

Teisės aktualijos

THE REQUIREMENTS FOR QUALIFICATION OF DEFENCE COUNSEL IN THE INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

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This article examines the requirements for qualification of defence counsel in the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Mechanism for International Criminal Tribunals and the Special Court for Sierra Leone. Particular attention is given to the requirements as to experience, language skills and lack of a criminal record or disciplinary proceedings. The proposals for improvement of the requirements for qualification of defence counsel are made in this article.

Introduction

Nowadays, International criminal law and procedure is one of the fastest growing fields of international law. That is related with active functioning of the international criminal courts and tribunals. Without increased requirements to the qualification of its participants the ensuring the highest standards of international justice is not possible.

The system of defense from criminal prosecution is not exception also. To ensure effective legal aid for suspected or accused and to ensure fair trial in general the defense counsel should meet requirements for the qualification. Suspected or accused may choose a counsel only among these persons. Defense counsel can be assigned (for legal aid by indigent) only from them.

Analysis of the Rules of Procedure and Evidence (hereinafter – RPE) of the International Criminal Tribunal for the former Yugoslavia (hereinafter – ICTY), the International Criminal Tribunal for Rwanda (hereinafter – ICTR), the Mechanism for International Criminal Tribunals (hereinafter – MICT), the Special Court for Sierra Leone (hereinafter – SCSL) and the International Criminal Court (hereinafter – ICC) allows us to classify the requirements qualification into three groups, in particular regarding: 1) experience; 2) language skills; 3) lack of a criminal record and disciplinary proceedings. The ICTY and the MICT also prescribed requirements concerning the moral qualities and membership in the good standing of an association of counsel in addition to abovementioned requirements.

1. Experience

A lawyer who wants to be a defense counsel in international criminal proceedings should have the necessary experience. It should be noted that the statutes of ad hoc international criminal tribunals do not prescribe the requirements for experience in international proceedings or the requirements related

to the level of knowledge of international criminal law and procedure. So, rule 44 (A) (i) PRE ICTY, rule 42 (A) (i) PRE MICT and rule 44 (A) RPE ICTR provide that counsel should be admitted to the practice of law in a State, or is a university professor of law. Hence, these rules do not prescribe a minimum length of that experience. From the ad hoc tribunals only RPE SCSL (rule 44 (A)) provides at least 5 years the necessity of experience in criminal law.

More progressive requirements for defense counsel's experience is prescribed in the ICC (rule 22 (1) of the ICC RPE and reg.67 (1) of the ICC Regulation). Progressiveness of such provisions as in setting the minimum duration of experience (10 years for lead counsel and 8 for associate counsel), as well as in concretization of spheres and positions should be gotten this experience (as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings). In addition to this, it is provided that a counsel for the defence shall have established competence in international or criminal law and procedure (rule 22 (1) of the ICC RPE). These requirements are the same for all defense counsels in the ICC: as that is chosen by suspects or accused, as is assigned to suspects or accused who lack the means to remunerate such counsel.

By contrast to the ICC, the ad hoc tribunals set more tougher requirements to the defense counsels who are assigned in order to provide legal assistance for person who lacks the means to remunerate such counsels.

In particular, under the rule 45 (B) ICTY RPE¹, art. 14 (A) of the ICTY Directive on the Assignment of Defence Counsel², rule 43 (B) of the MICT RPE³ and Article 14(A) of the MICT Directive on the Assignment of Defence Counsel⁴, defence counsel should possess at least seven years of relevant experience whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings and he must possess established competence in criminal law and / or international criminal law, international humanitarian law, international human rights law.

In the SCSL an assigned defence counsel should also have at least 7 years of experience⁵. However, that experience, according to Article 13 (B) (iii) of the SCSL Directive on the Assignment of Defence Counsel is taken into attention only as the counsel's experience.

