUBLIC OF ARMENIA ON THE PROFESSION OF ADVOCATE art. 11, 40 (2004) (Arm.); LAW OF GEORGIA ON ADVOCATES art. 35 (2001) (Geor.); LIBYA LAW NO. (3) OF 2014 ON LAW PRACTICE art. 47 (2014) (Libya).

360. *See* IBA GUIDE, *supra* note 206 and accompanying text.

361. Both the IBA and ABA support a transparent and publicized discipline process. IBA GUIDE, *supra* note 206; ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT r. 16 (AM. BAR ASS'N 2002); USAID QUARTERLY REPORT FOR SRI LANKA, *supra* note 217, at 2-3. Nevertheless, these processes are not always incorporated into national rules. *See, e.g.*, AM. BAR ASS'N, ABA ROLI, LEGAL PROFESSION REFORM INDEX FOR KOSOVO, VOL. III, at 45-47 (2009), https://www.americanbar.org/content/dam/aba/directories/roli/kosovo/kosovo_lpri_vol_iii_05_09_en.authcheckdam.pdf [<https://perma.cc/BK49-P9DR>]; AM. BAR ASS'N, ABA ROLI LEGAL PROFESSION REFORM INDEX FOR BULGARIA 41 (2006), available at <http://www.bili-bg.org/cdir/bili-bg.org/files/LPRI-2006-eng.pdf>. [<https://perma.cc/HTL3-NFRM>] [hereinafter ABA ROLI LEGAL PROFESSION REFORM INDEX FOR BULGARIA]. In some countries, sessions of the ethics commission are closed but the decision is publicly announced. *See, e.g.*, GEORGIA LAW OF ADVOCATES art. 35 (3) (Geor.).

362. *See, e.g.*, AM. BAR ASS'N, ABA ROLI, LEGAL PROFESSION REFORM INDEX FOR KOSOVO, VOL. II, at 44-45 (2007); ABA ROLI LEGAL PROFESSION REFORM INDEX FOR BULGARIA, *supra* note 361, at 41.

“Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education.”³⁶³ However, the IBA Policy Guidelines for Training and Education of the Legal Profession go further in suggesting that lawyers receive an undergraduate or post-graduate legal education.³⁶⁴ The CCBE’s Recommendation on Training Outcomes for European Lawyers also contemplates that lawyers will engage in university-level legal studies.³⁶⁵ ABA ROLI’s LPRI assesses legal professions based on whether lawyers “have a formal, university-level, legal education from institutions authorized to award degrees in law.”³⁶⁶ The LPRI further evaluates legal professions based on whether lawyers are required to complete a supervised apprenticeship prior to admission and pass a rigorous examination.³⁶⁷ These educational requirements have been incorporated into the admission requirements in the countries in which ABA ROLI has provided advice on the laws governing legal professions.³⁶⁸

While university-level training theoretically increases lawyer competence, it is not clear that less expensive supervised apprenticeship requirements—coupled with a testing requirement—would not suffice to significantly improve the quality of legal representation in developing countries. There may be gaps in the legal knowledge of someone who is not university-trained, but the

363. UN Basic Principles, *supra* note 11, at No. 9.

364. See INT’L BAR ASS’N, IBA POLICY GUIDELINES FOR TRAINING AND EDUCATION OF THE LEGAL PROFESSION PART I, at 1 (2011), available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=5A7375DC-7D1B-465C-A91E-19E47D2E7D45> [<https://perma.cc/4UVR-88T5>] (proposing that bar associations and law societies work to ensure improvement in the quality of preparation provided to intended entrants to the profession “at the undergraduate or postgraduate level”).

365. COUNCIL OF BARS & LAW SOC’YS OF EUR., RECOMMENDATION ON TRAINING OUTCOMES FOR EUROPEAN LAWYERS 8 (2007), available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TRAINING/TR_Guides_Recommendations/EN_TR_20071123_CCBE_Recommendations_on_Training_Outcomes_for_European_Lawyers.pdf [<https://perma.cc/29P3-FS6T>].

