

FILLING THE GAP IN THE ROME STATUTE ON DEFENSE

The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have provided initial testing grounds for the establishment of the International Criminal Court (ICC or Court). These tribunals have been faced with many challenges from which the ICC has learned and should continue to learn. Foremost among these have been the difficulties and limitations faced by defense counsel, whose functions and facilities have often appeared to be as *ad hoc* as the tribunals themselves.

It is perhaps only to be expected that a criminal prosecutor will enjoy certain immunities and rights that defense counsel do not during the proceedings of a criminal trial. This has been no less true of these tribunals, set up specifically to try individuals alleged to have committed horrible atrocities. However, the existence of defense counsel cannot be, or be perceived as, existing only to represent the accused before the judges so that a visibly and presumably fair proceeding may occur. It is imperative that defense counsel receive the appropriate resources and facilities to conduct a full and thorough defense of his or her client.

This is a critical difficulty that the ICC now faces. Since the Court is not merely an *ad hoc* tribunal set up to try a certain situation, it needs to be fair, consistent and concise with its cases across the board. The manner in which it conducts its first trials will be crucial to its continued existence. Those trials will be closely scrutinized by the international community, to determine if the Court is functioning with integrity, and can be trusted to provide all who come before it, including the accused, with a fair and equitable hearing. If the ICC is to appear a truly impartial Court, as the framers set it up to be, then the requirements of its defense counsel cannot be an aspect that is overlooked or minimized.

Unfortunately, the Rome Statute does not provide for adequate support, assistance, “equality of arms,” and equal access for defense counsel at the Court. The Statute contains very few references to defense counsel, or to the support and assistance they should expect and would receive. In actuality, it is only the associated Rules of Procedure and Evidence (RPE) that go into any detail concerning defense counsel. However, the attempts made by the RPE to fill the holes in the Statute still do not provide the support and facilities that defense counsel should be accorded. There has been widespread recognition at the Court and among its supporters that the failure of the Statute to provide for the needs of defense counsel needs to be addressed and remedied.

This paper will analyze the procedural gap that has been left with respect to the functioning and facilitation of the role of defense counsel in the Rome Statute, and review what has been done so far to fill it. It will also discuss the current status of defense counsel before the ICC, and what has been and is still being done to enhance that status. As an analysis of the current status of the Court, it should be read in conjunction with its companion paper, “*Defending Atrocity Crimes: The Requirements of Defense Counsel before the ICC.*”

Essential Requirements of an Independent and Efficient Defense

A program of the United Nations Association of the United States of America

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The companion paper has discussed in detail the requirements of an adequate defense and the corresponding rights and privileges a defense counsel must be accorded. These may be summarized as:

- Defendants must be assured and accorded all internationally recognized rights,¹ including, among others, the right to be deemed innocent until proven guilty and the right to a speedy trial
- “Equality of Arms” must exist between the prosecution and defense, including the right of the defense to have total evidence sharing, particularly exculpatory evidence, and disclosure from the Prosecutor as required by the Court’s rules and Statute
- The right of the defense to be able to conduct investigations without governmental or other interference, as well as adequate and unrestricted access to the accused, in order to mount an adequate defense
- The right of the defense to be recognized as a vital part of the judicial process and for the Court to be sensitive to and provide for defense needs and facilities to function effectively and adequately
- The right of the defense to have support facilities that are comparable to those enjoyed by the Prosecutor, including assistance from staff devoted to it alone, resources for on-site investigations and access to legal research at least equal to those of the Prosecutor
- The rules for application by and admission of defense counsel to the ICC must be clear and precise, and administered without discrimination. In addition, the rules relating to discipline, conduct and ethics, both interim and final drafts, must be prepared and revised in full consultation with the defense counsel and their associated ICB or other appropriate legal organization
- Defense counsel must be provided adequate training in relevant international law, including procedure and jurisprudence, so that they can provide the best defense possible for their clients
- The ICC Defense Counsel should be able to organize themselves into a professional bar association

The companion paper also provides considerable detail with respect to the efforts of both the tribunals and the ICC to ensure that a defendant before these judicial bodies is tried to the full extent of the law, but nonetheless enjoys every protection of his rights and status during the process.

It is abundantly clear that the tribunals have come a long way from a bad start in their support to defense counsel. The Court learned much from the tribunals as it begins to take up its

¹ These rights are discussed in great detail in the companion paper. These rights are included in the Universal Declaration of Human Rights and are also codified in the Covenant on Civil and Political Rights. The United Nations, “Universal Declaration of Human Rights,” adopted by General Assembly Resolution 217 A (III) of 10 December 1948, available at <http://www.un.org/Overview/rights.html>; Office of the High Commissioner for Human Rights, “Covenant on Civil and Political Rights,” adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

responsibilities to defense counsel. The ICC has made remarkable strides toward achieving the optimal level of procedural fairness. There are some areas, however, where there is room for improvement.

Shortcomings of the Rome Statute

The Rome Statute² is inadequate to provide for the needs of the defense in these ways particularly:

- Article 43 [Registrar] describes the duties of the Registrar, but his/her duty to defense counsel is not mentioned at all.
- Article 48 [Privileges and Immunities]. This article does not afford the defense counsel the same immunities and privileges as the Prosecutor and his office. While the Prosecutor is afforded the same level of immunity that diplomats or officials are afforded, the defense is only granted such immunity as is necessary for the proper functioning of the Court.
- Article 51 [Rules of Procedure and Evidence] states that amendments to the RPE may be proposed by a state party, the judges acting in an absolute majority or the Prosecutor. These three entities must then submit the proposed amendments to the President of the Bureau of the Assembly of States Parties (ASP). This means that the defense does not have the authority to propose an amendment to the RPE. A state party would have to agree to propose or sponsor the amendment. Therefore, the concerns of defense counsel may never be voiced or reflected in the RPE.
- Article 52 [Regulations of the Court] describes the duty of the judges to create the Regulations of the Court. This article states that the Prosecutor and the Registrar will be consulted as to any amendments or elaboration of the regulations. There is, however, no requirement to consult defense counsel to add their input.
- Article 67 [Rights of the Accused] 1(b)/(d) guarantee counsel to the defendant but do not say how this is to be achieved or supported.

The foregoing limitations or omissions with respect to defense counsel show that the Rome Statute failed to address fully the role of defense counsel, or to include appropriate provisions for defense counsel to fulfill their functions effectively. It is especially apparent that there are no provisions for defense counsel or a representative body of defense counsel to be consulted concerning the creation of documents or the further development of the Court.

