

The Code of Professional Conduct for Counsel Before the International Criminal Court*

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1. PREAMBLE

Recognising the provisions of the Rules of Procedure and Evidence and in particular Rules 8 and 22(3);

Recalling that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights enshrine the principle of equality before the law, the presumption of innocence, and the right to a fair and public hearing by a competent independent and impartial tribunal;

Emphasising that the role of Counsel as specialist advocates before the Court requires them to act honestly, fairly, skilfully, diligently and courageously;

Affirming that Counsel have a duty to the Client and to the Court to act with independence, in the best interests of the client within the law, and in the interests of justice;

Considering that Counsel appearing before the International Criminal Court are bound by this Code in accordance with Rules 8 and 22(3) of the Rules of Procedure and Evidence;

Acknowledging that any breach of this Code may subject Counsel to disciplinary proceedings;

The Presidency, in consultation with the Registrar and independent bodies and legal associations as called for by Rule 8 of the Rules of Procedure and Evidence, promulgates this Code as a common standard of achievement for all Counsel practising at the International Criminal Court.

2. PRELIMINARY

**Article 1.
 Definitions**

- (1) In this Code, the following definitions apply:
 ‘Client’ Persons to whom Articles 55(2)(c), 56(2)(d) or 58 apply,¹ Accused’ or Detainee.³

1. See also Article 61(1) of the Rome Statute of the International Criminal Court; Rules of Procedure and Evidence (RPE), rr 20(1)(c), 21(1), 117(2), 121(2)(a).
 2. Article 61(9): person against whom charges are confirmed.
 3. Article 60(2); RPE, r 117(2).

'Counsel'	Any person who has been deemed qualified under Rule 22(1) of the Rules of Procedure and Evidence, and: (a) has filed his or her power of attorney with the Registrar at the earliest opportunity; ⁴ or (b) has been assigned under the Rules to represent a Client. ⁵ Any reference to Counsel includes a reference to any co-counsel jointly and to each of them severally.
'Court'	The International Criminal Court since 1998, established by Article 1 of the Rome Statute of the International Criminal Court.
'Regulations'	The Regulations of the Court adopted on [], as amended.
'Rules'	The Rules of Procedure and Evidence of the Court adopted on [], as amended.
'Statute'	The Rome Statute of the International Criminal Court adopted on 17 July 1998 in Rome, Italy, at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, entered into force on 1 July 2002.

- (2) In the event of any inconsistency between this Code and the Statute or the Rules, the provisions of the Statute or Rules prevail.
- (3) Any term not defined in this Code has the meaning given to it by the Statute or by the Rules.
- (4) This Code must be read and applied so as to attain most effectively the objects and uphold the values expressed in the Preamble and should not be interpreted in a restrictive way by reason of any particular or illustrative provisions. Additional standards and requirements may be imposed on the conduct of Counsel by virtue of the Rules, Statute, and the Court's inherent jurisdiction.⁶
- (5) The singular includes the plural and vice versa.

Article 2.

Entry into Force

This Code enters into force on [].

Article 3.

General Purpose and Application

- (1) The general purpose of this Code is to provide standards of conduct for Counsel that are appropriate in the interests of justice.
- (2) This Code applies to Counsel as defined in Article 1(1) of this Code.⁷

4. RPE, r 22(2).

5. RPE, r 21.

6. ICC Statute, Articles 70–71.

7. *NB*: r 8 of the RPE cross-references to r 20(3) which sets out provisions for the assignment of counsel which in turn refers to r 21. Rule 21 refers to ICC articles dealing solely with Counsel for the defence. It does not, for example, refer to Article 68(3) regarding victims' representatives. Rule 22(3) notes that 'Counsel for the defence shall be subject to . . . the Code of Professional Conduct'. Rule 90(6) regarding victims' representatives makes no reference to r 8 or r 22(3). It therefore appears that on a strict interpretation of the rules and articles that the Code should only apply to defence Counsel. At the IBA Conference on 11–12 November 2003, the majority of participants were of the view that the Code should have a much broader application. While excluding prosecutors and the judiciary, it was felt that the Code should extend to victims' representatives, witnesses, *amicus curiae*, and possibly states' representatives. Rule 74(10), for example, allows for a witness at risk of self-incrimination to seek legal advice.

