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# **Ensuring Ethical Representation**

## **Comments on the draft Code of Professional Conduct for counsel before the International Criminal Court**

**Briefing Paper**

November 2004

## **About Us**

For the past quarter century, Human Rights First (formerly the Lawyers Committee for Human Rights) has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and make sure human rights laws and principles are enforced in the United States and abroad.

## **Acknowledgements**

This report was researched and written by Ken Hurwitz, Deirdre O'Brien and Cushla Thompson on behalf of the International Justice Program at Human Rights First. John Stompor also contributed to the report. Editorial review was undertaken by Eric Biel with the assistance of Ana Ayala.

Human Rights First also would like to thank the following donors for their financial support: Anonymous (1), FJC – a Donor Advised Fund, the Ford Foundation, the Richard and Rhoda Goldman Fund, the Horace W. Goldsmith Foundation, the William and Flora Hewlett Foundation, the Kaplen Foundation, the Lawson-Valentine Foundation, the John D. and Catherine T. MacArthur Foundation, and the Scherman Foundation.

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Printed in the United States.

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## Executive Summary

In July 2002, the International Criminal Court (ICC) began its official life as a permanent court for trial of those accused of the most egregious international crimes. Building on the historical experience of the Nuremberg and Tokyo trials after World War II, and later initiatives such as in the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), the ICC embodies the hope of the world community that crimes of genocide, crimes against humanity and war crimes shall never again go unpunished. The ICC is intended to be an anchor for a growing structure of international justice built on national and international institutions that will work toward ensuring *accountability* for those who commit these monstrous crimes, and, eventually, *deterrence* of those who may in the future consider perpetrating them. But the ICC has a further mandate.

One of the most significant innovations at the ICC will be the role of victims. Too often in past international criminal prosecutions, the plight and rights of victims have been overshadowed; and those whose sufferings underlie the proceedings have had a limited voice and opportunity for remedy. In the ICC, however, victims will be able to participate directly in the proceedings through their own legal representatives – a first for international criminal tribunals. Their stories will be told on their own behalf, not merely as evidence for the prosecution’s case. Moreover, under the ICC’s Rome Statute, victims are granted a clear entitlement to “reparations,” which include “restitution, compensation and rehabilitation.”<sup>1</sup> Though the nature of the crimes prosecuted in the ICC is such that no remedy can ever adequately restore to victims all they have lost, reparations in the ICC represent an important right to *equity*, understood as “[j]ustice administered according to fairness...based on what [is] fair in a particular situation.”<sup>2</sup>

Ambitious as they are, the challenges of establishing *accountability* and *deterrence* for the benefit of the world community and the approximate justice of *equity* for victims do not exhaust the role cut out for the Court.

It will not be enough if those charged with genocide, crimes against humanity and war crimes are brought to trial, unless they are also treated fairly. The world’s history is replete with cycles of retribution, “victor’s justice,” and violence begetting counter-violence. It is at the heart of the Court’s mission to break these cycles by providing justice under law. The ICC will speak for the world in pronouncing the world’s condemnation of the worst crimes and those responsible for them. To merit the appropriate gravity and respect, however, that condemnation must be spoken with the utmost fairness: justice must be done fairly and must clearly be seen to be done fairly. If

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<sup>1</sup> Rome Statute of the International Criminal Court, art. 75(1).

<sup>2</sup> *Black’s Law Dictionary* (6<sup>th</sup> Ed.), West Publishing (1991), p. 374 .

the work of the ICC will stand for anything, it must be that no objective, not even the most apparently moral or sublime, can justify the resort to unjust means. And if the defendant is condemned without *fairness*, then in a real sense justice will be denied to the victim.

## The Importance of the Code of Conduct

In sum, then, the mission of the ICC is three-fold: (1) to vindicate and uphold the moral structure of society through *accountability* and *deterrence*; (2) to provide a rough form of *equity* to victims through reparations and other forms of relief, including juridical acknowledgement of the injustice done them; and (3) in so doing, to ensure rigorous justice including strict *fairness* for the accused. The Code of Conduct is particularly important to the second and third aspects of this mission.

Given the nature of the crimes of which the defense counsel's client is accused, and the disproportion in human and material resources available to such counsel as compared with the powers of a well-funded and amply staffed Office of the Prosecutor, there is a danger that the scales of justice could be weighted against the defense. There have been reports of such imbalances at other international tribunals.

In a different way, the victim too can be shortchanged by the power of the Prosecutor, not because the victim's interests are directly adverse to the Prosecutor, but because their relevance to the Prosecutor extends only so far as they advance the aim of obtaining a conviction. To be sure, the victim has a valid interest in seeing the defendant brought to justice, but the victim also needs to have his story told, and have his injuries detailed, both for their own sakes and in order for proper relief to be determined.

In these circumstances, the Code of Conduct and the professional self-regulatory system it articulates play a key role. A proper legal ethics code must be built upon the legal principle of "equality of arms": that is to say, private counsel – both defense counsel and also victims' representatives – must be incorporated as full participants in the Court process, with status equivalent to the Prosecutor. This means that private counsel must be granted an institutional voice, and an institutional autonomy analogous to that of the Prosecutor, though, always, under the ultimate supervision of the judiciary. Overall, private counsel must function under the same rules and constraints as the Prosecutor. Just as the judiciary can never allow itself to be subservient to the Prosecutor, private counsel cannot be cast as a mere department of the Court or its management.

## Preparation of the draft Code of Professional Conduct

The Rules of Procedure and Evidence of the International Criminal Court assign to the Registrar the initial responsibility to make a proposal for a draft code of professional conduct for counsel.<sup>3</sup> In undertaking this duty, the Registrar is required to "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."<sup>4</sup>

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<sup>3</sup> Rules of Procedure and Evidence of the International Criminal Court, rules 8 and 20.

<sup>4</sup> Rules of Procedure and Evidence of the International Criminal Court, rule 20.

The Rules assign to the Presidency the responsibility for drawing up a draft code itself, on the basis of the Registrar's proposal and after consultation with the Prosecutor.<sup>5</sup> The Presidency shall then transmit the draft code to the Assembly for the purpose of adoption.<sup>6</sup>

In 2003, the Registrar started work on a proposal for a draft code and began consultations with independent organizations and individuals, which have included a wide range of bar associations, associations of counsel, nongovernmental organizations and individual experts.<sup>7</sup> The Registrar also submitted a draft proposal to the judges and subsequently incorporated their suggestions.<sup>8</sup>

In August 2004, the Secretariat of the Assembly of States Parties published a proposal for a draft Code of Professional Conduct for counsel, which it had received from the Presidency and which the Presidency indicated had been prepared by the Registry in consultation with the Prosecutor.<sup>9</sup> The proposal was submitted for consideration by the Assembly.<sup>10</sup>

At its third session in September 2004, the Assembly took note of the proposal and decided that the provisions of the draft Code shall apply provisionally until the end of its fourth session, which is scheduled to begin in November 2005.<sup>11</sup> It also requested that the Bureau prepare an amended draft Code for adoption by the Assembly at its fourth session and invited States Parties to submit their comments on the current draft Code to the Bureau by December 31, 2004.<sup>12</sup>

## Comments by Human Rights First on the draft Code of Professional Conduct

Much ink has now been spilled on the topic of the Code of Conduct, and much wonderful progress has been made in fashioning together a Code to truly reflect international standards of ethics. The Registrar and his collaborators are owed much appreciation for their tireless efforts over the past several years to produce a Code truly worthy of the Court and its historic mission. The draft Code goes very far in crystallizing the best of the experience of several generations and of the full range of the world's legal systems into one document. A small number of important issues remain to be addressed, however. In some cases these relate to what appear to be ambiguities or unintended contradictions; others concern questions that should be addressed. Consequently, in the continuing spirit of collaboration that has marked this process, we make the following comments:

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<sup>5</sup> Ibid., rule 8.

<sup>6</sup> Ibid.

<sup>7</sup> See document ICC-ASP/3/7 (Jul. 9, 2004).

<sup>8</sup> Ibid.

<sup>9</sup> See document ICC-ASP/3/11 (Aug. 11, 2004); document ICC-ASP/3/11/Rev.1 (Aug. 27, 2004).

<sup>10</sup> Ibid.

<sup>11</sup> Resolution ICC-ASP/3/Res.3 (Sep. 10, 2004), paras. 11 and 37.

<sup>12</sup> Ibid., para. 11.