366. See ABA ROLI LEGAL PROFESSION REFORM INDEX FOR MEXICO, *supra* note 219, at 27.

367. *Id.* at 30.

368. See, e.g., LIBYA LAW NO. (3) OF 2014 ON LAW PRACTICE art. 4, 8 (2014) (Libya); ABA CEELI ANALYSIS OF THE DRAFT LAW OF ALBANIA, *supra* note 218, at 8; ABA ROLI, ANALYSIS OF THE DRAFT LAWS OF UKRAINE ON THE BAR 12 (2007), available at https://www.americanbar.org/content/dam/aba/directories/roli/ukraine/ukraine_analysis_draft_laws_on_the_bar_09_2007.authcheckdam.pdf [<https://perma.cc/24HU-6GZ7>] [hereinafter ABA ROLI ANALYSIS OF THE DRAFT LAWS OF UKRAINE].

university-level education requirement significantly limits the number of individuals who can advocate in court on behalf of clients at a time when their lives are increasingly affected by the formal law.

Some of the specific rules governing lawyers also reflect western views of lawyer regulation that do not necessarily benefit the public. For instance, the CCBE and ABA promote rules that prohibit fee sharing with non-lawyers,³⁶⁹ which is a western concern that was aimed, at least in the United States, at limiting the business getting efforts of non-elite lawyers who represented individual clients.³⁷⁰ Yet fee sharing with other service providers may actually provide cost savings and efficiencies for the public.

None of this is meant to suggest international lawyer organizations' efforts in developing countries are not beneficial. As a result of the work of these organizations, many countries now have laws and ethical rules governing lawyers that better protect the public, including rules concerning conflicts of interest and the appropriate handling of client funds.³⁷¹ Indeed, in some cases, the international lawyer organizations promote laws on the books that better protect the public than the rules governing lawyers in some western countries. For example, both CCBE and ABA ROLI have promoted rules requiring lawyers to maintain professional liability insurance, even though US lawyers and lawyers in some EU countries are not required to maintain such insurance.³⁷² Nevertheless, the importation of western views about lawyer regulation may not only reproduce some of the self-

369. CCBE CODE OF CONDUCT, *supra* note 83, at 3.6; MODEL RULES OF PROF'L CONDUCT r. 5.4 (AM. BAR ASS'N 1983). These rules have been incorporated into the law in some developing countries. *See, e.g.*, LIBYA LAW NO. (3) OF 2014 ON LAW PRACTICE art. 35 (2014) (Libya).

370. *See* JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 42-43 (1976).

371. For examples of some of the international organizations' standards, see INT'L BAR ASS'N, *GEN. PRINCIPLES FOR THE LEGAL PROFESSION* art. 3, 8 (2006); CCBE CODE OF CONDUCT, *supra* note 83, at 3.2, 3.8. For examples of these rules migrating into national standards, *see* LIBYA LAW NO. (3) art. 32 (Libya); ABA CEELI ANALYSIS OF THE DRAFT LAW OF ALBANIA, *supra* note 218, at 4-6; ABA CEELI ANALYSIS OF THE 2003 DRAFT LAW OF ARMENIA, *supra* note 240, at 12-13, 22.

372. *See, e.g.*, CCBE CODE OF CONDUCT, *supra* note 83, at 3.9; ABA ROLI ANALYSIS OF THE DRAFT LAWS OF UKRAINE, *supra* note 368, at 27-28; ABA CEELI ANALYSIS OF THE 2003 DRAFT LAW OF ARMENIA, *supra* note 240, at 3, 12. Some of the European countries that do not require lawyers to carry professional liability insurance are Greece, Italy, and Spain. *See* HERBERT M. KRITZER & NEIL VIDMAR, *WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* 171 (2018).

interested aspects of that approach, but also be insufficiently mindful of the realities faced by legal professions and justice systems in countries in transition.

C. Hard Law versus Soft Law

Do the myriad activities, codes, principles, reports, indices, and the like from these three international organizations have any tangible effect? Or are they all simply rhetoric? If the impact is symbolic only, then the convergence on western values and any possible adverse effects should pose few concerns. Such questions arise in any study of transnational governance and require discussion of norm institutionalization, i.e., when normative understandings of appropriate behavior become stabilized.³⁷³ It also requires consideration of the role of hard versus soft law.