In addition, the Statute does not adequately provide as much equality as possible for defense counsel in the Court's judicial process. The defense is automatically at a disadvantage when it comes to the investigative process. This is due to the fact that a good portion of the investigation has already been conducted before the defense is even assigned to the case. There are two situations in which suspects or a prospective defendant is likely to be caught off guard. These are: 1) a unique investigative opportunity and 2) when an investigation takes place before and individual has been charged:

² International Criminal Court, Rome Statute, available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) [hereinafter Rome Statute].

- Article 56 [Role of the Pre-Trial Chamber in Relation to a Unique Investigative Opportunity]. Although this article does make an effort to take into account the rights of the defense, it does not mandate that specific action be taken. Rather, it states that action should be taken such as maintaining a record of the investigatory proceedings and appointing counsel to represent defense interests, but this is only taken as deemed necessary in the judgment of the Pre-Trial Chamber. The Pre-Trial Chamber, however, would make such determinations after consultations with the Prosecutor, whose interests may differ from or be antithetical to the interests of defense.
- The second situation is difficult to remedy due to the fact that many steps in the investigative process of a case occur well before any individual has been charged, and therefore defense counsel are completely excluded from participating in these stages of the prosecution. The office of the Prosecutor may send over a team of investigators as soon as a situation has been referred and well before the accused have been identified. A defense counsel appointed later cannot ensure that the investigation was conducted in a manner that did not prejudice the accused.

There have been attempts to fill this gap, several of which are discussed in detail below. The process is ongoing, however, and much still remains undone. Whether or not decisive action is taken to resolve these defense counsel issues, resulting perhaps in amendments to the Rome Statute, will depend largely on the will of the Registrar and how he conducts his office.

Steps Taken to Fill in the Gap

In order to address these omissions in the Rome Statute, some specific actions have been taken by both the Court and outside organizations. For instance, the Rules of Procedure and Evidence, the establishment of the Defense Support Section under the Office of the Registry, the creation of an Office of Public Defense Counsel under Regulation 77 of the Regulations of the Court, provisions for the Registrar in relation to defense in the draft of the Regulations of the Registry, and protections for the defense in the Agreement of Privileges and Immunities, were all established with the interests of the defense in mind. In addition, lawyers and legal associations created the International Criminal Bar to provide a venue through which defense counsel may be represented before the ICC.

Rules of Procedure and Evidence

Since there is no reference to defense counsel under Article 43 of the Rome Statute, the Rules of Procedure and Evidence tried to address this issue. The RPE not only elaborated upon the duties of the Registrar, but also expanded upon the provisions concerning defense counsel. Some of the Rules specifically state that the defense counsel and representative bodies of defense counsel should be consulted in the drafting of various regulations and the Code of Professional Conduct. The relevant Articles of the Rome Statute, as we have seen, do not contain such provisions. Thus the RPE is one example of the Court's efforts to try to fill in the omissions in the Statute about defense counsel.

References to defense counsel fall under RPE Chapter 2: Composition and Administration of the Court, Section III: The Registry, Subsection 3: Counsel for the Defense.³ Within Chapter 2, specific provisions for the defense are contained in Rules 8, 14(2), and 20 - 22 of the RPE:

- Rule 8 [Code of Professional Conduct] declares that the President shall create a Code of Professional Conduct after a proposal is made by the Registrar and he has consulted with the Prosecutor. These consultations shall be done in accordance with Rule 20(3). A draft of the Code will be then be submitted to the Assembly of States Parties for adoption.
- Rule 14 [Operation of the Registry]. Rule 14(2) states that the Regulations of the Registry shall “provide for defense counsel to have access to appropriate and reasonable administrative assistance from the Registry.”
- Rule 20 [Responsibilities of the Registrar relating to the rights of the defense]. Rule 20(1) states overall that “in accordance with Article 43, Paragraph 1, the Registrar shall organize the staff of the Registry in a manner that promotes the rights of the defense, consistent with the principle of fair trial as defined in the Statute.” The rule addresses the lack of provisions for defense counsel Article 43 of the Statute.
 - Rule 20(1)(a) also states that the Registrar must aid in the “protection of confidentiality” as defined in Article 67 (1)(b)⁴.
 - Rule 20(1)(b) states that the Registrar must provide “support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence.”
 - Rule 20(1)(c) states that the Registrar must assist accused persons in obtaining legal advice and the assistance of legal counsel.
 - Rule 20(1)(d) states that the Registrar must advise the Prosecutor and Chambers on “relevant defence-related issues.”
 - Rule 20(1)(e) states that the Registrar must provide the defense with adequate facilities so that counsel may carry out the “direct performance of the duty of the defence.”
 - Rule 20(1)(f) provides for the Registrar to disperse information and case law of the Court to defense counsel and to cooperate with “national defense and bar associations or any independent representative body of counsel and legal associations... to promote specialization and training of lawyers in the law of the Statute and the Rules.”
- Furthermore, Rule 20(2) states that the Registrar must carry out its duties, including the Registry’s financial administration, in such a manner that the independence of the defense is upheld.
- Finally, Rule 20(3) provides for the Registrar to consult with independent representative bodies of counsel or legal associations (whose creation may be facilitated by the ASP)

³ International Criminal Court, The Rules of Procedure and Evidence, available at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf.

⁴ Article 67 lists the rights guaranteed to the defense. Paragraph 1(b) specifically states, “to have adequate time and facilities for the preparation of the defense and to communicate freely with counsel of the accused’s choosing in confidence.”

concerning the management of legal assistance and developing the Code of Professional Conduct.

- Rule 21 [Assignment of Legal Assistance] states that independent representative bodies of counsel or legal associations should be consulted in creating the Regulations for the Registry concerning the criteria and procedures for assignment of counsel. Rule 21(2) states that the Registrar must follow the criteria set when assigning, creating and maintaining a list of counsel.
- Rule 22 [Appointment and Qualifications of Counsel for the Defense] discusses the qualifications of defense counsel.⁵
- See **Appendix One** for specific provisions of Chapter 2 of the RPE.

Defense Support Section

The Division of Victims and Counsel was created within the Registry of the ICC. This section is divided into two units: the Defense Support Section and the Victims' Participation and Reparations Section. The Defense Support Section is "responsible for the management of legal assistance and for providing defense teams with the necessary expertise and administrative support."⁶ The Victim Participation and Reparations Section "seeks to fulfill the mandate of the ICC in terms of its obligations to victims and increase awareness of the importance of the respect for the rights of victims in international justice."⁷

In accordance with Rule 14(2) of the RPE, the purpose of the Defense Support Section is to provide logistical and administrative support to defense counsel. Although it is among the responsibilities of the Registrar to provide administrative support to defense counsel, the inclusion of this section represents yet another proactive response to the inadequacies of the Rome Statute.