## 1. Definition of Counsel

*The Code should cover all lawyers, including the Prosecutor and his staff, who practice at the Court.*

*The Code must also be clear on when local counsel in an area of potential Court jurisdiction may be considered covered by the Code:*

*The Code should apply to local counsel once a lawyer actually understands that the matter he or she is advising on could reasonably be expected to come before the ICC.*

*When approaching an individual represented by a local attorney on a matter counsel knows to be potentially within ICC jurisdiction, counsel should consider such individual to be represented and make contact only through that individual's locally retained attorney, even if the individual and his locally retained attorney are unaware of the potential for ICC jurisdiction over the matter.*

It is axiomatic that a Code of Conduct binding counsel must explain clearly who is bound, and when. In this regard, two areas are of particular import: application of the Code to Prosecutors; and application of the Code to local lawyers in an area of potential ICC jurisdiction.

### **Applicability of the Code to the Prosecutor and His Staff**

Lawyers working for the Office of the Prosecutor and lawyers working for defendants or victims are in most respects similarly situated as counsel before the Court. As a general matter, the same ethical precepts should be binding upon all of these individuals. While there are some areas where standards for prosecutors may properly differ from those applicable to defense and victims' counsel, we believe those areas to be few. (Provisions governing conflicts of interest are likely one such area of exception.) To the extent that the process of Code development may, as a practical matter, have advanced too far to bring the Prosecutor and his staff under its application, we would urge that an ultimate code for the Office of the Prosecutor be drafted to track as closely as possible the corresponding provisions of the Code of Professional Conduct for counsel.

### **Applicability of the Code to Local Counsel in an Area of Potential ICC Jurisdiction**

The complementary nature of the ICC's jurisdiction means that there may be individuals involved as suspects or accused, as victims, or as witnesses in incidents that they do not perceive to fall under the Court's jurisdiction; such individuals may well in the first instance seek representation with local attorneys who themselves may be unaware that they are dealing with a matter that could come before the ICC. At a certain point, these local attorneys will certainly need to be held to comply with the Code's obligations, but it would be unfair to hold such practitioners responsible for compliance with obligations of which they are actually unaware. The Code should make clear that it applies to a counsel at such point as that counsel actually becomes aware that he is dealing with a matter potentially within the jurisdiction of the ICC.

A similar but distinct issue arises with regard to the customary rule that counsel shall only approach an individual represented by other counsel through that person's own lawyer. This rule – intended to protect legally unsophisticated laypersons from being taken advantage of by lawyers with adverse interests – should be considered to apply even when neither the individual being approached, nor his own local counsel, are yet aware that the representation relates to a

matter of potential ICC jurisdiction, so long as the lawyer making the approach has such awareness.

## 2. Right to Self-Representation

*Defendants must be assured the right to represent themselves.*

The Code is unclear whether it contemplates the right of a defendant to conduct his own defense. The Regulations of the Court add to this lack of clarity by suggesting the possibility that a counsel may take on a representation at the request of the Court, even when the client himself is opposed. We believe that the right of a competent defendant to represent himself if he so chooses is fundamental, and that this right must be clearly recognized in the Code. At the same time, this right of self-representation is not absolute, but is subject to an expectation of reasonable comportment by the defendant. If the competent defendant intentionally disrupts or abuses the process, his right to participate directly may be curtailed and, in some circumstances, he may be barred from the proceedings. In the interest of justice, standby counsel may be appointed for the benefit of the Court, to raise arguments that a reasonable defendant would want raised, even when the standby counsel's participation is opposed by the defendant. But it must be clear that the standby counsel does not represent the defendant, and his or her duty of loyalty is, ultimately, to the Court. Use of standby counsel by itself may not justify silencing a competent and reasonably cooperative defendant who desires to conduct his own defense.

By contrast, we do not believe victims have such an absolute right to *pro se* representation; and we believe the Code and the other instruments governing activities at the Court properly permit assigned counsel for victims.

## 3. Special Circumstances of Victims' Counsel

*Contingency fees should be permitted for victims' representation in certain exceptional circumstances.*

*The Code should not unduly restrict outreach to victim populations by human rights groups, humanitarian groups, and counsel who may wish to represent victims.*

### Contingency Fees for Victims' Counsel

While generally we believe standards applicable to all attorneys practicing before the Court or in connection with ICC matters should be the same, there are a few areas where we think the special circumstances of victims – and their counsel – call for differentiation. Two areas of particular concern relate to contingency fees and to client solicitation. The propriety of contingency fees – payment of part or all of a fee based on success in a litigation – is highly controversial in many systems; and, though contingency fees are generally accepted in civil tort litigation in the United States, we are aware of no system that authorizes contingency fees in criminal matters. The situation of victims' counsel, however, needs special attention because of the basic fact that financing for representation of victims appears to be scarce. In many ways, we believe the situation of victims in an ICC case is properly analogized to that of an injured plaintiff class in a U.S. class action suit. Such actions often involve negligent or reckless malfeasance by defective consumer products manufacturers, industrial polluters, and such, but can also be used to seek remedies for human rights violations. Class actions are generally undertaken on a contingency fee basis. In defining victim classes, determining criteria for inclusion or exclusion from the class, developing practical mechanisms of outreach to potential class members, and fashioning collective remedies, courts and counsel for victims will likely be engaged in tasks not so different

from that of courts and plaintiffs’ counsel in U.S. domestic civil class litigation. While we recognize this subject requires more study, we urge those responsible for the Code to leave open the possibility of contingent fees for victims’ counsel, under properly controlled circumstances.

### **Advertising and Solicitation**

For similar reasons, we believe an absolute ban on client solicitation, such as that contained in article 30(2) of the Code, is not in the interests of victim populations. Victims will, it is safe to predict, generally be at a strong disadvantage with respect to access to information about the Court and financial resources. Exploitation of vulnerable groups should, to be sure, be prohibited by careful regulation, but *bona fide* human rights organizations, victims support groups and other victim advocates – including lawyers, whether working *pro bono* or not – should not be hampered from conducting outreach activities by an overly restrictive Code.

## **4. Disclosure of Confidential Client Information**

*Counsel should be required – or at least permitted – to disclose confidential client information if necessary to avoid serious bodily harm or death.*

The lawyer’s duty to maintain the secrecy of privileged information and other client confidences is one of the benchmarks of every legal ethics system. Nonetheless, many systems – mostly in common law countries – have authorized an exception permitting the lawyer to divulge a confidence where necessary to avoid serious harm. Some jurisdictions have gone so far as to *require* disclosure where doing so is necessary to avoid physical injury or death. While such mandatory disclosure is still controversial in normal legal practice, it is our view that the experience in other international tribunals strongly suggests that the kinds of crimes that will come before the ICC raise a heightened concern that some defendants or others may take measures to intimidate witnesses or otherwise prevent witnesses from providing damaging testimony. Accordingly, we would propose requiring disclosure in the narrow circumstances where counsel has substantial grounds to believe that his or her client intends to commit an act, unlawful under local or international law, that will result in imminent death or substantial bodily harm to a third person. It is understood that such disclosure can and should be limited to the minimum necessary to avoid the feared injury, and should be made in such a way as to ensure that the tribunal does not learn of the client’s relationship to the disclosure.

## **5. Candor to the Court**

*The Code should clearly provide that a counsel may not knowingly provide false evidence to the Court.*

The draft Code now provides that counsel shall be “personally responsible” for the presentation of the client’s case, and “must exercise personal judgment on the substance and purposes of statements made and questions asked.”<sup>13</sup> Unfortunately these requirements provide no standard by which that personal responsibility is to be appraised, or by which that personal judgment is to be guided. The problem is extremely resistant to resolution because of the conflicting duties facing the lawyer with regard to the possibility of false testimony or evidence being provided by his client. Ethicists wish to preserve the lawyer’s duties of loyalty and confidentiality to his client while also maintaining the principle of candor and honesty to the tribunal. These values may not

<sup>13</sup> Proposal for a draft Code of Professional Conduct for counsel before the International Criminal Court, ICC-ASP/3/11/Rev.1 (Aug. 27, 2004) (the Code), art. 23.

harmonize. In our view, the least imperfect solution is that adopted by the codes of conduct for the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which prohibit counsel from “knowingly...offer[ing] evidence which counsel knows to be incorrect.”<sup>14</sup> It should be noted that this standard places no affirmative duty upon a counsel to investigate the truthfulness of a client’s testimony.

## 6. Self-Regulation of Counsel under Ultimate Supervision of the Court

*The Office of the Registrar should not be involved in an investigative or adjudicative role in the disciplinary procedures for counsel.*

*The Disciplinary Board, the counsel members of the Disciplinary Appeals Board, and the Investigating Commissioner should be selected by the Presidency from nominees proposed by respected international organizations of counsel.*

In general, we share the view of several other commentators that the legal profession should be largely self-regulating, under the ultimate supervision of the judiciary. We do not believe that the Registry should play a substantive role in managing the disciplinary organs because the Registry is by definition not an adjudicative body, and moreover could, in some cases, itself become an adverse party to an individual counsel as a result of disputes arising from the Registry’s role in financing and establishing working conditions for counsel. We agree with the principle embodied in articles 36 and 44 of the Code that the disciplinary bodies (Disciplinary Board and Disciplinary Appeals Board) should, as a general matter, be “elected...by representatives of counsel.” For the time being, however, there is no representative body of counsel that has the legitimate authority to elect such organs. At this time, then, the best solution is for members of the disciplinary organs to be elected by the Presidency, from nominations submitted on an open basis by any self-designated responsible organizations of counsel.