Rule 45 (A) of the ICTR RPE and Article 13(i) of the ICTR Directive on the Assignment of Defence Counsel prescribe also "relevant" experience at least 7 years. However, neither ICTR RPE nor ICTR Directive (as opposed to RPEs and directives of other ad hoc tribunals) do not provide the list of the positions where the defence counsel should have "relevant" experience. The lack of concretization of "relevant" experience was interpreted by international law scholars as arbitrary requirement⁶.

It should be stressed that the aforementioned requirements for experience of defence counsel are not ideal. For example, these requirements do not provide necessary experience in international proceedings or even the requirements concerning the level of knowledge of international criminal law and procedure. But even substantial practice of experience in a domestic legal system does not

¹ Rules of Procedure and Evidence of the ICTY, 11 February 1994 (As Amended 10 December 2009). Available at: <http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf>.

² Directive on the assignment of Defence Counsel of the ICTY, 28 July 1994 (As Amended 11 July 2006). Available at: <http://www.icty.org/x/file/Legal%20Library/Defence/Assignment_of_counsel_july2006.pdf>.

³ Rules of Procedure and Evidence of the MICT, 8 June 2012. Available at: <http://unmict.org/sites/default/files/documents/120608_rules_en.pdf>.

⁴ Directive on the assignment of Defence Counsel of the MICT, 14 November 2012. Available at: <http://unmict.org/sites/default/files/documents/pd_mict5_en.pdf>.

⁵ Rule 45(C)(iii) of the SCSL RPE, 16 January 2002. Available at: <<http://www.rscsl.org/Documents/RPE.pdf>>; art.13(B)(iii) of the SCSL Directive on the Assignment of Defence Counsel 1 October 2003. Available at: <http://www.rscsl.org/Documents/PRACTICE_DIRECTION_Assignment_Counsel.pdf>.

⁶ LEANEY, Erica. Assignment of Counsel of Choice to Indigent Accused at the ICTR: An Analysis of a Threat to Fair Trial Rights and What May Be Done about It. *New Zealand Yearbook of International Law*, 2008, Vol. 6, p. 252.

itself guarantee the counsel's competence in an international criminal setting⁷. The hybrid nature of international criminal justice requires the knowledge of both common law and civil law systems as well as the case-law of international criminal tribunals. However, a lot of defence counsel in the ad hoc tribunals had no experience in international criminal proceedings, and sometimes even had no experience in criminal proceedings⁸. It is clear that the lack of knowledge and experience has not promoted to the quality of legal aid.

The situation was clear concerning the lack of knowledge and experience in the field of international criminal justice in the early years of the ICTY and the ICTR. After all, in fact only the Nuremberg (1945–1946) and the Tokyo military tribunals (1946–1948), the legality of the creation and activity of which so far cause a lot of doubts⁹ were the precursors of the ICTY and the ICTR¹⁰. Therefore, it was not possible to require the knowledge of international criminal law and procedure which was only forming in the case-law of the ICTY and the ICTR.

However, after 20 years of activity of the ICTY and the ICTR and more than 10 years of the ICC, such requirements should be put forward.

It seems that there are several ways to solve this problem, which can be both alternative and used together.

1. Statutory requirements for experience in the sphere of international criminal justice. The general experience of seven years (ICTY, ICTR) or ten years (ICC) in criminal law and procedure is unreasonably high. Because such long term experience does not mean that defence counsel is highly qualified. At the same time RPE of international criminal courts and tribunals, as stated above, do not provide the experience in the field of international criminal justice. It is therefore advisable to reduce the total experience in criminal justice to four or five years, but to prescribe the experience in international criminal justice (e.g., one year).
2. Setting the period of trainee under the guidance of an experienced defence counsel. It will be the opportunity to get of necessary experience for defence counsel who does not have experience in international criminal proceedings. In particular, a defence counsel without work experience could be involved as co-counsel during internships to the defence counsel with considerable experience in the field of international criminal justice¹¹.
3. Training courses for defence counsel. Training courses might become an instrument for improving of qualifications of the defence counsels who do not have experience. During this period a defence counsel can gain the necessary knowledge in the field of international criminal