Regulations of the Court

The judges issued the Regulations of the Court,⁸ as required by Article 52 of the Statute. The regulations are provisions designed to help address gaps in the statute. Regulation 77 provides for the creation of a permanent and independent Office of Public Counsel for the Defense, to better equip defense counsel with the necessary legal resources and support. Pursuant to Article 52, the Registrar and Prosecutor will be consulted as to the elaboration or amendments of the regulations.

Regulation 77:

- Regulation 77 was adopted by the Judges of the court on May 26, 2004, at the 5th Plenary session held from May 17-28, 2004.⁹

⁵ This rule is discussed in greater detail in the companion paper.

⁶ International Criminal Court, The Defense Support Section, available at http://www.icc-cpi.int/recruitment/cc1g/intern_reg.html.

⁷ International Criminal Court, The Victim Participation and Reparations Section, available at http://www.icc-cpi.int/recruitment/cc1g/intern_reg.html.

⁸ International Criminal Court, Regulations of the Court, available at http://www.icc-cpi.int/library/about/officialjournal/Regulations_of_the_Court_170604-EN.pdf.

⁹ *Id.*

- According to Regulation 77, such an office would be responsible for “representing and protecting the rights of the defense during the initial stages of the investigation, in particular for the application of Article 56(2)(d) and Rule 47(2).
- Section 5 of the regulation states that the Office of Public Counsel for the defense will provide support and legal assistance to the Registry’s listed counsel as well as to the person entitled to legal assistance, including, where appropriate: a) legal research and advice; and b) appearing before a chamber in respect of specific issues.
- The Office of Public Counsel for Defense will be completely independent. The Registrar is obligated to provide administrative and logistical support for the office (the Defense Support Section), but will not provide legal assistance. This office will deal with early representation for persons who do not yet have it.
- At this point, it is unclear how broadly mandated the rights and functions that the regulation gives this office will be, and especially how much support and assistance it will be expected to give defense counsel generally. It has not been determined if this office will be small with a limited mandate, or large, with a great many functions and rights. How the office will function under this Regulation is still being discussed.
- See **Appendix Two** for specific provisions of Regulation 77.

Regulations of the Registry

The Regulations of the Registry are relevant to defense counsel because it is the Registrar who creates and maintains the list of defense counsel and the Office of the Registry that aids in the administrative support of defense counsel. Therefore, it is imperative that the Regulations of the Registry are so drafted to require the Registrar to provide real assistance to defense counsel and to work with them transparently in matters of eligibility, discipline and professional responsibility. Although it is still in its draft stage, it is evident that the requirements of defense counsel were taken into account:

- Chapter 4 of the Draft Regulations of the Registry¹⁰ is completely focused on the rights of defense counsel.
- This document clearly and specifically spells out the functions of the Registrar, from maintaining the list of defense counsel to developing training programs to ensure that counsel understand the Statute and the Rules of Procedure and Evidence.
- Section 5 of the Chapter discusses the Office of Public Counsel for the Defence, contains draft provisions concerning the appointment and independence of members of the office, the functions of the office and its reporting obligations.

As is clearly evident, the creation of this document is another manner in which the failure to meet the needs and requirements for defense counsel is addressed. It is an attempt to provide for “equality of arms” between the defense and the prosecution. The fact that an entire section of the Regulations of the Registry has been devoted entirely to the office that will provide legal support to defense counsel is indicative of the manner in which the Court is proactively addressing the

¹⁰ International Criminal Court, Organs: Registry: Consultations, “The Draft Regulations of the Registry,” available at http://www.icc-cpi.int/library/organs/registry/RoR2005April_En.pdf.

issues facing defense counsel. As is discussed in greater detail below, defense counsel have been consulted and have had the ability to provide comments on the draft.

Chapter 4 of the Draft Regulations of the Registry: Counsel issues and legal assistance

- See **Appendix Three** for specific provisions of Chapter 4.

International Criminal Bar

The International Criminal Bar (ICB) was created to ensure the quality of defense counsel and also serves as an organization through which they may collectively organize and speak with one voice. This bar association was not created by the Court, but rather through the efforts of legal associations and bars, and individual lawyers who saw this as an essential entity of the ICC. The frustration and bitterness that resulted from the negative experiences of defense counsel at the ICTR and ICTY was crucial in the creation of the ICB, to ensure that defense counsel at the ICC would not be abused as they had been at the tribunals.

- The International Criminal Bar was created on June 15, 2002 at a conference in Montreal. Over 350 lawyers, representatives from national bars and other legal associations from 48 countries attended.¹¹ The effort can be traced as far back as to 1997, when Elise Groulx, a Canadian criminal defense attorney, assisted in forming the International Criminal Defence Attorneys Association (ICDAA).¹² It was this association that approached the United Nations and called for the Rome Statute to include provisions for institutional recognition for defense. However, it was too late in the negotiations of the Rome Statute for anything to be done.
- The association again called for the same inclusion in the RPE of the ICC, and while provisions for defense were included in the RPE (Rule 20(3)), it was not what the ICDAA had hoped for.
- Groulx and the ICDAA would have better luck with the creation of an international bar association. Working groups were set up to discuss the various proposals for the mandate, structure and scope of the ICB.¹³ Groulx is now the co-president of the ICB.¹⁴
- The association not only represents defense counsel before the ICC, but also includes victims' representatives.
- The ICB has representation in The Hague and has already been established as a main force under which the defense counsel may mobilize.
- The purpose of the organization is to “enable lawyers to speak with a strong voice on issues of common concern, such as the independence of the legal profession, the right to a fair trial, “equality of arms,” lawyer-client confidentiality, and the structure and guiding

¹¹ Montreal Conference on the Creation of the International Criminal Bar, Final Resolution, June 15, 2002, available at http://www.bpi-icb.org/en/doc/final_resolution_en.doc.

¹² Achievements of the International Criminal Defence Attorneys Association, available at <http://aiad-icdaa.org/achievements.html>.

¹³ Nancy Hollander, “The International Criminal Bar; the Missing Link Necessary to Protect the Rights of Those Accused of War Crimes,” *The Heartland Journal*, Issue No. 49, Fall 2003, available at http://www.heartlandcafe.com/journal/jrnl_49/j49_p101.htm.