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<sup>14</sup> Code of Professional Conduct for Counsel Appearing before the International Tribunal (ICTY, 2002), art. 23(C). Article 13(2)(b) of the ICTR Code of Professional Conduct for Defence Counsel (1998) is almost identical.



# Comments on the draft Code of Professional Conduct for counsel before the International Criminal Court

## 1. Definition of Counsel

*The Code should cover all lawyers, including the Prosecutor and his staff, who practice at the Court.*

*The Code must also be clear on when local counsel in an area of potential Court jurisdiction may be considered covered by the Code:*

*The Code should apply to local counsel once a lawyer actually understands that the matters he or she is advising on could reasonably be expected to come before the ICC.*

*When approaching an individual represented by a local attorney on a matter counsel knows to be potentially within ICC jurisdiction, counsel should consider such individual to be represented and make contact only through that individual's locally retained attorney, even if the individual and his locally retained attorney are unaware of the potential for ICC jurisdiction over the matter.*

The draft Code of Professional Conduct for counsel before the ICC<sup>15</sup> does not define the term “counsel.” The only guidance regarding the scope of this term is found in article 1(1), which states: “This Code shall apply to counsel practicing at the International Criminal Court.”

In the absence of a definition of counsel in the Code, at least three issues arise:

- Does – or should – the Code affect prosecution counsel?
- When does a lawyer become subject to the Code?
- When is a person considered represented for purposes of the Code?

### **Applicability of the Code to the Prosecutor and His Staff**

As the Code currently stands, the term “counsel” implicitly excludes counsel for the prosecution. In the interests of a fair trial process, however, the prosecution should be bound by the same

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<sup>15</sup> Proposal for a draft Code of Professional Conduct for counsel before the International Criminal Court, ICC-ASP/3/11/Rev.1 (Aug. 27, 2004).

principles of appropriate conduct as defense counsel and victims' counsel. Key issues that should be considered in common include the use and treatment of evidence; discriminatory conduct; standards of confidentiality; and relations with unrepresented persons, the judiciary, other counsel, defendants, and witnesses, including victims and members of other vulnerable populations.

Questioning of witnesses is a particularly sensitive area. For example, it is important to regulate the questioning of witnesses so as to shield them from unnecessary harassment or intimidation. It is equally important, however, that such regulation be evenhanded, as applied to cross-examination of prosecution witnesses and those testifying for the defense, so that their testimony can be judged according to common standards of robustness and rigor. The Code currently applicable to defense and victims' counsel prohibits counsel from "subjecting [witnesses or victims] to *pressure in any manner or form within or outside the courtroom.*"<sup>16</sup> The code of conduct contained within the Draft Regulations of the Office of the Prosecutor (discussed below), by contrast, appears to specify a much less stringent standard: "respect for the rights of victims and witnesses, and respect for their interests and personal circumstances; dignified and courteous conduct towards victims and witnesses, professional conduct towards their legal representatives, and sensitive conduct towards victims, particularly victims of sexual and gender violence and violence against children."<sup>17</sup>

Thus a defense lawyer seeking to persuade a reluctant witness to testify by appealing to a sense of loyalty or morality or patriotism might fall afoul of the prohibition of "pressure in any manner or form," while a prosecutor engaged in a similar effort would not. More generally, vigorous cross-examination by a competent lawyer is likely to cause *any* witness *some* measure of *pressure*, and so would, apparently, be prohibited if conducted by defense counsel, but permitted if conducted by a prosecutor.<sup>18</sup>

It is true that the rules that guide some areas of conduct, such as those regulating conflicts of interest, may well need to be different as between prosecutors and staff, on the one hand, and defense or victims' counsel, on the other. The presumption should be, however, that unless differences in the counsels' duties and function give rise to some compelling reason for having two standards, prosecution and defense/victims' counsel should be bound by the same rules.

There has already been significant discussion on this point, and we recognize that the Code is not at this stage likely to be redrafted to include prosecution counsel. There is a code of conduct for prosecution contained in the Draft Regulations of the Office of the Prosecutor, but it is extremely limited (taking up 6 pages in total), and does not represent anything close to an analogue of the Code. Even if a code for prosecution counsel is to remain independent of the Code for defense and victims' counsel, the latter Code should serve as a touchstone for future elaboration of the code of conduct section now within the Draft Regulations of the Office of the Prosecutor and/or

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<sup>16</sup> Art. 29 (emphasis added).

<sup>17</sup> Draft Regulations of the Office of the Prosecutor (June 2003), regulation 5(f).

<sup>18</sup> It should be borne in mind that while vulnerable witnesses, particularly victims of sexual violence or violence against children, should be protected from re-traumatization, witnesses for the prosecution are by no means incapable of falsifying testimony. This is in fact documented as having occurred at the ICTY: "[W]itness L...admitted...that he had lied about the death of his father while under oath. Witness L asserted that he had done this at the behest of the Bosnian government authorities, who had allegedly 'trained' him to give evidence against the accused, Dusko Tadic....Consequently, the Prosecution advised the Trial Chamber that it could no longer support witness L as a witness of truth and invited the Trial Chamber to disregard his evidence entirely." Decision on Prosecution Motion to Withdraw Protective Measures for Witness L (Dec. 5, 1996), para. 4.

for a self-standing code of professional conduct for the Office of the Prosecutor.<sup>19</sup> Commonly applicable standards would, accordingly, need to be drafted *in identical language* to avoid unforeseen discrepancies. In the longer term, prosecution and defense and victims' counsel would ideally be regulated by a common standard of professional conduct within a single document, with any exceptions to the general norm being expressly indicated, as appropriate.

### **Applicability of the Code to Local Counsel in an Area of Potential ICC Jurisdiction**

A clear definition of how and when a lawyer becomes a counsel is necessary in order for lawyers and those working with them to know if and at what point they are bound by the Code. The key question here is one of chronology: at what stage in a lawyer's relationship with the ICC or ICC related matters does he or she become a "counsel," for purposes of the Code and so subject to its requirements? Does a lawyer become a "counsel" when he or she applies to be on the list of counsel for the Court? Once accepted onto that list?<sup>20</sup> Or when he or she agrees to represent a client suspected or accused of, or a client believed to have been victim of, a crime that could come before the Court? What if an individual seeks advice to determine if he will, or to ensure that he will not, be involved in a Court proceeding?

This issue is particularly pertinent given the wide variety of lawyers who are likely to have involvement in ICC matters, whether in representation before the Court, giving advice, or as the first point of contact for potential defendants.

*A person from the Democratic Republic of Congo (DRC) seeks legal advice from a local lawyer because investigators have been questioning him about recent killings in his village. This local lawyer is not on the list of counsel for the ICC and has little knowledge of the ICC. This lawyer is as well-qualified in international criminal law as any other in the region, however, and so agrees to provide advice.*

It is far from inconceivable that a local lawyer with no expertise in international criminal law would be approached by someone involved in crimes that could come before the ICC (whether as victim, witness, or suspected perpetrator). At a certain threshold of involvement in ICC matters this lawyer should become subject to the Code's ethical standards in the same way as any other counsel before the ICC. That threshold should not be set too low, however, since the local lawyer may have no reason, at least in the first instance, to believe that the case in question will be resolved in any forum other than a domestic court; and he or she may in fact have little or no prior knowledge of the existence of the Code or, indeed, of the ICC.

To resolve such situations, we suggest that the Code should apply once a lawyer actually understands that the matters he or she is advising a client on could reasonably be expected to come within the jurisdiction of the ICC, and at the very latest when an individual lawyer applies to be on the list of counsel before the ICC. The threshold of actual knowledge is important here, since it makes allowance for a hugely varying degree of familiarity with the ICC amongst lawyers around the world, and recognizes that many lawyers who become involved in situations that may eventually become ICC matters may well be working, by necessity, outside their area of

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<sup>19</sup> In January 2004 the Secretariats of the International Association of Prosecutors and the Coalition for the International Criminal Court released a discussion draft version of a "Code of Professional Conduct for Prosecutors of the International Criminal Court," some portions of which have been incorporated into the draft code within the Draft Regulations of the Office of the Prosecutor.

<sup>20</sup> Regulations of the Court, ICC-BD/01-01-04 (May 2004), regulation 70(1). On receipt of application by a person seeking to be included in the list of counsel, the Registrar shall establish whether the person has provided the information required under regulation 69.

expertise. It follows from this that the promotion and accessibility of the Code is of the utmost importance, so that as lawyers become acquainted with the ICC, they also become quickly acquainted with the Code of ethics to which they, as counsel, will be bound.

