

CODE OF CONDUCT
and
DISCIPLINARY PROCEDURE
of the
INTERNATIONAL CRIMINAL BAR

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Table of contents

Preamble

Chapter I

Interpretation and definitions

1. Interpretation
2. Definitions

Chapter II

General Principles

3. Independence
4. Honesty and integrity
5. Competence
6. Confidentiality and Privilege
7. Conflict of interest
8. The client's right to choice of counsel
9. Relationship between counsel and client to be respectful

Chapter III

General provisions

10. Application of the Code of Conduct
11. Conflicts between the Code of Conduct before the International Criminal Court and National Codes of Conduct
12. Affirmation of Counsel Appearing before the International Criminal Court
13. Former members of the Office of the Prosecutor and former Judges and staff of the Chambers and of the Registry
14. Adoption and amendments

Chapter IV

Relationship between counsel and client

15. Establishing the relationship with the client
16. The scope of the mandate
17. Instructions from the client
18. Refusal to accept a mandate
19. The withdrawal of counsel from a mandate
20. The termination of a mandate
21. The mandate from a client with diminished capacities

22. Enduring duty towards the client
23. Solicitation of prospective clients and publicity
24. Financial arrangements
25. Legal Aid
26. Resolution of disputes regarding accounts for fees and disbursements
27. The role of counsel as advocate
28. The role of counsel as counsellor
29. The representation of accused persons
30. The representation of victims
31. Communications with clients
32. Counsel called as witness
33. Duty to keep files containing documents and record of work accomplished in fulfilment of mandate
34. Professional liability insurance

Chapter V

Relationship between counsel and third parties

35. Dealing with unrepresented persons
36. Dealing with persons represented by counsel
37. Dealing with witnesses generally
38. Dealing with witnesses afforded protective measures
39. Statements by counsel to others
40. Respect for rights of third persons

Chapter VI

Relationship with other counsel

41. Co-counsel and other members of the team acting on behalf of the client
42. Counsel of victims
43. Counsel of accused persons
44. Counsel of co-accused persons
45. Obligations of counsel towards other colleagues generally

Chapter VII

Relationship with the Office of the Prosecutor

46. Professional courtesy in dealings with members of the Office of the Prosecutor

Chapter VIII

Relationship with the Judges of International Criminal Court

- 47. Immunity of Counsel
- 48. Demeanour in Court
- 49. Candour in representations before the Court
- 50. Integrity of the evidence
- 51. False or misleading statements
- 52. Respect for the Rules of the Court
- 53. Communicating with a Judge without the presence of the opposing party

Chapter IX

Relationship with the Registry

- 54. When counsel is appointed by the Registry to act on behalf of a client
- 55. Submission of fee accounts for clients entitled to legal aid
- 56. Resolution of disagreements regarding submission of fee accounts with the Registry

Chapter X

The Disciplinary Regime

- 57. Conflict between disciplinary regimes
- 58. Definition of professional and ethical misconduct
- 59. Defining principles of the disciplinary regime
- 60. Complaints against counsel
- 61. Statute of limitations
- 62. Right of Counsel to legal representation regarding disciplinary proceedings
- 63. Duty of Counsel to cooperate with the inquiry
- 64. Independence of the prosecution in matters relating to misconduct
- 65. Secretary of the Disciplinary Committee
- 66. The Disciplinary Panel
- 67. Adversarial process
- 68. Burden of proof and evidence
- 69. Findings by the Disciplinary Committee
- 70. Sanctions that may be imposed and costs
- 71. Notice to Registrar, the Prosecutor and other interested parties.
- 72. Disciplinary Appeal Process
- 73. Time to appeal to the Disciplinary Appeal Committee of the Court and procedure

Preamble

WHEREAS the International Criminal Court has been established through efforts undertaken by the International Community to put an end to impunity for the perpetrators of the crime of genocide, crimes against humanity, war crimes and the crime of aggression;

WHEREAS the International Criminal Court has been established to promote the respect for the enforcement of international justice;

CONSIDERING that a commitment to international justice requires the application of the Rule of Law;

CONSIDERING that a system of international justice based on the Rule of Law rests on three pillars: an independent judiciary, an independent prosecutor and an independent legal profession;

CONSIDERING that the Rule of Law requires that victims of the crime of genocide, crimes against humanity, war crimes and the crime of aggression have a right to be heard before the International Criminal Court;

CONSIDERING that accused persons are presumed innocent until proven guilty beyond reasonable doubt in a fair and public trial by an independent and impartial tribunal according to established principles of international law;

CONSIDERING that a fair trial requires giving the accused the opportunity to present a full, fair and vigorous defence according to well established principles of international law as stated in Articles 10 and 11 of the Universal Declaration of Human Rights;

CONSIDERING that according to established principles victims, witnesses and accused persons have a right to representation by counsel of choice in proceedings that affect them;

CONSIDERING that the right to representation by counsel for victims and accused persons is fundamental to a fair trial and that as such, counsel authorized to represent clients before the International Criminal Court have standing before the Court in equality with the Prosecutor;

CONSIDERING that established principles require that counsel acting on behalf of clients before the International Criminal Court maintain high standards of professional conduct and that they be competent, honest and loyal;

CONSIDERING that established principles require that counsel acting on behalf of victims and accused persons must be able to act with full independence and in the

interests of their clients under the authority of the Rules of the International Criminal Court;

CONSIDERING that the principle of self governance is at the heart of the independence the legal profession;

IT IS RESOLVED THAT:

A Code of Conduct be adopted as a means to ensure that victims and accused persons appearing before the International Criminal Court will be represented by independent, competent and honest counsel;

And that in order to ensure the independence of counsel, this Code of Conduct be enforced through a peer review process that is subject to judicial control.

Chapter I

Interpretation and definitions

1. Interpretation

- 1) Counsel who appear before the International Criminal Court are drawn from every continent, legal system and legal tradition. The Code of Conduct is designed primarily as an instrument to encourage the attainment of universal standards in the quality and effectiveness of the representation of clients and the assistance to clients by enunciating the principles to which counsel shall adhere and by providing guidelines for conduct. The Code of Conduct shall be interpreted with an understanding of these underlying objectives.

2. Definitions.

- 1) Counsel: In this Code the term “counsel” refers to counsel, legal representatives and persons offering legal assistance or services as described in the Rome Statute of the International Criminal Court and the Rules of Procedure and Evidence. The term “counsel” also applies to co-counsel.
- 2) Mandate: In this Code the term “mandate” refers to a mandate concerning a matter described in Article 10 (1) of the Code. A mandate exists when a client has authorized counsel to act on behalf of the client and counsel has accepted.
- 3) Court: The term “Court” refers to the International Criminal Court (ICC) as defined in the Rome Statute of the ICC.
- 4) Prosecutor: The term “Prosecutor” refers to the office of the Prosecutor and individual prosecutors as defined in the Statute of Rome and the Rules of Procedure and Evidence.
- 5) Registrar of the Court: The terms “Registrar of the Court”, “Registrar” and “Registry” refer to the office of the Registrar as defined in the Rome Statute of the ICC and the Rules of Procedure and Evidence.
- 6) National legal associations: The term “National legal associations” refers to any national Bar association or law society, and includes the professional organisations or authorities responsible for laying down rules of professional conduct and the administration of disciplinary matters.
- 7) Statute: In this Code the term “Statute” refers to the Rome Statute of the ICC.