¹⁴ International Criminal Bar, Organization, available at <http://www.bpi-icb.org/en/>.

principles of legal aid.”¹⁵ The organization has been created to regulate, represent and ensure that that counsel are able to practice in total independence before the ICC.

- The ICB enjoys a membership of individuals from national and regional bars from all over the world as well as non-governmental organizations.
- The Bar has adopted a constitution and elected an executive committee and a governing council. The resolution that adopted the constitution stated that the ICB will commit “the resources and will of the International Criminal Bar to ensuring the independence and professionalism of counsel appearing before the International Criminal Court.”¹⁶
- The ICB has already held training sessions so that the lawyers become familiar with the different criminal justice systems that the Court uses: a combination of civil law and common law. The training has included areas such as how to cross-examine witnesses.
- Although the United States is not a member of the ICC, Americans belong to the ICB. Specifically, the American Bar Association and the National Association of Criminal Defense lawyers are lead members, influencing the future development of the ICB.¹⁷
- Although the Registrar does not recognize the ICB, it is the most developed and organized association of defense counsel before the Court.

Even though the ICB was not created by negotiations surrounding the Court or by the Court itself, its establishment further enforces the position and integrity of defense counsel at the ICC. The ability to mobilize and collectively assemble gives defense counsel more equality when conducting its investigations and performing its tasks within the ICC. This is another step that has been taken to fill the procedural gap.

Agreement on Privileges and Immunities

In addition to Article 48 [Privileges and Immunities] of the Statute, the ICC has created the Agreement on Privileges and Immunities,¹⁸ which expands upon the provisions in the Statute and provides for a more expansive list of rights that defense counsel should be afforded when conducting their work in the field. Countries sign onto the agreement, and promise, among other things, that they will observe the rights provided for in the agreement and not interfere with the work of the Court and its officials, including defense counsel.

- Article 18 [Counsel and persons assisting defense counsel] of the Agreement states that: “counsel shall enjoy the following privileges and immunities and facilities to the extent necessary for the independent performance of his or her functions, including the time spent on journeys, in connection with the performance of his or her functions...” These include:
 - “Immunity from personal arrest or detention and from seizure of his or her personal baggage.”
 - “Immunity from legal process of every kind in respect of words spoken or written and all acts performed by him or her in official capacity, which immunity shall

¹⁵ International Criminal Bar, Organization: Overview: Purposes of the ICB, available at <http://www.bpi-icb.org/en/>.

¹⁶ International Criminal Bar General Assembly, Resolution, March 21, 2003, available at http://www.bpi-icb.org/en/doc/resolution_berlin.doc.

¹⁷ Hollander, *supra* note 13.

¹⁸ International Criminal Court, Agreement on Privileges and Immunities, available at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_e_e.pdf.

continue to be accorded even after he or she has ceased to exercise his or her functions.”

- “The same repatriation facilities in time of international crisis as are accorded to diplomatic agents under the Vienna Convention.”

- See **Appendix Four** for a complete list of the immunities and privileges that defense counsel enjoy.

The Agreement on Privileges and Immunities clearly allows defense counsel the capacity to carry out his or her functions effectively without fear of governmental or other interference.¹⁹

Current Situation and Status of Defense Counsel before the ICC

Defense Support Section

The Defense Support Section is already in existence and has begun its work under the Division of Victims and Counsel. As the section currently stands, it shares its resources and staff with the entire Registry. However, there may be a problem not only in the fact that resources may be extremely limited, but also that there may be an internal conflict within the office due to the fact that it deals with both victims and defendants. The unit may be compromised if a conflict of interest should occur. Therefore, the creation of an Office of Public Counsel for Defense is essential for the proper functioning of the Court. Although the separation between the two is still unclear, it is necessary.

Regulations of the Court

The Regulations of the Court entered into force at the point of the adoption of the judges and was distributed to the Assembly of States Parties for comments. If there were no objections from the ASP after six months, the document remained in force. Since there were no objections that could not be remedied, the Regulations of the Court have thus remained fully in force.

Office of Defense Counsel created by Regulation 77

- It appears that Regulation 77 will be approved by the Assembly of States Parties very soon, perhaps at its meeting in November. The defense will then have a good chance to have the independence and resources that were desperately lacking in the two tribunals.

Regulations of the Registry

The draft of the Regulations of the Registry is still being discussed among various actors of the Court. The Registry of the ICC held various seminars on the draft Regulations of the Registry. At a seminar from May 25-27, 2005, members from the international community including, the Centre for Justice and Reconciliation, Human Rights Watch, the International Criminal Bar, Lawyers Without Borders, and No Peace Without Justice and Redress were among those present at the

¹⁹ See companion paper for a discussion of the effect of governmental interference on defense counsel at the tribunals.

seminar.²⁰ Among the issues discussed was “Defense and Counsel.” Among the issues raised include:

- Reg. 129(3): The issue was raised that the Registrar should not be involved in mediation between counsel and client.
- Reg. 132(1): The list of defense counsel should also be available by means other than the website.
- Reg. 134: It was discussed whether local investigators without as much experience could be able to assist in the investigations since they have the potential trust of victims and witnesses. A paragraph was submitted by Francois Roux that asked whether defense counsel could hire local investigators who had knowledge of local languages and people to assist the formal investigators.²¹

The staff of the Registry listened to the comments that were made and will now create a final draft that will be submitted to the Presidency in the coming months.²² This seminar demonstrates that steps have been taken to consult defense counsel on the Regulations of the Registry. This highlights an important step for the inclusion of defense counsel in creating the Court’s fundamental documents.

International Criminal Bar Association

There is no provision for the ASP to formally recognize an association of lawyers, but Rule 20(3) of the RPE makes it strongly advisable for the Registrar to consult with an organization that has been facilitated by the Assembly. If the ASP states that it is its desire to facilitate the establishment of the ICB, the association will enjoy an improved status with the Registrar. This will assist the ICB in completing its mission to speak with one voice and providing a venue through which its members may mobilize. It will also give it the power to discipline itself and uphold the integrity and credibility of its members.

Code of Professional Conduct

Just as the ICC is expected to adhere to rules and regulations ensuring that the needs of defense counsel are met, it is equally important that defense counsel abide by the regulations that are created for them. Since the Professional Code of Conduct is examined in greater detail in the companion paper, this section merely discusses the current status of the Code before the ICC.