### **Determining when an Individual should be Considered “Represented”**

Related to, but distinct from, the issue of defining “counsel” is the question of determining when an individual is deemed “represented.” This question arises with respect to a general ethical principle, embodied in article 27 of the Code, that “[c]ounsel must not address directly the client of another counsel except through or with the permission of that counsel.” This principle has developed in most legal ethics systems to protect clients from being taken advantage of by lawyers with adverse interests to their own. When such a client is represented by counsel, other lawyers may only contact the client through his or her counsel.

Application of this principle to individuals who do not have legal representation is somewhat more complicated. The Code deals with this by requiring counsel to inform such a person of his or her right to legal representation; explain generally the interest that counsel represents and the purpose of the communication; and, if during the course of the communication, the counsel becomes aware of a potential conflict of interest, the counsel must terminate the contact.<sup>21</sup>

Given the differing obligations that arise when communicating with represented and unrepresented persons, it is necessary to establish a threshold for what constitutes “representation” in this context. This threshold need not match the threshold for being considered “counsel” and so bound by the Code, but must balance the appropriate protection of individuals with the reasonable expectations of lawyers. We therefore suggest that when approaching an individual represented by a local attorney on a matter counsel knows to be potentially within ICC jurisdiction, counsel shall consider such individual to be represented and make contact only through that individual’s locally retained attorney, even if the individual and his locally retained attorney are unaware of the potential for ICC jurisdiction over the matter.

In the example given above, this means that although the Congolese lawyer may not have any reason to think he is dealing with an actual or potential ICC matter, and so would not himself be bound by the Code, his client *would* have to be considered represented by any *other* counsel wanting to communicate with the client, provided the “approaching” counsel was aware that the matter was an actual or potential ICC matter. In the interests of protecting that client, all communications would have to be made through the lawyer; it would not be acceptable to bypass that lawyer simply because the client and the client’s lawyer are not yet aware they are dealing with a matter potentially within ICC jurisdiction.

## **2. Right to Self-Representation**

*Defendants must be assured the right to represent themselves.*

### **Defendants’ Right to Self-Representation**

Since at least the time of Socrates, some criminal defendants have found good reason to choose to conduct their own legal defense, and, at least in the common law system, that right to represent oneself has been understood as fundamental to justice for centuries. As the U.S. Supreme Court has observed:

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<sup>21</sup> Art. 25(2)

In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying "political" offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights.<sup>22</sup>

Today, the right to *pro se* or self-representation is a customary norm of international law, established in international criminal tribunals as well as several international treaties.<sup>23</sup> In the ICC the same right is established by the Rome Statute in articles 67(1)(d) ("to conduct the defence in person or through legal assistance of the accused's choosing") and 67(1)(e) ("[t]o examine, or have examined, the witnesses against him or her").<sup>24</sup>

Article 10 of the Code now permits a defense counsel to be assigned to a defendant by order of the Court, even against the wishes of the defendant.<sup>25</sup> While the Code permits the counsel to refuse such an assignment "without stating reasons" (article 12(1)), it gives the defendant himself no such control. In light of the clear language in article 67 of the Rome Statute, it may be that the phrasing in the Code is simply an oversight that can be readily corrected. However, it is also true that the Regulations of the Court appear to contemplate the power of the Court to deny the defendant's right to represent him or herself.<sup>26</sup> With these ambiguities, there is risk that counsel may, perhaps unknowingly, find himself in a situation of untenable ethical conflict: he would, at the same time, believe himself authorized by article 10 of the Code to comply with the Court's appointment to represent the defendant and yet he would also be bound by article 6 of the Code to act on behalf of his client "fearlessly and absolutely honourably, independently and freely." The counsel's duty would not be clarified by the guidance under article 13(2)(a) that he should "[a]bide by the client's decisions concerning the objectives of representation if they are not inconsistent with counsel's duties pursuant to the...Code," since the Code will be speaking with two voices on the subject. The proper resolution of this difficulty is to make it clear that no defendant may be required to accept representation involuntarily, provided he makes this choice "knowingly and intelligently."<sup>27</sup>

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<sup>22</sup> *Faretta v. California*, 422 U.S. 806, 821 (1975), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=422&page=806>.

<sup>23</sup> Article 21(4)(d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia and article 20(4)(d) of the Statute of the International Criminal Tribunal for Rwanda both provide the defendant the right "to defend himself [or herself] in person or through legal assistance of his [or her] own choosing." Art. 14(1)(d) of the International Covenant on Civil and Political Rights (ICCPR) provides the defendant the same right, as do many other basic human rights instruments.

<sup>24</sup> See also rule 21(4) of the Rules of Procedure and Evidence ("A person choosing to represent himself or herself shall so notify the Registrar in writing at the first opportunity.").

<sup>25</sup> Article 10 provides: "The [representation] agreement is established when counsel accepts a request from a person or group seeking representation *or from the Chamber*." (emphasis added.)

<sup>26</sup> Regulation 76 ("Appointment of defence counsel by a Chamber") of the Regulations of the Court, ICC-BD/01-01-04 (May 2004), provides: "A Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require."

<sup>27</sup> *Faretta v. California*, 422 U.S. 806, 835. "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Ibid.* (internal quotations omitted).

### **Ethical Standards for *Pro Se* Defendants?**

Some defendants who choose to self-represent may be lawyers themselves. The ICTY has been grappling with just such a case.

*Slobodan Milosevic, trained lawyer and former President of Yugoslavia, chose to defend himself in the recent ICTY proceedings. Ill health has put into question his fitness to conduct his own defense. Tribunal judges announced on September 2, 2004 that counsel would be imposed on Milosevic and he would be allowed only a secondary role.<sup>28</sup> Court-appointed counsel Steven Kay and his assistant Gillian Higgins formally requested to be withdrawn from the case on the grounds that they could not properly and diligently defend an unwilling client who was, in any case, fit enough to conduct the majority of his own defense. The Appeals Chamber found, in turn, that Milosevic should continue leading his defense as long as he is physically capable of doing so, with assigned counsel serving as a standby in case his health problems should return with sufficient gravity. The Appeals Chamber described the right to represent oneself as “an indispensable cornerstone of justice...on a structural par with defendants’ right to remain silent, to confront the witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves.”<sup>29</sup>*

At first glance, it may seem reasonable to consider such an individual as a “counsel” bound by the Code. This is probably not a useful approach to such individuals, however. The heart of a system of legal ethics is the professional duty of the individual practitioner to others. It establishes rules to guide the counsel’s dealings – first and foremost, with his client – but also with the Prosecutor, witnesses and potential witnesses, the Court, and, in some cases, third parties with no involvement in the proceedings. A defendant, however, is not bound by ethics, but by law. While counsel are, in most cases (it is hoped), adequately controlled by a system of peer discipline, the defendant has no peers in the ICC, and his situation is unique to him.

That said, however, a *pro se* defendant cannot be permitted simply to disrupt proceedings, or bring them to a halt, abuse other participants or bring the Court into disrepute.

*Mr. P, appearing before the ICC on charges of genocide relating to sex crimes, chooses to represent himself. During the trial Mr. P harasses and attempts to intimidate the witnesses appearing for the prosecution, referring to them in racially and sexually derogatory ways. The witnesses – many of whom are victims – are highly traumatized by the experience, and several later witnesses refuse to appear in court.*

It is not in the interests of justice and a fair trial that self-representing persons be able to disrupt the Court, or intimidate or insult witnesses or members of the Court in ways that counsel may not. With respect to counsel, the guidance bearing directly on the dignity and fairness of the proceedings is largely contained in articles 22 through 29,<sup>30</sup> covering relations with various participants in the proceedings and others. Though a self-representing defendant is not a counsel,

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<sup>28</sup> See Mike Farquhar, “Milosevic Counsel Explains Appointment Appeal”, Institute for War and Peace Reporting, October 1, 2004.

<sup>29</sup> See Judith Arnatta, “Milosevic to Resume Lead in His Defence Case”, Coalition for International Justice, November 1, 2004.

<sup>30</sup> These articles cover communications with the chambers and judges (art. 22); candour towards the Court (art. 23); handling of evidence (art. 24); relations with unrepresented persons (art. 25); relations with other counsel (art. 26); relations with persons already represented by counsel (art. 27); relations with counsel of co-accused (art. 28); and relations with witnesses and victims (art. 29).

these provisions articulate standards with which such a defendant should be expected to comply. It might be appropriate, therefore, for the Court to consider breaking out these particular provisions to establish a kind of mini-code of conduct for self-representing defendants, standards outside the regime of ethical regulation of counsel, but providing fair notice to *pro se* defendants of the rules governing their behavior. As is also true in the case of counsel, willful violation of these provisions will almost certainly constitute “Offences against the administration of Justice,” as set forth in article 70 of the Rome Statute, or “Misconduct before the Court,” as set forth in article 71, and, as such, they can and should be directly sanctioned by the Court.