3. GENERAL OBLIGATIONS OF COUNSEL TO CLIENTS

Article 4.

Scope and Termination of Representation

- (1) Counsel shall not consent to handle a case unless:
 - (a) the Client gives direct instructions; or
 - (b) the case is assigned by the Registrar to Counsel in accordance with the Rules⁸; or
 - (c) instructions are given in any other manner permissible under the Statute, the Rules, or the Regulations.
- (2) Counsel must advise and represent a Client until the Client duly terminates that Counsel's position, or the matter before the Court has been finally determined, including all appeals, or Counsel withdraws with the consent of the Court or is withdrawn by order of the Court.⁹ Any withdrawal of Counsel shall be done in such a manner as to have a minimum adverse effect on the interests of the Client.
- (3) When representing a Client, Counsel must:
 - (a) consult with the Client concerning the objectives of representation and the means by which those objectives are to be pursued; and
 - (b) abide by a Client's decisions concerning such objectives, if not inconsistent with Counsel's duties under the Code, the Statute and Rules.
- (4) Counsel must not advise or assist a Client to engage in conduct that Counsel knows is in breach of the Statute, the Rules, the Regulations or this Code or which will facilitate the commission of an offence or deception.
- (5) Counsel shall not handle a matter that he or she knows or ought to know he or she is not competent to handle.
- (6) Counsel shall not accept instructions unless he or she can discharge those instructions promptly having regard to the pressure of other work.

Article 5.

Competence and Independence

- (1) Counsel shall act at all times in the best interests of his or her client in accordance with the Statute, Rules of the Court and this Code. In providing representation to a Client, Counsel shall:
 - (a) act with competence, skill, diligence, care and honesty;
 - (b) exercise independent professional judgment and render open and honest advice;
 - (c) carry through to conclusion all matters undertaken for a Client within the scope of his or her legal representation until such representation is terminated or terminates.
- (2) Counsel must not:
 - (a) permit his or her absolute independence, integrity and freedom from external pressure to be compromised;

8. RPE, r 21.

9. Not fully canvassed were the terms under which Counsel should withdraw from a case, eg for reasons of 'professional embarrassment' such as when a Client insists on pursuing a course contrary to the Code, Rules or Statute. Specific provisions to this effect may clarify some aspects of the Code, eg this Article and Article 15.

- (b) do anything as may lead to any reasonable inference that his or her independence may be compromised;
- (c) compromise his or her professional standards in order to please the Client, the Court or a third party.

Article 6.

Communication

Counsel must keep a Client informed about the status of a matter before the Court in which the Client is an interested party and must promptly comply with all reasonable requests for information.¹⁰ Counsel shall undertake personal responsibility for the discharge of instructions given to him or her by a Client.

Article 7.

Confidentiality

- (1) Counsel shall, in accordance with the Statute,¹¹ Rules,¹² and this Code, respect the confidentiality of privileged and/or protected information that becomes known to him or her in connection with his or her representation of a Client, even after Counsel has ceased to represent such Client.
- (2) Whether or not the relationship of Counsel and Client continues, Counsel must preserve the confidentiality of information disclosed by his or her Client in confidence and/or subject to privilege, subject to sub-article (3), and must not:
 - (a) reveal to any other person information that has been entrusted to Counsel by the client in confidence, provided that Counsel may reveal such information to associates and staff and anyone engaged by Counsel in the course of providing professional services to a Client; or
 - (b) use such information to a Client's detriment or to Counsel's own or another client's advantage¹³;
- (3) Notwithstanding sub-article (2), Counsel may reveal information which has been entrusted to him or her in confidence by his or her client in any one of the following circumstances:
 - (a) when the Client has been fully consulted and knowingly consents in writing;
 - (b) when the Client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure, Counsel may reveal such information to those directly involved in the case;
 - (c) when required to establish, in connection with the representation of the client, a defence to a criminal or disciplinary charge or civil action formally instituted against Counsel or Counsel's professional associates and staff or a claim in a civil action instituted by Counsel,¹⁴ and in these circumstances disclosure may be made only to those directly involved in the disciplinary, criminal or civil proceedings; or