⁷ TEMMINCK TUINSTRA, J. P. *Defence Counsel in International Criminal Law*. Hague: T.M.C. Asser Press, 2009, p. 39; STARR, Sonja B. Ensuring Defense Counsel Competence at International Criminal Tribunals. *UCLA Journal of International Law and Foreign Affairs*, 2009, Vol. 14, Issue 1, p. 177; ELLIS, Mark S. Evolution of Defense Counsel Appearing before the International Criminal Tribunal for the Former Yugoslavia. *New England Law Review*, 2002–2003, Vol. 37, Issue 4, ELLIS, Mark S. Evolution of Defense Counsel Appearing before the International Criminal Tribunal for the Former Yugoslavia. *New England Law Review*, 2002–2003, Vol. 37, Issue 4, p. 957.

⁸ STARR, Sonja B. Ensuring Defense Counsel Competence at International Criminal Tribunals. *UCLA Journal of International Law and Foreign Affairs*, 2009, Vol. 14, Issue 1, p. 177–178; BUISMAN, Caroline; GUMPERT, Ben; HALLERS, Martine. Trial and Error – How Effective is Legal Representation in International Criminal Proceedings. *International Criminal Law Review*, 2005, Vol. 5, Issue 1, p. 7.

⁹ BAYTEMIR, Burcu. International Military Tribunal at Nuremberg: The Ongoing Reflections in International Criminal Law. *USAK Yearbook of International Politics and Law*, 2010, Vol. 3, p. 78; NERONE, F. Regan. Legality of Nuremberg. *Duquesne University Law Review*, 1965–1966, Vol. 4, Issue 1, p. 146–162; TOLBERT, David. ICTY and Defense Counsel: A Troubled Relationship. *New England Law Review*, 2002–2003, Vol. 37, Issue 4, p. 979.

¹⁰ SCHARF, Michael P. Assessment of the Yugoslavia War Crimes Tribunal. *ILSA Journal of International & Comparative Law*, 1996, Vol. 2, Issue 3, p. 655.

¹¹ LEANEY, Erica. Assignment of Counsel of Choice to Indigent Accused at the ICTR: An Analysis of a Threat to Fair Trial Rights and What May Be Done about It. *New Zealand Yearbook of International Law*, 2008, Vol. 6, p. 252.

justice. It is worth to agree with D.Tolbert, which considers that it will solve a lot of issues related to the competence of defence counsel and will increase the efficiency of his work¹². The first attempts in this direction have already been conducted. For example, under reg. 140–142 of the ICC Registry’s Regulation, Registrar is responsible for organization of trainings of counsels. Association of defence counsel practising before the ICTY is responsible for training of defence counsels in both the ICTY and the MICT¹³. However, at present these trainings are limited to single training seminars that are conducted for defence counsel. Moreover, a defence counsel may practice before the international criminal courts and tribunals without appropriate professional training in international criminal justice sphere. Therefore, it seems that at first a defence counsel should receive adequate training and then he may be admitted to practice before international criminal courts.

2. Language skills

Language skills are one of the biggest problems faced by defence counsels and directly affect their efficiency¹⁴. While in domestic legal systems the problem with language skills is not so acute (as usually all the participants in the process speak the same language, the same language is used for consisting of all procedural documents and collecting of evidence), in international criminal proceeding this problem is very complicated. This problem becomes particularly significantly when a suspected or accused person speaks in one language and other language is used as the working language of proceeding but a defense counsel cannot speak neither one nor the other.

This issue is resolved partially by the rule 22(A)(1) of the ICC RPE¹⁵, rule 44(A)(ii) of the ICTY RPE¹⁶, rule 42 (A)(ii) of the MICT RPE¹⁷, rule 45(A) of the RPE ICTR¹⁸, rule 45 (C)(i) of the SCSL RPE¹⁹ that prescribe the requirements for knowledge of language by counsel.