### **Standby Counsel**

There is room in the array of possible defense arrangements for standby counsel. In line with our reasoning above, a self-representing person should not have defense counsel forced upon him against his will; standby counsel can nevertheless supplement a *pro se* representation. The defendant himself may choose to have legal counsel advising him in a standby capacity, although such counsel never represents him in Court. Similarly, the Court may choose to appoint standby counsel for the accused in the interests of justice.

A distinction should be drawn between this last circumstance and the imposition of counsel on the accused, since standby counsel in this sense serve the *Court’s* interest, or the *interests of justice*, in a fair and smooth-running trial, rather than serving as the direct representative of the accused. There is, of course, likely to be some (though not necessarily total) congruence between these two interests, since one aspect of the Court’s interest is to ensure adequate representation of the accused, but the distinction should nevertheless be maintained to preserve the accused’s right to representation of his own choosing. Should standby counsel be assigned to a self-representing person, who later forfeits or waives the right to self-representation, that person should retain the right to choose or be assigned counsel to represent him directly. In other words, even where standby counsel is appointed in the interests of the Court, the accused retains the right to conduct his own representation, which he may exercise by himself or with the assistance of his own counsel.

In the case of Slobodan Milosevic, the counsel that had been imposed by the court upon the accused were eventually turned into standby counsel by the ICTY Appeals Chamber. The standby counsel in this case were mandated to appear in case “Milosevic’s health problems resurface with sufficient gravity,” enabling “the trial to continue even if Milosevic is temporarily unable to participate.”<sup>31</sup> Standby counsel were assigned so that the Trial Chamber might “steer a careful course between allowing Milosevic to exercise his fundamental right of self-representation and safeguarding the Tribunal’s basic interest in a reasonably expeditious resolution of the cases before it.”<sup>32</sup>

The ICTY was also called to decide upon the representation of defendant Vojislav Seselj, who had chosen to represent himself and who, the court found, was increasingly resorting to obstructionism.<sup>33</sup> It was also felt that the defendant’s behavior revealed a real need for legal

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<sup>31</sup> Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel (November 2, 2004), para. 20

<sup>32</sup> *Ibid.*, para. 19.

<sup>33</sup> Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence (May 9, 2003), paras. 22 – 26.

assistance.<sup>34</sup> In assigning Seselj standby counsel, the Chamber emphasized that “the Accused’s right to defend himself is left absolutely untouched and that standby counsel is not an *amicus curiae* but an assistant operating in the sphere of the Accused only, who will serve to safeguard a fair and expeditious trial.”<sup>35</sup> The Court went on to specify that “the right to self-representation and the appointment of standby counsel do not exclude the right of the Accused to obtain legal advice from counsel of his own choosing.”<sup>36</sup>

### Victims’ Representation

The status of a lawyer as counsel for a client should normally result from a voluntary contractual agreement. As discussed above, with reference to *defense* counsel, the Code appears to contemplate the power of the Court to impose a willing<sup>37</sup> counsel on a victim or, as it almost will certainly work out to be, a victim group. With regard to the still relatively uncharted waters of victims’ representation, however, it is much harder to insist on the absolute principle of the right to self-representation. Moreover, in light of the sheer size and complexity of victim classes created by the crimes that will be adjudicated at the ICC, recognition of an individual victim’s right of self-representation would simply be unmanageable. This is consistent with the distinction between the absolute principles of *fairness* that are always due the criminal defendant, and the much more approximate notion of *equity*, treatment that is fair for victims, in the circumstances. Accordingly, this is an area that requires clear differentiation between the rules applicable to victims (and their counsel) and those applicable to defendants (and their counsel). This careful distinction is reflected in the Rules of Procedure and Evidence, which expressly contemplate a defendant’s possible self-representation,<sup>38</sup> while providing for Court appointment of legal counsel or counsels for victims if they are, on their own, “unable to choose a common legal representative or representatives within a time limit that the Chamber may decide.”<sup>39</sup>

## 3. Special Circumstances of Victims Counsel

*Contingency fees should be permitted for victims’ representation in certain exceptional circumstances.*

*The Code should not unduly restrict outreach to victim populations by human rights groups, humanitarian groups, and counsel who may wish to represent victims.*

### Contingency Fees for Victims’ Counsel

Normally, the agreement establishing a lawyer-client relationship includes agreement that the lawyer’s fees will be paid regardless of the case’s outcome. By contrast, where they are allowed –

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<sup>34</sup> Ibid., para. 23.

<sup>35</sup> Ibid., para. 28.

<sup>36</sup> Ibid., para. 29.

<sup>37</sup> As with a defense counsel, article 12(1) of the Code properly permits an assigned victims’ counsel to refuse the appointment, as it makes no distinction between the two.

<sup>38</sup> Rule 21(4) (“A person choosing to represent himself or herself shall so notify the Registrar in writing at the first opportunity.”). Rule 21(4) is in chapter 2, section III, subsection 3, titled “Counsel for the defence.”

<sup>39</sup> Rule 90(3).

most widely, in the United States – *contingency fee* arrangements make some or all of the attorney’s remuneration contingent on the outcome of a case. Contingency fees are applicable only to civil (non-criminal) cases, and are not considered ethical for criminal defense representations. In the United States, when contingency fee arrangements are used, a lawyer is typically paid between one-fourth and one-third of any damages that are awarded in a civil case; if no damages are awarded, no fee is payable.<sup>40</sup>

Article 20(2) of the Code absolutely forbids the use of contingency fees by counsel at the ICC, stating that “counsel shall never make his or her fees contingent on the outcome of a case in which he or she is involved as such.” We believe that the prohibition on contingent fees for defense counsel is proper and in conformity with practice in most, if not all, national jurisdictions. With respect to victims’ representation, however, we believe that a more flexible approach is appropriate.

In most civil law systems, contingent fee arrangements have traditionally been subject to an absolute bar. The disfavor of contingency fees arises from several considerations. Since a successful lawyer will receive between a third and a quarter of the client’s damage recovery, the client does not receive the full relief that the court has found necessary and appropriate. The lawyer, in turn, does not receive equal pay for equal work, but only receives payment for his or her work when the court rules in the client’s favor. Such arrangements could also serve as an unseemly incentive to “win at all costs” – encouraging unethical behavior – since winning is the source of the lawyer’s income, not fair and ethical representation. Contingency fees may also be seen as providing the lawyer the incentive to stir up unnecessary litigation, resulting in injustice to lawsuit defendants (including extortion of settlements using threats to bring unmeritorious, but expensive, proceedings), wasteful expenditure of court resources, and harm to the dignity of the legal system. Contingency fees can also be used by unscrupulous lawyers to take advantage of unsophisticated victims with valid causes of action. Moreover, contingency fees may be seen as tending to undermine the important institutional distinction between clients, who pursue their own interests, and counsel, who, in addition to advancing the client’s interest, have duties of integrity and professionalism and, in some jurisdictions at least, are formally considered officers of the court.

On the other hand, however, contingency fees can serve to advance democratic values of equal access to justice by enabling the economically disadvantaged to have their day in court to remedy injustices inflicted upon them. For this reason, contingent fee arrangements in civil cases have a long history in the U.S. judicial system.<sup>41</sup>

As the price of competent legal representation rises beyond the reach of many citizens, the argument in favor of contingency fees becomes stronger, and this position has recently spread to other jurisdictions. In October 2002, the Law Society of Upper Canada (Ontario), for example,

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<sup>40</sup> One legal dictionary defines “contingent fees” as involving an “[a]rrangement...whereby attorney agrees to represent client with compensation to be a percentage of the amount recovered; e.g., 25% if the case is settled, 30% if case goes to trial. Frequently used in personal injury actions. Such fee arrangements are often regulated by court rule or statute depending on the type of action and amount of recovery, and are not permitted in criminal cases.” *Black’s Law Dictionary* (Abridged Sixth Ed. 1991), pp. 426-427.