10. RPE, rr 78, 79(2), 80(1), 101.

11. Articles 54(3)(e), 57(3)(c), 64(6)(c), 68(5), 72(5)(d), 72(7)(a)(i).

12. Rules 17(2)(a)(v), 73, 74(7), 81(1), (3), and (6), 82(5), 87(3)(b).

13. Some commentators were concerned that this clause would limit the freedom of expression of advocates who would wish to write about the trial(s) in which they were involved. Particularly noted was the indefinite nature of the bar.

14. ICTY Code, Article 13 allows for disclosure of privileged information to establish a claim, eg a client refusing to pay because Counsel did not follow instructions.

- (d) to prevent an act which Counsel reasonably believes:
 - (i) is, or may be, criminal within the territory in which it may occur or under the Statute, the Rules or the Regulations; and
 - (ii) may result in death or substantial bodily harm to any person unless the information is disclosed, or
 - (e) when required to do so by law.¹⁵
- (4) Counsel shall require his or her professional associates and staff and anyone engaged by Counsel in the course of providing professional services to a Client to observe the same obligation of confidentiality described in this Article, even after Counsel has ceased to represent such Client.

Article 8.
Conflict of Interest

- (1) Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put his or her client's interests before Counsel's own interests or those of any other person, organisation or state having due regard to the Statute, Rules and this Code.
- (2) Counsel shall not represent a Client in connection with any matter in which Counsel participated as an official or staff member of the Court or in any other capacity or otherwise, unless the Registrar consents after consultation with the parties.
- (3) Counsel or his or her firm¹⁶ must not represent a Client with respect to a matter if:
 - (a) there is a conflict, or significant risk of conflict, between the interests of such Client or any other client or clients.
 - (b) the matter is the same or substantially related to another matter in which Counsel or his or her firm had formerly represented another client ('the former client'), and the interests of the Client are materially adverse to the interests of the former client, unless the Client and the former client consent after consultation¹⁷;
 - (c) Counsel's professional judgment on behalf of the Client will be, or may reasonably be expected to be, adversely affected by:
 - (i) the Counsel's responsibilities to, or interests in, a third party; or
 - (ii) the Counsel's own financial, business, property or personal interests.
- (4) Counsel must not accept remuneration for representing a Client from a source other than that Client, unless:
 - (a) that Client consents after consultation; and
 - (b) there is no interference thereby with the Counsel's independence of professional judgment nor with the Client-Counsel relationship.
- (5) Counsel must not accept remuneration for representing a Client assigned by the Court from a source other than the Court.
- (6) Where a conflict of interest does arise, Counsel shall:
 - (a) promptly and fully inform each potentially affected client of the existence of the conflict; and
 - (b) either:

15. This clause reflects provisions of money laundering legislation adopted by a number of states.

16. The word 'firm' was somewhat contentious given the jurisdictional differences in the arrangement of legal practice.

17. In said consultation, Counsel must have respect to Article 7(3)(a) of this Code.

- (i) cease to act for each potentially affected Client; or
- (ii) obtain the full and informed consent in writing of all potentially affected clients to continue their representation, but only if such consent, in the best judgment of Counsel, is unlikely to prejudice in any way the administration of justice.

Article 9.

Prospective Clients

Counsel shall not:

- (a) contact a prospective Client, his or her relatives or acquaintances in an attempt to solicit work from such prospective Client, except as expressly permitted by Rules promulgated by the Registrar or the Court¹⁸; or
- (b) make false, misleading or deceptive communications about Counsel's services to a prospective Client, his or her relatives or acquaintances.

