

Third session

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**Proposal for a draft Code of Professional Conduct for counsel
before the International Criminal Court**

Note by the Secretariat

The Secretariat of the Assembly of States Parties has received the following proposal from the Presidency of the International Criminal Court which, in accordance with rule 8, paragraph 2, of the Rules of Procedure and Evidence, submits it for consideration by the Assembly. The Presidency indicates that the draft Code has been prepared by the Registry in consultation with the Prosecutor.

Draft Code of Professional Conduct for counsel

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Draft Code of Professional Conduct for counsel

Preamble

Having regard to rule 8 of the Rules of Procedure and Evidence;

Having regard to rule 20, sub-rule 3;

Having regard to the consultations conducted by the Registrar with independent organizations representing lawyers associations and legal counsel;

Recognizing the general principles governing the practice and ethics of the legal profession;

Chapter 1 **General provisions**

Section 1 ***General observations***

Article 1 **Scope**

1. This Code shall apply to counsel practising at the International Criminal Court.
2. Counsel must supervise the work of his or her assistants and other staff, including investigators, clerks or researchers, to ensure that they comply with the Code.

Article 2 **Use of terms**

1. All terms in this code are used as defined pursuant to the Statute, the Rules of Procedure and Evidence, the Regulations of the Court, and the Regulations of the Registry, or according to the terminology and definitions below.
2. In the present document:
 - “associate” refers to counsel’s partners who are associates in the same law firm;
 - “national authority” refers to the bar association of which counsel is a member or an administrative organ competent to regulate and control the activity of lawyers, judges, prosecutors or professors of law;
 - “client” refers to a person assisted or represented by counsel, whether receiving legal assistance or not;
 - “defence team” refers to counsel and all persons working under his or her oversight;
 - “agreement” refers to the oral or written legal relationship which unites counsel to his or her client before the Court.

Article 3 **Amendment procedure**

1. Any proposal for amendments to this Code shall be submitted to the Registrar, together with explanatory material, in both working languages of the Court.
2. The Registrar shall transmit, when appropriate, the proposals to the Presidency, together with a reasoned report prepared after consultation of the Prosecutor and, as necessary, of any independent organization representing lawyers associations and legal counsel, in particular of any organization whose establishment may be facilitated by the Assembly of State Parties.
3. The Presidency, after consulting the Prosecutor, shall report to the Assembly of State Parties and, if appropriate, submit a draft amendment to it.

Article 4

Primacy of the Code of Professional Conduct for counsel

Where there is any inconsistency between this Code and any other code of ethics or professional responsibility which counsel are bound to honour, the terms of this Code shall prevail in respect of the practice and professional ethics of counsel before the International Criminal Court.

Section 2

General principles

Article 5

Solemn undertaking by counsel

Before taking office, counsel shall give the following solemn undertaking before the Court: “I solemnly declare that I will perform my duties and exercise my mission before the International Criminal Court with integrity and diligence, honourably, freely, independently and conscientiously, and that I will scrupulously respect professional secrecy”.

Article 6

Independence of counsel

1. Counsel shall act fearlessly and absolutely honourably, independently and freely.
2. Counsel must not:
 - (a) Permit his or her independence, integrity or freedom to be compromised by external pressure;
 - (b) Do anything which may lead to any reasonable inference that his or her independence has been compromised.

Article 7

Professional conduct of counsel

1. Counsel shall be respectful and courteous in his or her relations with the Chamber, the Prosecutor and the members of the Prosecutor’s Office, the Registrar and the members of the Registry, the client, opposing counsel, accused persons, victims, witnesses and any other person involved in the proceedings.
2. Counsel shall maintain a high level of competence in the law applicable by the Court. He or she shall participate in all training initiatives required to maintain such competence.
3. Counsel shall comply at all times with the Statute, the Rules of Procedure and Evidence, the Regulations of the Court, the Regulations of the Registry and such rulings as to conduct and procedure as may be applied by the Court in its proceedings, including the enforcement of the Code.