<sup>41</sup> See, e.g., the rationale explained in American Bar Association, Model Code of Professional Responsibility, adopted by the House of Delegates of ABA on August 12, 1969 (as Amended 1980), Canon 2 Ethical Considerations, EC-2-20., available at <http://www.abanet.org/cpr/ethics/mcpr.pdf>.

approved the use of contingency fees by the province's lawyers, disallowing them only for criminal or family law cases.<sup>42</sup>

Even civil law jurisdictions, which traditionally have imposed a total ban on contingency fees, have begun to authorize them *as a portion* of the attorney's remuneration. In 1998 the European Community addressed the divergence of its member countries' ethical codes by adopting, through the Council of Bars and Law Societies for the European Community (CCBE), the common Code of Conduct for Lawyers in the European Union.<sup>43</sup> The CCBE code mirrors the laws of the Community's Member States – most of which are based in civil code – in its general ban on contingency fees.<sup>44</sup> Yet the prohibition is not absolute. The CCBE code permits a form of contingency fees where they are regulated not just by the sitting judge but by external standards of the relevant bar association.<sup>45</sup>

As far as the ICC is concerned, we believe that – despite valid concerns – a blanket ban on contingency fees may not be appropriate, since victims in particular may not be eligible for legal aid and so, in the absence of a contingency fee system, may not be able to exercise their right to counsel. While defendants at the ICC will typically have recourse to legal aid to fund their counsel, it is uncertain to what extent victims will, as a practical matter. The budget of the Victims Participation and Reparations Section approved by the Assembly of States Parties set aside salaries for a Principal Counsel, an Associate Counsel, a file clerk, a database administrator, a case manager, and consultants; in addition, there is an aggregate sum of 350,000 Euros made available for the purpose of contractual services, including organization of seminars, training programs and financial assistance to victims who lack the means to pay for a common legal representative. It is far from certain that these resources will adequately meet the needs of victims' representation.<sup>46</sup>

While contingency fees in a criminal trial context would not ordinarily be proper, that ban specifically relates to defense counsel. In the circumstance of legal representation for victims in the ICC, the posture of the victim clients may, at least from a financial perspective, be more

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<sup>42</sup> See web statement of The Law Society of Upper Canada, "Contingency fee arrangements: What are they and what do they mean to you?," available at [http://www.lsuc.on.ca/news/updates/apr1703\\_lwcont\\_fees.jsp](http://www.lsuc.on.ca/news/updates/apr1703_lwcont_fees.jsp). Rule 2.08(3) of the Law Society's Rules of Professional Conduct defines a "contingency fee" as an agreement providing that the "lawyer's fee is contingent, in whole or in part, on a specified disposition of the matter." Available at [http://www.lsuc.on.ca/services/RulesProfCondpage\\_en.jsp](http://www.lsuc.on.ca/services/RulesProfCondpage_en.jsp).

<sup>43</sup> Lauren R. Frank, Note, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, U. Ill. L. Rev 957, .2, n. 10 (2000).

<sup>44</sup> *Ibid.* at n. 11 (explaining that contingency fees are strictly prohibited in Austria, Cyprus, Germany, Norway and Spain and that contingency fees are prohibited "except in accordance with CCBE Code of Conduct in Belgium, Denmark, France and The Netherlands").

<sup>45</sup> *Ibid.* at n.86. The provision is art. 3.3 of the CCBE's Code of Conduct for Lawyers in the European Union (2002), available at [http://www.ccbe.org/doc/En/code2002\\_en.pdf](http://www.ccbe.org/doc/En/code2002_en.pdf). On the one hand, art. 3.3 prohibits "*quota litis*" arrangements, defined as "agreement[s] ... entered into prior to the final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter." On the other hand, the same article permits "agreement[s] that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of competent authority having jurisdiction over the lawyer." The applicable regulation in France repeats the CCBE language prohibiting "*quota litis*" arrangements, but expressly authorizes a lawyer to "request and receive *additional* success fees, dependent on the result achieved or the service rendered." National Bar Council of France, Regulatory Decision no. 1999-001 establishing Harmonised Practice Rules for the French Bars (1999), art. 11.3 (emphasis added).

<sup>46</sup> See Assembly of States Parties, Third Session, Official Records, ICC-ASP/3/25 (Sept. 19, 2004).

likened to that of a class of victim plaintiffs in an American style class action civil law suit. Such litigations are commonly brought by individuals who are “certified” by the court to act as representatives for a large class of individuals who have been victimized by defectively designed or manufactured consumer products, such as automobiles or pharmaceuticals or medical devices.<sup>47</sup> They can also be brought on behalf of victims of intentional torts, such as a group that has been injured by an exploitative or dishonest pricing mechanism perpetrated, for example, by managers of mutual funds or operators of public utilities. More recently, in the United States, lawyers have begun to bring class actions on behalf of victims of human rights abuses, such as a recent lawsuit brought by victims of torture at Abu Ghraib against civilian Defense Department contractors who allegedly took part in the abuses.<sup>48</sup> Class actions are usually undertaken on a contingency fee basis.

At the ICC there may be no alternative to some kind of contingent fee arrangement for victims’ counsel, at least with respect to reparations claims. In the absence of such arrangements, a victim group’s formal right to obtain counsel may be completely without effect, if the victims have no assets and are unable to pay – a likely scenario given that most if not all ICC cases will be conducted in the aftermath of major conflict and social breakdown. It is evident that this is a subject that will require extensive study in order to be able to fashion a system that is workable and not exploitative of the weak. Our suggestion is that allowance be made in the Code for contingency fee arrangements to be authorized under certain limited and carefully regulated circumstances, so that victims’ right to obtain counsel is not compromised.

### **Advertising and Solicitation**

Ethics codes commonly prohibit individual solicitation by lawyers of potential clients, on the grounds that sophisticated exploitative lawyers, sometimes disparaged as “ambulance chasers,” should not be authorized to take advantage of legally inexperienced individuals at their most vulnerable – particularly victims, but also defendants, caught up in intimidating bureaucratic systems they may not understand. Article 30(2) of the Code is such a provision, providing that “[c]ounsel shall not, directly or indirectly, solicit professional employment from a prospective client.” It is important, however, to distinguish between such unscrupulous activities and *bona fide* victims’ advocates, humanitarian groups, human rights NGO’s, etc. engaged in indispensable outreach to likely intimidated, poverty-stricken victim populations not necessarily aware of rights they may have under the Rome Statute. Lawyers interested in representing victims, on a *pro bono* basis or otherwise, may also participate in such outreach efforts, and even when lawyers do not directly take part, potential victims’ counsel may be considered responsible for these activities by virtue of an imputed principal-agent relationship between them and the NGO. While regulation of this situation, to avoid exploitation of the vulnerable, would be quite proper, an overly broad non-solicitation rule that risks becoming an absolute prohibition of *bona fide* outreach by victim advocates and advocacy groups would, we believe, be ill-advised. In the nature of things, defendants will as a matter of course become aware of their rights to representation under the Rome Statute. Victims, by contrast, may never even become aware of the Court’s existence.

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<sup>47</sup> Class actions in U.S. federal courts are brought under rule 23 of the Federal Rules of Procedure, available at <http://www.classactionlitigation.com/rule23.html>.

<sup>48</sup> See, e.g., T.Christian Miller, “8 Iraqis Charge Contractors Abused Them: Class Action Suit Says Torture Used in U.S.-run Prisons,” *San Francisco Chronicle*, June 10, 2004, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/06/10/MNGRA73LSM1.DTL>. Though our understanding is that this action was brought by lawyers acting *pro bono*, and so does not involve contingency or other fees, it is a good example of the relevance of class action experience in the U.S. to victims’ representation in the ICC.

## 4. Disclosure of Confidential Client Information

*Counsel should be required – or at least permitted – to disclose confidential client information if necessary to avoid serious bodily harm or death.*

Under article 89(4) of the Code, counsel may disclose information “confidential by nature” only under the terms of rule 73(1)<sup>49</sup> of the Rules of Procedure and Evidence or “where information confidential by order of the Court is involved,” only when the Court expressly lifts the restriction on disclosure.<sup>50</sup> Rule 73 differs from many common law jurisdictions in providing no kind of “public safety” exception. In its absoluteness, it matches many civil law systems, for example, article 2.3 of the CCBE code, which provides no exceptions to the duty of confidentiality.<sup>51</sup> Moreover, the CCBE provision is broader in scope, covering not just lawyer-client communications, but “all information that becomes known to [the lawyer] in the course of his professional activity.”

In common law jurisdictions, by contrast, legal professional privilege, which applies solely to the lawyer-client relationship and is meant to foster candor between the two, generally takes the form of a professional rule that can be waived by the client. The client may intentionally waive his or her right in writing and request the lawyer to produce for the court information normally covered by professional privilege. In many jurisdictions, a client may also, in some circumstances, be deemed to involuntarily waive the privilege by giving her or his lawyer information concerning a prospective crime or fraud. This allows common law lawyers to disclose information in cases where they believe, for example, that their client intends to commit an unlawful act that may result in substantial injury or death to a third person. The range of such provisions varies greatly.<sup>52</sup>

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<sup>49</sup> Rule 73 (1) provides:

Without prejudice to article 67, paragraph 1(b) communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

- (a) the person consents in writing to such disclosure: or
- (b) the person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

<sup>50</sup> Information “confidential by nature” is defined as information “envisaged by rule 73.” As set forth above, while rule 73(1) deals with *legally* “privileged” information, rules 73(2) – (6) deal with other types of confidential communications, e.g., involving, medical doctors, psychiatrists, the clergy and the International Committee of the Red Cross. We are not concerned with such other types of confidential information in the present discussion.