- The Registrar created the draft of the “Code of Professional Conduct for counsel before the ICC” through a lengthy process. He received input from the Assembly of States Parties, the International Criminal Bar and the ICB’s Ethics Committee, Human Rights First, and numerous other organizations. The ICB created its own proposed code of conduct for defense and submitted the proposed code to the Registrar.²³

²⁰ “Registry Makes Progress on Regulations,” *Insight on the ICC*, Issue 5, July 2005, available at http://iccnw.org/publications/insight/insight5_jul2005en.pdf [hereinafter “Registry Makes Progress on Regulations”].

²¹ “Seminar on the Draft Regulations of the Registry, 25-27 May 2005: Informal Report by the Coalition for the International Criminal Court,” Draft dated July 11, 2005 provided by Kristele Younes, Coalition for the International Criminal Court, the Hague, personal communication.

²² “Registry Makes Progress on Regulations,” *supra* note 20.

²³ The International Criminal Bar proposed draft Code of Professional Conduct, available at The International Criminal Bar, Organization: Official documents: BPI-ICB, available at <http://www.bpi-icb.org/en/>.

- The relationship between the ICB and the Registrar became strained during the process of drafting the code. The ICB wanted to create an independent disciplinary body that would oversee the actions of counsel, whereas the Registry sought to increase the role that it would play in regard to defense.
- However, the Registrar did not consult with these organizations before the final draft was issued. It was submitted to the President, which issued the document to the Assembly of States Parties at the Third Session of the ASP.
- After careful scrutiny, the ASP concluded that the draft was inadequate and did not adopt the Registrar's version of the Code.
- Probably the greatest point of contention with the draft Code is the role of the Registrar. According to the RPE, the Registrar should provide administrative assistance to defense counsel, not assume the role of a judge. The ICB, for instance, felt that the Code gave the Registrar too much decision making authority. Its comments include:
 - Article 7 [professional conduct of counsel] of the Draft Code states that a counsel must comply with the Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court and the Regulations of the Registry. However, the Regulations of the Registry have not been finalized and are supposed to establish the requirements for the Registrar and his office. These regulations are administrative in nature and this creates the assumption that defense counsel are bound by them. It would therefore be inappropriate to apply these regulations to defense counsel because they are not staff of the Registry.
 - Another example is Article 9 [counsel-client relationship] of the Draft Code. This Article states that counsel must “inform the Registrar and the Relevant Chamber” if his client's ability to make decisions as to his representation has been affected due to mental or other impairments. This information should fall under attorney-client privileges and counsel should not be obligated to reveal this information to the Registrar or even to the relevant Chamber. The ICB suggests other alternatives, such as appointing a guardian, before concluding that the Registrar and Court should be notified.²⁴
 - Article 16 [conflict of interest] states that the Registrar has the authority to withdraw counsel on his or her own motion. The ICB argues that this should not be a function of the Registrar and the Office of the Registry. The Registrar plays an administrative role and should not be part of the judicial process.
 - Article 33 [the Commissioner] states that in the case of counsel misconduct, the Registrar shall appoint a Commissioner to carry out the investigation of the misbehavior. The ICB states that “the disciplinary process may be improperly influenced if the investigation is conducted by the same authority that is the adjudicator.”²⁵ Therefore, the Commissioner should be selected by an independent body, not the Registrar.
- The bureau of the ASP and the President decided together that the Bureau should write a completely revised and new draft.

²⁴ ICB Commentary on the ICC Draft Code of Professional Conduct for Counsel Before the International Criminal Court, available at <http://www.bpi-icb.org/en/doc/Annotated%20ICC520Code.doc>.

²⁵ *Id.*

- The ASP resolved that the Code, as it currently stands, will be applied provisionally until the 4th Session of the ASP in November 2005. The resolution called for another draft to be created by the Bureau of the ASP and that States Parties submit comments by December 31, 2004.²⁶
- A Task Force was created under the Bureau of the ASP to review the code. The Task Force held seven meetings to discuss the code and received input from the States Parties of the ICC, NGOs and legal associations. The third meeting of the Task Force was completely devoted to NGOs and lawyers associations.
- The draft is in its final stages and is scheduled to be adopted at the Forth Session of the ASP in November 2005.²⁷ The adoption of the Code will probably occur before the first trial begins at the ICC. Therefore, from the very beginning, the ICC will in all probability only select defense counsel that meet the requirements provided for in the Code.

Conclusion

Although the rights of defense counsel in international criminal law were previously considered at most a formality, the International Criminal Court, as well as the international community, have come together to create an institution that does not resemble or portray the inadequacies that the ad hoc tribunals did. Although a gap in practical and substantive arrangements for the Court to assist defense counsel was left after the creation of the Rome Statute, proactive steps have been taken to address this issue.

The Court is in its infancy, so the effects of these actions may not be realized for some time. At the same time, this may be advantageous to the Court. The fact that no indictments have been issued and no trials have begun may give time to repair the gap in the Statute and complete the arrangements that the Regulations of the Court and the RPE provide.

The substantive actions and efforts of the Court indicate that it has taken into consideration the problems that the tribunals faced, particularly with respect to the rights of the accused and the difficulties faced by defense counsel. This is shown in the fact that ad hoc defense counsel have already been assigned to oversee preliminary defense concerns in the situation in the DRC, the first formal investigation opened by the Court. That the Court has devoted so much time and attention to the issue of rendering impartial justice attests to the integrity with which it executes its mandate. It is only reasonable that it be allowed time to do.

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²⁶ International Criminal Court, Third Session of the Assembly of States Parties: Resolutions, Part III, “Strengthening the International Criminal Court and the Assembly of States Parties,” September 10, 2004, available at http://www.icc-cpi.int/library/asp/ICC-ASP-3-25-III_English.pdf.

²⁷ “Code of Conduct to Ensure Best Legal Representation,” *Insight on the ICC*, Issue 5, July 2005, available at http://iccnow.org/publications/insight/insight5_jul2005en.pdf.

Appendix One

Rules of Procedure and Evidence

Rule 8

Code of Professional Conduct

1. The Presidency, on the basis of a proposal made by the Registrar, shall draw up a draft Code of Professional Conduct for counsel, after having consulted the Prosecutor. In the preparation of the proposal, the Registrar shall conduct the consultations in accordance with rule 20, sub-rule 3.
2. The draft Code shall then be transmitted to the Assembly of States Parties, for the purpose of adoption, according to article 112, paragraph 7.
3. The Code shall contain procedures for its amendment.

Rule 14

Operation of the Registry

1. In discharging his or her responsibility for the organization and management of the Registry, the Registrar shall put in place regulations to govern the operation of the Registry. In preparing or amending these regulations, the Registrar shall consult with the Prosecutor on any matters which may affect the operation of the Office of the Prosecutor. The regulations shall be approved by the Presidency.
2. The regulations shall provide for defence counsel to have access to appropriate and reasonable administrative assistance from the Registry.