It should be stressed that RPE’s of international criminal courts and tribunals put different requirements on language skills. Let us examine them in detail

The ICC RPE (rule 22(A)(1)) provides that defence counsel shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court (English or French).

Rule 44(A)(ii) of the ICTY RPE and rule 42 (A)(ii) of the MICT RPE provide that defence counsel shall have written and oral proficiency in one of the two working languages of the Tribunal (English

¹² TOLBERT, David. ICTY and Defense Counsel: A Troubled Relationship. *New England Law Review*, 2002–2003, Vol. 37, Issue 4, p. 980.

¹³ Art. 21 of the Constitution Association of Defence Counsel Practising Before the ICTY.

¹⁴ WALD, Patricia M. Reflections on Judging: At Home and Abroad. *University of Pennsylvania Journal of Constitutional Law*, 2004, Vol. 7, Issue 1, p. 244; LEANEY, Erica. Assignment of Counsel of Choice to Indigent Accused at the ICTR: An Analysis of a Threat to Fair Trial Rights and What May Be Done about It. *New Zealand Yearbook of International Law*, 2008, Vol. 6, p. 255; WALD, Patricia M. Running the Trial of the Century: The Nuremberg Legacy. *Cardozo Law Review*, 2006, Vol. 27, Issue 4, p. 1578.

¹⁵ In accordance to Rule 22(1) of the ICC RPE, a counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

¹⁶ Under Rule 44(A)(ii) of the RPE ICTY, counsel satisfies the Registrar that he or she has written and oral proficiency in one of the two working languages of the Tribunal, unless the Registrar deems it in the interests of justice to waive this requirement, as provided for in paragraph (B).

¹⁷ In accordance with Rule 42(A)(ii) of the RPE MICT, counsel satisfies the Registrar that he or she has written and oral proficiency in one of the two working languages of the Tribunal, unless the Registrar deems it in the interests of justice to waive this requirement, as provided for in paragraph (B).

¹⁸ Accordant to Rule 45(A) of the ICTR RPE, assigned counsel shall speaks a working language.

¹⁹ In accordance with Rule 45(C)(i) of the SCSL RPE, counsel, who may include members of the Defence Office, shall speak fluent English.

or French). At the same time, at the request of the suspect or accused and when the interests of justice demand so, the Registrar may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused (rule 44(B) of the ICTY RPE and rule 42 (B) of the MICT RPE). The latter provision was included in the ICTY RPE (and after in the MICT RPE) as the certain consensus. The fact is that the practice of the ICTY has shown (especially at the early stage), that suspects and accused persons did not speak working languages of the ICTY and the same time, the defence counsels (that spoke the working language of the ICTY) did not speak the same language that suspects and accused persons²⁰. Therefore, on 14 July 2000, the rule 44 of the ICTY RPE was amended in order to overcome language barrier between defence counsel and his client²¹. After creating MICT this rule was borrowed from the ICTY RPE to the MICT RPE (rule 42 (B) MICT RPE).

As for ICTR, according to rule (A) of the ICTR RPE, the requirements concerning languages are applied exclusively to the assigned defence counsel. This defence counsel should speak one or both of the working languages of the ICTR (English or French). However, given the fact that the most of accused persons at the ICTR had proficient in French, for this reason the defence counsels were mostly French speaking²².

According to rule 45 (C)(i) of the SCSL RPE, counsel shall *speak fluent English*.

Analyzing the requirements for language skills we can make the conclusion that the most stringent requirements for language skills are in the ICC (an excellent knowledge of and be fluent in at least one of the working languages). In addition, the ICC RPE has not provided of exceptions concerning language skills (as opposed to the ICTY and MICT).

Despite that language skills were fixed by different words, probably the greatest problem is in imperfection of verification procedures level of knowledge of the working language. For example, defence counsel at ICC does not need to give for including to List of counsels any document certifying that the candidate has the necessary level of knowledge of language²³. That is why the possibility of involvement of a defence counsel that does not have the working languages skills in the ICC is still very high.