<sup>51</sup> See article 2.3. of the CCBE code, which makes client confidentiality directly “entitled to special protection by the State,” and provides for no exceptions (other than the right to reveal information to other professional staff involved in the representation).

<sup>52</sup> See, e.g., rule 1.6 of the American Bar Association, Model Rules of Professional Conduct (2003), available at [http://www.abanet.org/cpr/mrpc/rule\\_1\\_6.html](http://www.abanet.org/cpr/mrpc/rule_1_6.html) . Rule 1.6(b) provides:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

We believe that the special nature and scale of the crimes that will be tried in the ICC will likely create urgent situations of risk to witnesses and perhaps others involved in the proceedings, and there should be some exception to the confidentiality rule authorizing disclosure when necessary to protect life or avoid serious injury.

*Counsel X is representing his client, Mrs. Y, in a case before the ICC. Mrs. Y is appearing on several charges relating to a massacre in an area of the DRC where members of Mrs. Y's militia are still active. Few eyewitnesses to the massacre survived and fewer are willing to come forward. Mrs. Y tells counsel X "not to worry" about the two who are poised to testify for the prosecution, as she will have them intimidated through attacks on family members and, if necessary, "have them silenced."*

This concern is far from theoretical. In the late 1990's, *Time International Magazine* reported, scores of potential witnesses in Rwanda were killed, and many more seriously threatened.

Nearly 40 murders of potential witnesses were reported in June [1996] alone. The international tribunal...estimates that 10 of those who promised to testify have already [as of September 1996] been killed. Dozens of others have been harassed. Would-be witnesses, as a result, are increasingly reluctant to come forward. "It is a big problem for us," says one tribunal prosecutor in Kigali. "There are people who know names and details but who are too afraid to speak."<sup>53</sup>

Recent reports indicate the situation continues to be grave. On October 12, 2004, "[a] confessed genocide killer who had just returned from testifying at the ICTR in Tanzania was murdered in his village of Kaduha (South Rwanda)...Bosco Nyemazi was a prosecution witness in the genocide trial of former military officer Aloys Simba." In late 2003, "at least two people scheduled to testify in local genocide trials were murdered" in the same village. Rwandan Deputy Attorney General Martin Ngoga announced that authorities "are conducting a wide inquiry into the existence of a group of people that has been attacking witnesses in that part of the country."<sup>54</sup>

Currently the ICC Code restricts counsel from releasing information even if it may help to save the lives of threatened individuals. At a minimum, we believe that counsel should be permitted in his or her discretion to reveal potentially live-saving information if counsel deems it appropriate. The provision in the American Bar Association Model Rules of Professional Conduct is similar to many such provisions in common law jurisdictions. Rule 1.6(b) states that "[a] lawyer may

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(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

<sup>53</sup> Andrew Purvis, "Dead Witnesses Tell No Tales," *Time International Magazine*, September 23, 1996. See also, "Rwanda Tribunal Witness Killed," *Montreal Gazette*, January 18, 1997; "Hutus Begin New Wave of Terror in Rwanda: Killing of Three Europeans Renews World Concern over Plight of Rwanda," *The Weekly Journal*, February 4, 1997.

<sup>54</sup> "Rwanda Insists on Interrogating UN Investigators in Witness Murder Inquiry," Hironelle News Agency (Lausanne), November 17, 2004, available at <http://allafrica.com/stories/printable/200411170675.html> .

reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:...(1) to prevent reasonably certain death or substantial bodily harm.”<sup>55</sup>

The absence of some kind of discretionary “public safety” exception to absolute confidentiality at the ICC contrasts starkly with the rules established in the other international tribunals. At the ICTY, for example, counsel may disclose confidential client information “to prevent an act which counsel reasonably believes: (i) is, or may be, criminal within the territory in which it may occur or under the Statute or the Rules; and (ii) may result in death or substantial bodily harm to any person unless the information is disclosed.”<sup>56</sup> The ICTR has almost an identical rule.<sup>57</sup>

This is a matter that goes to the heart of the ICC’s very purpose. Even the mere possibility that, in a particular case, defense counsel might be in a position to prevent the death or serious injury of an actual or potential witness, and yet fail to do so with the blessing of a Court-sanctioned ethics code, can only undermine the Court’s legitimacy as an institution designed to bring a measure of justice to victims by holding responsible those who commit the worst crimes, and, ultimately, to deter such crimes from occurring. It would be a catastrophe for the Court if such an incident were to occur.

In fact, we would actually go further, precisely because of the special gravity of ICC cases. We believe that disclosure of confidential and privileged information to the extent the lawyer reasonably believes necessary should be mandatory for counsel if he or she has substantial grounds to believe such action necessary to prevent an act by his/her client that will result in death or substantial bodily harm.

Though not yet a norm in international or domestic ethical standards, mandatory disclosure to prevent a client from committing a serious violent crime has been getting increasing support, at least in the U.S., and is now a part of the state ethics codes in Arizona, Connecticut, Illinois, Nevada, North Dakota, Texas, New Jersey, Florida and Virginia.<sup>58</sup>

Outside of the U.S., disclosure of client confidential information is also mandatory in New Zealand when “the anticipated crime is one involving the possibility of physical injury to another

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<sup>55</sup> American Bar Association, Model Rules of Professional Conduct (2003).

<sup>56</sup> Art. 13(C) of the Code of Professional Conduct for Counsel Appearing before the International Tribunal (ICTY, 2002), available at <http://www.un.org/icty/legaldoc/index.htm> .

<sup>57</sup> Art. 8(2)(d) of the Code of Professional Conduct for Defence Counsel (ICTR, 1998), available at <http://www.icttr.org/ENGLISH/basicdocs/codeconduct.htm> .

<sup>58</sup> Stephen Gillers and Roy D. Simon, Regulation of Lawyers 2002 (2002) pp 83-86. See, e.g., Arizona Rules of Professional Conduct (2004), rule 1.6(b): “A lawyer shall reveal [information relating to representation of a client] to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.” (Available at [http://www.law.cornell.edu/ethics/az/code/AZ\\_CODE.HTM#ER\\_1.6](http://www.law.cornell.edu/ethics/az/code/AZ_CODE.HTM#ER_1.6) .) Illinois Rules of Professional Conduct (2002), rule 1.6(b): “A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.” (Available at [http://www.law.cornell.edu/ethics/il/code/IL\\_CODE.HTM#Rule\\_1.6](http://www.law.cornell.edu/ethics/il/code/IL_CODE.HTM#Rule_1.6) .) Texas Rules of Professional Conduct (1998), rule 1.05(e): “When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.” (Available at <http://www.law.uh.edu/ethics/TRPC/index.html>.)

person;”<sup>59</sup> and similar directives have appeared in parts of Canada, such as Alberta<sup>60</sup> and Manitoba.<sup>61</sup>

## 5. Candor to the Court

*The Code should clearly provide that a counsel may not knowingly provide false evidence to the Court.*

One of the knottiest issues a counsel must contend with is the problem of untruthful clients. Article 23, dealing with “Candour toward the Court,” touches on this subject, but does not provide helpful guidance. Article 23(1) obliges a counsel to “take all necessary steps to ensure that his or her actions...are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.” Subparagraph (2) stipulates that “[c]ounsel is personally responsible for the conduct and presentation of the client’s case and must exercise personal judgment.” Subparagraph (3) adds a prohibition upon *counsel* to “deceive or knowingly mislead the Court.” Unfortunately, while these provisions mandate careful reflection by the counsel, they do not tell him what to do when the counsel has strong reason to believe that his client may be contemplating perjury. In such a circumstance, counsel clearly should attempt to dissuade his client from providing false testimony or evidence. But what if he fails to persuade, or if the client steadfastly denies that the testimony will be false? Must the counsel reveal the apparent untruths to the Court, thus betraying his client’s confidentiality (and in violation of current article 8 of the Code)?<sup>62</sup> Must the counsel permit the client to testify falsely, perhaps in violation of counsel’s article 23(1) duty not to bring the Court into disrepute? Or should he withdraw from the case? While the latter option would likely be feasible under article 16(1),<sup>63</sup> it might be difficult to do without communicating some hint of the reason to the Court. More importantly, even if a clean withdrawal is possible, this response does not resolve the ethical question, but merely puts it off for another counsel to deal with.

This ethical problem has been referred to as the “Perjury Trilemma,” involving irreconcilable conflicts between three obligations:

<sup>59</sup> New Zealand Rules of Professional Conduct for Barristers and Solicitors (2003), rule 1.08(iv), available at <http://www.nz-lawsoc.org.nz/about/profcon1.htm#R108>.