Subsection 3

Counsel for the defence

Rule 20

Responsibilities of the Registrar relating to the rights of the defence

1. In accordance with article 43, paragraph 1, the Registrar shall organize the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute. For that purpose, the Registrar shall, *inter alia*:
 - (a) Facilitate the protection of confidentiality, as defined in article 67, paragraph 1 (b);
 - (b) Provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence;
 - (c) Assist arrested persons, persons to whom article 55, paragraph 2, applies and the accused in obtaining legal advice and the assistance of legal counsel;
 - (d) Advise the Prosecutor and the Chambers, as necessary, on relevant defence-related issues;
 - (e) Provide the defence with such facilities as may be necessary for the direct performance of the duty of the defence;
 - (f) Facilitate the dissemination of information and case law of the Court to defence counsel and, as appropriate, cooperate with national defence and bar associations or any independent representative body of counsel and legal associations referred to in sub-rule 3 to promote the specialization and training of lawyers in the law of the Statute and the Rules.
2. The Registrar shall carry out the functions stipulated in sub-rule 1, including the financial administration of the Registry, in such a manner as to ensure the professional independence of defence counsel.
3. For purposes such as the management of legal assistance in accordance with rule 21 and the development of a Code of Professional Conduct in accordance with rule 8, the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties.

Rule 21

Assignment of legal assistance

1. Subject to article 55, paragraph 2 (c), and article 67, paragraph 1 (d), criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in rule 20, sub-rule 3.
2. The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list.
3. A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency shall be final. If a request is refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances.
4. A person choosing to represent himself or herself shall so notify the Registrar in writing at the first opportunity.
5. Where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel.

Rule 22

Appointment and qualifications of Counsel for the defence

1. A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.
2. Counsel for the defence engaged by a person exercising his or her right under the Statute to retain legal counsel of his or her choosing shall file a power of attorney with the Registrar at the earliest opportunity.
3. In the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties.

Appendix Two

Regulations of the Court

Regulation 77

Office of Public Counsel for the defence

1. The Registrar shall establish and develop an Office of Public Counsel for the defence for the purpose of providing assistance as described in subregulations 4 and 5.
2. The Office of Public Counsel for the defence shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office. Counsel and assistants within the Office shall act independently.
3. The Office of Public Counsel for the defence may include a counsel who meets the criteria set out in rule 22 and regulation 67. The Office shall include assistants as referred to in regulation 68.
4. The tasks of the Office of Public Counsel for the defence shall include representing and protecting the rights of the defence during the initial stages of the investigation, in particular for the application of article 56, paragraph 2 (d), and rule 47, sub-rule 2.
5. The Office of Public Counsel for the defence shall also provide support and assistance to defence counsel and to the person entitled to legal assistance, including, where appropriate:
 - (a) Legal research and advice; and
 - (b) Appearing before a Chamber in respect of specific issues.

Appendix Three

Regulations of the Registry

Chapter 4 Counsel issues and legal assistance

Section 1: General provisions

Regulation 129

Duties of the Registrar in relation to the defence

1. In order to give full effect to the rights of the defence, and in pursuance to the provisions of rule 20, the Registrar shall, *inter alia*:

(a) Assist appointed counsel and/or his or her team in travelling to the seat of the Court, to the place where proceedings take place, to the place of custody of the accused, or to various locations in the course of an on-site investigation. Such assistance shall encompass securing the protection of the privileges and immunities as laid down in the Agreement on the Privileges and Immunities of the Court and the relevant provisions of the Headquarters Agreement;

(b) Establish channels of communication and hold consultations with any independent body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties.

2. The Registrar shall also provide appropriate assistance to an accused who has declared his or her wish to represent him or herself in accordance with rule 21, sub-rule 4.

3. In the event of problems occurring between an accused and his or her counsel, the Registrar may, *proprio motu* or at the request of either of them, mediate personally or assign a mediator.

Regulation 130

Principles governing consultations with legal associations

1. In discharging his or her responsibilities including those in rule 20, sub-rule 3, the Registrar may, as appropriate, hold consultations with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties.

2. Special focus shall be made on international associations of bars, as well as to associations offering specific expertise in fields of law that are relevant to the Court.

3. The Registrar may also consult any expert he or she may identify regarding specific issues relating to his or her mandate, as appropriate.

Regulation 131

Forms of consultations

1. Consultations shall be carried out periodically through non-institutionalised channels, including written and oral communication, as well as bilateral and multilateral meetings.

2. The Registrar may, as appropriate, organise seminars for the purpose of holding in-depth discussions on the role of the legal profession before the Court. Associations and individual experts, as well as representatives of other international criminal tribunals, may take part in these seminars.

Section 2: Provisions relating to legal teams

Regulation 132

List of counsel

1. The Registry shall produce a standard form for counsel seeking inclusion on the list. The form shall be available on the website of the Court and shall also be provided upon request.
2. If not otherwise indicated by counsel, the Registry may publish the following data:
 - (a) Counsel's full name;
 - (b) The name, place and country of the bar association to which counsel is affiliated or, if counsel is not a barrister or attorney, his or her profession, including the name of the institution for which he or she works;
 - (c) The language(s) spoken by counsel; and
 - (d) Whether counsel would prefer to represent the accused, victims, or both.

Regulation 133

List of professional investigators

1. A list of professional investigators shall be created and maintained.
2. The Registry shall produce a standard form for professional investigators seeking inclusion on the list. The form shall be available on the website of the Court and shall also be provided upon request.

Regulation 134

Appointment and qualifications of professional investigators

1. A professional investigator shall have established competence in international or criminal law and procedure, as well as not less than ten years of relevant experience in investigative work in criminal proceedings at national or international level. A professional investigator shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court and, as far as possible, speak the language in which the investigation is being conducted.
2. Where legal costs are borne by the Court, a professional investigator shall be appointed by the Registrar at the request of counsel or the accused choosing to represent him or herself. The appointment shall be on the basis of a periodically renewable contract upon request of counsel or an accused choosing to represent him or herself.
3. The Registry shall produce a standard form to request a professional investigator. Counsel shall, *inter alia*, specify the identity of the potential investigator if already identified, the tasks to be carried out by the investigator and the estimated duration of the appointment.
4. In the event of an accused choosing to represent him or herself, if more than one investigator is appointed the accused shall designate a principal investigator. All privileged communications between the accused and investigators shall be channelled through the principal investigator.

