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Commentary on the Code of Professional Conduct for Counsel Before the International Criminal Court

SUBMITTED BY THE INTERNATIONAL BAR ASSOCIATION

I. Introduction

The International Bar Association (IBA) has long been an ardent proponent of the International Criminal Court (ICC). Thus it was with great enthusiasm that the IBA accepted the invitation to facilitate the drafting of a Code of Professional Conduct for Counsel before the International Criminal Court (Code) as part of the process under Rules 8(1) and 20(3) of the ICC Rules of Procedure and Evidence (RPE). The Code which the IBA submits to the Director of Common Services is the result of a widely transparent and consultative drafting process and represents the views of the international legal community. This commentary is intended to provide insight into the debates held during the drafting process, the final formulation of the code and the issues which remain outstanding.

II. Drafting Process

Drawing on the expertise of its extensive membership, the IBA began coordinating a multi-phase, consultative, and transparent process with a view to incorporating experience from the widest possible range of jurisdictions.

To initiate the project, an Advisory Panel¹ was assembled in January 2002 to draft a Code for wider consultation. The Panel included experts in the areas of professional conduct and ethics and international criminal law. The composition of the Panel was selected to ensure a gender, geographic and jurisdictional balance. The Panel finalised its Code in May 2002. The Code was then disseminated widely in English, French and Spanish. Recipients included the IBA's 183 member Bar Associations and Law Societies, international and regional lawyers' associations, Assembly of State Parties, interested lawyers, and non-governmental organisations. The draft was additionally posted on the Web sites of the IBA and the Coalition for an International Criminal Court (CICC). Presentations of the Code were also made at the ICC Preparatory Commission in July 2002 and at the European Bar

1. The Advisory Panel comprised: Abboud Al-Sarraj, Syria; Jan Borgen, Norway; Allison Clare, England, Sylvia de Bertadano, England; Silvia A Fernandez de Gurmendi, Argentina; Desmond Fernando PC, Sri Lanka; Steven Kay QC, England; Henrietta Mensa-Bonsu, Ghana; Ramón Mullerat OBE, Spain; Edward M Ngubane, South Africa; Heinz Weil, Germany.

Federation's conferences in May and September 2002. The IBA encouraged all the above to submit written comments on the Code by October 2002.

The Bar Associations of South Korea, Hong Kong, Mexico, and Gibraltar, the Council of Bars and Law Societies of the European Union (CCBE), *Avocats Sans Frontiers*, Lawyers' Committee for Human Rights, and the CICC were amongst the respondents contributing suggestions to the draft. These comments can be found in the accompanying booklet.

From the comments received, four main areas of contention were identified: applicability, conflict of Codes, client issues, and enforcement. These topics formed the basis of discussions at a two-day IBA Conference² held in London in November 2002 funded by the General Council of the Bar of England and Wales and the UK Foreign and Commonwealth Office. Attendance at the conference was open to all and the participants from 20 jurisdictions discussed each issue in small groups. At the report back sessions, participants were encouraged to find a consensus on each issue raised. Following the conference, the draft Code was amended to reflect the conclusions of the working groups and to take into account other written comments. The revised draft was circulated to conference participants to elicit final observations.

This document is intended to provide insight into the debates and explain the final formulation of the Code. Consensus was reached on most issues. There were, however, a few matters on which not all could agree. These have been noted and possible solutions have been suggested.

III. Methodology

There was some discussion as to whether the Code should be a broad theoretical statement of principles or a more concrete practical guide. The end result combines both approaches as a set of standards of practice putting principles in a practical but flexible context.

The Code links, by way of footnotes, specific RPE and Statute provisions ensuring that the legal basis for the Code is clear throughout.

Three broad types of amendments were made to the draft Code as the process evolved: cosmetic/semantic, substantial modifications, and new provisions. These are noted in the commentary. Examples of cosmetic changes include the Preamble, amalgamating old Articles 5 and 6, Article 7(3)(c) and Article 10(6). Substantial modifications include changes to the definition of counsel and client in Article 1(1) and Article 8(1). Articles 14, 19(3), and 23 are new provisions. In general, where specific wording was suggested by a commentator or working group that language was adopted if agreed by consensus at the Conference. Any new wording was drafted with care to reflect the agreed principle.

Where there was a conflict between conclusions made at the Conference and written comments, the Conference conclusions were given priority as they resulted from lengthy debate with representatives from a wide-range of jurisdictions. Where agreement on an issue was not unanimous, conflicting opinions are contained in footnotes and noted in the commentary which follows.

Editorial licence was taken with the inclusion of Article 14, Discriminatory Conduct. This issue was not raised by any commentators, most likely as it should be self-evident.

2. Judge Finn Lynghjem, Norway, chaired the Conference.

However, anti-discrimination provisions appear in comparable Codes and it was decided to include the Article for the sake of completeness.