<sup>60</sup> Law Society of Alberta, Code of Professional Conduct (2004), rule 8(c), available at <http://www.lawsocietyalberta.com/files/code.pdf> (“A lawyer must disclose confidential information when necessary to prevent a crime likely to result in death or bodily harm, and may disclose confidential information when necessary to prevent any other crime.”).

<sup>61</sup> Law Society of Manitoba, Code of Professional Conduct (2004), rule 11, available at [http://www.lawsociety.mb.ca/code\\_and\\_rules/chapter4.htm](http://www.lawsociety.mb.ca/code_and_rules/chapter4.htm) (“Disclosure of information necessary to prevent a crime will be justified if the lawyer has reasonable grounds for believing that a crime is likely to be committed and will be mandatory when the anticipated crime is one involving violence.”).

<sup>62</sup> Article 8(3) permits disclosure only as permitted by rule 73(1) of the Rules of Procedure and Evidence. That provision, in turn, requires either (1) written waiver by the client, or (2) that the client shall have voluntarily disclosed the content of the communication to a third party who has given evidence of the disclosure.

<sup>63</sup> Article 16(1) permits a counsel to withdraw from the representation agreement “under the terms of the Regulations of the Court if: (a) The client insists on pursuing an objective that the counsel considers repugnant or imprudent.” Regulation 78 of the Regulations of the Court requires defense counsel to seek the leave of the Chamber prior to withdrawal from a case. It is conceivable that such leave might be obtained without the counsel having to reveal the perjurious nature of his client, but even if so, failure to disclose the circumstances could be construed as “prejudicial to the ongoing proceedings,” under article 23(1) of the Code.

First, in order to give clients the effective assistance of counsel to which they are entitled, lawyers are required to seek out all relevant facts. Second, in order that clients will feel free to give lawyer the information necessary to effective representation, the lawyer is under a duty of confidentiality with regard to information obtained in the professional relationship. In addition, [third], the lawyer is expected to be candid with the court....A moment's reflection makes it clear, however, that one cannot do all three of those things – know everything, keep it in confidence, and reveal it to the court over the client's objections.<sup>64</sup>

Many lawyers deal with this problem by refusing to ask questions that could reveal the falseness of a client's story. While this may be the most pragmatic approach, it can hinder the lawyer from developing the fullest understanding of the facts, and may undermine trust between lawyer and client.

In light of the impossibility of satisfactory resolution, we believe on balance that the “give” in the ethical structure should be on candor toward the Court. That is to say, even if a counsel has strong reason to believe his client may not be truthful, he may present the client's testimony, though counsel should seek to dissuade the client from falsely testifying, and, in any event, should strongly consider whether likely perjurious testimony actually does advance his client's case. When the line is crossed to absolute knowledge, however, the lawyer should at that point be required to refuse to permit the testimony and, if need be, withdraw from the case.

In most situations, a defense lawyer's strong certainty about the truthfulness or falseness of his client's testimony will not rise to the 100% of “knowledge.” The Code should not, however, hide the troubling implications of the standard we suggest. Under our proposal, the lawyer would not be under an affirmative ethical duty to seek that absolute certainty. If, however, the client leaves no doubt, for example, by expressly telling the lawyer that he intends to lie, the lawyer may no longer cooperate with the client's fraud upon the Court.

We propose that the Code should adopt a provision similar to that used in the ICTY and the ICTR: “Counsel shall not knowingly: (i) make an incorrect statement of material fact or law to the Tribunal; or (ii) offer evidence which counsel knows to be incorrect.”<sup>65</sup>

## 6. Self-Regulation of Counsel under Ultimate Supervision of the Court

*The Office of the Registrar should not be involved in an investigative or adjudicative role in the disciplinary procedures for counsel.*

*The Disciplinary Board, the counsel members of the Disciplinary Appeals Board, and the Investigating Commissioner should be selected by the Presidency from nominees proposed by respected international organizations of counsel.*

<sup>64</sup> Monroe H. Freedman, *Understanding Lawyers' Ethics* (1990, 2000), p 111.

<sup>65</sup> Code of Professional Conduct for Counsel Appearing before the International Tribunal (ICTY, 2002), art. 23(C). Article 13(2)(b) of the ICTR Code of Professional Conduct for Defence Counsel (1998) is almost identical.

## Independence of the Disciplinary Procedures

As a general matter, we believe that counsel should regulate and discipline themselves. We do not believe that substantive professional oversight, and, in particular, quasi-judicial disciplinary proceedings, are a proper function for administrative officials, whether in the Office of the Registry or elsewhere within the Court. Most ethical questions for lawyers are intimately bound up with questions of law, and it is or should be, in the first instance, lawyers who address them.

We agree with the Code's concept for a Disciplinary Board, comprising four permanent members elected by "representatives of counsel," and an *ad hoc* member "appointed by the national authority competent to regulate and control the activities of counsel subject to disciplinary procedure."<sup>66</sup> We also believe that the Disciplinary Appeals Board of three judges (designated by the President), along with three counsel (elected by "representatives of counsel") is wisely structured.<sup>67</sup>

For the same reasons, however, we believe that some of the other aspects of the Code's disciplinary structure are problematic in that they tend to situate the Registry too centrally into the disciplinary process. In view of the strong impact the administrative and financial operations of the Office of the Registrar will have on day-to-day functioning of counsel, it is easy to imagine that disputes between counsel and the Registry could find their way before the Disciplinary Board. As a potential party, the Registry will need to be scrupulously aloof from participation in the charging or adjudicative process of the disciplinary organs.

We believe the Registry, for example, should not be responsible for appointing the investigating "commissioner," as now contemplated by article 34(3). The commissioner should be appointed in a manner similar to the members of the Disciplinary Board, which we discuss below.

To the extent that a designee of the Registry is charged with "ensur[ing] the secretariat of the Disciplinary Board," as provided in article 36(7), we believe it should be clear that such function is purely administrative and ministerial; and probably best handled by the Office of Public Counsel.

As a general matter, we do not believe that the "commissioner conducting the investigation" should "seek assistance from the Registrar," as provided in article 39(3), but if so, such assistance should be purely logistical.

We see no reason why there should be a normal expectation that the "the Registrar shall be called and heard" in any disciplinary proceeding, as provided in article 39(6). If, on the other hand, the Registrar has factual information to impart, or considers himself an aggrieved party, in the sense of article 34(1)(c) ("[a] person...whose rights or interest may have been affected by the alleged misconduct"), it is, of course, proper for the Registrar to be called and heard.

We do not, either, believe it proper for the Registrar to be authorized, "*proprio motu*...[to] lodge an urgent motion with the Chamber...so that it may, as appropriate, declare a temporary suspension of the counsel," as contemplated by article 39(7). This would properly be a function of the investigating commissioner.

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<sup>66</sup> Art. 36. The provision for appointment of the *ad hoc* member by a "national authority" responsible for regulating such individual does, however, raise a technical problem, in that it is possible that a counsel appearing before the Disciplinary Board might not be subject to any such national bar organization. For example, under rule 22(1) of the Rules of Procedure and Evidence, it is possible that professors of law with relevant expertise could practice before the Court.

<sup>67</sup> Art. 44.

### **Selection of Disciplinary Board, Disciplinary Appeals Board, and Investigating Commissioner**

Article 36 of the Code provides that the Disciplinary Board “shall comprise five members, four of whom shall be permanent and one *ad hoc*...the four permanent members shall be elected for two years by representatives of counsel under the terms of the Regulations of the Registry.” In principle, election by “representatives of counsel” is most appropriate. However, in the current early stage of the Court’s work, there are no commonly acknowledged “representatives of counsel.” While it is to be hoped that as the Court grows, a genuine community of ICC counsel – or a community of international criminal lawyers – may develop, there is no such organized, self-conscious and generally acknowledged community at present.

Accordingly, we suggest a provisional arrangement whereby the nominating “representatives of counsel” consist of various respected international law organizations or associations, which have credibility within the international legal field and familiarity with the ICC. In effect, we are referring to “independent representative bod[ies] of counsel or legal association, including any such body [or bodies] the establishment of which may be facilitated by the Assembly of States Parties.”<sup>68</sup>

Given the fluid nature of the international legal community at present it seems reasonable not to restrict the field to nominations from set groups, but to allow open nominations, at least in the immediate future. The Presidency of the Judiciary would then select candidates from among the nominees, during which process the professional stature of the bodies nominating each individual would presumably play a significant but not necessarily dispositive role. In this way the nomination process would include a comprehensive list of candidates with a variety of backgrounds, while allowing the constructive input of those organizations most respected in the field of international law. Allowing the Presidency to select the nominees, in turn, would insulate the process from possible accusations of political bias that could result were its members selected by the Assembly of States Parties. The investigating “commissioner” and the counsel members of the Disciplinary Appeals Board should be selected on similar principles.

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<sup>68</sup> Rule 20(3) of the Rules of Procedures and Evidence.