Regulation 135

Assistants to counsel

1. To assist counsel in the presentation of the case before the Chamber, persons shall have five years of relevant experience in criminal proceedings, as well as competence in international or criminal law and procedure.
2. Other persons assisting counsel shall either have five years relevant experience in criminal proceedings or specific competence in international or criminal law and procedure.

Regulation 136

List of assistants

1. A list of assistants shall be created and maintained.
2. The Registry shall produce a standard form for assistants seeking inclusion on the list. The form shall be available on the website of the Court and shall also be provided upon request.

Regulation 137

Appointment of assistants

An assistant shall be appointed by counsel or an accused choosing to represent him or herself. The assistant shall be selected from the list maintained by the Registrar.

Regulation 138

Assistance by the Registry

1. The Registry shall provide a person entitled to legal assistance with the list of counsel, along with the *curricula vitae* of counsel appearing on that list.

2. The Registry shall provide assistance when a person entitled to legal assistance under the Statute and the Rules is to be questioned pursuant to article 55, or in any other case where legal assistance is needed by a person entitled to it.

Regulation 139

Acknowledgment of appointment

The Registrar shall acknowledge in writing the appointment of counsel, stating the fact that he or she is included in the list. This acknowledgment shall be notified to the person who appointed counsel, to counsel, to the relevant Chamber and to the competent authority exercising regulatory and disciplinary powers upon counsel in the national order.

Regulation 140

Appointment of duty counsel

1. Subject to regulation 73, sub-regulation 2, of the Regulations of the Court, the Registry shall guarantee the availability of counsel at the place and the time indicated by the Prosecutor or the Chamber, as well as in the detention centre.

2. When requested by a person entitled to legal assistance, the Prosecutor or the Chamber, the Registry shall contact the duty counsel and provide him or her with all the information available.

Section 3: Legal assistance paid by the Court

Regulation 141

Procedure for applications for legal assistance paid by the Court

1. As soon as the Registry contacts a person entitled to legal assistance under the Statute and the Rules in order to assist him or her in accordance with regulation 138, it shall provide him or her with the relevant form(s) in order to submit an application for legal assistance paid by the Court.

2. When an application for legal assistance paid by the Court as described in sub-regulation 1 has been received, the Registry shall immediately acknowledge receipt. The Registrar shall then establish whether or not the applicant has provided the requisite supporting materials as described in regulation 142. He or she shall inform the applicant as soon as possible if, and to what extent, such materials are incomplete and shall direct him or her to provide the missing materials within a specified time period.

Regulation 142

Proof of indigence

1. A person applying for legal assistance paid by the Court must fill out the approved standard forms and provide comprehensive and reliable proof as to his or her indigence.

2. Where there are grounds to believe that an application for legal assistance paid by the Court and the supporting evidence are not accurate, the Registry may carry out an investigation into the matter. In doing so, it may request information and/or documents from any person or body that it deems appropriate.

3. The Registrar should make a decision as to whether legal assistance should be paid in full or in part by the Court within 30 calendar days of the submission by the person concerned of all the documentation required. Legal assistance shall be provisionally paid by the Court during that period.

4. The person shall communicate any change in his or her financial situation that might affect eligibility for legal assistance paid by the Court. The Registry may carry out random checks to verify whether any changes have occurred.

5. The Registry may investigate the means of the person if legal assistance has been provisionally granted. The person shall cooperate with the Defence Support Section in its investigation.

Regulation 143

Responsibility for costs and expenses

Where legal assistance paid by the Court has been granted, the costs and expenses of legal representation shall be borne by the Court.

Regulation 144

Fees paid to counsel and team

1. The fees paid to counsel and team shall consist of a scheme of payment based on a fixed fee system comprising of a maximum allotment of funds for each phase of the proceedings.

2. Counsel receiving remuneration for the same appointment from any source other than the Court shall inform the Registry, which shall take such remuneration into account when assessing the maximum allotment of funds for each phase of the proceedings as provided in sub-regulation 1.

Regulation 145

Action plan and modalities of payment

1. Before each phase of the proceedings, or every three months, counsel shall establish an action plan with the Registry. The action plan shall be approved by the Registrar who may consult the commissioner provided for in regulation 156.

2. At the end of every month, the Registry shall issue an order for payment in accordance with the action plan referred to in sub-regulation 1.

3. Every three months, or at the end of each phase of the proceedings, the Registry shall review the action plan and the remaining fees, if any, shall be paid to counsel.

4. When a mission has been carried out in accordance with the action plan, the relevant funds shall be paid upon presentation of the appropriate travel request, as approved by the Registry, together with any supporting documentation.

Regulation 146

Disputes relating to fees

In the event of disagreement as to the calculation and payment of fees, or the reimbursement of expenses, the Registrar shall make a decision as soon as possible. Counsel can appeal a decision before the Chamber within 15 calendar days of its notification.

Section 4: Training of Counsel

Regulation 147

Role of the Registrar

For the purpose of promoting the specialisation and training of lawyers in the law of the Statute and the Rules, and subject to availability of resources, the

Registrar shall, *inter alia*:

- (a) Ensure access to a database of the case law of the Court;
- (b) Provide comprehensive information on the Court;
- (c) Identify and publish the names of persons and organizations carrying out relevant training;
- (d) Provide training materials; and
- (e) Offer training with the aim of qualifying persons to train counsel.

Regulation 148

Training programmes

1. The Registry shall develop a standard for training programmes aimed at fostering knowledge of the law of the Statute and the Rules.
2. To this end, the Registry may make a survey of existing training programmes on a regular basis, and consult with any independent body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties.
3. The content of a standard training programme shall be developed in the standard operational procedures.
4. Where training programmes receive the Registrar's approval, the organisation offering training may expressly refer to it in its promotional material and in any certificates issued.
5. The Registry shall promote the standard programme amongst organizations offering training, and shall, as appropriate, and in consultation with any independent body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties, review the standard programme according to the practical experience of such training and the performance of counsel before the Court.

Regulation 149

Equal access and geographical distribution

1. The Registrar shall take all necessary steps to encourage an equal geographical and gender distribution of training opportunities. Training should especially be made available in countries where there is not a sufficient infrastructure of regular training, or where a situation has been brought before the Court.
2. In view of the limited financial capacities of lawyers in various countries, the Registrar shall make efforts to acquire financial resources for the support of such attendees. For this purpose, the Registrar may especially address the relevant States and their bar associations or ask the relevant organisation to provide the training free of charge.