Article 10.

Financial Arrangements between Counsel and Client

- (1) Assigned Counsel shall not permanently transfer all or part of his or her fees earned in connection with the representation of a Client or any other monies or assets to such Client, his or her relatives, acquaintances, or any other third person or organisation from which the Client benefits or in which he or she has a personal interest.
- (2) Assigned Counsel shall not lend or temporarily transfer all or part of his or her fees earned in connection with the representation of a Client or any other monies or assets to such Client, his or her relatives, acquaintances, or any other third person or organisation from which the Client benefits or in which he or she has a personal interest.
- (3) Counsel shall not borrow monies or assets from a Client.
- (4) A Client is presumed to have a personal interest in a third person, organisation or state under paragraphs (1) and (2) if such a Client would derive any personal and direct advantage from the transfer.
- (5) Sub-articles (1)–(4) do not apply to the temporary or permanent transfer of items of *de minimis* value, as determined by the Registrar.
- (6) Counsel shall not acquire a financial interest in the outcome of a case which he or she is conducting.
- (7) Counsel shall never mingle funds of a Client with his or her own or with the funds of Counsel's employer or law firm, and Counsel should at all times be able to refund money held for a Client. Counsel shall not retain money received for a Client for longer than is absolutely necessary.
- (8) An estimate of fees to be charged by Counsel shall be fully disclosed in advance to a Client and shall be fair and reasonable.

Article 11.

Client under a Disability

When a Client's ability to make reasonably considered decisions in connection with his or her representation is impaired because of minority, mental disability or any other reason, Counsel must:

18. This remained a contentious issue as many respondents felt an absolute ban essential, while others felt it unworkable, and others still felt it may prejudice organisations working with victims.

- (a) inform the Presiding Judge or Chamber of the Court hearing the matter of the disability;
- (b) take such steps as are necessary to ensure the adequate legal representation of such Client; and
- (c) as far as reasonably possible maintain a normal Counsel-Client relationship with the Client.

Article 12.

Accounting for Time

Counsel should account in good faith for the time spent working on a case and maintain and preserve detailed records of time spent and account for expenses on behalf of the Client in the manner and for a period directed by the Registrar.

4. CONDUCT BEFORE THE COURT

Article 13.

Rules of the Court

- (1) Counsel must at all times comply with the Statute and Rules¹⁹ and such rulings as to conduct and procedure as may be applied by the Court in its proceedings.²⁰ Counsel must at all times have due regard to the fair conduct of proceedings.
- (2) Counsel must not, unless permitted by the Rules or this Code or the Chamber of the Court hearing the matter:
 - (a) make contact with a Judge or Chamber of the Court concerning proceedings in which he or she is involved without first or concurrently informing counsel acting for any other party to the proceedings; or
 - (b) submit exhibits, notes or documents relating to proceedings in which he or she is involved to the Judge without communicating such material first or concurrently to counsel acting for any other party to the proceedings.²¹

Article 14.

Discriminatory Conduct

Counsel shall not engage directly or indirectly in discriminatory conduct in relation to any other person because of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability, religion or political persuasion.

Article 15.

Candour Towards the Court

- (1) Counsel is personally responsible for the conduct and presentation of his or her Client's case, and must exercise personal judgment on the substance and purpose of statements made and questions asked.
- (2) Counsel must not deceive or knowingly mislead the Court.

19. See, eg RPE, rr 78, 79, 80.

20. RPE, r 22(3).

21. RPE, r 81(6).

- (3) Counsel must take all necessary steps to correct an incorrect statement made by Counsel in ongoing proceedings before the Court as soon as possible after Counsel becomes aware that the statement was incorrect.

Article 16.

Integrity of Evidence

Counsel must at all times maintain the integrity of the evidence, whether in written, oral or any other form, which is submitted to the Court.