The situation regarding the confirmation of languages is slightly better in the ICTY and MICT. So, membership in the Association of Defence Counsel is an additional requirement for defence counsel in these tribunals (that will be discussed below). To apply for full membership of this Association, candidates shall submit an evidence of language proficiency in French or English²⁴. But this is not provided, what is meant by this “evidence of language proficiency”.

It seems that the required level of language proficiency of defence counsel can be achieved by using two alternative ways.

1. Evidence of language proficiency in French or English. It is worth to prescribe the Certificate of international standardised test of language proficiency (English or French) as evidence of language proficiency for including to List of counsel (e.g. TOEFL, IELTS, DELF etc.).

²⁰ LEANEY, Erica. Assignment of Counsel of Choice to Indigent Accused at the ICTR: An Analysis of a Threat to Fair Trial Rights and What May Be Done about It. *New Zealand Yearbook of International Law*, 2008, Vol. 6, p. 252.

²¹ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, UN Doc.: IT/32/Rev. 18, 13–14 July 2000. Available at: <http://icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev18_en.pdf>.

²² LEANEY, Erica. Assignment of Counsel of Choice to Indigent Accused at the ICTR: An Analysis of a Threat to Fair Trial Rights and What May Be Done about It. *New Zealand Yearbook of International Law*, 2008, Vol. 6, p. 252.

²³ Regulation 69 of the Regulations of the ICC, 26 May 2004. Available at: <<http://icc-cpi.int/NR/rdonlyres/50A6CD53-3E8A-4034-B5A9-8903CD9CDC79/0/RegulationsOfTheCourtEng.pdf>>; Proof and control of criteria to be met by counsel Guide for applicants to the ICC List of Counsel and Assistants to Counsel. Available at: <http://icc-cpi.int/iccdocs/PIDS/femalecounsel/Guide_for_App.Eng_w_cover.pdf>.

²⁴ Application Procedure to apply for Full Membership of the ADC-ICTY. Available at: <<http://adc-icty.org/home/membership/application.html>>.

2. Language proficiency examination. For example, this proficiency exam could be as the one administrated by the UN. For example, a proficiency exam in English or French could be similar to exam for the UN officials²⁵. At the same time, as S. Starr stresses, if a bar exam were established, a separate competency exam would not be necessary, because the bar exam would offer something better: the ability to test would-be counsel's ability to use English or French to write persuasive essays about international criminal law²⁶.

3. Lack of a criminal record and disciplinary proceedings

The requirement to avoid the work of persons who have committed crimes or disciplinary offences as a defence counsel at international criminal courts and tribunals is quite understandable. J. T. Tuinstra noted, that counsel appearing before an international criminal court should be of *good standing*, i.e., he should not have been found guilty in disciplinary proceedings, criminal proceedings or otherwise have engaged in dishonest conduct or conduct otherwise discreditable to a counsel that would be prejudicial to the administration of justice²⁷.

Thus, the requirement that defence counsel shall not been found guilty in criminal proceedings is provided by reg.67(2) of the ICC Regulation²⁸, rule 44(A)(v) of the ICTY RPE²⁹, rule 42 (A)(v) of the MICT RPE³⁰, art.13(B)(vi) of the SCSL Directive on the Assignment of Counsel³¹. But if reg. 67(2) of the ICC Regulation, rule 44(A)(v) of the ICTY RPE, rule 42 (A)(v) of the MICT RPE provide that the counsel had not been convicted (without any exceptions for all defense counsels), according to art.13(B)(vi) of the SCSL Directive on the Assignment of Counsel this requirement is only for assigned defence counsel.

International criminal courts or tribunals have required from defence counsel the lack of disciplinary measures. These requirements have prescribed by reg.67 (2) of the ICC Regulation³², rule 44(A)(iv) of the ICTY RPE³³, rule 42 (A)(iv) of the MICT RPE³⁴, art. (B)(vi) of the SCSL Directive

²⁵ United Nations Examinations and Tests Section Language Proficiency Exams. Available at: <<http://www.un.org/exam/lpe/welcome/main.asp>>.