- 8) Rules: In this Code the term “Rules” refers to the Rules of Procedure and Evidence of the International Criminal Court.
- 9) Judge : In this Code the term “Judge” refers to a judge of the International Criminal Court.
- 10) Crimes: In this Code the term “crimes” refers to the crimes mentioned in paragraph (1) of Article 5 of the Rome Statute of the ICC.
- 11) Code: In this Code, the term “Code” refers to the present Code of Conduct and Disciplinary Procedure of the International Criminal Bar.
- 12) Suspect: In this Code the term “suspect” or “suspects” refers to an individual or individuals under investigation for, or suspected of, committing crimes that fall under the jurisdiction of the International Criminal Court.
- 13) Accused person: In this Code the terms “accused person” or “accused persons” refers to an individual or individuals charged before the International Criminal Court or convicted of a crime before the International Criminal Court.
- 14) Convicted person: In this Code the terms “convicted person” or “convicted persons” refers to an individual or individuals convicted of crimes mentioned in paragraph (1) of Article 5 of the Rome Statute of the ICC.
- 15) Victim: In this Code the term “victim” or “victims” refers to a person or a particular group of persons who were victims or alleged victims of crimes mentioned in paragraph (1) of Article 5 of the Rome Statute of the ICC.
- 16) Witness: In this Code the term “witness” or “witnesses” refers to a person or to persons who could be called to give evidence, orally or in writing, in a matter that is before the International Criminal Court.
- 17) Firm: In this Code the term firm refers to a law firm or a law office and does not include a Barrister’s Chambers.
- 18) Amicus curiae: In this Code the term “amicus curiae” refers to a State, an organization or a person invited or granted leave by a Chamber of the Court to make any oral or written submissions on any issue the Chamber of the Court deems appropriate.
- 19) Investigators: In this Code the term “investigators” refers to investigators working for the Prosecutor or for counsel.

Chapter II General Principles

3. Independence

- 1) Counsel shall represent and assist a client without fear or favour within the bounds of the law.
- 2) Counsel shall always exercise independent professional judgement on behalf of a client.
- 3) Counsel shall never permit his or her independence, integrity, and standards of professionalism to be compromised by any external or personal pressures.

4. Honesty and integrity

- 1) Counsel shall be honest and respectful in his or her relations with the client, opposing counsel, accused persons, victims, witnesses, the Prosecutor, the Registrar and the Court.

5. Competence

- 1) Counsel shall provide competent representation. Competent representation requires the experience, legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation of a client before the International Criminal Court.

6. Confidentiality and Privilege

Confidentiality

- 1) Counsel has a duty to adhere to this confidentiality rule and to ensure that assistants and staff adhere to this confidentiality rule.
- 2) Counsel may reveal such information, but only to the extent counsel reasonably believes necessary:
 - a) to prevent the client from committing a criminal act that counsel believes is likely to result in imminent death or substantial bodily harm; or
 - b) to establish a defence to a criminal charge or civil claim against counsel based upon conduct in which the client was involved, or to respond to

allegations in any proceeding concerning counsel's representation of the client.

- c) When counsel is uncertain about whether information relating to the representation or assistance of a client should be revealed counsel shall consult or seek guidance with respect to this matter from the International Criminal Bar Ethics Committee, from a colleague who is bound by the present Code of Conduct or from the national legal association to which counsel belongs.
- 3) The fact that information has otherwise become public or known to others does not permit counsel to disclose the information unless the client has been fully informed and knowingly consents to counsel's disclosure or its continued disclosure is impliedly necessary to fully represent the client.
- 4) Counsel has a duty before and after representation of a client to safeguard client information and to take necessary precautions to protect the information.

Evidentiary Privilege

- 5) Except as otherwise provided in this Article, the counsel-client privilege may be invoked with respect to:
 - a) a communication
 - b) made between privileged persons
 - c) in confidence
 - d) for the purpose of obtaining or providing legal assistance for the client.
- 6) Definitions:
 - a) A "communication" is any expression through which a "privileged person" as defined below undertakes to convey information to another privileged person and any document or other record revealing such an expression.
 - b) "Privileged persons" are the client (including a prospective client), the client's counsel, agents of either who facilitate communications between them, and agents of counsel who facilitate the representation.
 - c) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the

communication except a privileged person or another person with whom communications are protected under a similar privilege.

- d) A communication is made for the purpose of obtaining or providing legal assistance if it is made to or to assist a person:
 - i) who is a counsel or who the client or prospective client reasonably believes is a counsel; and
 - ii) whom the client or prospective client consults for the purpose of obtaining legal assistance.

7) Common interest arrangements:

- a) If two or more clients with a common interest in a litigious or non-litigious matter are represented by separate counsel and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.
- b) Unless the clients have agreed otherwise, such a communication is not privileged as between clients in a subsequent adverse proceeding between them.

8) Waiver

The counsel-client privilege is waived if the client specifically agrees to waive the privilege.

9) Exceptions:

- a) The counsel-client privilege does not apply to a communication occurring when a client, regardless of the client's purpose at the time of consultation, uses counsel's advice or other services to wilfully engage in or wilfully assist a crime or fraud.
- b) The counsel-client privilege does not apply to a communication that is essential to establish a claim or defence on behalf of counsel in a dispute between counsel and the client, to establish a defence to a criminal or disciplinary charge or other claim formally instituted against counsel based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning counsel's representation of the client.
- c) The counsel-client privilege cannot apply where it is specifically excluded by law applicable to the Court.

10) Invoking privilege:

- a) When an attempt is made to introduce in evidence or obtain discovery of a communication that is privileged:
 - i) A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke or waive the privilege, either personally or through counsel or another authorized agent.
 - ii) Counsel, an agent of counsel, or an agent of a client from whom a privileged communication is sought must invoke the privilege when doing so appears reasonably appropriate, unless the client has waived the privilege or has authorized counsel or the agent to waive it.
- b) Counsel who is invoking the privilege must object to an attempt to disclose the communication.
- c) Counsel must timely assert a waiver of, or exception to the privilege.

Duration of confidentiality and privilege

- 11) Confidentiality and the counsel-client privilege continue after counsel ceases to represent the client for whatever reason, including the death of the client.

7. Conflict of interest

1) General Rule:

- a) Counsel shall not represent a client if the representation of that client could adversely affect, or could reasonably appear to affect, the interests of another client, third person, or counsel's own interests, unless:
 - i) the counsel reasonably believes there will be no material adverse consequences to the interests of either client, or any third party to whom counsel owes responsibilities; and
 - ii) each client or other person affected consents in writing after full and informed consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

- b) Any doubt about whether a conflict of interest exists shall be resolved in favour of there being a conflict of interest after consulting with the International Criminal Bar Ethics Committee.

Business transactions with clients

2) Counsel shall not:

- a) enter into a business transaction with a client or knowingly acquire ownership, possessory, security, or other pecuniary interests adverse to a client.
- b) during the course of representation, make or negotiate an agreement giving counsel literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Once the representation and the appeal process have ended, counsel may enter into such an agreement with the client if the client has obtained independent legal advice on the matter.
- c) accept a case on a contingent fee basis unless and except as regulated by the Rules of the Court.¹
- d) provide financial assistance or other substantial improper benefit to a client, a relative or an agent of the client in connection with pending or contemplated litigation.
- e) make an agreement prospectively limiting counsel's liability to a client.
- f) accept compensation from one other than a client unless all the following conditions are met:
- i) the client consents in writing after full and candid consultation;
 - ii) there is no interference with the counsel-client relationship and counsel's independence and loyalty to the client;
 - iii) client confidentiality is maintained;
 - iv) the person is made aware that client independence and confidentiality will be maintained.

¹ An absolute prohibition of contingent fee agreements may limit the possibilities for representation of victims or victims groups, therefore if the Court deems it appropriate, counsel will be entitled to negotiate such agreements.

3) Former client:

a) Counsel who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client and the new client give informed consent in writing after full and candid consultation.

b) Counsel shall not knowingly represent a person in a matter, or any substantially related matter, in which a firm with which counsel was formerly associated or by which counsel was formerly employed had previously represented a client:

i) whose interests are materially adverse to that person; and

ii) about whom counsel had acquired confidential information protected by this Article and Article 6 that is material to the matter,

unless the former client and the new client consent in writing after full and candid consultation.

c) Counsel who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

i) use information relating to the representation to the disadvantage of the former client except as Article 6 would permit or require with respect to a client, or when the information has become generally known; or

ii) reveal information relating to the representation except as Article 4 would permit or require with respect to a client.