Article 8

Respect for professional secrecy and confidentiality

1. Counsel shall actively exercise all care to respect professional secrecy and to protect confidential information in accordance with the statutory and regulatory provisions.
2. Counsel shall reveal information confidential by nature or by order of the Court only to persons working with him or her and solely to enable the exercise of his or her functions in the case in question. Counsel shall actively exercise all care to respect and maintain the confidentiality of such information.

3. Information confidential by nature is understood as information such as envisaged by rule 73.
4. Counsel may disclose information confidential by nature only under the terms of rule 73, sub-rule 1 or, where information confidential by order of the Court is involved, only when the Court expressly lifts the restriction on disclosure.

Article 9 **Counsel-client relationship**

1. Counsel shall not engage in any discriminatory conduct in relation to any other person, in particular to his or her client, on grounds of race, colour, ethnic or national origin, nationality, citizenship, political opinions, religious convictions, gender, sexual orientation, disability, marital or any other personal or economic status.
2. In his or her relations with the client, counsel shall take into account the client's personal circumstances and specific needs, in particular where counsel is representing victims of torture or of physical, psychological or sexual violence, children, the elderly or the disabled.
3. Where a client's ability to make decisions concerning the representation is impaired because of mental disability or for any other reason, counsel shall inform the Registrar and the relevant Chamber. Counsel shall moreover take the steps necessary to ensure proper legal representation of the client according to the Statute and the Rules of Procedure and Evidence.
4. Counsel shall not:
 - (a) Require or demand sexual relations with a client as a condition of professional representation;
 - (b) Employ coercion, intimidation or undue influence in his or her relations with a client; or
 - (c) Represent or continue to represent a client with whom counsel has or had sexual relations if such sexual relations may reasonably be expected to result in violations of this Code.

Chapter 2 **Representation by counsel**

Section 1 ***Representation agreement***

Article 10 **Establishment of the representation agreement**

The agreement is established when counsel accepts a request from a person or group seeking representation or from the Chamber.

Article 11 **Impediments to representation**

1. Counsel shall not represent a client in a case:
 - (a) If the case is the same or related substantially to another case in which counsel or his or her associates formerly represented another 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 consultation;

- (b) In which counsel was involved or was privy to confidential information as a staff member of the Court. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified by the interests of justice.
2. Counsel shall not act in proceedings in which there is a substantial probability that counsel or an associate of counsel will be called to appear as witness, unless:
 - (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.

Article 12

Non-acceptance of a representation agreement by counsel

1. Counsel has the right to refuse an agreement without stating reasons.
2. Counsel has a duty to refuse an agreement where:
 - (a) There is a conflict of interest under article 15;
 - (b) Counsel is incapable of dealing with the matter diligently;
 - (c) Counsel does not consider he or she has the requisite expertise.

Article 13

Performance in good faith of a representation agreement

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 discharging that duty, counsel shall act at all times with fairness, honour and candour towards the client.
2. When representing a client, counsel shall:
 - (a) Abide by the client's decisions concerning the objectives of representation if they are not inconsistent with counsel's duties pursuant to the Statute, the Rules of Procedure and Evidence, and the Code; and
 - (b) Consult the client on the means by which the objectives of the representation are to be pursued.

Article 14

Communication between counsel and the client

1. Counsel shall provide the client with all explanations the latter reasonably needs to make informed decisions regarding the representation.
2. When counsel is discharged of the representation or terminates it, he or she shall convey as promptly as possible to the former client or replacement counsel any material communication that counsel received relating to the representation, without prejudice to the duties which subsist after the end of the representation.
3. When communicating with the client, counsel shall ensure the confidentiality of such communication.

Article 15
Conflict of interest

1. Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client's interests before counsel's own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and the Code.
2. Where a conflict of interest does arise, counsel shall inform at once all potentially affected clients of the existence of a conflict; and either:
 - (a) Withdraw with the prior consent of the Chamber; or
 - (b) Seek the full and informed consent in writing of all potentially affected clients to continue representation.