Terence Halliday and Gregory Shaffer describe three sites of norm settlement when assessing whether transnational legal orders have become institutionalized.³⁷⁴ At each level, there are “standard texts” and normmaking institutions.³⁷⁵ At the *transnational* level, settling of legal norms involves a common understanding of the meaning of texts promulgated by international and transnational organizations, such as treaties, legislative guides, standards, etc.³⁷⁶ At the *national* level, norm settlement arises through the interplay of statutes, regulations, cases, etc. Frequent rounds of new lawmaking cease once there is national settling.³⁷⁷ At the *local* level, the meanings of local norms may appear in practice guides from a local bar and law firm manuals, and become internalized and reflected in practice. Settling at each level does not necessarily mean there is concordance on norms among these three levels.”³⁷⁸ So, for example, the legal norms of a transnational legal order such as the FATF are somewhat more settled on the transnational level through recommendations and guidelines than they are at the national level in terms of laws and practices. They are even less settled on the local level, as evidenced by

373. See Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 42 (Terence C. Halliday & Gregory Shaffer eds., 2015).

374. *Id.* at 43.

375. *Id.*

376. *Id.* at 43-44.

377. *Id.*

378. *Id.*

the fact that so many countries have been found to be non-compliant or only partially compliant in the FATF Mutual Evaluation Reports.³⁷⁹

Normative settling occurs on these levels through hard *and* soft law. Some legal scholars “tend to deny the very concept of ‘soft law’ since law by definition, for them, must be ‘binding.’”³⁸⁰ But empirical studies of soft law—e.g., guidelines, indices, best practices—contest that starkly positivist view. A well-known definition of hard law from international relations scholars Kenneth Abbott and Duncan Snidal includes three elements: precise rules, obligation, and a third-party decision maker delegated with enforcement.³⁸¹ Soft law begins once legal arrangements are weakened along one or more of those three dimensions.³⁸² As Gregory Shaffer and Mark Pollack put it, “hard and soft law are best seen not as binary categories but rather as choices arrayed along a continuum.”³⁸³ They suggest that the split between scholars who focus on a binary binding/nonbinding distinction and those who see characteristics of legality that vary on a continuum “depends on whether they address international law primarily from an ex post enforcement perspective or an ex ante negotiating one.”³⁸⁴ Understanding law from the latter perspective underscores the malleability and normative variation in how “binding” a rule is. The analysis here follows this constructivist perspective.³⁸⁵ David Trubek and Louise Trubek explain that dichotomous thinking about law that privileges hard law tends to overestimate the power of enforcement (“how hard is hard law anyway?”) and to underestimate the persuasive powers of soft law (“soft law may be harder than you think”).³⁸⁶ They argue instead for transcending the hard law/soft law debate and

379. See Laurel S. Terry & Jose Carlos Llerna Robles, *The Relevance of FATF's Recommendations and Fourth Round of Mutual Evaluations to the Legal Profession*, 42 *FORDHAM INT'L L. J.* 413, 443-44 (2018).

380. Shaffer & Pollack, *supra* note 43, at 713.

381. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT'L ORG.* 421 (2000).

382. *Id.* at 422.

383. Shaffer & Pollack, *supra* note 43, at 716.

384. *Id.* at 715-16.

385. For a fuller account of how three scholarly perspectives (positivism, rational choice institutionalism, and constructivism) view the interactions and strengths and weaknesses of hard and soft law, see Shaffer & Pollack, *supra* note 43, at 723, Table 1.