4) While counsel are associated in a firm, none of them shall knowingly represent a client if any one of them, practicing alone, would have a conflict of interest under these rules.

8. The client's right to choice of counsel

1) The client has the right to counsel of choice.

2) When the client is eligible for legal aid, counsel shall not accept a mandate to act on behalf of the client if the client has chosen to be represented by another qualified counsel or has chosen not to be represented by counsel.

9. Relationship between counsel and client to be respectful

- 1) Counsel should seek to establish a relationship of trust and confidence with the client and must keep the client reasonably informed of all developments in the case and strategies to be used.
- 2) Counsel shall not discriminate against clients or prospective clients on the basis of ethnic or national origin, nationality, citizenship, race, colour, religion, gender, marital status, age, disability, political beliefs, sexual orientation or sexual reasons or economic status.

Chapter III General provisions

10. Application of the Code of Conduct.

- 1) This Code of Conduct applies to the professional activities of all counsel who interact with those who are or may be:
 - a) suspected of committing crimes that fall under the jurisdiction of the International Criminal Court;²
 - b) accused of, or convicted of crimes that fall under the jurisdiction of the International Criminal Court;³
 - c) victims of crimes that fall under the jurisdiction of the International Criminal Court;⁴
 - d) witnesses to crimes that fall under the jurisdiction of the International Criminal Court.⁵
 - e) *amicus curiae* granted leave to submit, in writing or orally, any observation on any issue the Chamber of the Court deems appropriate on behalf of a State, an organization or a person.⁶

11. Conflicts between the Code of Conduct before the International Criminal Court and National Codes of Conduct.

- 1) Without prejudice to the pursuit of a progressive harmonisation of rules of conduct or professional practice, Counsel to whom the present Code of Conduct applies must at all times act in conformity with the rules contained herein.
- 2) Counsel appearing before the International Criminal Court may have obligations with respect to national legal associations that govern their professional conduct even when they are outside the territorial limits of their respective countries. Accepting that codes of conduct and rules of ethics

² Article 55 paragraph (2) c) and d) and article 56 paragraph (2) d) of the Treaty of Rome refer to legal assistance and counsel.

³ Article 61 paragraphs (1) and (2) and article 67 paragraph (1) b) and d) of the Treaty of Rome. Rule 21 and 22 of the Rules of Procedure and Evidence.

⁴ Article 68 paragraph (3) of the Treaty of Rome. Rule 90 of the Rules of Procedure and Evidence.

⁵ Article 43 paragraph (6) of the Treaty of Rome. Rule 16 and 17 of the Rules of Procedure and Evidence.

⁶ Rule 103 of the Rules of Procedure and Evidence.

are designed to promote and secure the highest standards within the legal profession, the present Code of Conduct does not limit or prevent the application of any other code of ethical conduct that may apply to counsel.

- 3) When counsel is confronted with a choice between ethical duties emanating from the application of the present code and the application of any other code of ethical conduct to which counsel is required to submit, counsel must seek to reconcile both duties whenever possible. Counsel may consult or seek guidance with respect to this matter from the International Criminal Bar Ethics Committee or from a colleague who is bound by the present Code of Conduct.
- 4) When counsel is confronted with irreconcilable conflicting ethical duties emanating from the application of the present code and the application of any other code of ethical conduct to which counsel is required to submit, counsel must either follow the rules outlined in the present Code of Conduct or withdraw from the case in accordance with Article 19 (2) f) of this Code.
- 5) In all situations described in paragraph (4) of the present section, counsel should disclose the existence of the irreconcilable conflict to the International Criminal Bar and the appropriate body of the national legal association to which they belong.

12. Affirmation of Counsel.

- 1) All counsel must take the following affirmation before a designated person of the International Criminal Bar before accepting a mandate as defined in Article 10 (1) of the Code:

I have read and understand the Code of Conduct regarding matters that concern the International Criminal Court and I undertake to respect and follow the principles, guidelines and requirements set forth by the Code.

I have signed on this day ____ of _____, 20____
In the city of _____, _____

- 2) Failure to take the affirmation does not exclude the application of this Code to counsel. Any counsel who comes within the ambit of a mandate as defined in Article 1 (2) of the Code will take the affirmation as soon as possible.

13. Former members of the Office of the Prosecutor and former Judges and staff of the Chambers and of the Registry.

- 1) Former Prosecutors or members of the office of the Prosecutor and former Judges and former staff of the Chambers and of the Registry may accept mandates to act as counsel on behalf of accused persons, victims and witnesses in matters that are prosecuted before the International Criminal Court under the following conditions.
 - a) The former Prosecutor, member of the office of the Prosecutor, former staff of the Chambers or of the Registry, or former Judge was not involved in any matter related to the mandate they are called to accomplish.
 - b) The former Prosecutor, member of the office of the Prosecutor, former staff of the Chambers or of the Registry, or former Judge is not in a conflict of interests and has not been privy to any information that is likely to result in a conflict of interests.

14. Adoption and amendments

- 1) The present Code shall enter into force in conformity with Rule 8 of the Rules.
- 2) In conformity with sub-rule (3) of Rule 8, the Code shall be amended according to the following procedure:
 - a) All proposals for amendments must be submitted to the Executive Committee of the International Criminal Bar at least 60 days before the General Assembly of the International Criminal Bar.
 - b) Upon reception by the Executive Committee of the International Criminal Bar, the proposals for amendments to the Code shall be circulated amongst the members of the International Criminal Bar and posted on the website of the International Criminal Bar.
 - c) The General Assembly of the International Criminal Bar shall adopt the proposed amendments to the Code and submit the amendments to the Registrar for approval by the Court.
 - d) The proposed amendments shall come into force 30 days after their adoption by the International Criminal Court.

Chapter IV

Relationship between counsel and client

15. Establishing the relationship with the client.

- 1) Establishing the relationship:
 - a) Counsel should discuss the objectives of the representation with the client and be able to justify the mandate.
 - b) Counsel should explain to the client the requirement of confidentiality and counsel-client privilege.
- 2) Counsel at all times must respect the autonomy of the client.
- 3) Counsel shall keep the client informed, on a reasonably regular basis, of the evolution and developments of the matter for which counsel has been retained.

16. The scope of the mandate

- 1) As between client and lawyer, counsel shall abide by the client's decisions concerning the objectives of representation after full consultation with the client.
- 2) Counsel may limit the objectives of the representation if the client consents after full and candid consultation.
- 3) When counsel undertakes to accomplish a mandate, counsel has the authority and duty to prepare and file all the required motions and take any other required and lawful actions in the client's name in order to fulfil the mandate.
- 4) Authority reserved to a counsel:
 - a) to refuse to perform, counsel, or assist future or ongoing acts in the representation that counsel reasonably believes to be unlawful;
 - b) to make decisions or take actions in the representation that counsel reasonably believes to be required by law or an order of a court;

- 5) Counsel shall conduct an adversarial defence unless otherwise instructed by the client after full consultation resulting in the confirmation of such a decision

17. Instructions from the client

- 1) Counsel may receive oral instructions from a client regarding any matter. When instructions concern essential matters of a mandate as defined in articles 15 and 16 of the Code, it is preferable they be in writing. Failure to get instructions in writing does not vitiate the instruction, nor does it constitute misconduct.

18. Refusal to accept a mandate

- 1) Counsel has the right to refuse to accept a mandate for any reason that is non-discriminatory under Article 9 without stating such reasons.
- 2) Counsel has a duty to refuse to accept a mandate because of a conflict of interest unless permitted under Article 7.
- 3) Counsel shall refuse to accept a mandate when counsel does not possess the required competence and skill to fulfil the mandate.
- 4) Counsel shall refuse to accept a mandate when counsel is incapable of dealing with the matter promptly and diligently.
- 5) Counsel shall refuse a mandate in any case in which the client has expressed his or her unequivocal desire not to be represented by such counsel.
- 6) Any confidential communications made by the client or counsel prior to counsel refusing to accept a mandate remain confidential.