Article 16
Termination of the representation

1. Counsel may withdraw from the agreement under the terms of the Regulations of the Court if:
 - (a) The client insists on pursuing an objective that the counsel considers repugnant or imprudent; or
 - (b) The client fails 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.
2. Where counsel withdraws from the agreement, he or she remains subject to article 8 of this Code, as well as any provisions of the Statute and the Rules of Procedure and Evidence relating to confidentiality.
3. Where counsel is discharged by the client, counsel may be discharged under the terms of the Regulations of the Court.
4. Where counsel's physical or mental condition materially impairs his or her ability to represent the client, counsel may be withdrawn by the Chamber at his or her request or on proposal of the Registrar, the client or third parties.
5. Counsel must convey to replacement counsel the entire case file, including any material or document relating to it.

Article 17
Consequences of the representation agreement

1. Counsel shall advise and represent a client until:
 - (a) The case before the Court has been finally determined, including all appeals;
 - (b) The Chamber has withdrawn counsel from the agreement in accordance with article 15; or
 - (c) The assigned counsel has been withdrawn.
2. The duties of counsel towards the client continue until the representation has ended, except for those duties which subsist under the Code.

Article 18
Conservation of files

Following the termination of the representation, counsel shall keep files containing documents and records of work accomplished in fulfilment of the representation agreement for five years. Counsel shall allow the client concerned by the file to inspect it unless he or she has substantial grounds to refuse. After this time counsel shall seek instruction from the client, his or her heirs or the Registrar on the disposal of the files, with due regard to confidentiality.

Section 2
Remuneration of counsel

Article 19
Counsel's fees

Prior to establishing an agreement, counsel shall inform the client in writing on the rate of the fees to be charged and the criteria for setting them, the basis for calculating the costs, the billing arrangements and the client's right to receive a bill of costs.

Article 20
Prohibitions

1. Counsel must not accept remuneration, in cash or in kind, from a source other than the client unless the client consents in writing after consultation and counsel's independence and relationship with the client are not affected thereby.
2. Counsel shall never make his or her fees contingent on the outcome of a case in which he or she is involved as such.
3. Counsel shall not mingle funds of a client with his or her own or with funds of counsel's employer or associates. Counsel shall not retain money received for a client.
4. Counsel shall not borrow monies or assets from the client.

Article 21
**Remuneration of counsel in the framework
of legal assistance**

1. The fees of counsel whose client benefits from legal assistance shall be paid exclusively by the Registry of the Court. Counsel must not accept remuneration in cash or in kind from any other source.
2. Counsel shall neither transfer nor lend all or part of the fees received for the representation of a client or any other assets or monies to such client, his or her relatives, acquaintances, or any other third person or organization in which the client has a personal interest.

Chapter 3
Execution of a representation agreement

Section 1
Relations with the Court

Article 22
Communications with the chambers and judges

Unless the judge or the Chamber dealing with a case permits counsel to do so, the latter shall not:

- (a) Make contact with a judge or Chamber relative to the merits of a particular case other than within the proper context of the proceedings; or
- (b) Transmit evidence, notes or documents to a judge or Chamber except through the Registry.

Article 23
Candour towards the Court

1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.
2. Counsel is personally responsible for the conduct and presentation of the client's case and must exercise personal judgement on the substance and purpose of statements made and questions asked.
3. Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware the statement was erroneous.
4. Counsel shall not submit any request or document with the sole aim of delaying the proceedings or of harming one or more participants therein.

Article 24
Evidence

1. Counsel shall at all times maintain the integrity of evidence, whether in written, oral or any other form, which is submitted to the Court. He or she shall not introduce evidence which he or she knows to be incorrect.
2. If counsel reasonably believes that the evidence will not be destroyed or tampered with, counsel may refuse to accept evidence or may return it to the source, warning the persons in possession of the evidence about the law regarding the conservation of evidence.
3. If counsel reasonably believes that the evidence may be destroyed or tampered with, or if the client consents, counsel shall request the Chamber to issue an order to collect the evidence pursuant to rule 116 of the Rules of Procedure and Evidence.