386. David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Europe: the Role of the Open Method of Co-ordination*, 11 *EUR. L. J.* 343, 359, 356 (2005).

understanding how the two can work effectively together.³⁸⁷ Hard and soft law can build on each other: soft law can pave the way for binding hard law and hard law can be strengthened through the tools of soft law.³⁸⁸

Considering the range of lawyer regulatory activities engaged in by the three lawyer organizations, there are relatively few instances of hard law. The CCBE directly influenced the content of certain EU laws, such as the 1998 Directive which provides enforceable rules for lawyers engaged in cross-border practice.³⁸⁹ ABA ROLI has worked with stakeholders in several countries to help establish lawyer regulatory systems through legislation (creating standards for admission, discipline processes, etc.) and professional conduct rules. Where successfully established, such systems have precise rules, clear obligations for lawyers, and a delegated enforcement authority. Nevertheless, the fact that these systems exemplify hard law does not guarantee their effectiveness. Regulatory authority can easily be undercut when admission standards are bypassed for cronies, conduct rules are ignored, and disciplinary authorities are bought off by bribes or political influence. Laws may lack sufficient specificity to be enforced. Political disagreements or armed conflict may prevent countries from taking “next steps” like adopting an ethics code after legislation calls for the implementation of such a code.³⁹⁰

When lawyer organizations articulate principles or guidelines, such as the IBA Principles, they are more like general standards than precise rules. While principles and guidelines have a certain degree of “hardness,” they also require “softer” tools of peer pressure, shared understanding of conduct standards, reciprocal networks, and so forth to be effective. But this need for soft law also describes the situation in jurisdictions with extensive hard law: the effectiveness of the law of lawyering often rests more on informal pressures than on the formal law.³⁹¹

387. *See id.* at 361. *See also* Shaffer & Pollack, *supra* note 43 at 724-27 (developing this point further and identifying the conditions for effective coordination of hard and soft law).

388. Shaffer & Pollack, *supra* note 43, at 721.

389. *See supra* note 87 and accompanying text.

390. This occurred, for example, in Libya, where violence has prevented the effective functioning of the Libyan Bar Association, which was charged with writing such a code.

391. *See* Lynn Mather & Leslie C. Levin, *Why Context Matters*, in *LAWYERS IN PRACTICE: ETHICAL DECISIONMAKING IN CONTEXT* 3, 12-17 (Leslie C. Levin & Lynn Mather eds., 2012).

How do informal pressures, or other instances of soft law, work to regulate lawyers? First, when international organizations criticize countries for poor treatment of lawyers or the legal profession, they engage in shaming, an informal sanction that affects those who do not want to be branded as deviant or outsiders.³⁹² For instance, when IBA, CCBE, and ABA leaders spoke out against a proposed Irish law that would move lawyer regulation to a government regulatory authority, they said it would make Ireland comparable to “countries like China, Iran or Gambia” and “unique in Europe in the level of control exercised by Government over the legal profession.”³⁹³ They pointed to soft law such as the UN Basic Principles and the Council of Europe’s Recommendations on the Freedom of Lawyers to support their arguments.³⁹⁴

Second, the increased use of indices reflects a new mode of “evidence-based governance,” one in which non-state actors like NGOs or private organizations play a key role in regulation.³⁹⁵ The indices of independence of the legal profession constructed by the IBA and ABA ROLI exemplify this trend. As Sally Engle Merry explains, indicators blend “technical expertise and political influence”³⁹⁶ and “harden soft law by articulating in measurable terms the meaning of rules.”³⁹⁷ Thus, “[w]hile we assume that they describe the world, they actually construct that world.”³⁹⁸

Third, when international lawyer organizations articulate best practices—e.g., for lawyer conduct or lawyer discipline systems—these practices can be diffused and spread across the globe. Diffusion facilitates “mimesis,”³⁹⁹ the copying of systems, practices or, in the case of the legal profession, codes of professional conduct. The many

392. Trubek & Trubek, *supra* note 386, at 357.

393. *Legal services Bill*, *supra* note 8.

394. Carol Coulter, *Legal System “Could be Like China’s,”* IRISH TIMES, Dec. 5, 2011, <https://www.irishtimes.com/news/legal-system-could-be-like-china-s-1.888213>.

395. See SALLY ENGLE MERRY, *THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING* 10-11 (2016) (citing others).

396. *Id.* at 21.

397. Sally Engle Merry, *Firming Up Soft Law: The Impact of Indicators on Transnational Human Rights Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS*, *supra* note 373, at 377. They do this by, *inter alia*, “specifying and fixing the meanings” of resolutions and by providing modes of measuring compliance. They also harden soft law by creating “an aura of scientific authority surrounding the data used to assess compliance.” *Id.* at 378.