19. The withdrawal of counsel from a mandate

- 1) Counsel shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - a) the representation will result in a violation of these rules or other law;
 - b) counsel's physical or mental condition materially impairs the counsel's ability to represent the client; or

- c) counsel is discharged or the client unequivocally instructs counsel to withdraw.
- 2) Counsel may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
- a) the client persists in a course of action involving the lawyer's services that counsel reasonably believes is criminal or fraudulent;
 - b) the client has used counsel's services to perpetrate a crime or fraud;
 - c) the client insists upon pursuing an objective that the counsel considers repugnant or imprudent;
 - d) the client fails substantially to fulfil an obligation to counsel regarding counsel's services and has been given reasonable warning that counsel will withdraw unless the obligation is fulfilled;
 - e) the representation will result in an unreasonable financial burden on counsel or has been rendered unreasonably difficult by the client;
 - f) counsel is confronted with irreconcilable conflicting ethical duties emanating from the application of the present code and the application of any other code of ethical conduct to which counsel is required to submit; or
 - g) other good cause for withdrawal exists.
- 3) Upon termination of representation, counsel shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client of the effort to withdraw, allowing time for employment of other counsel, co-operating with successor counsel to take over the representation, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned to the source of the advance fee. Counsel may retain papers relating to the client to the extent permitted by other law.

20. The termination of a mandate

- 1) A client may discharge counsel at any time, with or without cause.
- 2) Discharged counsel loses authority to act on behalf of the client, unless ordered to remain on the case by the court.

- 3) If the client discharges counsel, counsel must promptly move to withdraw from representing the client.
- 4) All information received by counsel in the course of the execution of the mandate shall remain confidential and privileged even after the mandate is terminated.

21. The mandate from a client with diminished capacities

- 1) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, counsel shall, as far as reasonably possible, maintain a normal client-counsel relationship with the client and continue to pursue the objectives of the representation.
- 2) Counsel may seek the appointment of a guardian or take other protective action with respect to a client, only when counsel reasonably believes that the client cannot adequately act in the client's own interest.
 - a) If a guardian is appointed, counsel will inform the guardian of the mandate and the scope of counsel's responsibilities and treat the guardian as the client.
 - b) If the guardian instructs counsel to act in a manner that counsel knows will violate the guardian's legal duties toward the client, counsel may refuse to follow those instructions.
- 3) Counsel representing a client with diminished capacity and for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue counsel's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.

22. Enduring duty to the client

- 1) The relationship of client and counsel is one of candid exchange and trust, binding counsel to utmost good faith in dealing with the client. In the discharge of that duty to the client, counsel must always act with fairness, honour, candour, and fidelity to the client.
- 2) The duty of counsel towards the client continues after the representation has ended.

23. Solicitation of prospective clients and publicity

- 1) Counsel shall not, directly or indirectly, solicit professional employment from a prospective client with whom counsel has no prior professional relationship when a significant motive for doing so is counsel's pecuniary gain or fame.
- 2) Counsel shall not solicit professional employment from a prospective client even when not otherwise prohibited by the above, if:
 - a) the prospective client has made known to counsel a desire not to be solicited by counsel; or
 - b) the solicitation involves fraud, coercion, duress, harassment or a breach of professional ethics.
- 3) Counsel may advertise or seek personal publicity for the purpose of reaching clients or potential clients located where such advertising or personal publicity is permitted. In all circumstances the contents of the advertising or personal publicity shall provide information that is:
 - a) truthful;
 - b) respectful of counsel's obligations regarding confidentiality and privilege;
 - c) thoughtful, considerate and dignified.

24. Financial arrangements (fee, fee sharing, compensation)

- 1) Counsel's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - a) the time and labour required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
 - b) the likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - c) the fee customarily charged by counsel for similar legal services;
 - d) the nature of the matter and what is at risk for the client;
 - e) the time limitations imposed by the client, court, or circumstances of the case; and

- f) the experience, reputation, and ability of counsel performing the services.
- 2) The basis or rate of the fee shall be communicated to the client in writing before or within a reasonable time after commencing the representation.
 - 3) Prohibited fees:
 - a) Counsel shall not enter into an arrangement for, charge, or collect a contingent fee for representing a client except in accordance with Article 7 (2) c) of the Code.
 - b) Counsel shall not accept a fee from a third person where there would be any interference with counsel independence and loyalty to the client, a breach of confidentiality, or a conflict of interest.
 - c) Counsel shall not accept a fee from the client or a third person when counsel is assigned by the Registrar.
 - 4) A division of a fee between counsel who are not in the same firm may be made only if:
 - a) the division relates to the services performed by each counsel or, by agreement with the client, each counsel assumes joint responsibility for the representation;
 - b) the client is advised of and agrees with the participation of all counsel involved; and
 - c) the total fee is reasonable.
 - 5) Counsel or members of their staff may not share counsel's fees with any one other than counsel, including clients, relatives, or agents of clients, but counsel may remunerate their staff from fees.
 - 6) Counsel shall review the statements of accounts of co-counsel and counsel's staff, regarding fees and disbursements engaged in the representation of clients.
 - 7) Counsel must ensure the client is provided with materials, documents and equipment in order to allow the client to adequately prepare a defence.
 - 8) All matters that relate to discussions or arrangements concerning the payment of fees for professional services rendered by counsel, the actual payment, the amount paid and the identity of the person who paid the fee for professional services, is confidential and privileged.

25. Legal Aid

- 1) Counsel shall inform the client, or potential client, of the availability of legal aid when the client may be eligible for assistance.

26. Resolution of disputes regarding accounts for fees and disbursements

- 1) When a client has a dispute with counsel regarding the account for fees and disbursements the client or counsel shall inform the International Criminal Bar, within a period of six months of the dispute.
- 2) The representative of the International Criminal Bar shall make the appropriate inquiries and attempt to reconcile the parties in order to reach an agreement regarding the account for fees and disbursements.
- 3) All matters pertaining to the dispute over fees and disbursements is confidential and the representative of the International Criminal Bar shall take the appropriate measures in order to guarantee the confidentiality of the process.

27. The role of counsel as advocate

- 1) Counsel who appear before the court appear as advocates: for the accused, for victims, for witnesses or for amicus curiae.
- 2) Counsel serving in one capacity should be mindful of the differing roles of other advocates in the system of justice, the prosecutor, counsel for the accused, for victims, for witnesses or for amici curiae, and the unique and sometimes conflicting duties and obligations those roles often place upon them.

28. The role of counsel as counsellor

- 1) In representing a client, counsel shall exercise independent professional judgement and render candid advice. In rendering advice, counsel may refer not only to law but to other considerations such as moral, reputational, economic, social, and political factors that may be relevant to the client's situation.
- 2) Counsel may not counsel or assist a client in conduct that counsel knows to be fraudulent or criminal or in violation of a court order.

- 3) Counsel may, however, counsel or assist a client in conduct when counsel reasonably believes:
 - a) that the client's conduct constitutes a good faith effort to determine the validity, scope, meaning or application of a law or court order; or
 - b) that the client can assert a non-frivolous argument that the client's conduct will not constitute a crime or fraud or constitute a violation of a court order.
- 4) When counsel knows that a client expects assistance not permitted by this Code or other law, counsel shall consult with the client regarding the relevant limitations on the counsel's conduct.

29. The representation of accused persons

- 1) Counsel should explain the nature of the charges faced by the accused, the elements of proof needed for conviction, and the potential consequences following a conviction.
- 2) Counsel should fully discuss the facts and law of the case with the client and the objectives of the representation.