Article 17.

Impartiality of the Court

- (1) Counsel must take all necessary steps to ensure that his or her actions do not bring proceedings before the Court into disrepute.
- (2) Counsel must not seek to influence a Judge or other official of the Court in an improper manner.²²

Article 18.

Counsel as Witness

Counsel shall not act in any matter in which the Counsel is likely to be a witness.

5. DUTY OF COUNSEL TO OTHERS

Article 19.

Fairness and Courtesy to Opposing Party, Counsel, and Witnesses

- (1) Counsel must recognise all other Counsel appearing or acting in relation to proceedings before the Court as professional colleagues and must act fairly, honestly and courteously towards them and their Clients.
- (2) Counsel must not communicate with the Client of another Counsel except through or with the permission of that Client's Counsel.²³
- (3) Counsel must refrain from gratuitously intimidating, bullying, badgering, humiliating witnesses or otherwise causing witnesses undue stress in the course of any interaction Counsel has with witnesses inside or outside the courtroom.

Article 20.

Dealing with Unrepresented Persons

- (1) If, on behalf of a Client, Counsel is dealing with a person who is not represented by Counsel, Counsel must not give advice to this unrepresented person if the interests of the person are, or have a reasonable possibility of being, in conflict with the interests of Counsel's Client.²⁴
- (2) Counsel must inform the unrepresented person of the role Counsel plays in the matter, the person's right to counsel under the Rules, and the nature of legal representation in general. This information must be given whether or not a conflict exists or may exist with the interests of Counsel's Client.

²² ICC Statute, Article 70(1)(d).

²³ Should this Code be expanded to cover Counsel other than defence Counsel? Suggestions have been mooted to broaden the coverage of this provision to include those represented by local lawyers not yet before the ICC.

²⁴ The above footnote applies to this provision as well.

6. MAINTENANCE OF THE INTEGRITY OF THE PROFESSION

Article 21.

Conflicts

If there is any inconsistency between this Code and any other code of ethics or professional responsibility which Counsel is bound to honour, the terms of this Code shall prevail in respect of Counsel's conduct before the Court. In the event of a conflict or potential conflict arising, the Registrar, in accordance with the Rules,²⁵ and/or Counsel may refer the matter to the Advisory Panel of the Regulatory Body provided for in this Code.²⁶

Article 22.

Misconduct

It is professional misconduct for Counsel to:

- (a) violate or attempt to violate this Code or to assist knowingly in the violation or attempted violation of this Code or to induce another person to violate or attempt to violate this Code through the acts of another person;
- (b) commit a criminal act for which he or she has been convicted and sentenced which reflects adversely on Counsel's honesty, trustworthiness or fitness as Counsel;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct which is prejudicial to the proper administration of justice before the Court²⁷; or
- (e) seek to influence a Judge or other official of the Court by means prohibited by the Statute, the Rules, or this Code; or
- (f) engage in any other conduct that adversely reflects on Counsel's fitness as a counsel.

Article 23.

Regulatory Body

- (1) To ensure compliance with this Code and the maintenance of professional standards, the Registrar shall, in accordance with the Rules²⁸ establish a Regulatory Body. The Regulatory Body shall be comprised of the Advisory Panel and the Disciplinary Panel. These two panels shall be separate and distinct; no member of one panel may be a member of the other.
- (2) The Advisory Panel shall:
 - (a) provide advice and guidance, when requested by Counsel, on conflicts or potential conflicts or questions of ethics arising in the performance of their duties; and
 - (b) facilitate the resolution of conflicts between this Code and any other code by which Counsel is also bound.

25. RPE, r 20(1), (3).

26. There was no consensus among commentators as to methods for preventing such conflicts. Some suggested that Counsel had a duty to raise any potential for conflict when lodging the power of attorney, though that may not account for unforeseen conflicts arising during the course of the trial. Others suggested that national bars be persuaded to accept the primacy of the Code by the IBA or similar institutions or by signing a memorandum of understanding with the bars on accepting a power of attorney from Counsel.