398. MERRY, *supra* note 395, at 33.

399. Trubek & Trubek, *supra* note 386, at 357.

cases of assistance to bar associations or capacity building efforts by IBAHRI, CCBE, and ABA ROLI illustrate diffusion. These also demonstrate another mechanism of diffusion, that is, through discourse. Language offers a powerful tool for reframing issues and conflicts.⁴⁰⁰ When international lawyer organizations work with nations to strengthen their legal professions, they introduce terms and concepts—such as “conflicts of interest,” “professional secrecy,” and “lawyer independence”—that can influence local attitudes.

Fourth, as local bar leaders work with representatives of international lawyer organizations, they create new networks. These networks provide channels of communication to transmit ideas from global leaders, as new task force reports are issued, new surveys conducted, or new projects initiated. Not only does communication run from the “top down,” but also from the “bottom up,” as networks offer powerful opportunities for political mobilization and pressure for change.⁴⁰¹ Recall, for example, the response of the three lawyer organizations to the detention of lawyers in China, which was facilitated by lawyer and media networks nurtured by activists.⁴⁰²

Finally, aspirational guidelines can take on a life of their own when they are quoted by courts and offered as guidance for best practices. Law firms, for example, may adopt new ethical guidelines articulated by international organizations and these, in turn, may influence the further development of global legal standards.⁴⁰³ These and other mechanisms suggest how soft law has some power and is not simply a second-rate substitute for hard law.

One cautionary note is in order. When thinking about how and why nations and bar associations respond to the initiatives of the IBA, CCBE, and ABA on lawyer regulation, one can easily imagine a scenario that is far less rosy than depicted above. When a government or lawyer association is offered assistance from an international lawyer organization, they could simply take whatever benefits are offered, with little interest in the normative message about the legal profession embodied in them. These benefits might involve expertise, funding,

400. Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 18 *LAW & SOC. REV.* 775, 780-81 (1980-81).

401. Trubek & Trubek, *supra* note 386, at 358.

402. *See supra* notes 345-48 and accompanying text.

403. *See* LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 12 (2016) (presenting a theory of legal endogeneity as a recursive process in which “the meaning of law is shaped by widely accepted ideas within the social arena that law seeks to regulate”).

commercial opportunities, social status, or political capital. The government or group could attempt to manipulate the international organizations, making promises and acting the part, but with no intention of making real changes that would improve the justice system or benefit the public.

V. CONCLUSION

Due to the weaknesses of the international systems vis-à-vis the sovereignty of nations, international efforts to regulate lawyers generates mostly soft law. This study demonstrates how hard and soft law is made by international lawyer organizations, how soft law (sometimes) translates into hard law, and how it may continue to hover over national systems, exercising a soft but potentially persistent long-term influence. Does this somehow measure up to “success”?

While there is a great deal of convergence in the values and visions of the IBA, CCBE and ABA, the impact of their efforts in the area of lawyer regulation at the national and local levels is not entirely clear. There is evidence that they have succeeded in getting more hard law on the books, and in some cases, those laws have had some real effects. This can be seen, for example, in national laws establishing mandatory lawyer organizations, heightened admission standards, and lawyer discipline systems.

Yet when we look deeper, the results are more mixed. This is due, in part, to the fact that the norms communicated by the three organizations are sometimes directly at odds with prevailing and deeply entrenched norms in developing or transitional countries. Western views assume that government institutions—including the courts—are the primary locus of social control, while in developing countries, “the grip of tribe, clan, and local community is far stronger than that of the nation-state.”⁴⁰⁴ Rose Ehrenreich Brooks contends in her critique of rule of law efforts in developing countries—which involves a nearly “identical template” of writing new rules and upgrading the legal profession through support of bar associations and

404. David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062, 1080 (1974).

law schools—that “[t]his model simply does not work.”⁴⁰⁵ She argues that this formalistic approach fails to understand that rule of law does not exist “beyond culture” and cannot simply be added to the existing culture by creating formal structures and rewriting the law.⁴⁰⁶ Brian Tamanaha similarly observes that the standard law and development “formula” for reform, which involves drafting legal codes, training judges and prosecutors, solidifying law schools and the legal profession, and increasing legal access for individuals, “have not taken hold.”⁴⁰⁷ While some of these critiques have been challenged,⁴⁰⁸ they highlight questions about the actual impact of the international lawyer organizations’ activities on the local level.