30. The representation of victims

- 1) Counsel acting on behalf of victims or victims groups should explain to their clients the special nature of their status in the proceedings before the Court and inform them of their rights and recourses. Counsel should:
 - a) determine with the clients the objectives of the representation;
 - b) ensure that the clients are not subject to measures that are prejudicial or contrary to their rights and interests and that such measures are respectful of the requirements of a fair trial;
 - c) when a client is afforded protective measures by the Witnesses Unit of the Registrar, ensure the protection of the identity of the clients or any information relating to the client;
 - d) when representing a group of victims, inform the clients collectively of the potential for conflicts of interests and take measures to avoid any potential conflicts arising from divergent individual or collective interests;

- 2) Counsel acting on behalf of a group of victims may, with the agreement of their respective clients, enter into agreements regarding specific issues or common strategies for representation. In such circumstances, counsel cannot enter into agreements that could affect counsel's independence or loyalty to the client.

31. Communications with clients

- 1) Counsel shall keep a client reasonably informed about the status of any matter and promptly comply with reasonable requests for information.
- 2) Counsel shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- 3) Upon withdrawal or termination, counsel shall take reasonable steps to convey to the former client or replacement counsel any material communication counsel receives relating to the matter involved in the representation.
- 4) When interviewing the client, counsel shall seek to ensure privacy essential for confidential communication between counsel and client. If the client is detained, counsel shall act reasonably to ensure privacy and, if necessary, seek adequate facilities for private discussions between counsel and the suspect or the accused.

32. Counsel called as witness

- 1) Counsel shall not act in a matter in which there is a substantial probability that counsel or an associate of counsel will be a necessary witness except where:
 - a) the testimony relates to an uncontested issue; or
 - b) the testimony relates to the nature and value of legal services rendered in the case; or
 - c) substantial hardship would be caused to the client if that counsel does not so act.
- 2) Counsel shall not call an opposing counsel as a witness unless there is a compelling need for that counsel's testimony. If an opposing counsel has to be called as a witness, confidentiality and privilege shall be preserved, unless counsel is ordered to testify to a confidential or privileged matter by the court.

33. Duty to keep files containing documents and record of work accomplished in fulfilment of mandate

- 1) Counsel must take necessary steps to safeguard and protect the confidentiality of documents in counsel's possession or in the possession of counsel's staff relating to the representation of a client or former client.
- 2) On request, counsel should allow a client or former client to inspect any document or tangible item in the possession of counsel relating to the representation, unless substantial grounds exist to refuse.
- 3) Counsel shall keep the files of any case before the International Criminal Court for ten years after fulfilment of the mandate unless earlier turned over to subsequent counsel or to the client, at the client's request.
- 4) After 10 years following the termination of the mandate, if the client or the client's representative do not want the files or the client is unavailable, counsel shall seek instruction from the International Criminal Bar on the disposal of the files, with due regard to confidentiality.
- 5) Counsel work-product and notes do not have to be disclosed to the client or former client.

34. Professional liability insurance

- 1) Any counsel accepting a mandate shall have professional liability insurance covering the representation⁷.

⁷ It is understood that this section will come into force once the ICB has negotiated an agreement with an insurance company for this purpose. Until that moment, counsel shall inform the client of the terms of the insurance policy that covers counsel's professional liability.

Chapter V
Relationship between counsel and third parties

35. Dealing with unrepresented persons (victims, witnesses and accused persons)

- 1) Counsel may communicate and meet with an unrepresented person when, in the client's interests, it is required by counsel's mandate. When counsel communicates with an unrepresented person counsel shall:
 - a) inform the person of their right to assistance from counsel, and if applicable, of their right to legal aid;
 - b) without infringing upon the confidentiality of the counsel-client privilege, inform the person of the interest counsel represents and the purpose of the communication;
 - c) act with integrity and courtesy;
 - d) not coerce, threaten or harass the person or any of the person's family members, friends or relations.
- 2) If counsel becomes aware of a potential conflict of interests in the course of a communication or meeting with an unrepresented person counsel shall:
 - a) inform the person of the potential conflict if it is possible to do so without infringing upon the confidentiality of the client-counsel privilege;
 - b) inform the person of their right to assistance from counsel, and if applicable, of their right to legal aid;
 - c) abstain immediately from engaging in any further contact or communication with the person.

36. Dealing with persons represented by counsel

- 1) Counsel shall not communicate or meet with any person who, to counsel's knowledge, is represented or advised by another legal professional, without the consent of that other legal professional.
- 2) Counsel shall keep the represented person's counsel informed of any communications or meetings that take place between counsel and the represented person.

37. Dealing with witnesses generally

- 1) Counsel can communicate or meet with witnesses by following the procedure provided for in Articles 35 and 36 of the Code.
- 2) Counsel is prohibited, from offering anything to anyone for the purpose of unduly encouraging or influencing their testimony.
- 3) Counsel shall not coerce, threaten or harass a witness, potential witness or their family members, friends or relations.
- 4) The payment of an expert's fee is permissible.

38. Dealing with witnesses afforded protective measures

- 1) Counsel can communicate or meet with witnesses afforded protective measures when they are represented by counsel, by following the procedure provided for in Article 36 of the Code, or otherwise by communicating with the Witnesses Unit of the Registrar.
- 2) Counsel shall not reveal the identity of protected witnesses nor any information that may reveal their identity and whereabouts unless counsel has been specifically authorized to do so by the competent authority.

39. Statements by counsel to others

- 1) All correspondence between counsel who are party to a common interest agreement pursuant to Article 6 (7) shall be presumed confidential and privileged by counsel unless otherwise stipulated.
- 2) When counsel does not expect a particular communication to be confidential, counsel must, at the outset, state clearly that the communication between counsel is not confidential.
- 3) Counsel shall be honest, candid and in good faith when making statements to other counsel or persons generally.
- 4) Neither Counsel nor counsel's staff shall make an out of court statement that a reasonable person would expect to be disseminated by means of public communication if the counsel knows or reasonably should know that it is likely to create a grave danger of imminent and substantial harm to the fairness of a proceeding before the court.

- 5) Notwithstanding paragraph (4), counsel may make a statement that a reasonable counsel would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the counsel or the counsel's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- 6) Any statement made by counsel or counsel's staff concerning a proceeding before the court must not offend the dignity and decorum of the court and must not demonstrate disrespect for the law.

40. Respect for rights of third persons

- 1) Counsel shall under all circumstances respect the rights of third parties.

Chapter VI

Relationship with other counsel

41. Co-counsel and other members of the team acting on behalf of the client

- 1) Counsel has a duty to supervise the actions of all other members of the team, directly under their control, including investigators, law clerks, researchers, and paralegals to ensure that these ethical standards are met by the team.
- 2) Co-counsel are authorized to act on behalf of a client.
- 3) The client, after consultation, shall designate one of the co-counsel as lead counsel.

42. Counsel of victims and witnesses

- 1) Counsel for victims and witnesses shall recognize and respect the duties of independence of prosecutors and counsel for the accused.
- 2) Counsel for victims and witnesses:
 - a) should advise their clients of the legal and tactical consequences of discussing the facts or their potential testimony with other counsel or investigators;
 - b) should not advise their clients to refuse to discuss the facts or their potential testimony with other counsel, the Prosecutor or investigators.
- 3) Counsel for victims may agree on how to conduct a defence to their mutual benefit. Counsel must, however, always provide independent representation for their client. Counsel will not enter into agreements to conduct a defence that sacrifices independence and loyalty to their clients.
- 4) Counsel for victims who become privy to a communication or an information that is confidential or privileged from a victim or the victim's counsel shall protect the confidentiality of that information.

43. Counsel of accused persons

- 1) Counsel for accused shall recognize and respect the duties of independence of prosecutors and victims' and witnesses' counsel.

- 2) Counsel for the accused should not advise witnesses to refuse to discuss the facts or their potential testimony with counsel for a co-accused or victims' counsel, the Prosecutor or investigators.

44. Counsel of co-accused persons

- 1) Counsel for co-accused may agree on how to conduct a defence to their mutual benefit. Counsel must, however, always provide independent representation for their client. Counsel will not enter into agreements to conduct a defence that sacrifices independence and loyalty to their clients.
- 2) Counsel for co-accused persons who are a party to a common interest agreement pursuant to article 6 (7) and become privy to confidential or privileged information or a communication from a co-accused or his or her counsel shall protect the confidentiality of that information.