27. Articles 70–71.

28. RPE, r 20(1), (3).

- (3) The Advisory Panel shall comprise:
- (a) a senior Registry legal official;
 - (b) one independent Counsel appearing before the Court appointed by his or her peers; and
 - (c) a representative of an independent representative body of counsel appointed by that body.

Should it not be possible to appoint a representative of an independent body, another independent practitioner shall be appointed by the Registrar. In a situation arising under Article 21(2)(b) of this Code, a representative of the Bar Association by whose code Counsel is also bound shall be invited by the Registrar to participate and shall substitute for the representative of an independent body or second independent practitioner.

- (4) The advice of the Advisory Panel may be admissible in any disciplinary proceedings that may ensue.
- (5) The Disciplinary Panel shall:
- (a) receive, consider, and adjudicate on complaints of professional misconduct;
 - (b) have power to sanction Counsel on a finding of misconduct by way of:
 - (i) admonishment;
 - (ii) public reprimand;
 - (iii) fine up to 50,000 euros;
 - (iv) temporary suspension not exceeding two years;
 - (v) permanent ban from practising before the Court.
- (6) The Disciplinary Panel shall comprise:
- (a) the Registrar of the Court or a senior Registry legal official designated by her or him;
 - (b) one independent Counsel appearing before the Court appointed by her or his peers;
 - (c) one representative of an independent representative body of Counsel nominated by that body. Should it not be possible to appoint a representative of an independent body, another independent Counsel shall be appointed by the Registrar.
- (7) The Disciplinary Panel shall determine its own procedure, in consultation with the Registrar and representatives of Counsel appearing before the Court. Such procedure shall include:
- (a) the right to be represented by Counsel before the Disciplinary Panel;
 - (b) the right to appeal the findings of the Disciplinary Panel to a Disciplinary Board within a time frame determined by the Disciplinary Panel.
- (8) The Disciplinary Board shall comprise:
- (a) one or three Judges appointed by the President of the Court;
 - (b) a senior independent Counsel appearing before the Court nominated by her or his peers; and
 - (c) an executive member of an independent representative body of Counsel. Should it not be possible to include a member of an independent body, another senior independent Counsel shall be appointed.
- (9) The President and Registrar will ensure that no conflict of interest arises in the appointment of members of the Disciplinary Panel and Disciplinary Board.²⁹

²⁹ Eg no Judge who sat as a member of a Chamber before which the defendant to the misconduct charge appeared shall be eligible to sit as a member of the Disciplinary Board.

- (10) There shall be a prohibition on initiating proceedings which arise from the same facts as a matter previously adjudicated on by the Disciplinary Panel or another body.
- (11) This part shall not affect the inherent powers of the Court.³⁰

Article 24.
Enforcement

Counsel must abide by and voluntarily submit to any enforcement and disciplinary procedures as may be established by the Disciplinary Panel, Registrar or Court in accordance with the Rules.³¹

Article 25.
Amendment

This Code may be amended by the Registrar, after consultation with the Judges, the Prosecutor and a representative of an independent representative body of Counsel in accordance with the consultation process established in Rule 20(3) of the Rules. Any amendments made shall not apply retroactively.

7. SOURCES

The following codes of professional conduct and related sources have been consulted:

1. International Criminal Tribunal for Yugoslavia, Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal.
2. International Criminal Tribunal for Rwanda, Code of Professional Conduct for Defence Counsel.
3. International Bar Association, International Code of Ethics.
4. Bars and Law Societies of the European Union, Code of Conduct for Lawyers in the European Union.
5. New York State Bar Association, The Lawyer's Code of Professional Responsibility.
6. Advisory Committee Comments
7. Comments arising from IBA Conference, 11–12 November 2002, London

30. Articles 70–71; rr 162–172.

31. RPE, rr 20(3), 162, 170, 171.