In some instances, even when international lawyer organizations have influence on the national level, it does not change norms or behavior on the ground. There are a variety of reasons why even black letter law may not be implemented as intended or may be “resisted, subverted, or neutralized in practice.”⁴⁰⁹ As Pierre Legrand has noted, in order to understand a legal culture, it is necessary “to explicate how a community thinks about the law and why it thinks about the law in the way that it does.”⁴¹⁰ This may help explain why, for example, the

405. Rose Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2285 (2003).

406. *Id.* at 2285.

407. Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L. J. 209, 213 (2011); see also Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES 441, 445 (2010) (quoting a recent World Bank report that noted “most of these interventions produced little change”).

408. See, e.g., MICHAEL J. TREBILOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* 36-37 (2008); Ruth M. Buchanan, *A Crisis and its Afterlife: Some Reflections on Scholars in Self-Estrangement*, in *CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE* (Grainne de Burca et al. eds., 2014); deLisle, *supra* note 154, at 250-53.

409. Halliday & Shaffer, *supra* note 373, at 40. The authors argue that some of the mechanisms that drive transnational recursivity theory help to explain why this occurs. Among the reasons are diagnostic struggles over the problem to be addressed. Problems can arise when one set of actors prevails at the diagnostic stage, but implementation is handled by different actors who diagnose the problem differently. Relatedly, actor mismatch may impede implementation where the actors who wield power in the national implementation of transnational legal norms are not represented or do not otherwise prevail in the negotiations. *Id.* at 38-39. For a discussion of how ABA ROLI, in particular, attempts to make its efforts “stick,” see McKeown, *supra* note 133, at 143-44.

410. Pierre Legrand, *European Legal Systems are not Converging*, 45 INT’L COMP. L. Q. 52, 60 (1996).

ABA's legal profession reform work in Kyrgyzstan over the last twenty-five years—which has contributed to the passage of the Law on Advocatura and the establishment of a mandatory bar organization—has seemingly not significantly changed the culture of corruption that has prevailed in the legal system since the Soviet period.⁴¹¹ Of course, changes in that legal culture may come with time, but this will depend on a number of factors including funding, training, incentives, judges' and prosecutors' behavior, client expectations, disciplinary enforcement, etc. In some countries, real impact may be especially hard to achieve when regulatory models are adopted that fit poorly with the local legal culture, where poor or sparsely populated countries cannot administer or afford those regimes, or where political authorities oppose them.⁴¹²

At the same time, the three lawyer organizations have unmistakably contributed to some significant changes in norms and practices on the local level. Lawyers are now able to engage with relative ease in cross-border practice in Europe. More lawyers engaged in international commercial arbitration now share common views about how they may or must conduct themselves in practice. Legal education is improving in many countries, thereby presumably raising the quality of legal representation. Lawyers in developing countries are increasingly exposed to, and sometimes internalizing, views of lawyers as independent professionals and as agents of social change.⁴¹³ Of course, other factors, organizations, and stakeholders may have also contributed to these changing views and norms. Still there is evidence to suggest that the efforts of these international lawyer organizations are producing modest progress towards their goals.

411. *See, e.g.*, ABA ROLI LEGAL PROFESSION REFORM INDEX FOR THE KYRGYZ REPUBLIC, *supra* note 226, at 4, 10, 13-14; Blake K. Puckett, "We're Very Apolitical": Examining the Role of the International Legal Assistance Expert, 16 *IND. J. GLOBAL LEG. STUD.* 293, 296-97, 299-301 (2009).

412. *See, e.g.*, Bartlett, *supra* note 52, at 44.

413. *See deLisle, supra* note 154, at 291.