45. Obligations of counsel towards other colleagues generally

- 1) Counsel shall recognise all other counsel as professional colleagues and shall act honestly, fairly, and courteously towards them and their staff at all times, in or out of court.
- 2) Counsel must always recognize that counsel are members of a profession with duties to both their clients and the court and a duty to further the fair and efficient administration of justice.
- 4) Some matters may be handled informally between counsel, without prejudice to the client's rights, and counsel should attempt to do so before presenting the matter to the court.
- 5) At all times, in and out of court, counsel shall treat other counsel as he or she expects to be treated.

Chapter VII
Relationship with the Office of the Prosecutor

46. Professional courtesy in dealings with members of the Office of the Prosecutor

- 1) Counsel shall at all times maintain a courteous and professional relationship with the Prosecutor and members of the Office of the Prosecutor.
- 2) In dealing with the Prosecutor and members of the Office of the Prosecutor, counsel should be mindful of the prosecution's duty to disclose all collected evidence and relevant information and must be diligent in seeking such disclosure.
- 3) Requests for disclosure shall not infringe on the confidentiality of the client-counsel privilege.

Chapter VIII
Relationship with the Judges of International Criminal Court

47. Immunity of Counsel

- 1) The obligations set forth in this Code do not limit the immunity of counsel for any oral or written statements made while representing a client.

48. Demeanour in Court

- 1) While maintaining due respect and courtesy towards the court, counsel shall defend the client's interests honourably and fearlessly without regard to counsel's own interests or to any consequences to counsel or to any other person.

49. Candour in representations before the Court (integrity in dealing with the evidence)

- 1) Counsel shall not knowingly and deliberately:
 - a) make a false statement of material fact or law to the court;
 - b) offer evidence that counsel knows to be false or assist a witness to testify falsely or offer false evidence. If a lawyer has offered material evidence and becomes convinced beyond reasonable doubt of its falsity, the lawyer shall take reasonable remedial measures.
- 2) Counsel may refuse to offer evidence that counsel reasonably believes is false, irrelevant, or lacks probative value.

50. Integrity of material physical evidence

- 1) Counsel shall at all times maintain the integrity of material physical evidence.
- 2) If counsel reasonably believes that the evidence will not be destroyed or tampered with, counsel may refuse to accept the evidence or return it to the source, explaining to all persons necessary the laws concerning tampering with and destruction of evidence and the interference with the collection of evidence.

- 3) If counsel reasonably believes that the evidence may be destroyed or tampered with, or if the client consents, counsel shall consult with the Committee on Ethics of the International Criminal Bar to determine what is to be done with the evidence.
- 4) In all circumstances counsel must ensure that any act of production relating to such evidence shall not be linked to the client or the client's counsel before the finder of fact.

51. False or misleading statements

- 1) Counsel shall never knowingly give false or misleading information to the client, court, or another counsel or party, whether involving an assertion of fact or law.
- 2) Counsel shall take all required measures to correct any false or misleading representation made to the client, court or another counsel or party as soon as counsel becomes aware that such representation was inaccurate.
- 3) Counsel shall not ask a question of a witness or make a statement of fact to the court without a good faith basis for the question or statement.

52. Respect for the Rules of the Court

- 1) Counsel who appears or takes part in a case before the court must comply with these rules of conduct, the rules of procedure, and the rules of evidence.
- 2) Counsel shall at all times have due regard to the fair conduct of the proceedings.

53. Communicating with a Judge without the presence of the opposing party

- 1) Counsel shall not communicate with a Judge about the merits of a case *ex parte*, except as authorized by the Rules or with the permission of the opposing party or other counsel, and then only for the purpose allowed. In a permitted *ex parte* proceeding, counsel shall inform the court of all material facts known to counsel that will enable the court to make an informed decision, whether or not the facts are adverse.

- 2) Counsel shall not transmit any document or other material to a Judge except as authorized by the Rules or with the permission of the opposing party or other counsel.
- 3) The opposing party or other counsel shall be given adequate notice of any meeting or hearing with the Court to be able to participate.

Chapter IX Relationship with the Registry

54. When counsel is appointed by the Registry to act on behalf of a client

- 1) Counsel appointed by the Registry to act on behalf of a client shall act toward the client with the same standards as counsel would if the client had retained counsel without the intervention of the legal aid.
- 2) In such circumstances, counsel shall at all times act in the client's best interests and in full independence from the Registry.
- 3) Counsel appointed by the Registry to act on behalf of a client shall request all materials and information related to the matter that concerns the client in the Registry's possession.

55. Submission of fee accounts for clients entitled to legal aid

- 1) When counsel accepts an appointment to represent a person on legal aid, counsel shall not accept or solicit a fee or require payment for a disbursement when such fee or disbursement is covered by legal aid.
- 2) Counsel shall with integrity and in good faith submit statements of accounts regarding fees and disbursements engaged in the representation of clients eligible for legal aid in conformity with the applicable Rules and Regulations.
- 3) Lead counsel shall review the statements of accounts of co-counsel and counsel's staff, regarding fees and disbursements engaged in the representation of clients eligible for legal aid.

56. Resolution of disputes regarding submission of fee accounts with the Registry

- 1) Disputes with the Registry over an account for fees and disbursements shall be dealt with in a respectful and courteous manner, without infringing upon the confidentiality of the counsel-client privilege.
- 2) If counsel is unable to resolve the dispute over an account for fees and disbursements with the Registry, counsel shall inform the International Criminal Bar and seek instructions and guidance.

Chapter X The Disciplinary Regime

57. Conflict between disciplinary regimes

- 1) The present Chapter is not intended to prohibit or limit in any matter the disciplinary powers of a national legal association that may apply to a counsel subject to this Code.

58. Definition of professional and ethical misconduct

- 1) Professional misconduct referred to in this Code concerns the actions of counsel in the execution of their mandates. While misconduct as defined in this Code may, in some cases, also constitute “Offences Against the Administration of Justice” or “Misconduct Before the Court” as defined in Articles 70 and 71 of the Rome Statute of the ICC, this Code and its Disciplinary Regime do not concern the enforcement or the sanctions that may result from the application of Articles 70 or 71 of the Rome Statute of the ICC.
- 2) A material violation of this Code or an intentional attempt to commit such constitutes professional misconduct by Counsel.

59. Defining principles of the disciplinary regime.

- 1) Independence of counsel requires self-governance with respect to matters concerning misconduct. In order to ensure the complete independence of counsel, this Code shall be enforced through a peer review process.
- 2) The Council of the International Criminal Bar shall elect counsel chosen from the membership of the International Criminal Bar to fill the functions required for the proper governance of matters pertaining to the misconduct of counsel.
 - a) **Director of the Office of Disciplinary Investigations:** A counsel with at least 10 years of continuous legal experience and a recognized competence in the field of legal ethics, shall be elected to direct the Office of Disciplinary Investigations. Other counsel, with the same qualifications, may be elected by the Executive Committee of the International Criminal Bar to assist the director of the Office of Disciplinary Investigations. The election to these positions shall be for a non-renewable term of 5 years. The task of the Office shall be to investigate and prosecute complaints of misconduct made against counsel.