Section 2
Relations with other parties to the proceedings

Article 25
Relations with unrepresented persons

1. When required by the representation, counsel may communicate with and meet an unrepresented person in the client's interest.
2. When counsel communicates with unrepresented persons he or she shall:
 - (a) Inform them of their right to assistance from counsel and, if applicable, to their right to legal assistance; and
 - (b) Without infringing upon the confidentiality of counsel-client privilege, inform them of the interest that counsel represents and the purpose of the communication.
3. If counsel becomes aware of a potential conflict of interest in the course of a communication or meeting with an unrepresented person, he or she shall, notwithstanding the provisions set forth in paragraph 1 above, abstain immediately from engaging in any further contact or communication with the person.

Article 26
Relations with other counsel

1. In dealing with other counsel and their clients, counsel shall act fairly, loyally and courteously.
2. All correspondence between counsel representing clients with a common interest in a litigated or non-litigated matter and who agree on exchanging information concerning the matter, shall be presumed confidential and privileged by counsel.
3. When counsel does not expect a particular correspondence to be confidential, he or she shall state clearly at the outset that the correspondence between counsel is not confidential.

Article 27
Relations with persons already represented by counsel

Counsel must not address directly the client of another counsel except through or with the permission of that counsel.

Article 28
Relations with counsel of co-accused

Counsel shall always provide independent representation for his or her client. Counsel shall not enter into any agreement with anyone to conduct a defence at the expense of his or her independence or of the loyalty owed to his or her client.

Article 29
Relations with witnesses and victims

1. Counsel shall refrain from intimidating, harassing, or humiliating witnesses or victims or from subjecting them to pressure in any manner or form within or outside the courtroom.

2. Counsel shall have particular consideration for victims of sexual, physical or psychological violence; children; the elderly and the disabled.

Article 30
Publicity

1. Counsel may advertise provided the information is:
 - (a) Accurate;
 - (b) Respectful of counsel's obligations regarding confidentiality and privilege.
2. Counsel shall not, directly or indirectly, solicit professional employment from a prospective client.

Chapter 4
Disciplinary regime

Article 31
Conflict with other disciplinary regimes

The present chapter is not intended to prohibit or limit in any manner the disciplinary powers of any other disciplinary authority that may apply to counsel subject to this Code.

Article 32
Misconduct

Counsel commits misconduct when he or she:

- (a) Violates or attempts to violate any provisions of the Code, the Statute and the regulations in force imposing a substantial duty on him or her;
- (b) Knowingly assists or induces another person to do so or does so through the acts of another person;
- (c) Fails to comply with a decision by the competent disciplinary authority within the context of proceedings before it.

Article 33
Liability for conduct of assistants or other staff

1. Counsel shall be liable for violations of this Code by their assistants or staff when he or she:
 - (a) Orders or approves the conduct involved; or
 - (b) Knows or has information suggesting that violations may be committed and takes no reasonable remedial action.
2. Counsel shall be held liable for the misconduct of assistants or staff only when he or she did not instruct assistants or staff in the standards set by this Code and the law enforced by the Court.

Article 34
Filing a complaint of misconduct

1. Complaints against counsel regarding misconduct as defined in articles 32 and 33 may be submitted to the Registry by:

- (a) The Chamber dealing with the case;
 - (b) The Prosecutor;
 - (c) Any person or group of persons whose rights or interests may have been affected by the alleged misconduct.
2. The complaint shall be made in writing or, if the complainant is unable to do so, orally before a member of the Registry. It shall identify the complainant and the counsel against whom the complaint is made and shall describe in sufficient detail the alleged misconduct.
 3. The Registrar shall transmit the complaint to the commissioner conducting the investigation, who is appointed by the Registrar in accordance with the Regulations of the Registry.
 4. The Registrar may, on his or her own initiative, refer to the commissioner conducting the investigation any facts which he or she considers constitute misconduct under article 32 of this Code.
 5. All complaints shall be kept confidential by the Registrar.