²⁶ STARR, Sonja B. Ensuring Defense Counsel Competence at International Criminal Tribunals. *UCLA Journal of International Law and Foreign Affairs*, 2009, Vol. 14, Issue 1, p. 199.

²⁷ TEMMINCK TUINSTRA, J.P. *Defence Counsel in International Criminal Law*. Hague: T.M.C. Asser Press, 2009, p. 43.

²⁸ Regulation 67of the Regulation of the ICC: "Counsel should **not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court**".

²⁹ Rule 44(A)(v) of RPE of the ICTY "Counsel shall be considered qualified to represent a suspect or accused if the Counsel satisfies the Registrar that **he has not been found guilty in relevant criminal proceedings**".

³⁰ Rule 42(A)(v) of RPE of the MICT "Counsel shall be considered qualified to represent a suspect or accused if the Counsel satisfies the Registrar that **he has not been found guilty in relevant criminal proceedings**".

³¹ Article 13(B)(vi) of the SCSL Directive on the Assignment of Counsel: "To be eligible to be included by the Principal Defender in the List of Qualified Counsel an individual must have the following qualifications: (vi) have no record of professional or other misconduct, which may **include criminal convictions**".

³² Regulation 67of the Regulation of the ICC: „Counsel should not have been convicted of a serious criminal or **disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court**".

³³ Rule 44(A)(iv) of the ICTY RPE: "Counsel shall be considered qualified to represent a suspect or accused if the Counsel satisfies the Registrar that he (iv) has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel.

³⁴ Rule 42(A)(iv) of the MICT RPE "Counsel shall be considered qualified to represent a suspect or accused if the Counsel satisfies the Registrar that he (iv) has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel".

on the Assignment of Counsel³⁵. At the same time this requirement is determined differently in above mentioned documents. So, ICC Regulation emphasizes that counsel should not have been convicted of disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court; SCSL Directive on the Assignment of Counsel prescribes that counsel has no record of professional or other misconduct; ICTY RPE and MICT RPE provides that counsel has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal.

Moreover, if the disciplinary proceeding against a defence counsel has just started, Registrar of the ICTY can already refuse his appointment as defense counsel. In particular, the Registrar may carry out it according to art.45 of the ICTY Code of professional conduct for defence counsel appearing before the International Tribunal through the interim suspension from practice that ICTY Registrar has made already few times³⁶. The same rule provided by art. 45 of the MICT Code of professional conduct for Defence Counsel appearing before the Mechanism.

Concerning the ICTR, none of these documents which provide the requirements for qualification of defence counsel do not prescribe the requirements concerning lack of a criminal record and disciplinary proceedings.

4. Other requirements concerning qualification of defence counsel

In addition to abovementioned requirements, the ICTY and the MICT have prescribed requirements regarding the moral qualities and membership in good standing of an association of counsel.

4.1. With regard to moral qualities the ICTY RPE and MICT RPE provide two requirements:

1) Counsel has not engaged in conduct whether in pursuit of his or her profession or otherwise which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the ICTY (or MICT) or the administration of justice, or otherwise bring the ICTY (or MICT) into disrepute³⁷. The case of Veselin Sljivancanin (ICTY) is a good example of refusal on this ground. So accused Veselin Sljivancanin (ICTY) wished to choose by defence counsel Mr. Petronijevic. But ICTY Registrar refused it. The point is that Mr. Petronijevic in 2000, in one trial involving 143 ethnic Albanian defendants from the area of Djakovica in which he served as presiding judge he may have violated the defendants' fundamental rights and convicted many of them in the absence of any evidence of individual guilt³⁸.

Without going into details of this issue and debate about the correctness refusing to assignment of counsel on that reason it should be emphasized that analyzing the requirements for moral qualities there are at least two questions.