- b) **Secretary of the Disciplinary Committee:** A counsel with at least 10 years of continuous legal experience, shall be elected Secretary of the Disciplinary Committee. The task of the Secretary shall be to administer the Secretariat of the Disciplinary Committee. The Secretary of the Disciplinary Committee shall be elected for a non-renewable term of 7 years.
- c) **Disciplinary Committee:** A group of counsel, the number of which shall be determined by the Council of the International Criminal Bar, with at least 15 years of continuous legal experience, shall be elected to the Disciplinary Committee. The election to this position shall be for a non-renewable term of 5 years. The Disciplinary Committee shall be charged with the task of holding public Disciplinary Hearings into the alleged misconduct of counsel subject to this Code. Members of the Disciplinary Committee shall take an oath of discretion relating to the exercise of their function. The Disciplinary Committee shall adopt rules pertaining to procedural matters before the Disciplinary Panel.
- d) **Chair of Disciplinary Committee:** Counsel with at least 15 years of continuous legal experience and a recognized competence in the field of legal ethics, shall be elected Chair of the Disciplinary Committee. The election to this position shall be for a non-renewable term of 5 years. The task of the President of the Disciplinary Committee shall be to organize the Disciplinary Panels that will hold the disciplinary hearings and administer the Disciplinary Committee.
- e) **The Disciplinary Appeal Committee of the Court:** A Chamber composed of three members of the Court.
- f) The Director of the Office of Disciplinary Investigations and counsel elected to assist the Director, the Secretary of the Disciplinary Committee and the members of the Disciplinary Committee shall, at the end of their term, hold their office or function until such time as they have been replaced.

60. Complaints against counsel

- 1) Complaints against counsel regarding misconduct as defined in this Code may be made by any person whose rights or interests could be affected by the alleged misconduct.
- 2) The complaint shall be made in writing, identifying the complainant and the counsel against whom the complaint is made, and shall describe in sufficient detail the alleged misconduct of counsel. The complaint may refer to more

than one or more acts of alleged misconduct, but each act of misconduct must be particularized with sufficient detail.

- 3) The complaint shall be made to the Secretary of the Disciplinary Committee and shall remain confidential unless the Office of Disciplinary Investigations determines that a prosecution of the alleged misconduct is warranted.

61. Statute of limitations

- 1) Complaints against counsel regarding misconduct as defined in this Code shall be submitted no later than 12 months after the termination of the mandate or no later than 12 months after the complainant should have reasonably known about the existence or occurrence of the alleged misconduct.
- 2) For substantial reasons, the Chair of the Disciplinary Committee may extend the delay to submit a complaint to the Secretary of the Disciplinary Committee after the above-mentioned period.

62. Right of counsel to legal representation regarding disciplinary proceedings

- 1) Counsel who is under investigation for alleged misconduct or who is charged with an offence under this Code shall be entitled to representation by an attorney. The attorney will be authorized to act on behalf of counsel in all matters pertaining to the investigation of the alleged misconduct or the prosecution of the alleged misconduct before the Disciplinary Panel.
- 2) The national legal association of which counsel is a member is entitled to submit written arguments or comments regarding any matter under investigation.

63. Duty of Counsel to cooperate with the inquiry

- 1) Counsel who is under investigation for alleged misconduct shall cooperate with the Office of Disciplinary Investigations by answering all questions and by providing pertinent information. However, counsel may refuse to answer questions or provide materials on the basis that the answers to the questions or the contents of the requested materials may tend to incriminate counsel. The refusal to cooperate under such circumstances cannot be used against counsel.

- 2) Counsel may not invoke the counsel-client privilege or the duty of confidentiality to refuse to cooperate or disclose information to the Office of Disciplinary Investigations in a matter pertaining to an inquiry into the counsel's alleged misconduct when the client has waived the privilege or counsel's alleged misconduct concerns conduct in which the client was involved, the instructions received from the client or counsel's representation of the client.

64. Independence of the prosecution in matters relating to misconduct

- 1) The Office of Disciplinary Investigations shall fulfil its duties with total independence from the International Criminal Bar.
- 2) The Office of Disciplinary Investigations shall submit to the President of the International Criminal Bar an annual report of its activities indicating the number of complaints that were investigated, the number of prosecutions that have been initiated before the Disciplinary Committee and the expenses related to the general administration of the Office of Disciplinary Investigations.
- 3) The Office of Disciplinary Investigations shall establish a working relation with the Office of the Registrar of the Court for the purpose of obtaining information relating to its duties.
- 4) The Office of Disciplinary Investigations shall:
 - a) Investigate every complaint concerning the alleged misconduct of counsel transmitted by the Secretary of the Disciplinary Committee.
 - b) Indicate in writing to the Secretary of the Disciplinary Committee, within 6 months from the time the complaint was made, whether the alleged misconduct by counsel warrants a prosecution. If the investigation cannot be concluded within a period of 6 months, advise in writing both the Secretary and the complainant of the reasons for the delay and the additional time that will be required to complete the investigation.
 - c) Provide counsel with an opportunity to respond in writing to the allegations of the complaint before deciding if a prosecution of the matter relating to the complaint is warranted.
 - d) Attempt to reconcile the parties or mediate the matter that gave rise to the alleged misconduct.
 - e) Prosecute matters when it is determined that a prosecution of the alleged misconduct is warranted by probable cause.

- f) When a complaint is not prosecuted, advise the complainant in writing of the reasons for the decision.
- g) The Director shall consider any additional information the complainant may offer, following a decision not to prosecute the alleged misconduct, within 90 days from the time the decision was made.
- h) Members of the Office of Disciplinary Investigations are empowered to consult all files, documents, recordings, electronic or other, in the possession of counsel who is under investigation in accordance with the provisions of article 63 (1).
- i) The Office of Disciplinary Investigations may require that counsel under investigation respond to questions and provide materials, in what ever format they may be, for the purpose of the investigation.
- j) All members of the Office of Disciplinary Investigations shall take an affirmation by which they undertake to keep secret any information pertaining to a complaint or an investigation, including the name or any other information, that could lead to the identification of the counsel under investigation.
- k) All members of the Office of Disciplinary Investigations must protect the secrecy of privileged and confidential information at all times.
- l) The Director shall receive the information concerning the disagreement between counsel and client regarding accounts for fees and disbursements and shall follow the procedure set out in article 26.

65. Secretary of the Disciplinary Committee

- 1) The Secretary of the Disciplinary Committee shall fulfil the following duties:
 - a) Receive all complaints regarding allegations of misconduct by counsel.
 - b) Forward such complaints in confidence to the Office of Disciplinary Investigations.
 - c) When the Office of Disciplinary Investigations considers that a complaint should be prosecuted, the Secretary shall: transmit a copy of the complaint to the accused counsel; convene the parties to appear before the Chair of the Disciplinary Panel to determine all preliminary matters, confirm in writing to all the parties the date agreed upon for the disciplinary hearing, make all necessary preparations for the hearing, including, issuing

subpoenas, reserving translators and recording the proceedings of the disciplinary hearing and inform the national legal association to which counsel belongs of the proceedings.

- d) Keep a registry of all the proceedings and judgements of the Disciplinary Committee.
- e) Allow for the inspection of all public documents found in the registry of the Secretary of the Disciplinary Committee.
- f) If sanctions and costs are imposed by the Disciplinary Panel, make arrangements for the execution of the sanctions and costs.
- g) Where an appeal against the decision of the Disciplinary Panel is filed, the Secretary shall co-operate with the Registrar for the hearing of the appeal before the Disciplinary Appeal Committee of the Court.
- h) Take an affirmation undertaking to keep secret any information pertaining to a complaint or an investigation or any matter that is not public regarding a disciplinary hearing, including names or any other information, that could lead to the identification of the counsel under investigation.

66. The Disciplinary Panel

- 1) The Chair of the Disciplinary Committee shall appoint three members of the Disciplinary Committee to form a Disciplinary Panel when a prosecution for misconduct is initiated against counsel.
- 2) The members of the Disciplinary Panel shall designate a Chair of the Panel.
- 3) The Disciplinary Panel shall hold a hearing regarding the alleged misconduct of counsel as a three member panel at all times unless one member can no longer continue and the parties agree to continue the proceedings with a two member panel.
- 4) All proceedings before the Disciplinary Panel must be conducted in the presence of counsel who are the subject matter of the complaint or the attorney representing counsel.
- 5) Under exceptional circumstances, on a showing of clear and convincing evidence, the Disciplinary Panel may refer a matter for an emergency interim ruling by the International Criminal Court until the matter of the alleged misconduct is disposed of. After conducting a hearing, the Court may impose the emergency measure.