Article 35
Time-bar

The right to file a complaint against counsel for misconduct shall lapse five years after the termination of the representation agreement.

Article 36
Composition and management of the Disciplinary Board

1. The Disciplinary Board shall comprise five members four of whom shall be permanent and one *ad hoc*.
2. The four permanent members shall be elected for two years by representatives of counsel under the terms of the Regulations of the Registry. They shall be chosen preferably among persons with established competence in ethical matters.
3. The *ad hoc* member shall be a person appointed by the national authority competent to regulate and control the activities of counsel subject to disciplinary procedure.
4. The permanent members shall be eligible for re-election once. At their first meeting, they shall elect one of their number chairperson.
5. All members of the Disciplinary Board shall have the same rights and votes. The Disciplinary Board shall decide by majority vote. In the event of equality of votes, the chairperson shall have the casting vote.
6. Permanent members whose mandate has expired shall continue to deal with the cases they already have under consideration until these are finally determined including all appeals.
7. The Registrar shall designate a member of the Registry to ensure the secretariat of the Disciplinary Board.

Article 37
Due process of law

1. If the complaint filed meets the requirements set forth in article 34 above, the Registrar shall forward it to counsel subject to disciplinary procedure, who must submit a response within 30 days from the date of forwarding.
2. The response shall indicate whether the alleged misconduct has been or is the object of a disciplinary procedure before the national authority. If so, it must include:
 - (a) The identity of the national authority deciding on the alleged misconduct;
 - (b) A certified communication by the national authority stating the alleged facts that are the basis of the disciplinary procedure before it.

Article 38
Complementarity of disciplinary measures

1. When the alleged misconduct has been the basis of a disciplinary procedure before the national authority, the procedure before the Disciplinary Board shall be suspended until a final decision is reached regarding the former procedure.
2. The Disciplinary Board shall designate one of its members as contact point with the national authority for all communication and consultation regarding the procedure.
3. Counsel subject to disciplinary procedure shall instruct the national authority dealing with the matter to inform the Disciplinary Board of the progress of the procedure and of its final decision. If the Disciplinary Board does not receive the decision or is not satisfied with the information received, it shall continue its procedure.
4. As soon as it receives the decision, the Disciplinary Board shall:
 - (a) Declare the procedure closed; or
 - (b) State:
 - (i) That the decision of the national authority does not cover or only partially covers the misconduct brought before the Disciplinary Board and that therefore the procedure is to be continued; or
 - (ii) That the national authority is unable or unwilling to conclude the disciplinary procedure and that therefore the procedure set out in this chapter is to be followed.
5. In the case of paragraph 3 and subparagraph 4(b) above, the Disciplinary Board may ask counsel subject to disciplinary procedure to provide detailed information about the procedure, including any minute or evidence which might have been submitted.
6. A decision by the Disciplinary Board based on this article may be appealed before the Disciplinary Appeals Board.

Article 39
Procedure before the Disciplinary Board

1. The commissioner conducting the investigation may dismiss a complaint without any further investigation if he or she considers on the basis of the information at his or her disposal that the allegation of misconduct is unfounded in fact or in law. He or she shall notify the plaintiff accordingly.