Section 5: Office of Public Counsel for the defence

Regulation 150

Appointment of members of the Office

The members of the Office of Public Counsel for the Defence are appointed in accordance with the rules and regulations governing the recruitment of the staff of the Court. A representative of the legal profession shall sit on the selection panel.

Regulation 151

Independence of the members of the Office

1. The members of the Office of Public Counsel for the Defence shall not receive any instructions from the Registrar in relation to the conduct of the representation of a person entitled to legal assistance under the Statute and the Rules.
2. In discharging their responsibilities under sub-regulation 1, the members of the Office shall be bound by the Code of professional conduct of counsel adopted pursuant to rule 8.
3. The relevant provisions of section 3 of this chapter shall apply to the Office.

4. The Registry shall ensure that all work carried out by the members of the Office in the exercise of their functions remains confidential.

Regulation 152

Functions of the Office

1. The Office shall provide persons entitled to legal assistance under the Statute and the Rules, as well as defence teams, with assistance in their cases in accordance with regulation 77, sub-regulations 4 and 5, of the Regulations of the Court. To that end, the Office shall:

- (a) Produce factual background documents on the situations before the Court;
- (b) Produce research papers and provide advice on selected aspects of international criminal law;
- (c) Produce a bibliography on international criminal law;
- (d) Act as duty counsel whenever requested to do so by the Court.

2. Members of the Office may also assist defence teams located outside the host State in any form agreed with counsel.

3. Members of the Office may also appear before the Chamber in respect of specific issues.

Regulation 153

Report

The Office shall report on its activities to the Registrar on a regular basis and submit an annual report of its work to the Registrar having due regard to the obligation of confidentiality.

Section 6: Provisions relating to the disciplinary procedure for counsel

Regulation 154

Election of the permanent members of the Disciplinary Board

The election of the permanent members of the Disciplinary Board referred to in article 36, paragraph 2, of the Code of Professional Conduct for counsel shall be governed by the following provisions:

- (a) The Registrar shall set the schedule for the elections and inform counsel on the list of counsel by letter. Those who wish to stand for election shall announce their candidacy within thirty calendar days from the date of dispatch of the letter; if no candidate stands, all of them shall be eligible.
- (b) When the period referred to above expires, the Registrar shall disseminate the list of candidates to all counsel on the list of counsel by way of postal or courier services. They may cast their vote for four of the candidates within thirty calendar days from the date of postage.
- (c) Counsel shall ballot by sending a confidential postal ballot, by postal or courier services, to the Registry. All correspondence received shall be treated with due regard for confidentiality. Only ballots sent before the expiry of the above deadline shall be counted, the postmark or receipt of the courier operator being proof thereof.
- (d) Once the ballot has closed and the votes have been counted, the Registry shall draw up a return of the persons elected and submit the results to the Registrar.
- (e) The candidates having obtained the most votes shall be elected. If two or more candidates obtain the same number of votes, the candidate(s) with the highest level of professional seniority shall be elected. If the tie persists, lots shall be drawn between the remaining candidates.
- (f) The Registrar shall notify the successful candidates of their election to the Disciplinary Board, inform counsel on the list of counsel of the outcome of the election and have the results published in the Official Journal of the Court and on the Court website.
- (g) Within thirty calendar days from the publication of the outcome, candidates who have not been elected may file a complaint with the Registrar concerning any issue relating to the election procedure. After considering the complaint, the Registrar shall take a decision.
- (h) Within thirty calendar days from the notification of the decision taken by the Registrar, any candidate whose complaint has been rejected may ask the Presidency to review the matter. In this event, the Registrar shall transmit the entire file to the Presidency. The decision of the Presidency shall be final.

Regulation 155

Elections of representatives of counsel to the Disciplinary Appeals Board

The elections of representatives of counsel to the Disciplinary Appeals Board referred to in article 44, paragraph 2 (b), of the Code of Professional Conduct for counsel shall be governed by the same provisions as for the permanent members of the Disciplinary Board, *mutatis mutandis*.

Regulation 156

Appointment of the commissioner conducting the investigation

1. The Registrar, in consultation with any independent representative body of counsel or legal associations, shall prepare a list of five persons with experience in ethical matters who could act as commissioners conducting the investigation, according to article 34 of the Code of Professional Conduct for counsel. The Presidency shall select two of these persons to perform as commissioners.
2. The Registrar shall appoint a commissioner as soon as a complaint is filed against a counsel. Such appointment shall be done alternately, unless there is a justification presented by one commissioner to excuse his or her participation in a given investigation. Such justification shall be presented in writing.
3. The mandate of the commissioners shall be for three years, and will not be renewable. Nevertheless, a commissioner who is involved in an investigation when his or her mandate expires shall continue in charge of such investigation until its conclusion.

Appendix Four

Agreement on Privileges and Immunities

Article 18

Counsel and persons assisting defense counsel

1. Counsel shall enjoy the following privileges, immunities and facilities to the extent necessary for the independent performance of his or her functions, including the time spent on journeys, in connection with the performance of his or her functions and subject to production of the certificate referred to in paragraph 2 of this article:

- (a) Immunity from personal arrest or detention and from seizure of his or her personal baggage;
- (b) Immunity from legal process of every kind in respect of words spoken or written and all acts performed by him or her in official capacity, which immunity shall continue to be accorded even after he or she has ceased to exercise his or her functions;
- (c) Inviolability of papers and documents in whatever form and materials relating to the exercise of his or her functions;
- (d) For the purposes of communications in pursuance of his or her functions as counsel, the right to receive and send papers and documents in whatever form;
- (e) Exemption from immigration restrictions or alien registration;
- (f) Exemption from inspection of personal baggage, unless there are serious grounds for believing that the baggage contains articles the import or export of which is prohibited by law or controlled by the quarantine regulations of the State Party concerned; an inspection in such a case shall be conducted in the presence of the counsel concerned;
- (g) The same privileges in respect of currency and exchange facilities as are accorded to representatives of foreign Governments on temporary official missions;
- (h) The same repatriation facilities in time of international crisis as are accorded to diplomatic agents under the Vienna Convention.

2. Upon appointment of counsel in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court, counsel shall be provided with a certificate under the signature of the Registrar for the period required for the exercise of his or her functions. Such certificate shall be withdrawn if the power or mandate is terminated before the expiry of the certificate.

3. Where the incidence of any form of taxation depends upon residence, periods during which counsel is present in a State Party for the discharge of his or her functions shall not be considered as periods of residence.

4. The provisions of this article shall apply mutatis mutandis to persons assisting defense counsel in accordance with rule 22 of the Rules of Procedure and Evidence.