- 6) The Disciplinary Panel shall hold public hearings unless one of the parties requests an *in camera* hearing or an order for non-publication of the proceedings until such time as the potential prejudice that would be caused by the publication of the proceedings ceases to exist.
- 7) The hearings of the Disciplinary Panel shall be held at the seat of the International Criminal Bar at The Hague, Netherlands, or for good cause at any other place determined by the Disciplinary Panel.
- 8) The proceedings before the Disciplinary Panel shall be held in any of the working languages of the International Criminal Court with appropriate provisions made for complainants and counsel to participate fully in the hearings in their native language.

67. Adversarial process

- 1) The hearing before the Disciplinary Panel shall be conducted in conformity with the principles of the adversarial process.
- 2) The representative of the Office of Disciplinary Investigations shall disclose to accused counsel all materials and evidence gathered during the course of the investigation into the alleged misconduct. The materials and information must be disclosed to counsel before a date for the hearing by the Disciplinary Panel is set.
- 3) Accused counsel is entitled to question witnesses in order to test their reliability and credibility, and present evidence in defence. Accused counsel shall have the right to be the last to examine any witness.

68. Burden of proof and evidence

- 1) The accused counsel shall be presumed innocent of misconduct until proven guilty by clear and convincing evidence.⁸
- 2) Witnesses appearing before the Disciplinary Panel shall make a solemn declaration as set out in the Rules before giving evidence.
- 3) The Disciplinary Panel may consider all evidence, oral, written or in any other format, which is relevant and has probative value.

⁸ We believe the burden to establish misconduct should be higher than a balance of probabilities and just short of beyond reasonable doubt. The terms clear and convincing evidence is used in the USA and similar terms are used in Quebec.

69. Findings by the Disciplinary Panel

- 1) The Disciplinary Panel may dismiss a complaint if it finds the alleged misconduct is unfounded in fact or in law on a preliminary motion or after having considered the evidence of the representative of the Office of Disciplinary Investigations even before the accused counsel presents a defence.
- 2) At the end of the hearing, after the evidence has been presented and arguments made by both parties, the Disciplinary Panel may conclude its proceedings without a finding of misconduct or conclude that the accused counsel committed the alleged misconduct.
- 3) The decision of the Disciplinary Panel shall be rendered by the majority of its members and shall be accompanied by written reasons, to which separate or dissenting opinions may be appended.

70. Sanctions that may be imposed and costs

- 1) The Disciplinary Panel may make the following recommendations or orders, or impose the following sanctions against counsel after a finding that counsel committed the alleged misconduct:
 - a) Make a recommendation regarding counsel's future conduct.
 - b) Recommend that counsel complete a specific course or courses before being authorized to accept mandates as defined in Article 2 (2) of the Code.
 - c) Recommend that counsel be supervised by another counsel for a determined period of time not exceeding 1 year.
 - d) Reprimand counsel and if necessary, order the publication of the reprimand.
 - e) When assets have been misappropriated by counsel, make an order for restitution.
 - f) Suspend counsel's ability to accept or complete mandates as defined in Article 2 (2) of the Code for a determined period of time not exceeding 2 years.

g) Order that counsel be prohibited from accepting or completing mandates as defined in Article 2 (2) of the Code.

h) Order counsel to pay costs.

71. Notice to the Registrar, the Prosecutor and other interested parties.

1) At the end of a Disciplinary Hearing, the Secretary of the Disciplinary Committee shall inform the complainant, the Office of the Registrar, the Office of the Prosecutor and the respective national legal association of which counsel is a member of the findings of the Disciplinary Panel, and in the event of a conclusion that the accused counsel committed the alleged misconduct, of the sanction imposed.

72. Disciplinary Appeal Process

1) Appeals against a decision of the Disciplinary Panel regarding the alleged misconduct of counsel or the imposition of a sanction shall proceed before the Disciplinary Appeal Committee of the Court. Appeals may be filed by the accused counsel found to have committed the alleged misconduct and by the Director of the Disciplinary Investigations.

2) The Disciplinary Appeal Committee of the Court shall hear appeals concerning the findings of the Disciplinary Panel regarding the alleged misconduct and the sanctions imposed by the Disciplinary Panel.

3) The Disciplinary Appeal Committee of the Court exercises the following powers:

a) In the case of a finding by the Disciplinary Panel that the accused counsel committed the alleged misconduct, allow the appeal if it is shown that the conviction results from an unreasonable finding, or an erroneous application or understanding of the applicable law, likely to have affected the conclusion. When the appeal against a conclusion that the accused counsel committed the alleged misconduct is allowed the Disciplinary Appeal Committee of the Court may:

i) Annul the finding that the accused counsel committed the alleged misconduct and make a finding that counsel did not commit the alleged misconduct, or

ii) Annul the finding that the accused counsel committed the alleged misconduct and order that a new hearing be held before a different Disciplinary Panel.

- iii) Substitute its own finding for that of the Disciplinary Panel.
 - b) In the case of a finding by the Disciplinary Panel that counsel did not commit misconduct, allow the appeal if it is demonstrated that the finding results from an erroneous application or understanding of the applicable law that is likely to have affected the conclusion of the Disciplinary Panel or that an important misapprehension of the evidence lead to such a finding. When the appeal is granted against a finding by the Disciplinary Panel that counsel did not commit misconduct the Disciplinary Appeal Committee of the Court may:
 - i) Annul the decision and where the Disciplinary Appeal Committee of the Court concludes no other result is possible, declare that counsel committed the alleged misconduct and remit the matter to the Disciplinary Panel for the imposition of a sanction.
 - ii) Annul the decision and order that a new hearing be held before a different Disciplinary Panel.
 - iii) Substitute its own finding for that of the Disciplinary Panel.
 - c) In the case of an appeal against a sanction imposed by the Disciplinary Panel, the Disciplinary Appeal Committee of the Court may confirm the sanction imposed or grant the appeal and modify the sanction imposed if it is overly lenient or excessively severe.
 - d) Make orders pertaining to costs.
- 4) At the end of a Disciplinary appeal hearing, the Office of the Registrar shall inform the complainant, the Office of the Prosecutor, the International Criminal Bar and the respective National legal association of which counsel is a member of the findings of the Disciplinary Appeal Committee , and in the event of a conclusion that the accused counsel committed the alleged misconduct, of the sanction imposed.

73. Time to Appeal to the Disciplinary Appeal Committee of the Court and procedure

- 1) An appeal may be filed against a finding regarding the alleged misconduct, a sanction, a finding regarding the alleged misconduct and a sanction, as the case may be, by serving a Notice of Appeal to the Registrar within 60 days of the decision in the case of a finding that counsel did not commit the

alleged misconduct and in the case of a finding that counsel did commit the alleged misconduct, within 30 days of the sanction imposed.

- 2) The Disciplinary Appeal Committee of the Court may grant an extension of the time to file a Notice of Appeal.
- 3) Upon reception of the Notice to Appeal, the Registrar of the Disciplinary Appeal Committee of the Court shall make all the necessary arrangements for the appeal to be heard.
- 4) The Notice of Appeal shall set out the grounds for which the Disciplinary Appeal Committee of the Court should grant the appeal and be drafted according to the required procedure.
- 5) Within 6 months of the filing of the Notice of Appeal the appealing party shall file written arguments to the Registrar of the Disciplinary Appeal Committee of the Court and the opposing party.
- 6) The opposing party shall have 3 months to respond to the appealing party by filing written arguments with the Registrar of the Disciplinary Appeal Committee of the Court and the appealing party.
- 7) The Disciplinary Appeal Committee of the Court may grant an extension of the time to file a Notice of Appeal or written arguments.
- 8) The national legal association of which counsel is a member is entitled to submit written arguments or comments to the Disciplinary Appeal Committee of the Court regarding the matter under appeal.

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Draft proposal of the International Bar Association.
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15. Restatement (Third) of the Law Governing Lawyers (US source)
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