2. Should he or she consider otherwise, he or she shall promptly investigate the counsel's alleged misconduct and decide either to submit a report to the Disciplinary Board or to bring the procedure to an end.
3. The commissioner conducting the investigation shall take into consideration all evidence, be it in oral, written or any other form, which is relevant and has probative value. He or she may seek assistance from the Registrar and shall keep all information concerning the disciplinary procedure confidential.
4. The report from the commissioner conducting the investigation shall be submitted to the Disciplinary Board.
5. The Disciplinary Board hearing shall be public. However, the Disciplinary Board may decide to hold the hearing in closed session, in particular to safeguard the confidentiality of information in the investigation report and the protection of victims and witnesses.
6. Counsel subject to disciplinary procedure and the Registrar shall be called and heard. The Disciplinary Board may also call and hear any other person deemed useful for the establishment of the truth.
7. In exceptional cases, where the alleged misconduct is of a nature as to seriously prejudice the interests of justice, the Registrar may proprio motu or at the request of the commissioner conducting the investigation lodge an urgent motion with the Chamber before which counsel intervenes so that it may, as appropriate, declare a temporary suspension of the counsel.

Article 40 **Rights and duties of counsel**

1. Counsel subject to disciplinary procedure shall be entitled to assistance by another counsel.
2. Counsel subject to disciplinary procedure shall have the right to remain silent before the Disciplinary Board, which will take its decision in the light of the other information submitted to it.
3. Counsel subject to disciplinary procedure shall have the right to become acquainted with the report by the investigating person and with the information gathered by the latter.
4. Counsel subject to disciplinary procedure shall be given the time required to prepare his or her defence.
5. Counsel subject to disciplinary procedure shall have the right to question, personally or through his or her counsel, any person called by the Disciplinary Board to testify before it.

Article 41 **Decisions by the Disciplinary Board**

1. The Disciplinary Board may close the procedure finding no misconduct on the basis of the evidence submitted to it or finding that counsel subject to disciplinary procedure committed the alleged misconduct.
2. The decision shall be made public. It shall be reasoned and issued in writing.
3. The decision shall be notified to counsel subject to disciplinary procedure and to the Registrar.
4. When the decision is final, it shall be published in the Official Journal of the Court and transmitted to the national authority.

Article 42
Sanctions

1. When misconduct has been established, the Disciplinary Board may impose the following sanctions:
 - (a) Admonishment;
 - (b) Public reprimand with an entry into counsel's personal file;
 - (c) Payment of a fine of up to €30,000;
 - (d) Suspension of the right to practise before the Court for a period not exceeding two years;
 - (e) Permanent ban on practising before the Court with striking off the list of counsel.
2. The admonishment may include recommendations by the Disciplinary Board.
3. As a general rule, the costs of the procedure shall be borne by the sanctioned counsel.

Article 43
Appeals

1. Sanctioned counsel and the commissioner conducting the investigation shall have the right to appeal the decision of the Disciplinary Board.
2. The appeal shall be notified to the secretariat of the Disciplinary Board within one month from the day on which the decision has been delivered.
3. The secretariat of the Disciplinary Board shall transmit the appeal to the secretariat of the Disciplinary Appeals Board.
4. The Disciplinary Appeals Board shall decide on the appeal, which may concern factual or legal aspects, according to the procedure followed before the Disciplinary Board.

Article 44
Composition and management of the Disciplinary Appeals Board

1. The Disciplinary Appeals Board shall decide on appeals against decisions of the Disciplinary Board.
2. The Disciplinary Appeals Board shall comprise six members:
 - (a) Three judges, including a Vice-President of the Court, designated by the President from among the judges not dealing with the case in which counsel's professional conduct is subject to disciplinary procedure ;
 - (b) Three counsel, elected for two years by counsel representatives under the terms in the Regulations of the Registry and chosen preferably among persons with established competence in ethical matters.
3. The functions of member of the Disciplinary Appeals Board are incompatible with those of member of the Disciplinary Board.
4. The Vice-President designated by the President of the Court is *ex officio* chairperson of the Disciplinary Appeals Board.

5. The Disciplinary Appeals Board shall take its decisions by majority vote. In the event of equality of votes the chairperson shall have the casting vote.

Chapter 5
Entry into force

Article 45
Entry into force

This Code and any amendments to it shall enter into force 30 days after its publication in the Official Journal of the International Criminal Court.

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