IV. Commentary on Final Code

a) Article 1—Definitions

The applicability of the Code generated considerable debate. Whilst there was broad agreement that the Code should not apply to Judges or judicial assistants, there were diverging views on whether the same Code should apply to Prosecutors and Defence Counsel. Some commentators, mainly from common law traditions, advocated strongly for a joint Code in order to ensure the same standards of practice for both lawyers and prosecutors. For civil law commentators, it was impossible to envisage both prosecutors and defence Counsel under the same Code as their function in civil law jurisdictions was fundamentally different.

It was agreed that there would be separate Codes. However, it was noted that, should the Registrar choose, it might be possible to have one uniform Code which would include a few articles common to all followed by separate sections for lawyers and prosecutors.

It was noted that a draft Code of Professional Conduct for Prosecutors was currently being compiled by the International Association of Prosecutors (IAP). The IAP, which was represented at the IBA Conference, agreed to take the IBA's draft Code into consideration during the drafting process. It was hoped that these two codes would be similar in spirit.

b) Article 4: Scope and Termination of Representation

As footnote 7 states, there was detailed discussion on the applicability of the Code. Many commentators were of the view that the Code should apply to all lawyers before the court (save for Prosecutors, Judges and judicial assistants) including victims' counsel, *amicus curiae*, and state counsel. Although it was noted that on a strict interpretation of the RPE the Code should only apply to defence Counsel, delegates, in principal, were in favour of including these groups and recommended that the Registrar give careful consideration as to how this could happen.

In preparing the final draft, it was decided that there should be strict adherence to the RPE so that the definition of counsel does not refer to clients whilst "client" refers only to the various stages of "defendant" in accordance with the ICC Statute and Rules. The IBA would, however, recommend that consideration be given to widening the definition of counsel as discussed above.

Some recommended that the Code apply more broadly as different types of advocates will confront different and perhaps conflicting ethical issues. As noted by the Gibraltar Bar Association, for example, the Code does not provide for defence Counsel dealing with confessions of guilt whilst under instructions to maintain a not guilty plea. Specific issues affecting *amicus*, victims' representatives, or other lawyers were not considered but may merit attention should the application of the Code be extended.

It was pointed out by both the Korean Bar Association and some at the Conference that the point at which Counsel becomes subject to the Code could be open to debate. Whilst Article 1 states that by definition Counsel is one who has filed power of attorney or been assigned, Article 4 states that Counsel shall not act until instructed. This begs the question as to whether Counsel who has been instructed but not filed a power of attorney is subject

to the Code. The issue is significant as it was noted by the Korean Bar Association, that there will be instances, such as under ICC Article 55(2)(c), where the urgent need for legal representation precedes an opportunity to file a power of attorney. The Registrar may wish to consider this issue in the final draft along with any directive.

Related issues were raised by the Lawyers Committee for Human Rights as to the application of the Code to Counsel between the termination of representation of one client and the commencement of another case. It has been left open for the consideration of the Registrar or indeed adjudication by the Advisory Panel (Article 23).

c) Client Issues: Articles 4, 7, 8, 9, 15

Throughout the period of consultation and at the conference a number of issues surfaced relating to Counsel's relationship with, and duty, to clients.

Legal professional privilege presented the most contentious area. In some civil law jurisdictions privilege can never be waived, regardless of the severity of the consequences. By contrast, other jurisdictions require breaches of confidence where there is a reasonable belief that a criminal act may occur. Whilst this exception mainly concerns crimes causing death or grievous bodily harm, recently enacted provisions on money laundering offences were also given as an example.

The compromise position was found in maintaining waiver as discretionary in Article 7(3) enabling Counsel to act according to his or her own principles. It is noted, however, that some commentators remained dissatisfied in the absence of mandatory disclosure to prevent serious criminal acts. Following the Conference, other aspects of Article 7 were tightened up to reflect the general view that privilege may be waived only the most limited circumstances.

As noted in footnote 13, some commentators were concerned that Article 7(2)(b) might limit the freedom of expression of advocates who would wish to write about the trial(s) in which they were involved. The indefinite nature of the bar was of particular concern.

Counsel's duty to the competing interests of the client and justice also provoked debate and proved problematic (Article 8(1)). Civil law commentators explained that it was not acceptable for the "interests of justice" to prevail over the "interests of clients" as had been included in the original draft (Article 9(1)). Lawyers from common law jurisdictions were more comfortable with ensuring that the "interests of justice" prevail. Discussion on this point was lengthy but centred around differences in emphasis rather than in principle. It was generally agreed, although not unanimously, that Counsel's duty to the client is paramount and the wording in Article 8(1) was agreed. The Preamble and Articles 5 (previously 5 and 6) and 8 (previously 9) were amended accordingly.