First, what are the factors determining the moral qualities of defence counsel? It is often, a defence counsel can participate in cases which could take considerable resonance and very conflicting views. Second, why has not any disciplinary measures taken (or criminal proceeding) to this defence counsel? If the counsel has been found guilty or otherwise disciplined in relevant disciplinary proceedings or

³⁵ Article 13(B)(vi) SCSL Directive on the Assignment of Counsel: "To be eligible to be included by the Principal Defender in the List of Qualified Counsel an individual must have the following qualifications: (vi) **have no record of professional or other misconduct**, which may include criminal convictions".

³⁶ See, e.g., ICTY Pres., *Prosecutor v. Rašević*, Case No. IT-97-25/1-PT, Decision on Assignment of Defence Counsel, 16 October 2003, § 6. Available at: <http://www.icty.org/x/cases/todovic_rasevic/tdec/en/031016.htm>.

³⁷ Rule 44(A)(vi) of RPE of the ICTY and Rule 42(A)(vi) of RPE of the MICT.

³⁸ ICTY Pres., *Prosecutor v. Šljivancanin*, Case No. IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003, § 3 and 27. Available at: <<http://www.icty.org/x/cases/mrksic/tdec/en/030820.htm>>.

in relevant criminal proceedings against him, then that mean, he has failed to meet the requirement concerning the lack of a criminal record and disciplinary proceedings, as provided under rule 44 (A) (iv-v) of the ICTY RPE and rule 42(A) (iv-v) of the MICT RPE and was considered above.

The foregoing concerning moral qualities is in doubt in the expediency of this requirement as such.

2) Counsel does not have eligibility to practice before the ICTY and MICT when he or she provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information (rule 44(A)(vii) of the ICTY RPE, rule 42 (A)(vii) of the MICT RPE)³⁹. This requirement also is in doubt in it's the expediency. If the defence counsel submits the false information about his qualification, language skills, lack of disciplinary measures, etc., he will not meet the requirements that prescribed under the rule 44 of the ICTY RPE or rule 42 (A) of the MICT RPE. For this reason, it seems do not need to provide additional requirements, that "he has not provided false or misleading information".

4.2. The ICTY RPE and the MICT RPE have prescribed that counsel shall be a member in good standing of an association of counsel practicing at the ICTY (or MICT) recognised by the Registrar⁴⁰.

At the ICTY and the MICT there is only one association of counsel: the Association of defence counsel practicing before the ICTY⁴¹. Establishment of this Association was caused by amended on 12 July 2002 of rule 44 of the ICTY RPE that prescribes as the requirement for defence counsels the membership in good standing of an association of counsel.

As a result of this amendment, the First General Assembly of the Association of defence counsel practicing before the ICTY was convened on 14 September 2002, at which the officers were elected⁴². The purposes of this organization is to promote the highest standards of legal professionalism and ethics, whilst at the same time ensuring that the interests of all defence counsel were collectively represented by one body⁴³. Association of defence counsels plays important role concerning disciplinary measures and training of defence counsels. As part of the Association of defence counsel is the Disciplinary Council that has the power to take disciplinary measures and has other important tasks in this sphere⁴⁴. Important in the context of training of defence counsels is the work of Training Committee that is responsible for the design and implementation of advocacy training and training on substantive international criminal law for all members of the Association of defense counsel⁴⁵.

³⁹ Under rule 44(A)(vii) of the ICTY RPE and Rule 42(A)(vii) of the MICT RPE: "Counsel shall be considered qualified to represent a suspect or accused if the Counsel satisfies the Registrar that he has not provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information".

⁴⁰ Rule 44(A)(iii) of the ICTY RPE and Rule 42(A)(iii) of the MICT RPE: 'Counsel shall be considered qualified to represent a suspect or accused if the Counsel satisfies the Registrar that he (iii) is a member in good standing of an association of counsel practicing at the Tribunal recognised by the Registrar.

⁴¹ Despite such name, this Association is not acting only at the ICTY, but also at MICT.