Having agreed to this principle, some commentators were still uncertain as to the extent of Counsel's duty to the client and court raising a number of thought provoking questions. For example, does the difference between "objectives" and "means" in Article 4(3) restrict the client's right to control her case? Should Counsel be sanctioned for frivolous or vexatious applications? Is "personal responsibility" under Article 15 an appropriate burden where clients can be unpredictable and unscrupulous? Does the obligation to correct an incorrect statement in Article 15(3) include an obligation on Counsel to disclose his or her Counsel's deceit? Should there be a duty on Counsel to dissuade a client from giving false evidence? These questions were raised in written comments and are noted for the Registrar.

The larger issue derived from these questions, which may merit further consideration, is the specific circumstances in which counsel may withdraw, including the terms of 'professional embarrassment'.

Contacting prospective clients generated numerous written comments. At the Conference, there was general agreement to an absolute ban, however, it was noted by some participants this was likely to be unworkable and, as discussed in footnote 18, could be detrimental to victims' representatives (should coverage be extended to them). Article 9 was thus amended with suggested language to provide flexibility.

Another query related to whether it was possible to accept instructions on a case where the previous lawyer had not yet been paid. It was noted that this would be impossible in some jurisdictions, for example, in France.

d) Article 21—Conflicts

General consensus supported the view that the ICC Code should have primacy over any other Code by which Counsel at the ICC is bound. In the course of discussion, however, three problem areas were identified. First, it was not clear to commentators how Counsel should approach situations in which the ICC Code is silent or where the relevant provisions of the home Code are more stringent. In such circumstances should Counsel follow the home bar or the spirit of the ICC Code? The CCBE Code and the principle of double deontology was provided as an example whereby Counsel is bound to both Codes with the Code of the host country having supremacy, whilst adherence to the other is maintained to the extent not inconsistent with host country Code.

Secondly, as noted in footnote 26 of the Code, no agreement was reached on strategies for preventing conflicts. Particular concern was raised by participants from civil law jurisdictions that their home bar associations were unlikely to surrender jurisdiction. Suggestions for dealing with this include:

- (a) Counsel should be required to notify the Registrar at the outset of areas of likely conflict, although that may not account for unforeseen conflicts arising during the course of the trial. For example, the following text could be added to the Code: "Counsel should notify the Registrar when filing a power of attorney or accepting an assignment of any conflicts of which he is aware with the requirement of any other code of ethics or responsibility;
- (b) ICC Code should prevail and National Bar Associations or other independent representative body of Counsel should be encouraged to cede jurisdiction and amend their own Codes accordingly;
- (c) The Registrar should enter into a memorandum of understanding with the home bar associations on accepting a power of attorney from Counsel.

The third area was conflict resolution. Here there was agreement on the need for an Advisory Panel to resolve potential or actual conflicts between Codes. Emphasising the importance of such a body, participants were reminded of the unfortunate experience of Counsel for Barayagwiza, who, following her own Code of conduct, withdrew upon being fired by the client and was disbarred from the ICTR who had ordered her to continue. As another commentator noted, Rule 171 empowers the Court to take disciplinary action (albeit not disbarment) for perceived misconduct. An Advisory Panel was thus viewed as essential to protect Counsel from potentially unwarranted disciplinary action.

Article 23(2)–(4) was drafted to embody these suggestions. The proposed composition includes peers and a registry official.

e) Article 23 and 24: Enforcement

The one amendment approved unanimously at the Conference was the deletion of [then] Article 23, Reporting Misconduct. Commentators and conference participants were in agreement that such a requirement was inappropriate.

Agreement was also reached on the need for a disciplinary panel, separate from the powers of the Court, to be established to address complaints of misconduct under Rules 170 and 171 of the Rules of Procedure and Evidence.

There was consensus on the right of counsel to be represented in front of such a panel and the right to appeal findings of a panel at first instance. Article 23(5)–(11) was drafted bearing in mind the agreed principles and drawing heavily on the procedure in the Code of Professional Conduct for Counsel Appearing before the International Tribunal for the Former Yugoslavia.

V. Additional Issues

In addition to the above, several issues were raised either in written comments or in general discussion that fell outside the categories above but which merited consideration in the composition of the final Code. For example, the word *firm* was somewhat contentious given the jurisdictional differences in the arrangement of legal practice. Some commentators requested that care be taken when translating the Code because of linguistic difficulties (e.g., *counsel v. conseil*).

VI. Conclusion

In the preparation of the draft Code for submission to the Acting Registrar, every effort has been made to represent the views expressed by commentators in writing and at the Conference to ensure that this Code is rooted not only in law but reflects the breadth of global experience.

Whilst it is hoped that this Code provides the necessary guidance for Counsel, it is also noted that not every situation can be predicted or legislated for. Thus there are still more issues raised in the course of discussions that may best be left to the Regulatory Body to determine once the Court is up and running. An example is the potential restrictions on Counsel's freedom of expression given provisions on confidentiality (Article 7(2)(b)) and behaviour (Article 17(1)).

In submitting this Code, the IBA is hopeful that as the product of a thoroughly consultative and transparent process, it provides a useful basis for the Registrar's proposal to the Presidency.