⁴² MUNDIS, Daryl A. Current Developments at the ad hoc International Criminal Tribunals. *Journal of International Criminal Justice*, 2003, Vol. 1, Issue 2, p. 551.

⁴³ HOCKING, John. Legal Aid and the Defence Support at the UN International Criminal Tribunal for the Former Yugoslavia. *Commonwealth Law Bulletin*, 2010, Vol. 36, Issue 3, p. 537; MCMORROW, Judith A. Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY. *Boston College International and Comparative Law Review*, 2007, Vol. 30, Issue 1, p. 159.

⁴⁴ In accordance with art.16 of the Constitution of the Association of Defence Counsel Practising Before ICTY, the Disciplinary Council is an independent organ of the ADC-ICTY, responsible to the General Assembly for the following tasks: a. To monitor the conduct of members of the ADC-ICTY in the representation of a suspect or accused; b. To adjudicate on complaints received against members of the ADCICTY for alleged misconduct; c. To provide advisory opinions on matters relating to the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, the Directive on the Assignment of Counsel and the interpretation of the present Constitution.

⁴⁵ Art. 21 of the Constitution Association of Defence Counsel Practising Before the ICTY.

To join as full member the Association of defence counsel, ICTY prescribes separate requirements⁴⁶, which mainly coincide with the requirements stipulated under the rule 44 of the ICTY RPE. In addition to these requirements, defence counsel must pay an annual membership fee. The amount of the annual membership for the year 2014 has been set at €250⁴⁷.

Conclusion

The following groups of qualification requirements for defence counsel are prescribed in International criminal courts and tribunals: 1) experience; 2) language skills; 3) lack of a criminal record and disciplinary proceedings. However, the requirements for qualification of counsel in the ICC are the same for both appointed and assigned defence counsels. By contrast to the ICC, the ad hoc tribunals set tougher requirements to defense counsels who are assigned in order to provide legal assistance for person who lack the means to remunerate such counsels.

Although standards of the duration of experience (5–10 years), the proficiency in working languages (English or French), the lack of a criminal record and disciplinary proceedings are prescribed, these requirements in the form in which they are in the RPE's of the international criminal courts and tribunals currently are far from to be perfect.

It seems that it is necessary to take a greater emphasis on qualification of defence counsels in international criminal justice sphere and should be prescribed the experience in the international criminal justice, or at least there is a need to make appropriate training for counsel before giving the opportunity for practising as defence counsel.

Concerning language skills, it seems necessary to make clear the mechanism of confirmation of proficiency in working languages. It is worth to prescribe the Certificate of international standardised test of language proficiency (English or French) as evidence of language proficiency for including to List of counsel (e.g. TOEFL, IELTS, DELF etc.) or language proficiency examination to prescribe, that could be similar to exam for the UN officials.

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⁴⁶ According to art. 3 (2) of the Constitution Association of Defence Counsel Practising Before the ICTY, “any person who fulfils the following requirements is eligible to be a Full member: a. Being admitted to the practice of law in a state, or being a university professor of law; b. Possessing established competence in criminal and/or international criminal law / international humanitarian law / international human rights law; c. Possessing at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings; d. Having written and oral proficiency in one of the two working languages of the Tribunal or having obtained a waiver pursuant to Rule 44 B of the Rules of Procedure and Evidence. e. Not having been found guilty or otherwise been disciplined in relevant disciplinary proceedings where being admitted to the practice of law or a university professor of law; f. Not having been found guilty in relevant criminal proceedings”.

⁴⁷ The amount of the annual membership fee for Full and Associate Members is determined by the General Assembly on the recommendation of the Executive Committee and for the year 2014 has been set at €250. The annual membership fee must be paid in one installment, either within 30 days of the beginning of the membership year or for new members, within 30 days of approval of membership. The membership year runs from 1 January until 31 December inclusive. See, ‘Fees And Dues the members of the ADC-ICTY’. Available at: <<http://adc-icty.org/home/membership/fees-and-dues.html>>.

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